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STATE OF WISCONSIN
COURT OF APPEALS
DISTRICT III

Appeal No. 2024AP51

STATE OF WISCONSIN EX REL. DOUGLAS OITZINGER,

Plaintiff-Appellant-Cross-Respondent,

v.

CITY OF MARINETTE AND MARINETTE COMMON COUNCIL,

Defendants-Respondents-Cross-Appellants.

On Appeal from Marinette County Circuit Court
The Honorable Jay N. Conley, Presiding
Marinette County Case No. 21CV238

NON-PARTY BRIEF ON BEHALF OF WISCONSIN FREEDOM OF INFORMATION COUNCIL, WISCONSIN NEWSPAPER ASSOCIATION, WISCONSIN BROADCASTERS ASSOCIATION, and SOCIETY OF PROFESSIONAL JOURNALISTS

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 about the affairs of government, based on an untenable interpretation of the Wisconsin Open Meetings Law, Wis. Stat. § 19.81 *et seq*. (the "Open Meetings Law"). Defendants-Respondents-Cross-Appellants City of Marinette and Marinette Common Council (collectively, "Marinette") seek to expand an exception under the Open Meetings Law that allows governmental bodies to enter closed session for the purpose of "[d]eliberating or negotiating the purchasing of public properties, the investing of public funds, or conducting other specified public business, whenever competitive or bargaining reasons require a closed session" (the "Bargaining Exception"), Wis. Stat. § 19.85(1)(e).

Amici curiae Wisconsin Freedom of Information Council ("WFOIC"), Wisconsin Newspaper Association ("WNA"), Wisconsin Broadcasters Association ("WBA"), and Society of Professional Journalists (collectively, "Amici") are well familiar with the importance and workings of the Open Meetings Law. The WFOIC 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 Society of Professional Journalists, the nation's largest and most broad-based journalism organization, is dedicated to promoting the free flow of information vital to a well-informed citizenry.

The Amici and their members regularly rely upon the Open Meetings Law to attend government meetings and, when necessary, use it to challenge unlawfully closed meetings to provide the public with the "fullest and most

complete information regarding the affairs of government," Wis. Stat. § 19.81. Notably for this case, WFOIC, WNA, and WBA filed an amicus brief in *State* ex rel. *Citizens for Responsible Development v. City of Milton*, a case that features prominently in both parties' briefs filed to date regarding the scope of the Bargaining Exception, 2007 WI App 114, 300 Wis. 2d 649, 731 N.W.2d 640.

Amici urge this Court to reject Marinette's attempt to greatly expand the Bargaining Exception to Wisconsin's Open Meetings Law. Moreover, Amici ask the Court to overrule the circuit court's reasoning that it may refuse to award attorneys' fees to a prevailing relator if there is a "split decision," and reaffirm that courts may only refuse awarding fees when there is a "showing of special circumstances which would render an award unjust." *See State* ex rel. *Hodge v. Town of Turtle Lake*, 180 Wis. 2d 62, 78–79, 508 N.W.2d 603 (1993).

ARGUMENT

I. Robust access to government information promotes democracy, and courts must strictly construe any limitation upon that access.

The default rule in Wisconsin is that "[e]very meeting of a governmental body… shall be held in open session." Wis. Stat. § 19.83(1). Courts must strictly construe any exemption to the default of open meetings. *Hodge*, 180 Wis. 2d at 71.

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

> In recognition of the fact that ***a representative government of the American type is dependent upon an informed electorate***, it is declared to be the policy of this state that the public is entitled to the fullest and most complete information regarding the affairs of government as is compatible with the conduct of governmental business.

Wis. Stat. § 19.81(1) (emphasis added).

In other words, the Open Meetings Law is about democracy. Open meetings allow citizens to observe their government in action, understand how decisions are being made, and make their own decisions about who to vote for and policies to support. When deliberations occur in public view, it also puts pressure on officials to act ethically, justify their positions, and be accountable to those they serve.

Hence, "all meetings of all state and local governmental bodies… shall be open to all citizens at all times ***unless otherwise expressly provided by law***." Wis. Stat. § 19.81(2) (emphasis added). So important is this policy that the Legislature has also directed that the Open Meetings law "shall be liberally construed to achieve the purposes set forth in this section." Wis. Stat. § 19.81(4).

II. The plain language of the Bargaining Exception is unambiguous and limited to situations where there is *no other option* than to close meetings.

With this backdrop, the Court should confirm the Bargaining Exception to open session means what it says and is limited to situations where secrecy is "required." The Court should reject Marinette's invitation to adopt a more convoluted and less transparent definition and its decision to close the meetings at issue in this case.

A. *The plain language of Wis. Stat. § 19.85(1)(e), confirmed by* City of Milton*, does not support Marinette*.

The language of the Bargaining Exception is clear: "[a] closed session may be held for any of the following purposes … (e) Deliberating or negotiating the purchasing of public properties, the investing of public funds, or conducting other specified public business, whenever competitive or bargaining reasons require a closed session." Keying in on the term "require," this Court has held that "the exception under § 19.85(1)(e) [is limited] to those

situations where the government's competitive or bargaining reasons leave ***no other option*** than to close meetings." *City of Milton*, 300 Wis. 2d 649, ¶14 (emphasis added).

Marinette asks this Court to dramatically expand the Bargaining Exception by redefining the phrase "whenever competitive or bargaining reasons require a closed session" to mean:

> anytime a rational justification renders closed session sufficiently appropriate to be more compelling than a desire, provided the justification is not speculative and arise [sic] from either (1) competition with other entities seeking the same business or (2) bilateral discussions regarding the terms of an agreement affecting their relationship.

(Marinette Br. 36.) In its effort to transform the plain language and clear purpose of the Open Meetings Law into a morass of uncertainty, Marinette devotes 14 pages of its brief to an almost word-by-word parsing of the Bargaining Exception. (*See* Marinette Br. 22-36.)

Yet when interpreting statutes, courts seek to ascertain their meaning and do not engage in a search for ambiguity. *See State* ex rel*. Kalal v. Cir. Ct. for Dane Cnty.*, 2004 WI 58, ¶47, 271 Wis. 2d 633, 681 N.W.2d 110. Marinette's strained analysis is both unnecessary and inappropriate because the plain language of the Bargaining Exception is unambiguous. *Id.* ¶45 ("If the meaning of the statute is plain, we ordinarily stop the inquiry."). Marinette does not even argue that the Bargaining Exception is ambiguous, but rather that the plain meaning of "whenever competitive or bargaining reasons require a closed session" actually is a mashed-together jumble of broad and vague terms like "rational justification," "sufficiently appropriate," and "not speculative." (*See* Marinette Br. 36.) The very fact that Marinette's argument about the "plain meaning" of the Bargaining Exception encompasses 14 pages is reason enough for this Court to reject its effort to create ambiguity in the statute where there is none.

The Court should apply the statute's plain meaning and not Marinette's tortured interpretation.

B. *Attorney General Opinions support the statute as interpreted by* City of Milton.

The lack of ambiguity as to the meaning of the Bargaining Exception is bolstered by decades of opinions from the Wisconsin Attorney General that consistently apply the plain terms of the statute as they are written: Governmental bodies may only utilize the exception "whenever competitive or bargaining reasons require a closed session."

The Wisconsin Statutes empower the Attorney General to advise any person on the application of the Open Meetings Law, *see* Wis. Stat. § 19.98, and courts may consider any such advice as persuasive authority, *see Milwaukee Journal Sentinel v. City of Milwaukee*, 2012 WI 65, ¶41, 341 Wis.2d 607, 815 N.W.2d 367. "Opinions of the Attorney General interpreting the public records and open meetings laws have special significance…". *State* ex rel. *Krueger v. Appleton Area Sch. Dist. Bd. of Educ.*, 2017 WI 70, ¶25, n.14, 376 Wis. 2d 239, 898 N.W.2d 35 (internal citations and quotations removed).

In 1979, Attorney General La Follette wrote:

> The key word in [the Bargaining Exception] is the word "require"… the governmental body calling a closed session [needs] to make a determination that circumstances did indeed require a closed session… [M]ere inconvenience, delay, embarrassment, frustration, or even a speculation as to the probability of success would be insufficient bases to close a meeting. The Legislature, by using the word "require," put a very strong burden on the governmental body considering whether to close a meeting.

Letter from Wis. Att'y Gen. Bronson C. La Follette to Henry A. Gempeler at 2 (Feb. 12, 1979) (emphasis in original) (Am-Appx.06). In 1992, another Attorney General emphasized that the competitive or bargaining reasons at issue must "require" a closed session and warned that a more expansive interpretation would allow a governmental body to invoke it "whenever it discusses a matter that may in some way indirectly influence the outcome of

negotiations with a third party." Letter from Wis. Att'y Gen. James E. Doyle to James B. Henderson at 3 (Mar. 24, 1992) (emphasis in original) (Am-Appx.10).

Yet another letter explained that the "obvious purpose" of the Bargaining Exception is to "permit a governmental body to meet in closed session whenever an open discussion would compromise the government's bargaining position ***by revealing its negotiating strategy***." Letter from Wis. Asst. Att'y Gen. Thomas C. Bellavia to Paula Brisco at 2 (December 13, 2005) (emphasis added) (Am-Appx.13). A 2007 letter highlighted the importance of identifying the negotiating and bargaining reasons that give the body "***no option***" but to close a meeting. Letter from Wis. Asst. Att'y Gen. Bruce A. Olsen to Jeffrey J. Wirth and Kim Lamoreaux at 8 (May 30, 2007) (emphasis added) (Am-Appx.24). In 2009, the Attorney General explained:

> [Meetings] may not be closed in a blanket manner… just because such disclosure may appear desirable or because those meetings may at times be likely to involve discussions of the investing of public funds or of bargaining as to the expenditure of public funds. Rather, a meeting of the task force may be closed only on those occasions when the particular meeting in question is going to involve specific information which, if discussed in open session, would directly and substantially harm the competitive or bargaining interests at issue.

Letter from Wis. Att'y Gen. J.B. Van Hollen to William F. Greenhalgh at 6 (Sept. 28, 2009) (Am-Appx.36).

The plain language of the Bargaining Exception is unambiguous and limited to situations where there is ***no other option*** than to close meetings.

C. *The Court should reject Marinette's policy arguments and claims of impracticability in following the law.*

Under the facts, here, to the extent it had legitimate bargaining or competitive concerns regarding aspects of the proposed agreement, the law required Marinette to evaluate what those concerns were and enter into closed session only to the extent necessary to address them. Instead, Marinette chose

to shut the public out of discussions on October 6 that included basic explanations about the purpose and functioning of the very equipment the City wanted to purchase with the proceeds that would result from the proposed agreement.

Marinette complains that compliance with the plain terms of the Open Meetings Law is impractical because, *inter alia*, it would require "clairvoyance" for a governmental body to predict when a closed session may be required under the Bargaining Exception. (Marinette Br. 39.) According to Marinette, "the City had no way of knowing how the Council would react to the proposed agreement," and that it is therefore effectively impossible to predict whether a session that includes discussion of a proposed agreement should be open or closed in advance. (Marinette Br. 38-39.) Because such foreknowledge is unobtainable, argues Marinette, a governmental body considering a proposed agreement would need to discuss the agreement in open session "unless or until the prospect of a counteroffer is raised… [and] [t]hen – and only then" could the body call for a closed session at a ***future*** meeting. (Marinette Br. 39.) Along the same lines, Marinette suggests it is "incompatible with 'the conduct of public business'" for a governmental body to have to return to open session if conversations unpredictably and uncontrollably "veer" from the topic that properly required that it enter closed session. (*Id.*)

There is a simple solution that addresses both the "clairvoyance" needed to anticipate what may be discussed at a meeting and the tendency of discussions to "veer" from a given topic: setting and following an agenda. In fact, the Open Meetings Law requires it. Wis. Stat. § 19.84(2).

Even if "the City had no way of knowing how the Council would react to the proposed agreement" (Marinette Br. 38), there are only two relevant possibilities: Either the Council would approve the proposed agreement as drafted or the Council would engage in discussions about additional

negotiation. It does not require "clairvoyance" to set aside time for a closed session for the limited purpose of discussing possible negotiation strategy after the City detailed the terms of a proposed agreement in open session. If the governmental body accepts the terms of the proposed agreement without additional negotiation, as the Council did here, then the body simply returns to open session after that short discussion. It is also not difficult to avoid conversations that "veer" from a topic that is properly noticed and discussed in closed session. Again, members of the governmental body need only look to their own agenda and follow it. Marinette's argument insults the intelligence of public officials everywhere by suggesting they are not capable of setting and following agendas based on the topics they plan to address at a given meeting.

The Court should find that Marinette improperly closed discussions at the October 6 meeting, and affirm the circuit court's ruling as to the October 7 meeting.

III. Courts may not refuse to award attorneys' fees under the Open Meetings Law on the basis that there is a split decision.

Although Marinette does not dispute that the circuit court must award Plaintiff-Appellant-Cross-Respondent Oitzinger his attorneys' fees pursuant to Wis. Stat. § 19.97(4) should he prevail on his appeal or the pending cross-appeal (Marinette Br. 40), this Court should independently address the circuit court's ruling on this issue.

The circuit court stated simply: "[t]he Court is not going to award attorney fees or costs to either side given the split Decision." R.91:3. The circuit court's reasoning that a "split decision" allows it to refuse to award fees and costs to a prevailing relator is contrary to the long-established law in Wisconsin:

> [T]he prevailing relator under the Open Meetings Law serves as a private attorney general by vindicating his or her own rights and the rights of the public to open government. In light of this, and the legislative mandate to

> construe the Open Meetings Law liberally, we conclude that a prevailing relator under the Open Meetings Law should be awarded attorney's fees if an award would advance the purpose of the Open Meetings law: to ensure that the public has the fullest and most complete information possible regarding the affairs of government. If this condition is met, fees are awarded unless there is a showing of special circumstances which would render an award unjust.

Hodge, 180 Wis. 2d at 78–79 (internal citations omitted). The supreme court has held that awarding fees to a prevailing relator in itself "provide[s] an incentive to others to protect the public's right to open meetings and to deter governmental bodies from skirting the open meetings law," and therefore advances the purpose of the Open Meetings Law. *See State* ex rel*. Buswell v. Tomah Area Sch. Dist.*, 2007 WI 71, ¶54, 301 Wis. 2d 178, 732 N.W.2d 804.

There is nothing about a split decision that renders an award of attorneys' fees unjust. Indeed, *Buswell* was a split decision. The supreme court agreed with Buswell that a reasonableness standard applies to the Open Meeting Law's public notice requirements, and that the notice provided for one particular meeting was insufficient under that standard (although the court disagreed with one aspect of Buswell's argument in this regard). *See Buswell*, 301 Wis. 2d 178, ¶3. The court in that case also ruled against Buswell and held that a public notice provided for a meeting on a different date was sufficient. *Id.* Even though Buswell did not prevail on one of the two challenges he made as to the sufficiency of particular notices under the Open Meetings Law, the court ruled without qualification that the circuit court must award him his attorneys' fees. *Id.* ¶54.

It is essential to the proper functioning of the Open Meetings Law that courts determine that relators are entitled to their attorneys' fees and costs when they successfully challenge any violation of the Law. While the *amount* may be adjusted based on the degree of success, the bare fact of *entitlement* to fees should not be. *See Meinecke v. Thyes*, 2021 WI App 58, ¶¶21-23, 399 Wis. 2d 1, 963 N.W.2d 816. If courts may refuse to award fees to relators any time

there is a split decision, relators are likely to only challenge the most egregious violations on a piecemeal approach. And without robust private enforcement, governmental bodies like Marinette may feel emboldened to whittle away at the public's opportunity to receive "the fullest and most complete information regarding the affairs of government as is compatible with the conduct of governmental business" by conducting more and more public business behind closed doors.

The circuit court's determination as to attorneys' fees should be reversed.

CONCLUSION

This Court should reject Marinette's effort to redefine the plain terms of the Bargaining Exception and the notion that entitlement to attorneys' fees can be denied in an Open Meetings Law case based on a split decision.

Respectfully submitted this 28th day of May, 2024.

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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 2,976 words.

Dated this 28th day of May, 2024.

Electronically signed by: Will Kramer
Will Kramer