STATE OF WISCONSIN
COURT OF APPEALS
DISTRICT II

Case No. 22-AP-1532

AMERICAN OVERSIGHT,

Petitioner-Respondent,

v.

ROBIN VOS, EDWARD BLAZEL and
WISCONSIN STATE ASSEMBLY,

Respondents-Appellants.

Dane County Circuit Court Case No. 21-CV-2440,
the Hon. Valerie Bailey-Rihn and the Hon. Diane M. Schlipper, presiding

BRIEF OF PETITIONER-RESPONDENT AMERICAN OVERSIGHT

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ISSUES PRESENTED

The statement of the Issues Presented for Review in the brief of Respondents-Appellants Robin Vos ("Vos"), Edward Blazel ("Blazel"), and the Wisconsin State Assembly (the "Assembly," and together with Vos and Blazel, the "Assembly Respondents") lists six Issues Presented for Review (Respondent-Appellants' Brief ("Assem. Br.") at 1-2) but presents five, in some cases, different, issues in its Argument (*id.* at 12-39; *see also id.* at ii-iii), contrary to Wis. Stat. § 809.19(1)(e) (requiring "[a]n argument, arranged in the order of the statement of the issues presented").

Because Petitioner-Respondent American Oversight ("American Oversight" or "AO") believes that responding to Assembly Respondents' brief will allow the Court to efficiently evaluate all of the issues about which Assembly Respondents actually argue, AO identifies five issues for review, in line with the order of the issues as articulated in Assembly Respondents' Argument. AO also adopts a more neutral and accurate phrasing, as Assembly Respondents' statement contains impermissible argument and assumes argument it is trying to prove. AO states the issues as follows:

1. Were Vos and Blazel properly subject to a mandamus order to "produce contractors' records"?

Circuit Court Answer: Yes.

2. Did American Oversight establish a prima facie case of contempt for violation of the mandamus order?

   Circuit Court Answer: Yes.

3. Was American Oversight properly awarded attorneys' fees as a remedial sanction for contempt under Wis. Stat. § 785.04(1), and, if so, may the court include in that award in-house attorneys' fees?[1]

   Circuit Court Answer: Yes, and yes.

4. Is American Oversight entitled to recover in-house counsel attorneys' fees in an Open Records action, under Wis. Stat. § 19.37(2)(a)?

   Circuit Court Answer: Yes.

5. Was American Oversight properly awarded $98,073.27 in attorneys' fees and costs?

   Circuit Court Answer: Yes.

[1] As far as AO understands, Assembly Respondents' third and fifth Issues Presented for Review are both addressed in Part III of their Argument.

STATEMENT AS TO ORAL ARGUMENT AND PUBLICATION

American Oversight does not believe oral argument is necessary for the legal issues presented in this matter. AO anticipates the briefs will fully present and meet the issues on appeal. Wis. Stat. § 809.22(2)(b). While Assembly Respondents refer in their Statement as to Oral Argument and Publication to unspecified "issues raised in this action under Wisconsin's Public Records Law [they say] are issues of first impression" (Assem. Br. at 3), the issues presented involve arguments that are plainly contrary to relevant legal authority, are on their face without merit, and/or involve solely questions of fact for which the fact findings are clearly supported by sufficient evidence. Wis. Stat. § 809.22(2)(a).

American Oversight agrees with Assembly Respondents that publication is warranted. (*See* Assem. Br. at 3.) Pursuant to Wis. Stat. § 809.23(1)(a)5., this is a case of substantial and continuing public interest as it implicates the "declared . . . public policy of this state that all persons are entitled to the greatest possible information regarding the affairs of government . . . ." Wis. Stat. § 19.31.

RESPONSE TO STATEMENT OF THE CASE

Assembly Respondents' summary of the case and issues presented contain significant omissions, glossing over portions of the proceedings below that do not further their arguments, or ignoring important context that would aid this Court in reviewing the issues on appeal under the appropriate standards. As such, AO provides the following supplemental statement of the case.

I. NATURE OF THE CASE

This is a case to enforce the Open Records law, Wis. Stat. §§ 19.31 *et seq.* ("Open Records law"). In May 2021, Wisconsin State Assembly Speaker Robin Vos announced the Assembly would be hiring independent contractors to investigate the 2020 election. Vos hired three contractors soon thereafter. Following that announcement, American Oversight submitted a series of public records requests to Vos and Assembly Chief Clerk Blazel seeking records of the election investigators under Wis. Stat. § 19.36(3), which requires government authorities to disclose records "produced or collected under a contract entered into by the authority."

Assembly Respondents did not produce the Assembly's contractors' records, and AO filed this litigation seeking to compel them to do so. Following a hearing, the circuit court issued a mandamus order. When

Assembly Respondents only minimally complied with that order, AO filed a motion for contempt.

After determining there had been a violation establishing a prima facie case, and then determining the Assembly Respondents had essentially done nothing in response to the mandamus order, the court held Vos and the Assembly in contempt. The court ordered Vos and the Assembly to comply with remedial sanctions, including payment of AO's attorneys' fees and various purge conditions. Ultimately, the court found the contempt had been purged after AO subpoenaed one of the contractors, Michael Gableman ("Gableman"), and Vos and the Assembly finally provided sufficient information to determine what had happened to their contractors' records. AO then sought and was awarded $98,073.27 in attorneys' fees and costs for both the mandamus and contempt phases of the case.

Assembly Respondents challenge five pieces of the circuit court's rulings: the original mandamus order as against Vos and Blazel (but not the Assembly); the finding of a prima facie case of contempt (but not the finding that Vos and the Assembly intentionally did not comply with the mandamus order); the decision to award attorneys' fees, including in-house attorneys' fees, as a remedial sanction; the award of in-house

attorneys' fees under the Open Records law's fee-shifting statute (but not the award of outside attorneys' fees); and the decision to award the full amount of fees requested. AO individually addresses these disputes in the Argument section, below.

II. PROCEDURAL HISTORY

A. The Mandamus Order.

On October 8, 2021, AO filed its complaint seeking an order compelling Assembly Respondents to produce records of the Assembly's election investigators under Wis. Stat. § 19.36(3). (Doc. 4.) AO simultaneously filed an application for an alternative writ of mandamus. (Doc. 6.)

The same day, the circuit court signed the alternative writ, requiring Assembly Respondents to "release the records responsive to [AO's] request, or in the alternative to show cause to the contrary" at a hearing set for November 5, 2021. (Doc. 38.) Assembly Respondents did not produce the requested records or file any motions in response to the alternative writ. Instead, on the day before the hearing, Assembly Respondents filed an "Answer to Petition for Alternative Writ of Mandamus." (Doc. 56.)

In that Answer and during the November 5 show cause hearing, Assembly Respondents argued an Office of Special Counsel ("OSC"), led

by Gableman, had been created, and the OSC, not Assembly Respondents, was responsible for responding to AO's requests, even from before it existed. (*See generally* Doc. 58, Supplemental Appendix of Petitioner-Respondent American Oversight"("AO-App") at 1-44; *see also* Doc. 56, ¶¶ 24-26.) Noting it "would be a shell game if you could retroactively protect documents by having a[n Assembly] subunit created after the fact" (Doc. 58 at 26:14-16, AO-App-26), the court ordered Vos, Blazel, and the Assembly to produce their contractors' records. (*E.g.*, *id.* at 27:24-28:3, 35:11-18, AO-App-27, 35.)

After the hearing, the parties submitted competing proposed orders (Docs. 60, 62) and the court issued its mandamus order, stating: "Respondents shall produce contractors' records that existed through August 30, 2021 [the date OSC was formed], and that are responsive to the requests cited in the Petition." (Doc. 65, Respondents-Appellants' Appendix ("AR-App") at 4 (the "Mandamus Order").)

B. AO's Motion for Contempt and Prima Facie Case.

Assembly Respondents produced some records to AO's counsel on November 19, 2021. In a letter accompanying the production, Assembly Respondents' counsel stated the production included "the remainder of the records that are responsive to the public records request" at issue.

(Doc. 70, AO-App-45.) However, only twenty-seven pages of records in the production appeared to have come from Assembly Respondents' contractors. (*See* Doc. 72 at 3; *see also* Docs. 69-71.) Given the paucity of produced records in contrast to the purported breadth and scope of the election investigation during the June-through-August time period covered by the Mandamus Order, it was apparent Assembly Respondents had not produced all responsive contractors' records.

On December 3, 2021, AO moved for remedial sanctions under Wis. Stat. § 785.04(1). (See Docs. 67, 68.) Assembly Respondents say AO filed its contempt motion "[d]espite AO receiving all the responsive documents in Respondents' possession" (Assem. Br. at 5; *id.* at 8), but, in fact, AO identified significant gaps in Assembly Respondents' production. (*Compare* Docs. 71-72 (the November 19 production), *with* Doc. 28 at 8 (contract mandating creation of investigator reports, but no such reports were produced), Doc. 73 (identifying various activities for which no records were produced); *see also* Doc. 68 at 8-9.) AO also provided an email exchange with Gableman, obtained from a different source, that was responsive to the Mandamus Order but had not been produced. (Doc. 78 at 4, AO-App-49; *see also* Doc. 77 at 6-7.)

On December 30, 2021, the circuit court held a hearing on AO's motion for remedial sanctions. (*See* Doc. 98, AO-App-50-73.) During the hearing, the court declined to find Assembly Respondents in contempt, but expressed concerns related to their compliance with its Mandamus Order, stating:

> [T]he problem I have with this response [] is I don't know what was done, what was requested, who did the requesting, and what they did to ensure that these documents were produced. If there are no documents – I hardly can hold anyone in contempt if there are no documents. But the problem is, I'm not sure that there aren't documents because I don't know what was done.

(*Id.* at 7:25–8:9, AO-App-56-57.) In response to Assembly Respondents' objection to the contempt proceedings, the court also explained:

> Normally I would agree with you if there were no records. But they did produce an e-mail that had two people that are subject to this order copied on it in August . . . .
>
> When we have three months of work costing quite a bit of money, from my understanding, with absolutely nothing, one e-mail that supposedly was deleted, that strikes me as going well beyond credibility.

(*Id.* at 12:24-13:23, AO-App-61-62.)

Consequently, the court ordered Assembly Respondents to produce "a records custodian or custodians to testify regarding actions taken to comply with [AO's] open records requests and the Court's mandamus order." (Doc. 83.) Later, the court expressly confirmed it had found a

prima facie case based on the evidence submitted with AO's motion. (Doc. 99 at 8:16-10:1, AR-App-13-15.)

C. The Contempt Order and Remedial Sanctions.

Assembly Respondents' brief makes almost no reference to one of the pivotal events in this case: the evidentiary hearing regarding what steps Assembly Respondents took to comply with the Mandamus Order. The testimony of two witnesses, Steve Fawcett ("Fawcett") (Vos's counsel and representative) and Blazel, revealed Assembly Respondents had done very little, falling far short of any reasonable effort to comply. (*See generally* Doc. 99, AR-App-6-103.) Assembly Respondents do not challenge the court's contempt ruling on this ground, which was explained in detail in the subsequent contempt order, issued on March 30, 2022.

In that contempt order, the circuit court also reiterated it had "already" found a prima facie case of contempt (Doc. 107 at 9, AR-App-112) and rejected the contention, raised for the first time in the contempt proceedings, that the Mandamus Order was "void" as to Vos and Blazel (*id.* at 10-11, AR-App-113-14). The court noted Assembly Respondents' argument that AO "fails to identify a single document that exists that was not produced" was "confusing because in a later section of their brief [they] concede that American Oversight has, in fact, identified documents

that were not produced." (Doc. 107 at 11, AR-App-114 (citing Doc. 100 at 5, 9); *see also* Doc. 78 at 4, AO-App-49.)

The circuit court found Vos and the Assembly, but not Blazel, in contempt of the Mandamus Order and imposed a series of remedial sanctions, "each of which [was] designed to ensure compliance with a prior order of the Court." (Doc. 107 at 14, AR-App-117; *see also id.* (noting "[a] remedial purpose is clear—fulfillment of the Respondents' obligation under the public records law to search the records of the contractors they hired and supervised").) The remedial sanctions included, among other things: "purge conditions" aimed at demonstrating that Vos and the Assembly have "complied with their duties under the public records law to search for responsive records created by their contractors" and paying AO's "costs and fees incurred in bringing this contempt motion." (*Id.* at 2, 14-15.)

Vos and the Assembly's initial attempts to purge were not successful. (*E.g.*, Doc. 145.) As a result, the court entered further orders outlining additional steps for purging the contempt. (*Id.*) At a June 23, 2022 hearing, Gableman appeared pursuant to a subpoena and testified about his recordkeeping and retention practices between June and August 30, 2021. (*See* Doc. 183.) Assembly Respondents state, "[t]here was no showing

that any of the Respondents failed, much less intentionally failed, to produce contractors' records that existed through August 30, 2021, and that were responsive to AO's request." (Assem. Br. at 10.) The purpose of the hearing, however, was not to establish whether there had been an intentional violation of the Mandamus Order—that had already been established at the evidentiary hearing (Doc. 99, AR-App-6-103), as addressed in the contempt order (Doc. 107, AR-App-104-18)—but instead was to determine if any further remedial actions were necessary to correct the violations.

After the testimony closed, the circuit court noted a number of inconsistencies in Gableman's account, along with his concession he did little work in July and August 2021, and he deleted many records from this period. (Doc. 183 at 72:19-73:18.) Nonetheless, the court noted "the purge conditions were, 'Tell me what happened,'" and that an understanding of what happened to the records had now been achieved sufficient to purge Vos and the Assembly's contempt, even if such records had been improperly deleted or improperly not produced. (*Id*. at 73:19-74:5.)

D. Attorneys' Fees.

Following the June 23 hearing, AO sought a determination of the amount of attorneys' fees to be awarded under the Open Records law and

for the contempt proceedings. (*See* Docs. 188, 189.) AO provided detailed billing records for its litigation attorneys. (*See* Docs. 190, 192, 197.) AO also provided an affidavit of an experienced, third-party attorney who affirmed AO's claimed fees were reasonable. (Doc. 191, ¶¶ 15-16.) The circuit court held a hearing on AO's fees request (AR-App-122-153) and awarded AO a total of $98,073.37 in attorneys' fees and costs for the merits, contempt, and fees phases of the case. (Doc. 204, AR-App-120-21.)

AO discusses additional facts as appropriate below.

STANDARDS OF REVIEW

A. The Open Records Law.

The first sentences of the Open Records law declare the state's official policy of virtually unfettered access to government information:

> 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. Further, providing persons with such information is declared to be an essential function of a representative government and an integral part of the routine duties of officers and employees whose responsibility it is to provide such information.

Wis. Stat. § 19.31. "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, 731 N.W.2d 240; *see also Gierl v. Mequon-Thiensville Sch. Dist.*, Case No. 21AP2190, Slip Op., ¶ 7, __ Wis. 2d __, __ N.W.2d __ (Dec. 7, 2022) (recommended for publication).[2]

The presumption in favor of access creates rules for this Court's interpretation of the law. Sections "19.32 to 19.37 shall be construed in every instance with a presumption of complete public access, consistent

[2] Because the publication decision is pending, AO includes a copy of this decision in its appendix. *See* Wis. Stat. § 809.23(3)(c).

with the conduct of governmental business," and "only in an exceptional case may access be denied." Wis. Stat. § 19.31.

B. Questions of Law.

This Court reviews *de novo* legal questions under Wisconsin's Open Records law and contempt statute. *See Zellner*, 300 Wis. 2d 290, ¶ 17; *Town of Seymour v. City of Eau Claire*, 112 Wis. 2d 313, 319, 332 N.W.2d 821 (Ct. App. 1983).

For mixed questions of fact and law, an appellate court upholds the court's findings of fact "unless they are clearly erroneous, but review[s] the application of the law to those facts de novo." *Klismet's 3 Squares Inc. v. Navistar, Inc.*, 2016 WI App 42, ¶ 10, 370 Wis. 2d 54, 881 N.W.2d 783.

C. Discretionary Determinations.

"A trial court's use of its contempt power is reviewed to determine if the trial court properly exercised its discretion." *City of Wis. Dells v. Dells Fireworks, Inc.*, 197 Wis. 2d 1, 23, 539 N.W.2d 916 (1995). Likewise, "[a] fees [award] will be sustained unless there is an abuse of discretion." *Standard Theatres v. Dep't of Transp.*, 118 Wis. 2d 730, 747, 349 N.W.2d 661 (1984) (quotation marks omitted).) Appeals courts "give deference to the circuit court's decision because the circuit court is familiar with local billing norms and will likely have witnessed first-hand the quality of the service

rendered by counsel." *Kolupar v. Wilde Pontiac Cadillac, Inc.*, 2004 WI 112, ¶ 22, 275 Wis. 2d 1, 683 N.W.2d 58. As a result, the appeals court may not "substitute [its] judgment for the judgment of the circuit court" but instead only "prob[es] the court's explanation to determine if the court employ[ed] a logical rationale based on the appropriate legal principles, and facts of record." *Id.* (quotation marks omitted).

In reviewing a discretionary decision, appellate courts determine if the circuit court "examined the relevant facts, applied a proper standard of law, and, using a demonstrated rational process, reached a conclusion that a reasonable judge could reach." *Loy v. Bunderson*, 107 Wis. 2d 400, 414-15, 320 N.W.2d 175 (1982). Where the circuit court has done so, the appeals court "will affirm the decision even if it is not one with which [the court] [itself] would agree." *Burkes v. Hales*, 165 Wis.2d 585, 590, 478 N.W.2d 37 (Ct. App. 1991). The appellant carries the burden to demonstrate an abuse of discretion. *See Colby v. Colby*, 102 Wis. 2d 198, 207-08, 306 N.W.2d 57 (1981) (requiring abuse of discretion to be "clearly shown").

ARGUMENT

This is an appeal of several, specific rulings of the circuit court, spanning nearly the entirety of this Open Records case. The proceedings below were about Assembly Respondents' inadequate responses to AO's open records requests for records of contractors performing an investigation of the 2020 election on behalf of the Assembly. The relevant contracts were entered into and overseen by Vos, as leader of the Assembly and pursuant to an explicit delegation of authority by the Assembly; likewise, as Chief Clerk, Blazel administered the open records responses and oversaw payment of the contractors on behalf of the Assembly.

After rejecting arguments not at issue in this appeal, the circuit court ordered Assembly Respondents to respond to AO's requests in full. When that response proved demonstrably inadequate, the circuit court held Assembly Respondents in contempt to force sufficient performance of their official responsibilities and compliance with the court's order.

Assembly Respondents' piecemeal attacks to the circuit court's orders are not tethered to the facts, the history of this case, or Wisconsin law. It is not correct that the Open Records law cannot be applied by the courts to the actual public officials responsible for entering and

administering the state's contracts. It is not correct that the circuit court abused its discretion or acted without reason or explanation. It is not correct that the contempt order was unfounded or unnecessary to achieve compliance with the Mandamus Order. And it is not correct that Wisconsin Law prohibits non-profit organizations from recovering the reasonable costs of their in-house litigators. Indeed, Assembly Respondents offer no reason to disrupt the fee award in this case.

Ultimately, Assembly Respondents seek to avoid paying attorneys' fees under the Open Records Law's fee-shifting provision and as a remedial sanction for their contempt of the court's Mandamus Order. As such, this appeal is little more than an after-the-fact effort to avoid the consequences of Assembly Respondents' violations of the Open Records law and the Mandamus Order. It should be rejected in its entirety, and this Court should affirm the circuit court.

I. THE CIRCUIT COURT PROPERLY ISSUED THE MANDAMUS ORDER TO VOS AND BLAZEL.

Assembly Respondents do not dispute that the circuit court properly issued the Mandamus Order to the Assembly, and they do not challenge the validity of the overall order. Instead, they claim the court erred in directing the order at Vos and Blazel because they supposedly did not "ha[ve] a contract with anyone regarding the investigation of the 2020

election." (Assem. Br. at 15.) While not fully explained, Assembly Respondents' argument appears to be that Vos and Blazel are not expressly named as parties to the contracts, which are between "The Wisconsin Assembly" and the contractors. (*See id.*; *see also* Doc. 28 at 8-17.) This argument entirely ignores that Vos acted on the Assembly's behalf in engaging the contractors, and, without Vos and Blazel, there would be no way to enforce Wis. Stat. § 19.36(3), contrary to the Open Records law's express terms and purpose.

As a threshold issue, Assembly Respondents fail to mention they did not raise the question of whether Vos and Blazel were "parties" to the election investigators' contracts (or what import, if any, such a factual finding would have under Wis. Stat. § 19.36(3)) at the time the Mandamus Order was issued, despite ample opportunity to do so. They did not file *any* motions at all before the show cause hearing (*see* Doc. 37); they did not raise this argument in their "Answer" (*see* Doc. 56), at oral argument (*see* Doc. 58, AO-App-1-44), or when they objected to portions of the proposed mandamus order (Doc. 62); and they did not argue that only the Assembly had or could respond to the Mandamus Order when making the November 19 production (*see* Doc. 70, AO-App-45). This Court can decline to address this issue on that ground alone. *See Schonscheck v. Paccar, Inc.*,

2003 WI App 79, ¶ 11, 261 Wis. 2d 769, 661 N.W.2d 476 ("[a] fundamental appellate precept is that [appellate courts] will not blindside trial courts with reversals based on theories which did not originate in their forum" (internal quotation marks omitted)).[3]

But even if the issue of whether Vos and Blazel "had" a contract under Wis. Stat. § 19.36(3) had been timely raised, it does not supply any basis to disrupt the Mandamus Order as issued against Vos and Blazel.

A. The Text of the Open Records Law Supports Enforcing Wis. Stat. § 19.36(3) Through Vos and Blazel, in Addition to the Assembly.

The Open Records law is clear that government authorities are responsible for disclosing the records of their contractors. Assembly Respondents seek to upend this mandate by distinguishing between a government entity and the public officials with authority—in this case,

[3] Assembly Respondents did raise this issue as a defense to contempt. (*See* Doc. 75 at 6; Doc. 100 at 3-4.) The circuit court rejected that defense, noting Assembly Respondents had not directly attacked the Mandamus Order. (*See* Doc. 107 at 10-11.) The circuit court also noted a motion for reconsideration requires "present[ing] newly discovered evidence or establish[ing] a manifest error of law or fact," *Bauer v. Wis. Energy Corp.*, 2022 WI 11, ¶ 13, 400 Wis. 2d 592, 970 N.W.2d 243 (quotation marks and citation omitted), and found the collateral argument, even if construed as such a motion, did not meet those standards. (Doc. 107 at 11 & n.4.)

Additionally, when Respondents state that "Vos and Blazel have consistently asserted that they are not responsible for these contractors' records," they cite only vague passages from the "Answer" (Doc. 56, ¶¶ 9-10; Assem. Br. at 14), omitting that they made the exact same assertions regarding the Assembly (Doc. 56, ¶ 11), which indisputably had a contract with the investigators (Assem. Br. at 15).

expressly delegated authority, *see* Part I.B—to act on its behalf. Assembly Respondents' view, if adopted, would significantly limit courts' ability to enforce Wis. Stat. § 19.36(3), contrary to the clear mandates in the Open Records law itself.

Wis. Stat. § 19.36(3) states:

> Each authority shall make available for inspection and copying under s. 19.35(1) any record produced or collected under a contract *entered into by the authority* with a person other than an authority to the same extent as if the record were maintained by the authority.

Id. (emphasis added). Assembly Respondents seek to supplant this text with several vague standards, none of which are explained or supported. (*See* Assem. Br. at 12 (Vos and Blazel "were not a party to any contract"), 15 ("[n]either Vos nor Blazel had a contract").) They do not once address whether the requested records were "produced or collected under a contract *entered into by*" Vos or Blazel. They also do not explain why, in their view, Wis. Stat. § 19.36(3) applies only to "parties," or what it means to "have" a contract. In short, the statute is specific in describing a "contract entered into by the authority," and Assembly Respondents ignore that language. *See State* ex rel. *Kalal v. Cir. Ct. for Dane Cnty.*, 2004

WI 58, ¶ 45, 271 Wis. 2d 633, 681 N.W.2d 110 (commanding courts to "begin[] with the language of the statute").

The enforcement provision of the Open Records law also does not support Assembly Respondents' narrow view of who may be subject to a mandamus order to produce records. Wis. Stat. § 19.37(1)(a) provides that "[i]f an authority withholds . . . or delays granting access" to a record, "[t]he requester may bring an action for mandamus asking a court to order release of the record." It does not say that the order may *only* be issued to the authority who withholds or delays access to the record, or preclude naming specific custodians to carry out the order's mandates.

Moreover, a narrow reading of Wis. Stat. § 19.36(3) does not comport with the purpose of the provision, which is to prevent a government authority from "avoid[ing] the public access mandated by the public-records law by delegating both the record's creation and custody to an agent." *J. Sentinel, Inc. v. School Bd. of Sch. Dist. of Shorewood*, 186 Wis. 2d 443, 452-53, 521 N.W.2d 165 (Ct. App. 1994); *see also Juneau Cnty. Star-Times v. Juneau Cnty.*, 2013 WI 4, ¶ 40, 345 Wis. 2d 122, 824 N.W.2d 457. It also flies in the face of the statutory mandate to "construe[] [the Open Records law] in every instance with a presumption of complete public access." Wis. Stat. § 19.31; *see also Juneau Cnty.*, 345 Wis. 2d 122, ¶ 40 (observing a narrow

interpretation of Wis. Stat. § 19.36(3) "seems contrary to the legislature's directive" in Wis. Stat. § 19.31).[4]

Finally, the only case Assembly Respondents cite does not support their argument. In *WIREdata, Inc. v. Vill. of Sussex*, the Wisconsin Supreme Court held, as relevant here, that authorities remain responsible for producing records of their contractors even if those records are in a contractors' custody. 2008 WI 69, ¶¶ 4-5, 310 Wis. 2d 397, 751 N.W.2d 736. Nowhere in *WIREdata* does the court specifically limit this holding to "authorit[ies] who [are] part[ies] to the contract," as Assembly Respondents suggest. (*See* Assem. Br. at 15-16.)[5]

B. Vos and Blazel Were Responsible For Producing the Contractors' Records Under Wis. Stat. § 19.36(3).

Here, there was ample reason under Wis. Stat. § 19.36(3) and § 19.37(1) to issue the mandamus order to Vos and Blazel, in addition the Assembly.

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[4] In at least some situations, Wis. Stat. § 19.36(3) even requires a government authority to disclose records produced pursuant to a contract to which the authority is not a party. *See, e.g.*, *Juneau Cnty.*, 345 Wis. 2d 122, ¶¶ 10, 30 (requiring the authority to release records produced pursuant to a contract between a law firm and an insurer, even though only the insurer was a party to the contract with the authority).

[5] Respondents' reliance on a single line from a ruling in a "separate action" (Assem. Br. at 15), *American Oversight v. Assembly Office of Special Counsel*, Dane County Case No. 21-cv-3007, is not evidence in this case—and had no bearing on the issuance of the Mandamus Order, which came many months prior to that ruling.

Vos, acting in his capacity as Speaker of the Assembly, *did* enter the contracts with the election investigators. Prior to engaging the contractors, Vos sent a mail ballot to the Assembly Committee on Assembly Organization, which:

> authorized the Speaker of the Assembly to hire legal counsel and employ investigators to assist the Assembly Committee on Campaigns and Elections in investigating the administration of elections in Wisconsin. Speaker Vos, on behalf of the Assembly, shall approve all financial costs and contractual arrangements for hiring legal counsel and investigators.

(Doc. 4, ¶ 16; Doc. 64, ¶ 16; *see also* Doc. 72 at 6.) In other words, Vos was expressly and explicitly delegated the authority to enter into contracts with the election investigators on the Assembly's behalf. Moreover, it was his official duty to oversee the contracts, including approving "all contractual arrangements."

According to these duties and authorities, Vos then hired the election investigators. (Doc. 4, ¶¶ 17-18; *see* Doc. 64, ¶¶ 17-18.) He was the sole government signatory to each of their contracts. (*See* Doc. 28 at 11, 14, 17.) The contractors reported directly to Vos's office and were required to submit reports to him. (*See id.* at 8, 12, 15.) Vos's legal counsel, Steve Fawcett, was the designated "point of contact" with whom the lead investigator would coordinate. (*See id.* at 8.) The investigators were not

allowed to disclose any "information/findings related to the services rendered" except to designees named by Vos. (*Id.*)[6]

The testimony of Blazel and Vos's representative, Fawcett, also demonstrates why all three Assembly Respondents were properly ordered to produce contractors' records in line with Wis. Stat. § 19.36(3). After the Court issued its Mandamus Order, Fawcett "contacted the Office of Special Counsel and . . . notified them of the order and asked them to turn over the documents they had in their possession that were responsive to these requests." (Doc. 99 at 16:1-5, AR-App-21; *see also id*. at 30:18-24, 31:6-13, AR-App-35-36.) Fawcett testified he understood "Vos's office" to "ultimately [be] subject to the open records request" and that "the buck stops with . . . Mr. Vos and his office to produce relevant documents." (*Id*. at 60:14–61:9.)

Blazel also had a significant degree of communication with and control over the contractors, in particular with respect to open records compliance. For example, it is the Chief Clerk's responsibility to send open records productions to requesters on behalf of the Assembly, and he

[6] In their "Answer," Assembly Respondents argued that suing Vos and Blazel in their official capacities was equivalent to suing the Assembly itself. (Doc. 56, ¶¶ 1-3.) If that argument had been adopted, as Assembly Respondents urged the circuit court to do, there was no harm in issuing the Mandamus Order against all three parties as effectively all three would have worked on behalf of the Assembly to comply with the order.

already had responded to several of AO's requests (albeit without contractors' records, in violation of Wis. Stat. § 19.36(3)). (*See* Doc. 99 at 88:1-5, AR-App-93; *see also* Docs. 4, 10-11, 16-17, 28-30.) Blazel also was responsible for contractor invoices and payments on behalf of the Assembly. (*See, e.g.*, Doc. 28 at 1, 3-5, 7; Doc. 99 at 93:2-5, AR-App-98.)

It was reasonable for the circuit court to tie the Mandamus Order to the individuals who the record showed were clearly responsible for producing the records and who could effectuate the order. Indeed, Assembly Respondents' hyper-technical argument does not have any practical effect; because the Mandamus Order indisputably applied to the Assembly and resulted in the production of some records, this litigation would have proceeded in essentially the exact same way, with the exact same result.

II. THE CIRCUIT COURT PROPERLY FOUND A PRIMA FACIE CASE OF CONTEMPT.

There is no basis to disrupt the circuit court's discretionary determination that AO made a prima facie case of contempt; Assembly Respondents were not free to ignore the Mandamus Order and there were ample grounds to find the Order had been violated.

A. Vos and Blazel Were Bound to Follow the Mandamus Order, Even if They Disagreed With It.

Contrary to Assembly Respondents' argument that "Vos and Blazel could not be held in contempt of the unlawful mandamus order" (*id.* at 16), Vos and Blazel were not free to ignore the Mandamus Order; having sought no additional relief, they were bound by the Order's terms, regardless of whether they agreed with it.

As an initial matter, the circuit court found "Vos and the assembly in contempt, but not Edward Blazel." (Doc. 107 at 14, AR-App-117; *see also id.* ("[r]emedial sanctions are necessary to force Vos and the assembly into compliance. . . . but not Blazel.").) Thus, Assembly Respondents simply misunderstand this case in arguing the contempt finding "against Vos *and Blazel* cannot stand." (Assem. Br. at 17 (emphasis added).)[7]

In any event, as explained in Part I, Vos and Blazel *were* properly subject to the Mandamus Order. But even if that were not the case, they were not free to ignore it.

It is a basic tenet of the judicial system that parties may not ignore court orders simply because they disagree with them. *See State v. Orethun*, 84 Wis. 2d 487, 490, 267 N.W.2d 318 (1978) (assuming proper jurisdiction,

[7] Respondents repeatedly state that *all* "Respondents" were held in contempt. (Assem. Br. at 5-6.) If Respondents intended to limit the argument about Blazel to the first step of the contempt analysis—the prima facie showing—that argument also fails; Blazel was not ultimately found in contempt and thus there is no appealable order applicable to him. *See Brown v. LaChance*, 165 Wis. 2d 52, 69, 477 N.W.2d 296 (Ct. App. 1991) ("We do not give advisory opinions.").

"the fact that an order or judgment is erroneously or improvidently rendered does not justify a person in failing to abide by its terms." (quotation and citation omitted)). Courts regularly find that parties must abide by the terms of a court order unless and until that order has been set aside. *See Getka v. Lader*, 71 Wis. 2d 237, 247, 238 N.W.2d 87 (1976); *State v. Campbell*, 2006 WI 99, ¶ 49, 294 Wis. 2d 100, 718 N.W.2d 649.[8] That is precisely what Vos and Blazel were required to do here.

Moreover, Vos and Blazel recognized they were not free to ignore the Mandamus Order. Assembly Respondents produced some documents in response to the Mandamus Order without arguing Vos and Blazel did not have to do so. (*See* Doc. 70, AO-App-45.) They also produced witnesses (including Vos's representative and Blazel himself) who made numerous representations about Vos and Blazel's responsibilities under Wis. Stat. § 19.36(3) and the Mandamus Order. (*See generally* Doc. 99, AR-App-6-103); *see also* Part I.B. Vos and Blazel never moved the court to reconsider or otherwise set aside the Mandamus Order. This conduct is entirely inconsistent with their position that they could not be held in contempt.

[8] Assembly Respondents' only citation is to *In re Paternity of D.A.A.P.*, 117 Wis. 2d 120, 126, 344 N.W.2d 200, 203 (Ct. App. 1983), to explain the basic concept that contempt is "intentional disobedience of a lawful court order." (Assem. Br. at 16.) But even if the Mandamus Order was wrongly decided or subject to reversal on appeal that does not make it "unlawful" such that they could ignore it. *See Orethun*, 84 Wis. 2d at 490.

B. AO Established a Prima Facie Case of Contempt.

Assembly Respondents further argue that the circuit court abused its discretion "when it found Respondents in contempt" (Assem. Br. at 17), focusing only on the first step of the contempt analysis, the prima facie case. *See Jt. Sch. Dist. No. 1, City of Wis. Rapids v. Wis. Rapids Educ. Ass'n*, 70 Wis. 2d 292, 320, 234 N.W.2d 289 (1975) (requiring party asserting contempt to make "prima facie showing of a violation of the order," then shifting burden to defendants to make arguments as to whether the order was "actually violated").

Assembly Respondents concede that contempt is reviewed under an abuse of discretion standard. (Assem. Br. at 12, 17.) Despite this deferential standard, Assembly Respondents cite no legal authorities supporting their argument. (*See* Assem. Br. at 17-20 (citing *Noack v. Noack*, 149 Wis. 2d 567, 575, 439 N.W.2d 600 (Ct. App. 1989), for only basic principle that prima facie showing is first step in analysis).) Nor could they because the argument relies on a fundamental misunderstanding of the Mandamus Order and ignores the court's reasoning for finding a prima facie case.

First, Assembly Respondents admit AO identified at least one specific document that had not been produced despite being subject to the Mandamus Order. (*See* Assem. Br. at 19; *see also* Doc. 107 at 9, AR-App-112;

Doc. 78 at 4, AO-App-49.) Even if this was the only evidence that Assembly Respondents violated the Mandamus Order—which it was not, as explained below—the question of a prima facie case is straightforward and is satisfied with basic evidence that a court order was violated. *See, e.g.*, *Noack*, 149 Wis. 2d at 571; *see also Jt. Sch. Dist. No. 1, City of Wis. Rapids*, 70 Wis. 2d at 320.

Second, and related, Assembly Respondents' reasons for why the circuit court should not have relied on AO's evidence about this document are nonsensical. Assembly Respondents argue there was no evidence that it was "possessed by Respondents when [AO's] request was made, or that it existed as of August 30, 2021." (Assem. Br. at 20.)[9] Assembly Respondents' focus on their own "possession" is entirely misplaced. There is no dispute that the omitted record was in the possession of a *contractor* at the time, Gableman, because it was an email exchange in which he participated. The Mandamus Order required Assembly Respondents to "produce contractors' records" *that were not in their possession* but nevertheless were their responsibility to produce under Wis. Stat. § 19.36(3). *See WIREdata*, 310 Wis. 2d 397, ¶¶ 4-5. As such, Assembly

[9] Assembly Respondents' argument that there was no evidence this document "existed as of August 30, 2021" is baffling, as they admit the document was dated August 17, 2021 (Assem. Br. at 20).

Respondents' "possession" of records as of a particular date (or at all) is not relevant to whether they violated the Mandamus Order; what matters is whether the *contractor* possessed it, which he indisputably did.

Third, Respondents are wrong that the circuit court relied on a "single document" in finding a prima facie case. (Assem. Br. at 19.) Instead, AO presented additional evidence that Assembly Respondents had not complied with the Mandamus Order. For example, AO identified that very few produced records appeared to come from the contractors rather than from Assembly Respondents' own files, which were not at issue. Moreover, there were significant gaps, such as no records relating to contractually-mandated reports that the contractors should have produced and no communications regarding investigators' reported travel, despite evidence indicating such records should exist. (*Compare* Docs. 71-72 (the November 19 production), *with* Doc. 28 at 8 (mandating investigator reports), Doc. 73 (identifying various investigator activities); *see also* Doc. 68 at 8-9.)

An open records plaintiff is not obligated to affirmatively prove the existence of each and every responsive record (nor could they), yet that is precisely the position Assembly Respondents take. *Cf. King v. U.S. Dep't of Just.*, 830 F.2d 210, 218 (D.C. 1987) (recognizing "asymmetrical distribution

of knowledge that characterizes FOIA litigation"). The circuit court properly did not credit that argument. (*See, e.g.*, Doc. 99 at 9:23-10:1, AR-App-14 ("I did have some concerns about the paucity of the records produced" and "[t]hat's why I requested this hearing today.").)

III. THE CIRCUIT COURT PROPERLY AWARDED ATTORNEYS' FEES FOR THE CONTEMPT PROCEEDINGS.

There is no basis to disrupt the circuit court's discretionary finding to require payment of AO's attorneys' fees as a remedial sanction under Wis. Stat. § 785.04, nor is there any basis to find those sanctions could not include in-house attorneys' fees.

A. The Circuit Court Exercised its Discretion to Impose Remedial Sanctions, Including Attorneys' Fees.

1. The Circuit Court's Award of Attorneys' Fees was Itself a Remedial Sanction for Contempt; It Was Not Contingent on the Result of Other Remedial Sanctions.

Assembly Respondents' argument that "AO was not successful in the contempt proceeding" and "[w]ithout success AO should not have been awarded any damages for litigating its contempt motion" (Assem. Br. at 21-22) fundamentally misunderstands the concept of "success" in a contempt proceeding.

Under Wis Stat. § 785.01(3), a "remedial sanction" is "imposed for the purpose of terminating a continuing contempt of court." *Id*. Following notice and hearing on a motion for contempt, a circuit court "may impose

a remedial sanction authorized" in the statute. *Id.* § 785.03(1)(a). As explained in Part III.B, authorized remedial sanctions include payment for attorneys' fees. Which remedial sanctions to award is a discretionary determination of the circuit court. *See Benn v. Benn*, 230 Wis. 2d 301, 308, 602 N.W.2d 65 (Ct. App. 1999).

In attacking the fee award based on the "entire contempt proceeding, from motion through purge" (Assem. Br. at 21), Assembly Respondents appear to confuse the contempt timeline. Distilled to its core, Assembly Respondents' argument is that a specific *remedial* sanction (attorneys' fees)—properly imposed at the time a party is held in contempt, *for the purpose of terminating that contempt*—can somehow, after-the-fact, be limited by the *results* of *other* remedial sanctions (the purge conditions). This makes no sense.

In this case, the court followed the proper contempt process as provided for in *Noack*, 149 Wis. 2d at 575: After finding a prima facie case based on violations of the Mandamus Order, Assembly Respondents had opportunity to rebut that case by demonstrating their violations were not intentional. (*See, e.g.*, Docs. 98, 99.) The court then found Vos and the Assembly in contempt and ordered a series of remedial sanctions. (*See* Doc. 107, AR-App-104-18.) Among these remedial sanctions were payment

of AO's attorneys' fees to prosecute the contempt motion, as well as ordering various steps to demonstrate compliance with the Mandamus Order. (*Id.* at 14-15, AR-App-117-18.) It would make no sense for the validity of one of these two independent remedial sanctions to be negated by the later-determined outcome of the other.[10] In other words, the award of costs and fees because Vos and the Assembly did not properly carry out their duties under the Mandamus Order could not be negated by the eventual conclusion, after a proper search and explanation as implemented through the purge conditions, that there happened to be no additional records (because those records had been deleted or destroyed).

2. Assembly Respondents' Argument that AO Did Not Achieve "Success" Improperly Conflates the Contempt and Open Records Proceedings.

Assembly Respondents' argument, that AO was not "successful"—based on an invented standard that the contempt proceedings must have resulted in the production of additional records (Assem. Br. at 21)—is circular for the reasons described above. Under the proper framework, AO

[10] The only two cases Respondents cite have nothing to do with the remedial sanctions statute, contempt, or enforcement of court orders. *See Harmann v. French*, 74 Wis. 2d 668, 699, 673 N.W.2d 707 (1976) (addressing allowable statutory damages for holdover tenants); *Chris Hinrichs & Autovation Ltd. v. Dow Chec. Co.*, 2020 WI 2, ¶ 80, 389 Wis. 2d 669, 937 N.W.2d 37 (addressing recovery of damages in fraud claims).

was successful on nearly every aspect of its contempt motion.[11] In its contempt ruling, the circuit court imposed a series of remedial sanctions, each "designed to ensure compliance with a prior order of the Court," including a set of "purge conditions" aimed at ensuring compliance with the public records law and the Mandamus Order, a potential daily monetary forfeiture, and "American Oversight's costs and fees incurred in bringing this contempt motion." (Doc. 107 at 14-15, AR-App-117-18.)

AO's contempt motion was directed towards understanding Respondents' efforts (or lack thereof) to comply with the Mandamus Order and determining whether any additional responsive records still existed and could be produced. (*See* Doc. 67; *see also* Doc. 101 at 24-25.) The purge-related sanctions thus directly addressed the precise relief AO sought in its motion. (*See* Doc. 183 at 72:19-74:5; Doc. 107 at 14, AR-App-117.) Recognizing the contempt finding, the circuit court also imposed the independent remedial sanction of attorneys' fees AO spent bringing the motion in the first place.

Vos and the Assembly nevertheless argue that because they did not ultimately *produce records* in the contempt proceedings, AO is not entitled

[11] The contempt motion was only unsuccessful as against Blazel, and only because the court found remedial sanctions against him would be duplicative. (Doc. 107 at 14, AR-App-117.)

to fees on its contempt motion. (*See* Assem. Br. at 21.) Respondents conflate the contempt and merits phases of this case. As explained below, a court has discretion to award attorneys' fees as a remedial sanction for contempt. *See* Part III.B. While fees may be separately available under the Open Records law, Wis. Stat. § 19.37(2), to a records requester who, for example, "obtain[ed] access to improperly withheld public records through a judicial order," *Meinecke v. Thyes*, 2021 WI App 58, ¶ 8, 399 Wis. 2d 1, 963 N.W.2d 816; *see also Friends of Frame Park, U.A. v. City of Waukesha*, 2022 WI 57, 403 Wis. 2d 1, 976 N.W.2d 263, that is an entirely different inquiry. AO did not also need to obtain records through the contempt motion, and Assembly Respondents cite no case saying that. Indeed, the notion that AO could be unsuccessful in the contempt phase despite obtaining essentially the *full relief* requested is absurd.

B. Courts May Exercise Discretion to Award In-House Counsel Attorneys' Fees Under Wis. Stat. § 785.04(1).

There is no basis in Wisconsin law to find that Wis. Stat. § 785.04 bars courts from exercising their discretion to award attorneys' fees for litigation work performed by in-house counsel representing an organization.

Wis. Stat. § 785.04(1)(a) states in relevant part that remedial sanctions for contempt may include "[p]ayment of a sum of money

sufficient to compensate a party for a loss or injury suffered by the party as a result of a contempt of court." *Id.* Assembly Respondents argue that an organization represented by in-house counsel suffers no "loss or injury" when those counsel expend time and resources to enforce a court order, and as such the organization may not be compensated for such expenditures. (Assem. Br. at 23–25.) That argument fails both in law and logic.

First, Assembly Respondents' interpretation of Wis. Stat. § 785.04(1)(a) is at odds with the seminal case they cite in their brief. (*See* Assem. Br. at 23–24.) *Town of Seymour* actually *confirmed* Wis. Stat. § 785.04 "authorizes the trial court to award attorney's fees and other litigation costs." 112 Wis. 2d at 320; *see also Evans v. Luebke*, 2003 WI App 207, ¶ 27, 267 Wis. 2d 596, 671 N.W.2d 304. Moreover, nothing in *Seymour* suggests Wis. Stat. § 785.04(1)(a) makes a distinction between in-house and outside attorneys; on the contrary, *Seymour* found that Wis. Stat. § 785.04 *does not limit* the courts' ability to award attorneys' fees. *See* 112 Wis. 2d at 320. The court declined to read the provision in a way that would disrupt "prior law [under which] our supreme court has considered the attorney's fees that a person incurs while prosecuting a contempt action as losses and damages within the meaning of the contempt statute." *Id.*; *see also*

Stollenwerk v. Klevenow, 151 Wis. 355, 364, 139 N.W. 203 (1912). Thus, *Seymour* implies that *all* fees should be seen as losses or damages.

Second, parties employing in-house counsel *do* suffer a "loss or injury" when seeking to enforce a court's order. In-house counsel, like hired counsel, expend time and resources on litigation that could be spent pursuing other action. *See, e.g.*, *Serv. Emp's. Inter. Union Local 32BJ v. Preeminent Protective Servs., Inc.*, 415 F. Supp. 3d 29, 34 (D.D.C. 2019) (awarding fees to union for "expenses" of in-house counsel time incurred as a result of contemptuous conduct); *Cottman Transition Sys., Inc. v. Metro Distributing, Inc*., Nos. CIV. A. 92-2131, CIV. A. 92-2253, 1996 WL 41608, at *6 (E.D. Penn. Feb. 2, 1996) (awarding fees for in-house counsel work as part of civil contempt sanctions); *see also Textor v. Board of Regents of Northern Ill. Univ.*, 711 F.2d 1387, 1396–97 (7th Cir. 1983) ("for every hour in-house counsel spent on this case defendants lost an hour of legal services that could have been spent on other matters"); *Holland v. Jachmann*, 85 Mass. App. Ct. 292, 297–298, 344 9 N.E.3d 340 (Ct. App. Hampden 2014) (company "'incurred' a cost" for "having in-house counsel engaged in the present suit"). An organizational plaintiff employing in-house counsel thus cannot be made whole without recovering their fees.

Third, an interpretation of Wis. Stat. § 785.04 that limits courts' discretion to fashion remedies flies in the face of the courts' long-standing and traditional strength in enforcing their own orders. *See Benn*, 230 Wis. 2d at 308; *see also In re Kading*, 70 Wis. 2d 508, 542, 238 N.W.2d 63 (1976); *In Interest of D.L.D.*, 110 Wis. 2d 168, 181, 327 N.W.2d 682 (1983). Indeed, such a reading is entirely consistent with the remedial purpose of "terminating a continuing contempt of court," Wis. Stat. § 785.01(3), as being forced to pay attorneys' fees is a strong incentive to come into compliance.

Finally, there is no dispute that in-house attorneys' fees would be subject to the same reasonability standards as all other attorneys' fees. Assembly Respondents' protest of "impermissibly meld[ing] the concepts of a prevailing party fee award and damages" (Assem. Br. at 24) makes no sense.[12] The lodestar method is simply a way of translating losses into a measurable and reasonable amount, *see Kolupar*, 275 Wis. 2d 1, ¶ 28, and there is no meaningful difference in doing that calculation for in-house and outside attorneys. *See, e.g.*, *Video-Cinema Films, Inc. v. Cable News Network, Inc.*, Nos. 98 Civ. 7128-30, 2004 WL 213032, at *6 (S.D.N.Y. Feb. 3, 2004)

[12] Fee-shifting statutes and the contempt statute have both been described as "make-whole" provisions, *see Rand v. Rand*, 2010 WI App 98, ¶ 8, 327 Wis. 2d 778, 787 N.W.2d 445, so Assembly Respondents' attempt to distinguish them on that basis is irrelevant here.

("the court may use a reasonable hourly rate that the in-house counsel would be awarded if he or she was acting in the capacity of an outside counsel."); *PLCM Grp. v. Drexler*, 997 P.2d 511, 516–17 (Cal. 2000) ("the lodestar method, as applied to the calculation of attorney fees for in-house counsel is presumably reasonable").

IV. AMERICAN OVERSIGHT IS ENTITLED TO RECOVER IN-HOUSE ATTORNEYS' FEES UNDER THE OPEN RECORDS LAW.

Assembly Respondents next claim, citing law from other states, that AO cannot obtain in-house attorneys' fees under the Open Records law. Yet Wis. Stat. § 19.37 is a mandatory fee-shifting provision and does not distinguish between in-house and outside attorneys. To accept Assembly Respondents' argument would go against the text and purpose of the statute.

A. Excluding In-House Attorneys' Fees from Fee Awards Under Wis. Stat. § 19.37 Would Be a Radical Departure from the Statutory Text and Prevailing Wisconsin Law.

1. Wis. Stat. § 19.37's Mandate to Award Attorneys' Fees Must Be Construed Broadly, and in Line With the Purpose of Fee-Shifting Provisions.

Wis. Stat. § 19.37(2) *requires* courts to award attorneys' fees to a prevailing open records requester: "the court *shall* award reasonable attorney fees . . . if the requester prevails in whole or in substantial part . . ." *Id.* (emphasis added).

Nothing in the statute suggests that "attorney fees" do not include fees incurred by in-house counsel litigating on behalf of an organization, or that such fees are somehow carved out. *Kalal*, 271 Wis. 2d 633, ¶ 45 ("statutory interpretation begins with the language of the statute. If the meaning of the statute is plain, we ordinarily stop the inquiry") (citation and internal quotation marks omitted). To the extent there is any doubt, Wis. Stat. § 19.37 is among the Open Records law's provisions that the Legislature has directed must be construed in favor of access. Wis. Stat. § 19.31 ("ss. 19.32 *to 19.37* shall be construed . . ." (emphasis added)); *see also Meinecke*, 399 Wis. 2d 1, ¶ 14 (noting Wis. Stat. § 19.31's statement of policy applies to the Open Records law's enforcement provisions).

The presumption of public access supports the award of attorneys' fees. "[T]he purpose of sec. 19.37, Stats., is to encourage voluntary compliance." *Eau Claire Press Co. v. Gordon*, 176 Wis. 2d 154, 159, 499 N.W.2d 918, 921 (Ct. App. 1993). Compliance in turn serves the Open Records statute by effectuating its purpose to timely inform the public about the affairs of government. More generally, fee-shifting statutes "encourage injured parties to enforce their statutory rights when the cost of litigation, absent the fee-shifting provision, would discourage them from doing so." *Kolupar v. Wilde Pontiac Cadillac, Inc.*, 2007 WI 98, ¶ 55, 303 Wis. 2d 258, 735 N.W.2d 93 (internal citation omitted).

Wisconsin law does not require that litigants actually pay their attorneys to recover attorneys' fees under a variety of fee-shifting statutes. In *Shands v. Castrovinci*, the Wisconsin Supreme Court held that a public interest legal services organization may recover reasonable attorneys' fees, even when its clients were not charged. 115 Wis. 2d 352, 354, 359-62, 340 N.W.2d 506 (1983); *see also Richland School Dist. v. Dep't of Industry, Labor, & Human Relations*, 174 Wis. 2d 878, 911-15, 498 N.W.2d 826 (1993). Otherwise, it would be harder for organizations acting in the public interest to pursue certain types of claims. *See Shands*, 115 Wis. 2d at 360–61; *Richland*, 174 Wis. 2d at 913. Rather than representing "a windfall or unjust

enrichment," fee awards promote statutory schemes through enforcement. *Richland*, 174 Wis. 2d at 913.[13]

A decision that limits the rights of requestors would cut equally across the political and civic spectrum. In addition to AO, a number of groups representing disparate viewpoints are litigating in Wisconsin courts using in-house counsel; for example, Wisconsin Institute for Law & Liberty, Inc., Wisconsin Manufacturers & Commerce, and Midwest Environmental Advocates. (*See* Doc. 197 at 6.) The ability of these groups and many others to enforce the Open Records law on behalf of themselves and the public would be harmed under Assembly Respondents' reasoning, contrary to the law's text and statement of policy.

2. In-House Attorneys Are Not Pro Se Litigants.

The only Wisconsin case on which Assembly Respondents rely for their novel proposition excising in-house attorneys' fees from Wis. Stat. § 19.37(2) points to the opposite result Assembly Respondents wish for. In *State* ex rel. *Young v. Shaw*, 165 Wis. 2d 276, 297, 477 N.W. 2d 340 (Ct. App. 1991), the court held that a pro se litigant who happened to be an attorney

[13] Assembly Respondents' purported comparisons between AO and the types of organizations in *Shands* and *Richland* (Assem. Br. at 27), are both legally irrelevant and factually unsupported by the record in this case. This Court should disregard them. *See* Wis. Stat. § 902.01(2) ("[a] judicially noticed fact must be one not subject to reasonable dispute . . .").

could not recover fees under Wisconsin's Open Records law. The *Young* court explicitly adopted the reasoning of *Kay v. Ehrler*, 499 U.S. 432 (1991), which held pro-se litigants were prohibited from recovering attorneys' fees under the federal Civil Rights Attorney's Fees Awards Act. *Young*, 165 Wis. 2d at 295; *see also Kay*, 499 U.S. at 437–38. This was because "the existence of an attorney-client relationship" is key to recovering fees. 165 Wis. 2d at 295. By contrast, a pro se litigant (even one who happens to be an attorney) is "deprived of the judgment of an independent third party." *Id.* (citing *Kay*, 499 U.S. at 437). (*See also* Assem. Br. at 29.)

Of course, AO has not been—nor, as an organization *could* it be—proceeding pro se, and Assembly Respondents do not claim otherwise. Instead, they say *Young*'s holding can be extended to in-house counsel litigating on behalf of an organization, arguing: "If an attorney who is a party to a § 19.37 mandamus cannot recover for his time in prosecuting that action, it logically follows that a plaintiff who is a non-profit, cannot recover its in-house attorneys' fees under § 19.37." (Assem. Br. at 29-30.)

This "logical" leap fails. Pro se litigants and in-house attorneys performing litigation functions are not at all alike, because in-house attorneys are not identical with their clients. *See Kay*, 499 U.S. at 436 n.7 ("[A]n organization is not comparable to a pro se litigant because the

organization is always represented by counsel, whether in-house or pro bono, and thus, there is always an attorney-client relationship."). This reasoning has been expressly affirmed in other jurisdictions. *See* Part IV.A.3 (federal examples); *Drexler*, 997 P.2d at 17 ("payment of a salary to in-house attorneys is analogous to hiring a private firm on a retainer").

Here, AO's in-house attorneys have advised the organization, offered independent judgment, appeared in court, drafted and led substantive submissions, pledged to follow Wisconsin rules of professional conduct through their pro hac vice applications (Docs. 44, 46), and undertaken all the other independent functions that outside counsel perform. And, like any organization or law firm, the efforts of the attorneys whose time is billed do not reflect the total efforts and overhead costs invested in and supporting the attorneys' work. As such, a bar on recovery of in-house counsel fees would lead to an entirely arbitrary result.

3. Federal Courts Interpreting Fee-Shifting Provisions Like Wis. Stat. § 19.37 Do Not Differentiate Between In-House Attorneys Representing an Organization and Outside Attorneys.

As Assembly Respondents acknowledge a "vast body of federal authority" allows for recovery of in-house attorneys' fees under the Federal Freedom of Information Act (FOIA). (Assem. Br. at 30.) Assembly Respondents offer no reason why Wisconsin should deviate from its

ordinary practice of looking to federal law in interpreting the Open Records law. *See Friends of Frame Park*, 403 Wis. 2d 1, ¶¶16–24; *Racine Educ. Ass'n v. Bd. of Educ. for Racine Unified Sch. Dist.*, 129 Wis. 2d 319, 326, 385 N.W.2d 510 (Ct. App. 1986) ("[F]ederal court decisions are persuasive authority for the interpretation of similar language in our statute"), *abrogated on other grounds by Frame Park*, 2022 WI 57; *see also Young*, 165 Wis. 2d at 295 (adopting U.S. Supreme Court's reasoning on similar issue).

Baker & Hostetler LLP v. U.S. Dept. of Commerce is instructive. There, the court held that a plaintiff law firm that substantially prevailed in FOIA litigation was eligible for an attorneys' fees award under the plain language of that statute and the decision in *Kay*. 473 F.3d 312, 324–26 (D.C. Cir. 2006). Like the Open Records law, FOIA entitles "complainants" who "substantially prevail[]" to receive their fees. *Id.* at 324. Although *individuals* who represent themselves in FOIA litigation may not recover fees, it is "crystal clear" that such exceptions "do[ ] not apply to organizations." *Id.* at 325 (emphasis omitted).[14]

[14] *See also Nat'l Sec. Couns. v. Cent. Intel. Agency*, 811 F.3d 22, 25 (D.C. Cir. 2016) ("[A] corporation with a legal identity distinct from the attorney who represents it in litigation is eligible to recover attorney's fees under FOIA."); *Hertz Schram PC v. FBI*, No. 12-14234, 2015 WL 13743459, at *4 (E.D. Mich. Aug. 19, 2015), *report and recommendation adopted*, No. 12-CV-14234, 2015 WL 5719673 (E.D. Mich. Sept. 30, 2015) ("[T]he fact that the 'hired' attorneys work from within the corporation rather than another entity does not change the result.").

B. This Court Should Not Follow Inapposite Law from Other States.

This Court should reject Respondents' efforts to ignore the text of the Open Records law and on-point precedent in favor of the laws of two other states employing disanalogous legal principles. (*See* Assem. Br. at 30–35.)

The Illinois cases on which Assembly Respondents rely (Assem. Br. at 30-33) both derive from a third Illinois case, *Hamer v. Lentz*, 547 N.E.2d 191 (Ill. 1989). *See Uptown People's Law Center v. Dep't of Corrections*, 7 N.E.3d 102, 109-10 (Ill. App. 2014) (applying *Hamer*); *State* ex rel. *Schad, Diamond & Sheddon, P.C. v. My Pillow, Inc.*, 115 N.E. 3d 923, 931 (Ill. 2018) (applying *Uptown*). *Hamer* was decided prior to *Kay*, at a time when federal courts were split as to awarding fees to attorney pro se litigants. *See Hamer*, 547 N.E.2d at 196. The court in *Schad*—which is not a public records case—expressly rejected *Kay*'s reasoning as to organizational plaintiffs because Illinois courts had *previously decided* to take a different approach on this issue. *Schad*, 115 N.E.3d at 931. It would make no sense to apply Illinois law rejecting *Kay* in Wisconsin, where the doctrine derives from that case.[15]

[15] In invoking the irrelevant reasoning from Illinois cases, Respondents also argue that awarding in-house attorneys' fees would encourage fee generation. (Assem. Br. at 33–34.) This purported concern is checked under the statutory text requiring fees to be "reasonable," Wis. Stat. § 19.37(2), and does not support a bar on recovery.

Similarly, Assembly Respondents cite inapt Ohio cases that do not employ the same reasoning as *Kay* and *Young*. (*See* Assem. Br. at 34-35; *see also Beacon Journal Publishing Co. v. City of Akron*, 2004-Ohio-6557, 819 N.E.2d 1087, 1098 (turning on whether a client paid for attorney services); *Hous. Advocates, Inc. v. City of Cleveland*, 2012-Ohio-1187, 2012 WL 985841, ¶ 6–7 (same)).) The result may be that litigants proceeding pro se and through in-house counsel are barred from receiving fees in Ohio, but the explanation is distinct from Wisconsin precedent. Ohio's fee shifting provision, unlike Wisconsin's, also explicitly limits what fees are recoverable and thus there is no reason for Wisconsin courts to follow Ohio courts on this issue. *See, e.g.*, Ohio R.C. 149.43(C)(4)(b); *see generally id.* 149.43.[16]

Notably, Assembly Respondents ignore that other states *do* allow recovery of in-house attorneys' fees under fee-shifting statues like Wis. Stat. § 19.37(2). *See, e.g.*, *Young v. Midwest Family Mut. Ins. Co.*, 753 N.W.2d 778, 781–83 (Neb. 2008) (in-house counsel may receive fees but a pro se attorney litigant cannot); *see also Softsolutions, Inc. v. Brigham Young Univ.*, 1 P.3d 1095, 1106 (Utah 2000); *Drexler*, 997 P.2d at 516–18. In some states,

[16] Unlike in Wisconsin courts, Ohio courts are not obligated to award attorneys' fees to the prevailing party. *Compare* Wis. Stat. § 19.37(2) ("the court shall award. . ."), with R.C. 149.43(C)(3)(b) ("the court may award. . . ").

courts have rejected an absolute bar on recovery of in-house attorneys' fees, instead finding fees are justified when, like here, in-house counsel meaningfully participates in litigating. *See, e.g.*, *Advest, Inc. v. Carvel Corp.*, No. CV980585401S, 2001 WL 665227, at *2 (Conn. Sup. May 21, 2001) ("I believe that our appellate courts would follow the *apparently great majority of cases* and would hold that the recovery of attorneys fees is not barred by the fact that counsel is in-house, *but would examine the circumstances of the case. . .*" (emphases added)); *Greater Anchorage Area Borough v. Sisters of Charity House of Providence*, 573 P.2d 862, 862–63 (Ala. 1978) (allowing in-house attorneys' fees where "a party's active representation in litigation is by in-house counsel rather than retained counsel.").

V. THE CIRCUIT COURT PROPERLY EXERCISED ITS DISCRETION IN DETERMINING THE AMOUNT OF ATTORNEYS' FEES.

Assembly Respondents concede (Assem. Br. at 35), as they must, that circuit courts have wide discretion to determine the amount of an attorneys' fees award. *See Standard Theatres*, 118 Wis. 2d at 747. Despite bearing the burden to demonstrate an abuse of discretion, *Colby*, 102 Wis. 2d at 207-08, Assembly Respondents' efforts to undermine the court's award are almost entirely undeveloped.

Cherry-picking from the record, Assembly Respondents assert that the "Circuit Court's analysis was limited to a single paragraph." (Assem. Br. at 36.) But even if that were the case—it was not, as explained below—Assembly Respondents merely restate in broad strokes the arguments they made in their lower court brief, without citation to the underlying facts. (*See* Assem. Br. at 37-38.) Falling far short of their burden, *Colby*, 102 Wis. 2d at 207-08, they do not supply any specific contentions to evaluate on appeal or what result they believe the circuit court should have reached. This Court's inquiry can end there. *See Bettendorf v. Microsoft Corp.*, 2010 WI App 13, ¶ 62, 323 Wis. 2d 137, 779 N.W.2d 34 ("we will not consider propositions unsupported by legal authority"); *Indus. Risk Insurers v. Am. Eng'g Testing, Inc.*, 2009 WI App 62, ¶ 25, 318 Wis. 2d 148, 769 N.W.2d 82 ("[W]e will not abandon our neutrality to develop arguments.").

In any event, the record makes clear the circuit court properly exercise its broad discretion in awarding AO's fees. *See Kolupar*, 275 Wis. 2d 1, ¶ 52 ("The circuit court might well have explained its decision with more depth. But . . . , a court need give only a concise but clear explanation of its reasons for the fee award when the reasonableness of the requested fee is challenged." (internal quotation marks and citation omitted)).

In assessing the reasonableness of fees, circuit courts typically start with the "lodestar" calculation, *Meinecke*, 399 Wis. 2d 1, ¶ 23, and then adjust that calculation based on various factors in Wis. Stat. § 814.045(1) and SCR 20:1.5. *See Anderson v. MSI Preferred Ins. Co.*, 2005 WI 62, ¶ 39, 281 Wis. 2d 66, 697 N.W.2d 73; *Kolupar*, 275 Wis. 2d 1, ¶ 24. There is a "strong presumption that the lodestar is sufficient" because it "includes most, if not all, of the relevant factors." *Perdue v. Kenny A.* ex rel. *Winn*, 559 U.S. 542, 553-52 (2010) (internal quotation marks and citations omitted).

In its oral ruling, the circuit court identified the legal standard (the "lodestar") and several factors supporting the fee award ("the evidence submitted by petitioner" and the length and extent of the proceedings). (AR-App-149, 28:13:-20.) Each of the relevant factors listed in Wis. Stat. § 814.045(1) and SCR 20:1.5 were individually discussed in AO's brief (*see* Doc. 189 at 15-20), which the circuit court expressly stated it reviewed prior to the hearing, at which all parties had the opportunity to be heard. (AR-App-123, 2:15-21.) Assembly Respondents did not and do not contest the application of these factors. (*See generally id.*; Doc. 193.)

Instead, focusing on only unspecified objections to line-item entries, they argue that the circuit court "wholly failed to offer any explanation as to how it arrived at its conclusion that it was appropriate to award AO

every penny it requested." (Assem. Br. at 38-39.) But AO submitted substantial evidence justifying its fee award, including itemized billing entries showing all of the claimed fees for outside and in-house counsel (Docs. 190, 192, 198) and three affidavits (Docs. 190-92), including from a third-party attorney who affirmed that "[g]iven the nature of the litigation, the motions filed, and the character of the case, the amount of time the Petitioner's counsel spent and incurred in fees and costs on this matter is reasonable." (Doc. 191, ¶¶ 15-16). The circuit court expressly stated that it relied on those submissions in making its fee determination. (AR-App-149, 28:18-20.) The circuit court also had deep familiarity with the proceedings underlying the claimed fees. *See Kolupar*, 275 Wis. 2d 1, ¶ 22 ("the circuit court is familiar with local billing norms and will likely have witnessed first-hand the quality of the service rendered by counsel."). This record presents more than a sufficient justification for AO's fees, and the court provided a concise and clear explanation for awarding them. There is no basis to require more.

CONCLUSION

For the reasons articulated above, American Oversight respectfully requests that the Court affirm the circuit court in full.

Respectfully submitted this 15th day of December, 2022.

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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 the brief is 10,924 words.

Dated this 15th day of December, 2022.

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