STATE OF WISCONSIN
SUPREME COURT

FRIENDS OF FRAME PARK, U.A.,

Plaintiff-Appellant,

v.

Appeal No. 2019AP96
Cir. Ct. No. 17-CV-2197

CITY OF WAUKESHA,

Defendant-Respondent-Petitioner

APPEAL FROM A FINAL ORDER ENTERED ON NOVEMBER 26, 2018 IN CIRCUIT COURT FOR WAUKESHA COUNTY, THE HONORABLE MICHAEL O. BOHREN, PRESIDING

RESPONSE TO PETITION FOR REVIEW

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RESPONSE TO ISSUES AND BASIS FOR REVIEW

The City seeks this Court's review of the Court of Appeals decision in this matter. The City suggests that the Court of Appeals has changed the standard for awarding attorneys fees to a party that prevails in pursuing an open records claim. The City also argues that the Court of Appeals erred in determining that the City was not permitted under the Open Records Law to withhold documents that were draft contracts that had been exchanged and were being negotiated between officials of the City and a private party.

While the City is right to recognize the impact of the Court of Appeals decision, *on the City in this case*, the Court of Appeals decision is well grounded in the existing decisional law, including this Court's decisions regarding the award of attorney fees to prevailing parties under Wis. Stats. § 19.37. The Court of Appeals analysis and ruling are detailed and comprehensive and will provide excellent confirmation and guidance to litigants regarding both the applicability and construction of the exceptions that allow non-disclosure of public records and the proper approach to awarding attorneys fees when a municipality improperly/mistakenly withholds public records in the face of a valid request.

There is no substantial need demonstrating that this matter warrants review under the criteria set forth in Wis. Stats. § 809.62(1r)(c) or otherwise, in particular given the soundness of the Court of Appeals decision.

RESPONSE TO CITY'S STATEMENT OF THE CASE

The City's Statement of the Case sets forth below the basic chronology of events. Further detail and clarification is required and is set forth below.

This matter arises from an open records request served on the City of Waukesha in October 2017. The City responded but withheld certain records. In an October 23, 2017 letter from the City Attorney accompanying the responsive records, the City asserted it was permitted to withhold certain records pursuant to an exception in the Open Meetings law. *See Petitioner's App at. 170-71 City Attorneys Response Letter.*

The underlying activity of the City, and the subject of the records request, was the City's involvement with a private business, a collegiate baseball promoter called Big Top Baseball. Big Top's plan was to engage the City to re-purpose the City's public park, Frame Park, into a for-profit baseball stadium operation. *See Record at 19; Objection/Legal Position Statement filed with City.*[1] The records withheld were draft contractual documents between the City and Big Top. *See Petition App at 170 – City Attorney Response.*

Plaintiff-Appellant, Friends of Frame Park filed the underlying case in Waukesha County Circuit Court on December 18, 2017. The Common Council

[1] The record citation are to the index item record numbers. These numbers do not correlate to the document numbers assigned to many of the documents by the efiling system.

for the City was set to meet the next day on December 19, 2017.

A review of the Council meeting and other submissions makes clear that the issue was controversial. However, the issue of the contracts and the City's apparent business partnership with Big Top was only briefly addressed at the Council meeting. *Record at 38 – Minutes of meeting.* The City points to this meeting as somehow removing its need to withhold the records. Yet nothing in the public record shows that any action was taken regarding the plan to convert Frame Park and to allow Big Top's plan to go forward. That plan was not rescinded or cancelled at the December 19, 2017 meeting, just the opposite. *Record at 38 p. 6 Minutes of December 19, 2017 meeting.*

What also did ***not*** happen at the December 19th Council Meeting was a "closed session meeting" wherein the City Council members met out of public view to address the Big Top Contract and Frame Park redevelopment. Yet in its Petition, the City has asserted that the December 19th meeting included a closed session to discuss the draft contracts:

> [The records] were disclosed one day after the City's Common Council had met in closed session to review and consider the documents. The Common Council met in closed session pursuant to the exception to the Open Meetings Law set forth in Wis. Stats. § 19.85(1)(e).

See City's Petition at p. 5.

The City's Petition contains no citation to the record to support this assertion. The City also states that:

> The Court of Appeals did not find that the Common Council violated the Open Meetings law when it met in closed session to review and consider the draft contracts pursuant to Wis. Stats. § 19.85(1)(e). It made no determination regarding the propriety of the closed session but assumed it had been proper.

See City's Petition at p. 8.

The City cites to the Court of Appeals Decision at ¶ 49. However the Court of Appeals noted that the meeting minutes from the December 19, 2017 Council meeting was "unclear" about what transpired. *See Petitioners App at p. 28; Decision at ¶ 49.* The Court of Appeals was being generous but the reality is that no closed session was noticed or on the agenda for the meeting. *See Record at 38.*

The City, through the City Attorney, released the withheld records the next day, December 20, 2017. *Record at 39 – Email between counsel.* This did not end the matter and the circuit court case proceeded to a scheduling conference and pre-trial discovery. The City filed a motion for summary judgment. The circuit court held a hearing on November 5, 2018 and thereafter issued its ruling from the bench on November 9, 2018.

The Circuit Court determined that the City's justification for withholding the records was sufficient to allow that action by the City. The Court also determined that the filing of the Court case was not a cause for the City to release the records, which eliminated the ability for Appellant to recover attorneys fees pursuant to Wis. Stats. § 19.37.

A. History of Negotiations Between City Officials and Big Top Baseball

The City of Waukesha through its City Administrator Kevin Lahner first communicated with representatives of Big Top Baseball ("Big Top") regarding converting Frame Park into a professional baseball park in the fall of 2016. *Record at 42 – Depo of K. Lahner at p. 36 et seq.* Negotiations with Big Top, which is a private party, began soon thereafter and were ongoing from late 2016 and continued through spring of 2017 and thereafter into the fall of 2017. *Id.* Public awareness grew through the summer and into the fall of 2017. The project was quite controversial. The reason for the controversy was that far from simply building a new ball diamond to replace the existing public baseball field at Frame Park, the ambitious plan being discussed called for the City to use public taxpayer/TIF money to build a new stadium facility. *Record at 19 Objection filed with City.*

Big Top Baseball, in the form of a separate LLC called Big Top Waukesha, LLC, would control the stadium. Big Top would presumptively be entitled to all revenues and would operate the facility for profit. The facility would be controlled by Big Top and only be used as per its discretion. Early drafts of an agreement between the City and Big Top make clear that these terms and conditions were being negotiated in detail as early as Spring of 2017. *See*

Record at 63 – Email by K Lahner .

In May 2017, the City Administrator sent an email to certain private parties who were involved in the behind-the-scenes discussions asking them to keep information about the Frame Park project secret and not share it with the Waukesha City Council:

> Please keep the information regarding the Frame Park improvements confidential as we are not yet ready to discuss it with the entire City Council until we are further along.

See Record at 62 – Email from City Administrator to non-city third parties.

By early summer of 2017, word was getting out about the City Administrator's plan to convert Frame Park. However, very little was publically discussed at City Council meetings. Questions persisted. Finally in an email on October 2017, the City Administrator explained that:

> **Status:**
>
> After learning in July/August that the League had chosen Big Top Baseball as their preferred partner for a new team in this area we *began working through the negotiation process for a use agreement for Frame Park.* We are nearing the end of the negotiation process and are planning a public meeting schedule. The public meetings will include a General Public Informational Meeting, Parks Recreation and Forestry Board, Finance Committee and the Common Council. This is pretty typical for a potential project that has a parks impact and a financial impact. ....

Record at 65 – October 22, 2017 email from City Administrator (emphasis added).

In hindsight, this turned out to be inaccurate because extensive negotiations and draft contracts had already been exchanged between the City

Administrator and the attorneys and other representatives of Big Top well before the July/August time frame represented by the City Administrator.

The Friends of Frame Park, U.A. was formally established in November of 2017. However, a group of Waukesha citizens, property owners, and tax payers had been acting as an organized group for several months before that time. By the early fall of 2017, questions and concerns mounted. One of the members of the group, Scott Anfinson, prepared and submitted the open records request that is at issue in this matter on October 9, 2017. The request has several parts and included the following:

> 6. Please include any Letters of Intent (LOI) or Memorandum of Understanding (MOU) or Lease Agreements between Big Top Baseball and or Northwoods League Baseball and the City of Waukesha during the time frame of 5-1-16 to the present time frame.

See Record at 59 - October 9, 2017 records request.

While the request was submitted to the City Administrator, the City Attorney prepared a written response and provided that to Mr. Anfinson on October 23, 2017. *Petitioners App at p. 170-71.* In that response, the City Attorneys office acknowledges that it is producing records but also that it is withholding certain records which would otherwise be responsive. These records were the contractual documents and correspondence between the City and Big Top. The City Attorney's letter states that the City has determined to withhold from its production of records a so-called "Park Use" Contract. The

City Attorney explained that:

> Because the contract is still in negotiation *with Big Top,* and there is at least *one other entity that may be competing with the City of Waukesha* for a baseball team, the draft contract is being withheld from your request, pursuant to Wis. Stats. §§19.35(1)(a) and §19.85{1)(e).

See Petitioners App at 170-71.

Based on this response it is apparent that the City was engaged in negotiations with Big Top Waukesha, *and only Big Top Waukesha,* regarding the re-development of Frame Park into a baseball stadium operation. The letter also asserts that there is some competition, "for a baseball team," that the City and/or Big Top is a part of at that time. However, on October 22, 2017, the day before the City's Attorneys response letter, the City Administrator issued an email to the Mayor and other City Officials. The email suggests that he had waited until "July/August" to learn whether Big Top or another entity was awarded the franchise from the league before getting involved in negotiations with Big Top. *Record at 65 October 22nd email at "status."* Thus, according to the City Administrator, the competition with other entities was over by July/August. As noted, the City Attorneys October 23, 2017 letter takes the opposite position, explaining that the competition was still ongoing at that time. Moreover, negotiations with Big Top have been ongoing long before July/August 2017 as the City Administrator discussed in his deposition. *See Record at 42 – Depo of K. Lahner at p. 36 et seq.*

It is clear that the City Administrator had selected Big Top many months prior to the open records response. That preference is concerning, and relevant. But what is directly at issue is the notion that Big Top and/or Big Top in partnership with Waukesha had yet to be selected by the league as of the City Attorney's October 23, 2017 response letter. Recall that the City Attorney explains that the "competition" as to who will get a baseball team is ongoing and is the basis for withholding the records. *Petitioners App at 170.*

The City Attorney's explanation for withholding the records raises two different concepts. The first is negotiating with Big Top over the conversion of Frame Park. The second is the idea of the City "competing" with another entity for a baseball team. The City Attorney's explanation does not identify who that might be and the nature of that competition. And as noted the City Administrator had already stated that the competition was over in July/August. *Record at 65, October 22, 2017 email.*

These two proffered exceptions raised the core legal issue that was presented to the circuit court below, which was whether the "competitive/bargaining" exception under the *open meetings* law in Wis. Stats. §19.85(1)(e) could be used as an exception to withhold *open records* under § 19.35 and, if it could, whether the City's proffered justification satisfied the statutory standard.

Friends had filed a letter with the City in November 2017 and objected to

the City Attorney's withholding of the key draft contracts and asked that the be produced. *Record at 19 – November 2017 Objection.* Despite this objection, the City did not produce any further records during later November and into early December 2017. However, the agenda for the City Council meeting of December 19, 2017 indicated that the issue of the use of Frame Park would be taken up by the Common Council at that meeting. *Record at 38 – Minutes of December 19, 2917 Common Council meeting.* The records that were being withheld directly addressed the nature and specific terms that the City Administrator had been negotiating with Big Top regarding the conversion of Frame Park into a for-profit baseball operation. This was the precise and controversial issue that was to be taken up at the December 19, 2017 public meeting. *Id.*

Given this, Friends believed it was necessary to preserve its remedies and somewhat quickly filed the underlying circuit court action seeking production of the withheld records. The summons and complaint was filed the day before the meeting on December 18, 2017. A service copy was provided to the City Attorney by email that evening and then again in the morning of December 19, 2019. The December 19, 2017 Common Council meeting did take up the Frame Park issue. As the minutes indicate, there was little discussion and no resolution of the issue at stake. *Record at 38 p. 6.* The public record shows that the City Administrator was continuing with his negotiations with Big Top and the plans

were to move ahead. *Id.* Neither the minutes nor any other public record describe discussions regarding who the City was competing with, or, alternatively, that the competition was resolved or no longer existed. As noted above, there was no closed session associated with this meeting.

The next day, the City Attorney sent an email to counsel for Friends explaining that:

> Dear Mr. Cincotta –
>
> The remaining documents responsive to Mr. Anfinson's October 9th open records request are attached. These are being released now because there is no longer any need to protect the City's negotiation and bargaining position.

Record at 39.

The City Attorney released the records just two days after Friends filed this action. These records were not available to the public or to Friends as of the December 19, 2017 City Council meeting. Friends had previously explained in the November 17, 2017 letter to the City Attorney that the withholding of the contractual redlines and similar records did not appear to be permitted under the Open Records law. *Record at 19 p. 6.* The City was thus aware of the Plaintiff's position for over a month prior to the Common Council meeting of December 19, 2017, at which time the Frame Park baseball project was to be discussed.

As noted and as is obvious from the record, members of Friends and other citizens were not provided key records showing the contractual terms and

conditions being discussed and negotiated with Big Top nor other correspondence.They were thus at a disadvantage at the December 19, 2017 meeting. The City Administrator admitted as much. *Record at 42 - Depo of K. Lahner at p. 58-60:* 7. Moreover, it appears that the elected members of the Common Council were also prevented from receiving the withheld documents and information. At his deposition, the City Administrator explained that he could not recall if those same records had been kept from the Alderman on the City Council at that time. *See Record at 42 - Depo of Lahner at p. 73.*

As noted above, even though the contract documents had been provided, Friends pursued its claim at the circuit court. This was in part because the City's withholding of the records was improper, in Friends' view, and also because the Frame Park development was still in process. The circuit court upheld the City's withholding of the records. The Court of Appeals reversed.

The City argues in its Petition that the Court of Appeals erred in determining that the City's justification for withholding the documents was inapplicable. And this that the City's delay in providing the records was not in compliance with the Open Records law. The City also argues that the Court of Appeals has somehow altered or created a new standard for awarding attorneys fees to a prevailing party. As described below, Friends believes that the City is in error regarding its arguments and further that the Court of Appeals decision is consistent with and indeed required by the Open Records law.

Further discussion is included below.

ARGUMENT

I. The Court of Appeals properly applied the open records law as per the language of the statute and this Court's rulings in determining that a City may not withhold documents shared with outside non-public private parties.

The Court of Appeals determination that the City was wrong to withhold the draft contracts is well grounded in both the language and policy of the Open Records law and earlier decisions of this Court and the Courts of Appeals. The issue is whether the records could be withheld based on the "competitive/bargaining" provisions of the open meetings law.

The competitive or bargaining exception is designed to allow municipalities to get the best contract from a vendor. For example, when the City wants to hire a sanitation contractor, it may get three bids and engage in internal discussions about the bids. Thus, in an open meetings context, those discussions between internal city officials could be held in confidence until the winning bidder is selected. This would be an appropriate application ofthe competitive/bargaining exception. It would also sensibly apply to public records that contain information about the City's *internal* discussions.

Another possible circumstance would be if a municipality was competing against others for an award of some kind. Again, it would likely be appropriate to keep confidential *internal* communications about how the City was planning to

compete for the award.

Here, the City's justifications are somewhat confused, overlapping and ultimately unpersuasive. If the City was competing for something (which was not identified by the City in a concrete way) then *internal* discussions or emails might be properly withheld. However, Friends was not asking for internal emails. Friends requested communications and draft documents between the City and a private third party, Big Top. Thus, there was no way that disclosure of those documents could impact the City's ability to compete with another entity for something- they had already been disclosed to Big Top.

The Court of Appeals agreed:

> ¶43 The City's first stated reason for not releasing the draft contract was that it could suffer competitive harm if the document were disclosed. This document, however, was marked up and exchanged among City and Big Top representatives in a succession of back-and-forth edits. To state the obvious, then, any harm from disclosing this document could not relate to the City's negotiating strategy with respect to Big Top.
>
> ¶44. Nor has the City shown that it would have suffered any *other* type of competitive harm had it made the contract available to a member of the public in October 2017. Although the City asserts that another "entity" was competing with it, the evidence shows that the only competition was from one or more business groups that may have been working to locate a Northwoods League team in a different municipality.

See Petitioners App at p. 25-26; Decision at ¶ 43 and 44.

Moreover, the reality appears to be that it was really Big Top that was competing for the baseball franchise or rights, not the City. The City's use of the

competitive/bargaining exception to withhold records from the public (*but not from Big Top)* ends up using the exception to benefit a private party. Understood is this light, the posture of the parties undermines the idea that the City was negotiating with Big Top about something that needed to remain confidential.

In that connection, the City's other justification – which is that it needed to keep the redline contracts between it and Big Top confidential because it was negotiating a deal with Big Top also fails. As the Court of Appeals explained:

> The City's second justification—that the draft contract required common council review before release—fares no better. In his deposition Lahner could not clarify how nondisclosure prior to common council review could create any competitive advantage for the City. For example, when asked how public disclosure during the spring and summer of 2017 could have affected the City's bargaining position, Lahner replied, "I don't know." Thus, the City has not met its burden of showing that "competitive or bargaining reasons *require[d]"* nondisclosure.

Petitioners App at p.26 Decision at ¶ 46.

The Court of Appeals *City of Milton* decision is from 2007. The notion of public-private partnerships where City Officials and Planners go from being regulators to quasi-partners is not new. The Court of Appeals was faced with almost exactly the same arguments in *City of Milton* that the City put forward in this case. The Court of Appeals decision below relied heavily and appropriately on *City of Milton.* And just like that decision, the decision in this matter is well reasoned and comprehensive, providing excellent and appropriate guidance for citizens and governmental bodies.

This could explain why the City is attempting to add new facts into the record – i.e. that the records were withheld so that they could be reviewed at a closed session meeting by the Common Council ahead of releasing them to the public.

As the City argues in it Petition:

> Friends' argued the City's Common Council improperly entered into closed session to review the draft contracts. Therefore, it violated the Open Meetings Law when relying on that statutory exemption, and as a result that exemption could not be used in support of nondisclosure of the records in question.

See Petition at p. 27

There is no citation to this supposed argument and it did not happen. The December 19th meeting minutes are included in the record. The format used by the City shows that minutes of meetings are prepared on top of the underlying agenda. Thus the minutes include the underlying agenda. This is relevant because neither the minutes nor the underlying agenda show that the City had properly noticed or went into closed session. However, based on this faulty premise, the City goes on to argue:

> In this case, however, the documents in question were the subjects of the closed session; they were the documents which were to be reviewed and considered in closed session, and possibly acted on by the Common Council. If the review and consideration of those documents was appropriate in closed session under the Open Meetings Law pursuant to § 19.85(1)(c), it is difficult to understand why the documents themselves should have been disclosed before the properly held closed session.

Petition at p. 30

Again, this case was not about challenging the use of documents in a closed session meeting of the Common Council. The City's addition of these facts seems designed to create a more palatable context in which to justify its withholding of the records. The City argues in essence that, "the documents were only being withheld so that the Common Council could get the first crack at them and then we were planning to release them publicly." This is not accurate and finds no support in the record. Indeed, as described above, the City Administrator could not even recall if he had supplied the records to the Common Council members for use at the December 19, 2017 meeting. *See Record at 42 – Depo of K. Lahner at p. 73.*

Moreover, the Court of Appeals considered that scenario in its decision. As it rightly explained:

> *City of Milton* prohibits a municipality from invoking Wis. Stat. § 19.85(l)(e) to "save costs" or otherwise prevent "the possible disruption of its plans." *City of Milton,* 300 Wis. 2d. 649, H17-18. This suggests that even if nondisclosure prior to common council review would have streamlined negotiations by, say, avoiding public dissent, § 19.85(l)(e) still might not apply. Nor, under *City of Milton,* would the City be justified in temporarily withholding the draft contract until the common council meeting on the grounds that the contract would be available sometime thereafter. There is "no authority [for] allowing an exception to the requirement of open meetings on the basis of the opportunity for future public input." … Finally, to the extent nondisclosure was meant to accommodate Big Top's interests, *City of Milton* is clear: in and of itself, "a private entity's desire for confidentiality does not permit" nondisclosure under § 19.85(l)(e).

Petitioner's App at p. 27; Decision at ¶ 47.

The Court of Appeals rejected the notion that use of the documents in a presumably proper closed session justified withholding them in advance of that session. That was because they were not internal documents but had already been disclosed to Big Top. The Court of Appeals continued:

> The City nonetheless maintains that Wis. Stats. § 19.85(l)(e) applies because "[m]eeting in closed session ... was necessary to prevent those with whom the City was negotiating from learning of the Common Council's reactions to proposed terms, preferences, willingness to accept alternatives, and other matters which would put the City at a disadvantage in the bargaining process." The problem with this argument is that Friends was not seeking access to a *meeting*—it was simply seeking disclosure of a *document* that might be discussed at that meeting. By itself, the document could reveal nothing about internal reactions or negotiating strategies.

Petitioner's App at p. 28; Decision at ¶ 49

The Court of Appeals decision is solidly based on and drawn from both the language and policy of the open records law. It is almost always more convenient for governmental officials to avoid scrutiny on controversial matters. But as Friends argued below, and the Court of Appeals recognized, that approach is the antithesis of the policy behind our State's open records law. The Court of Appeals decision is consistent with its previous rulings and those of this Court as well as the language and policy of the statute. Contrary to the City's argument, there is no need for this Court to step in to correct the Court of Appeals.

II. The Court of Appeals did not create or change the standard for awarding attorneys fees to prevailing parties in open records cases

The City also focuses on its view that the Court of Appeals has somehow changed the law regarding when an award of attorneys fees is appropriate in an open records case under the provisions in Wis. Stats. § 19.37. Citing the Court of Appeals decision, the City argues that:

> [The Court of Appeals] found that test was not applicable in this case, or indeed in other cases with similar circumstances:
>
> "We hold that where litigation is pending and an authority releases a public record because a public records exception is no longer applicable, causation is not the appropriate inquiry for determining whether the requesting party 'substantially prevailed.' Rather, the key consideration is whether the authority properly invoked the exception in its initial decision to withhold release."

Petition at p. 12-13 citing Decision at ¶ 4. The City misconstrued both the causation test and the holding and reasoning of the Court of Appeals. As the Court of Appeals explained in discussing the key holding in *Racine Education Association v. Board of Education for Racine Unified School District,* 129 Wis.2d 319, (Ct.App.1986):

> Because the test was "largely a question of causation," we did not consider whether there was a violation of the statute. ***Racine Educ. Ass'n,*** 129 Wis. 2d at 327-28 … Instead, we decided that the requesting party was *not* entitled to fees because the lawsuit was not a cause of the release; rather, there was "an unavoidable delay accompanied by due diligence in the administrative processes.

Petitioners App, at p. 113, Decision at p. 13 ¶ 23.

> In the *Racine Education Association* decisions, our stated focus on the lawsuit as a cause-in-fact clearly dovetailed with our consideration of whether there was an unreasonable (as opposed to an unavoidable) delay in release. If we had determined that there *was* an unreasonable delay in that case, the outcome undoubtedly would have been different. Thus the *Racine Education Association* decisions adopted causation as the test for prevailing-party status, but the application of that test was intertwined with

> the court's finding that there was no violation of the statute: the "cause" of the release was not the commencement of a lawsuit but the authority's prompt action once the records became available.

Petitioners App at p. 114; Decision at ¶ 24.

The Court of Appeals rightly noted that its "causation " rulings have occurred in cases where the issue of whether the governing body improperly relied on (and thus improperly delayed producing the challenged records) has not been directly addressed of decided. *Petitioner's App at p. 114; Decision at ¶ 24.* That is the key difference here. Even taking the City at its word that it was withholding the records under a genuine belief that the competitive/bargaining exception applied, and thus that when it did release them it was because it genuinely believed the exception no longer applied, if the City was wrong from the outset, it seems contrary to the policy and language of the statute to deny an award of fees to the party that demonstrates the violation. As the Court of Appeals noted:

> " ...application of a causation analysis in all cases would likely thwart the goal of our public records law: to provide "*timely* access to the affairs of government," *WTMJ, Inc.*, 204 Wis. 2d at 457 (citation omitted), "as soon as practicable and without delay," *id.* (quoting Wis. Stat. § 19.35(4)). After all, "the purpose of [Wis. Stat. § 19.37(2)(a)] is to encourage voluntary compliance; if the government can force a party into litigation and then deprive that party of the right to recover expenses by later disclosure, it would render the purpose nugatory."

Petitioner's App at p. 117; Decision at ¶ 29.

It worth noting, as the Court of Appeals implicitly does, that the causation analysis is not part of the language of the statute itself, which provides that:

> Except as provided in this paragraph, the court shall award reasonable attorney fees, damages of not less than $100, and other actual costs to the

> requester if the requester *prevails in whole or in substantial part in any action filed under sub. (1) relating to access to a record* or part of a record under s. 19.35 (1) (a).

See Wis. Stats. § 19.37(2)(a).

Friends has prevailed as a result of the Court of Appeals' thorough analysis, reasoning, and application of the open meetings law consistent with its purpose and intent. To deny Friends an award of reasonable actual attorneys fees now would run strongly contrary to the statutory directive. As the Court noted, strict application of the causation test will often deprive requesters of appropriate awards even when they prevail at showing that the governing body acted erroneously. That will deter both pursuing meritorious claims and could at the margin encourage more withholding of records given the low chance of any concrete consequence from doing so.

The Court of Appeals decision is well grounded in its and this Court's previous rulings regarding an award of fees to prevailing parties There is no need for this Court to review that decision at this juncture.

CONCLUSION

For the above reasons, Plaintiff-Appellant respectfully requests that the Court decline the City's Petition and leave the Court of Appeals decision ruling that Friends have prevailed in place.

Dated this 11th day of November, 2020

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CERTIFICATIONS PURSUANT TO WIS. STATS. § 809.19(2) and (8) and 809.62.

I certify that this Brief conforms to the rules contained in s. 809.19(8) (b) and (c) and s. 809.62 for a Brief produced with a proportional serif font. The length of this brief is 5505 words.

Joseph R. Cincotta

I certify that I have submitted an electronic copy of this brief, excluding the appendix, if any, which complies with the requirements of s. 809.19(12) and s. 809.62 that said electronic brief is identical in content and format to the printed form of the brief filed as of this date.

Joseph R. Cincotta