STATE OF WISCONSIN
COURT OF APPEALS
District II
Appeal No. 2020AP338

SUSAN MEINECKE,

Petitioner-Appellant,

v.

JESSE THYES and WILLIAM Q. RICE,

Defendants-Respondents

Appeal from the Circuit Court of Ozaukee County
Honorable Sandy A. Williams Presiding
Case No. 19-CV-62

BRIEF AND APPENDIX OF PETITIONER-APPELLANT, SUSAN MEINECKE

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INTRODUCTION

In an Open Records Law case, when a court orders the release of records, has the requester "prevail[ed] in whole or in substantial part" under Wis. Stat. § 19.37(2)(a)? The Petitioner-Appellant, Susan Meinecke, filed this lawsuit seeking certain records that the Defendants-Respondents, Jesse Thyes and William C. Rice, had withheld from record requests. The Ozaukee County Circuit Court, Judge Sandy A. Williams presiding, ordered the release of all or a part of 15 emails, totaling 146 pages.

Despite that clear victory, the Circuit Court denied Meinecke's motion for attorney fees, costs, and damages, concluding that she had not prevailed, in whole or substantial part. Meinecke challenges that denial; she prevailed in substantial part by obtaining a court order directing the release of a significant portion of the records she sought, and is therefore entitled to attorney fees, costs, and damages under the mandatory language of Wis. Stat. § 19.37(2)(a).

STATEMENT OF THE ISSUES

Issue 1: If a record requester challenges an authority's denial of access to 39 records, and the court concludes that the authority violated the Open Records Law and orders the release of all or parts of 15 records, has

the requester "prevail[ed] . . . in substantial part" under Wis. Stat. § 19.37(2)(a), entitling the requester to attorney fees, damages, and costs?

Circuit Court's Decision: No.

STATEMENT ON ORAL ARGUMENT

There is no need for oral argument in this case. The issue is limited and straightforward, involving the application of clear statutory language to simple and undisputed facts. The parties can adequately address the issue in briefing.

STATEMENT ON PUBLICATION

The Court should publish the decision in this matter under the considerations of Wis. Stat. § (Rule) 809.23(1)(a). Although the question of whether a voluntary release of records in response to a lawsuit qualifies as "prevailing" has been addressed in multiple published opinions, no published opinion confirms that a requester "prevails" when a court orders the production of records. Publishing this opinion may prevent a repetition of the Circuit Court's mistake.

STATEMENT OF FACTS

Jesse Thyes is employed as the Village Administrator of Grafton and William Q. Rice is employed as the Fire Chief of Grafton. (R. 15:2.) On

August 11, 2018, Susan Meinecke made two record requests: one to Thyes and one to Rice. (*Id.* at 4, 7, 10.) Each request sought emails sent or received by Thyes or Rice containing any of eight keywords. (*Id.* at 7, 10.)

On August 31, 2018, Thyes partially fulfilled the request with 902 emails (R. 12:1), denying access to one "to-do" note he had emailed to himself and noting that review of additional documents was pending (*id.* at 5). On September 28, 2018, Thyes provided an additional 16 emails (*id.* at 1), denying access to "40 e-mails and their attachments which are confidential attorney-client communications and therefore privileged" and "3 e-mails and their attachments which contain performance evaluations of Village employees" (*id.* at 7).

On September 4, 2018, Rice partially fulfilled the request with 104 emails (R. 13:1), denying access to "three emails between me and my wife which are purely personal in nature and have no nexus to Village business or operations" (*id.* at 4).

On September 9, 2018, Meinecke filed four additional record requests with Rice. (R. 15:5, 12-15.) These requests sought all emails sent or received by two email addresses over two different date ranges. (*Id.*)

On September 28, 2018, Rice partially fulfilled those four additional requests with 34 emails he had sent to those two email addresses. (R. 13:1, 6.) Rice also explained that the addresses were each "a shortcut to a distribution list," that it was not possible to send emails from either of those distribution lists, and that the Village had no way, short of possibly "engaging an IT specialist," of collecting all emails that had been sent to those distribution lists. (*Id.* at 6.)

STATEMENT OF THE CASE

On February 19, 2019, Meinecke filed this action under Wis. Stat. § 19.37(1), seeking "a writ of mandamus commanding Respondent Jesse Thyes, and Respondent William Q. Rice, to immediately produce the requested public records." (R. 1:9.) In her Petition, Meinecke identified five categories of records she alleged Thyes and Rice (collectively, the "Village") had unlawfully withheld:

1. One email claimed to be a "to-do" note;
2. 40 emails claimed to be "confidential attorney-client privilege[d]";
3. Three emails claimed to be "performance evaluations of Village employees";
4. Three emails claimed to be "purely personal"; and
5. All emails sent to or received from two email groups

(*Id.* at 7-8.)

The parties filed cross-motions for summary judgment on August 12, 2019. (R. 11, 17.) Meinecke was seeking *in camera* review of the responsive records to test whether they were what the Village claimed them to be. (*See, e.g.*, R. 16:13 ("An *in camera* review is necessary because the content of the requested records is not known to Meinecke or the court.").) After briefing (R. 14, 16, 19, 20, 21, 24), the court held a hearing on October 18, 2019 (R. 54). The Circuit Court granted both motions in part, ruling that the Village properly withheld records in categories 1, 3, and 4 and that no records existed in category 5, but ordering the Village to provide the claimed attorney-client privileged emails (category 2) to the Court for *in camera* review. (R. 27.)

After review, the Court found that of the 32[1] emails, 17 were properly withheld, 5 were not privileged and should have been released in full, and 10 were partially privileged and the unprivileged parts should have been released. (R. 31.) In all, the court ordered the release of 146[2] printed pages and approved the withholding of 183 pages. (*Id.*) The Court expressly

[1] Although Thyes initially indicated that 40 emails had been withheld, upon further review he realized that eight had already been turned over as part of a supplemental production prior to the lawsuit being filed, leaving 32 emails in dispute. (R. 28.)

[2] Although the Circuit Court's order identified 146 pages to be released (*see* R. 31), the Court released only 140 pages directly to Meinecke (*see* R. 32). The parties later realized that the Court had inadvertently omitted pages, which the Village then turned over to Meinecke.

granted Meinecke's motion for summary judgment in part with regard to the improperly withheld emails. (R. 38.)

Meinecke moved for attorney fees, costs, and statutory damages, arguing that by obtaining an order for the release of records, she had substantially prevailed under Wis. Stat. § 19.37(2). (R. 35.) After briefing (R. 39, 40), the Circuit Court held a hearing on January 24, 2020 (R. 55). The Court denied Meinecke's motion and refused to award her fees, costs, or damages. (R. 44.)

The Circuit Court relied on approximately five reasons in finding that Meinecke did not prevail. The Court believed that because the documents she obtained did not contain the evidence of misbehavior she was looking for, Meinecke did not achieve her broader objectives. (R. 55:5, 7-8, 9.) For example, the Court believed that some of the emails had triggered a search term but were not really responsive to what Meinecke was actually looking for; *e.g.*, the word "electronic" triggering the "elect" search term. (*Id.* at 5.)

The Court also believed that Meinecke did not prevail because Thyes and Rice had not acted in "wanton disregard" of the Open Records Law; rather, they had acted "in good faith." (*Id.* at 5, 8, 9.) The Court also believed that Meinecke did not prevail because some of the records were repetitive or

she already had seen them. (*Id.* at 4, 5-6, 7.) The Court noted that Meinecke succeeded in only one of the six categories[3] of records she was seeking and what she got "wasn't that much," especially compared to the amount of records that were given to her before the lawsuit. (*Id.* at 7.) The Court called her actions a waste of time and energy, described her accusations as baseless, and accused her of "nastiness" and having an "ulterior motive outside of . . . the open records request." (*Id.* at 8.)

The Court entered judgment on January 30, 2020 (R. 44), and the Village filed a Notice of Entry of Judgment the same day (R. 45). Meinecke filed a timely Notice of Appeal on February 21, 2020. (R. 49.) Meinecke appeals only the denial of her motion for fees, costs, and damages, and not the partial denial of her motion for summary judgment. (*Id.*)

STANDARD OF REVIEW

The application of undisputed facts to Wis. Stat. § 19.37 presents a question of law that appellate courts review de novo. *Capital Times Co. v. Doyle*, 2011 WI App 137, ¶3, 337 Wis. 2d 544, 807 N.W.2d 666; *Racine Educ. Ass'n v. Bd. of Educ. for Racine Unified Sch. Dist.*, 129 Wis. 2d 319,

[3] The Petition explicitly sought five categories of records. (R. 1:7-8.) Whether Meinecke's request for a "privilege log" for the 40 allegedly-privileged emails (*see id.* at 8) counts as a sixth category or was a request for redacted emails from an existing category is immaterial for this appeal.

325, 385 N.W.2d 510 (Ct. App. 1986) ("*REA I*"). The Court of Appeals is "not bound by trial court interpretations because statutory construction is a question of law." *REA I*, 129 Wis. 2d at 325.

The Village might argue that whether a party has prevailed under Wis. Stat. § 19.37(2)(a) is a question of fact and the Court of Appeals must review it under an erroneous exercise of discretion standard, relying on cases such as *WTMJ, Inc. v. Sullivan*, 204 Wis. 2d 452, 555 N.W.2d 140 (Ct. App. 1996), or *Eau Claire Press Co. v. Gordon*, 176 Wis. 2d 154, 499 N.W.2d 918 (Ct. App. 1993). However, those and similar cases all deal with a different question: whether a requester has prevailed when an authority voluntarily turns over records after a lawsuit is filed. *See WTMJ*, 204 Wis. 2d at 456; *Eau Claire Press*, 176 Wis. 2d at 158; *State ex rel. Vaughan v. Faust*, 143 Wis. 2d 868, 869, 422 N.W.2d 898 (Ct. App. 1988). In that situation, the factual question is whether a "causal nexus" exists between the lawsuit and the production of the records; in other words, whether the lawsuit was a "substantial factor" in causing the records to be produced. *WTMJ*, 204 Wis. 2d at 458-59; *Eau Claire Press*, 176 Wis. 2d at 160.

Here, there is no such question of fact. The Village fully resisted turning over the requested records and none of the contested records were

produced until the Court granted partial summary judgment to Meinecke. Those facts are undisputed, and the question of whether Meinecke prevailed in substantial part is purely one of law.

ARGUMENT

Meinecke has substantially prevailed in this lawsuit under Wis. Stat. § 19.37(2)(a) because the Circuit Court ordered the production of a significant number of records the Village fought to withhold.

I) UNDER THE PLAIN LANGUAGE OF WIS. STAT. § 19.37(2)(a), MEINECKE PREVAILED IN SUBSTANTIAL PART

A) Statutory Interpretation

"[S]tatutory interpretation begins with the language of the statute." *State ex rel. Kalal v. Cir. Ct. for Dane County*, 2004 WI 58, ¶45, 271 Wis. 2d 633, 681 N.W.2d 110. "Statutory language is given its common, ordinary, and accepted meaning, except that technical or specially-defined words or phrases are given their technical or special definitional meaning." *Id.*, ¶45; Wis. Stat. § 990.01(1). Dictionaries are an accepted source for the common, ordinary, and accepted meaning of a statutory term. *See Kalal*, 2004 WI 58, ¶¶41, 53-54.

B) The Meaning of "Prevails . . . in Substantial Part"

The enforcement mechanism of the Open Records Law is found in Wis. Stat. § 19.37, which provides in relevant part:

> (1) MANDAMUS. If an authority withholds a record or a part of a record or delays granting access to a record or part of a record after a written request for disclosure is made, the requester may pursue either, or both, of the alternatives under pars. (a) and (b).
>
> (a) The requester may bring an action for mandamus asking a court to order release of the record. The court may permit the parties or their attorneys to have access to the requested record under restrictions or protective orders as the court deems appropriate.

Costs, fees, and damages are provided as remedies for violations in § 19.37(2):

> (2) COSTS, FEES AND DAMAGES. (a) Except as provided in this paragraph,[4] 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).

(Emphasis added.) The use of the word "shall" in this statute is mandatory, so § 19.37(2)(a) "requires that the court 'shall' award attorney fees to a prevailing requester." *WTMJ v. Sullivan*, 204 Wis. 2d at 462; *see also Kolupar v. Wilde Pontiac Cadillac, Inc.*, 2004 WI 112, ¶19, 275 Wis. 2d 1,

[4] The exception applies to incarcerated persons and is not applicable here.

683 N.W.2d 58 ("*Kolupar I*") (when "shall" is used in a fee-shifting statute, "costs, including attorney fees, must be awarded to successful litigants").

The Open Records Law must be construed liberally in favor of open access to government activities. *See* Wis. Stat. § 19.31 ("[Sections] 19.32 to 19.37 shall be construed in every instance with a presumption of complete public access, consistent with the conduct of governmental business."); *ECO, Inc. v. City of Elkhorn*, 2002 WI App 302, ¶23, 259 Wis. 2d 276, 655 N.W.2d 510 ("[T]he legislature's well-established public policy presumes accessibility to public records and mandates that open records law be liberally construed to favor disclosure . . ."). The fee-shifting provisions of the Open Records Law encourage open access to government activities by incentivizing people to enforce their right to receive records in court, which in turn incentivizes custodians to properly perform their duties. *See Kolupar v. Wilde Pontiac Cadillac, Inc.*, 2007 WI 98, ¶55, 303 Wis. 2d 258, 735 N.W.2d 93 ("*Kolupar II*"), *citing Shands v. Castrovinci*, 115 Wis. 2d 352, 358, 340 N.W.2d 506 (1983) ("[A]n important purpose of fee-shifting statutes is to encourage injured parties to enforce their statutory rights when the cost of litigation, absent the fee-shifting provision, would discourage them from doing so.").

1) The Meaning of "Prevails"

It is axiomatic that a requester who obtains a court order directing the release of records "prevails" in their lawsuit. Although no published decision in Wisconsin analyzes the question, courts have stated it in passing as an obvious principle. For example, in *ECO*, the Court of Appeals was not asked the specific question of whether obtaining a court order directing the release of records qualifies as "prevailing." *See* 2002 WI App 302, ¶1 (requester appealed from a finding that requests referencing the Freedom of Information Act did not qualify as open record requests). Nevertheless, the court, after concluding that the authority in that case had violated the Open Records Law, stated the obvious: "Because the City failed to respond to ECO's request and thus failed to comply with the requirements of Wis. Stat. § 19.35(4)(a), ECO is entitled to costs, fees and damages pursuant to WIS. STAT. § 19.37(2)." *Id.*, ¶30.

In other fee-shifting contexts, Wisconsin courts have found that "a party has prevailed if he or she succeeds on any significant issue in litigation which achieves some of the benefit sought by bringing suit." *Footville State Bank v. Harvell*, 146 Wis. 2d 524, 539-40, 432 N.W.2d 122 (Ct. App. 1988) (awarding fees under Wisconsin Consumer Act); *In re J.S.*, 144 Wis. 2d 670,

679, 425 N.W.2d 15 (Ct. App. 1988) (awarding fees using the same standard under act to enforce rights of those admitted to treatment facilities). Courts have also defined prevailing similarly as being "successful in a litigated trial court proceeding." *Finkenbinder v. State Farm Mut. Auto Ins. Co.*, 215 Wis. 2d 145, 151, 572 N.W.2d 501 (Ct. App 1997).

This Court should apply this test for whether a party is a prevailing party under other fee-shifting provisions to the Open Records Law's fee-shifting provision as well. Such statutes all serve similar purposes, such as encouraging plaintiffs who cannot afford attorneys to vindicate their rights in court and incentivizing defendants' compliance with the law. *See, e.g.*, *First Wis. Nat. Bank v. Nicolaou*, 113 Wis. 2d 524, 539, 335 N.W.2d 390 (1983) ("In short, the policies of the [Wisconsin Consumer Act] will not be effectively carried out through private enforcement unless adequate attorney fees are awarded to prevailing consumers.").

The "benefit sought" in a records suit is obtaining records that have been withheld, so the plaintiffs in such suits "succeed" and are "successful in a litigated trial court proceeding" when they obtain those records. There is no greater way to prevail – to win – an open records suit than by having a court declare that you have a legal right to receive records and the authority

violated the Open Records Law by withholding them. If a plaintiff obtains records through a voluntary release after suit is filed, that is a lesser victory. The authority can still claim that they did not violate the law and are under no obligation to provide the records, but are choosing to do so in this limited circumstance. Uncertainty remains.

Yet Wisconsin courts have held that this lesser victory can qualify as prevailing. *See WTMJ*, 204 Wis. 2d at 458-59; *Eau Claire Press*, 176 Wis. 2d at 159-60. *A fortiori*, the greater victory of obtaining a court order must qualify as well. That logic is implicit in the following statement from *Eau Claire Press*: "a court order compelling disclosure of the requested information is not a condition precedent to an award of fees." 176 Wis. 2d at 160. The court was saying that a court order is not a necessary condition for recovery, a statement that would make little sense if a court order were not a sufficient condition for recovery. It would be absurd to conclude that a requester can only "prevail" if an authority turns records over voluntarily, yet cannot "prevail" with a court order compelling release. *See Kalal*, 2004 WI 58, ¶46 (courts must interpret statutes to avoid absurd results).

Finally, a brief glimpse into federal cases interpreting the Freedom of Information Act confirms this understanding as well. *See REA I*, 129 Wis.

2d at 326-28 (looking to federal decisions as persuasive authority for the interpretation of "prevailed in whole or substantial part" because FOIA contains the analogous phrase "substantially prevailed"). Prior to a 2007 change in the FOIA law, federal courts interpreted "substantially prevailed" as requiring a court order in the requester's favor. *See Brayton v. Office of U.S. Trade Rep.*, 641 F.3d 521, 525 (D.C. Cir. 2011). Reacting to that narrow reading, Congress amended FOIA to explicitly make clear that "substantially prevailed" covers either a court order or voluntary production in some circumstances. *Id.*, *citing* Pub. L. No. 110-175; 5 U.S.C. § 552(a)(4)(E)(ii). In federal law, a "prevailing" party has always included one who wins via court order. *See Buckhannon Bd. & Care Home, Inc. v. W. Va. Dep't of Health & Human Resources*, 532 U.S. 598, 603 (2001). Wisconsin law is no different.

2) The Meaning of "In Substantial Part"

Wisconsin Statute § 19.37(2)(a) does not define what it means to prevail in "substantial part," but the logic behind the inclusion of the term is obvious: the victory can be partial, it need not be complete. If the statute had been written with just "prevails in whole," custodians could argue that if even one contested record had been properly withheld, requesters could not

recover fees and costs. Such a construction would not help achieve the goals of the Open Records Law, so the legislature adopted a standard that covers a greater range of victories. Yet the victory must also be more than a mere pittance. The legislature could have said "prevails in obtaining any record" or "prevails in part" and allowed recovery for even the tiniest victory. Instead it chose a word with a little more weight to it – "substantial."

Thus, the construction used by Wisconsin courts in other contexts – requiring the plaintiff to succeed "on any significant issue in litigation which achieves some of the benefit sought by bringing suit," *Footville*, 146 Wis. 2d at 539-40 (emphasis added) – fits in the Open Records context as well. *Footville* further explained that under this standard, "a [plaintiff] who prevails on some but not all issues" has prevailed, but a victory on a "minor violation" may not be sufficient. *Id.* at 539.

In *Footville*, a consumer was sued for failing to make payments on a purchase contract. *Id.* at 528-29. The consumer raised provisions of the Wisconsin Consumer Act in defense and was partly successful in reducing pre-verdict interest and obtaining a penalty against the vendor under the WCA. *Id.* at 532, 535. Even though the consumer did not obtain a judgment in his favor (the penalty merely offset what he owed the vendor), the Court

of Appeals concluded that he qualified as a "prevailing party" and awarded him attorney fees. *Id.* at 538-40. The court equated the concept of substantially prevailing with succeeding on a significant issue: "Although Morris did not succeed on every litigated issue, he succeeded in substantially reducing his preverdict interest liability. This was a significant issue in litigation, and he achieved the benefit by asserting a defense under the WCA. He is a prevailing party . . . and entitled to attorney's fees incurred in presenting that defense." *Id.* at 540. Winning a significant issue therefore counts as substantially prevailing.

Federal courts also use this approach under FOIA. "[T]he term 'substantially' would suggest that counsel fees may be awarded not just to parties who fully prevail, but also to those who prevail in part." *Union of Needletrades, Industrial & Textile Employees, AFL-CIO, CLC v. INS*, 202 F.Supp. 2d 265, 283 (S.D.N.Y. 2002), *citing Ruckelshaus v. Sierra Club*, 463 U.S. 680, 689-90 (1983) (interpreting FOIA). "This interpretation is consistent with pre-*Ruckelshaus* cases authorizing award of attorney's fees to litigants who prevailed on some parts of the litigation, but were unsuccessful on other aspects." *Id.*, *citing Hensley v. Eckerhart*, 461 U.S.

424, 433-35 (1983) & *Nadeau v. Helgemoe*, 581 F.2d 275, 278 (1st Cir. 1978).

Federal courts also accept that a technical or *de minimis* victory can be so insubstantial as to not support a conclusion that a plaintiff prevailed. For example, the D.C. Circuit hypothesized that "a FOIA plaintiff may seek thousands of documents but wind up with a judgment providing only a handful of insignificant documents." *Oil, Chemical & Atomic Workers Int'l Union, AFL-CIO v. DOE*, 288 F.3d 452, 455 (D.C. Cir. 2002), *superseded by statute on other grounds*,[5] Pub. L. No. 110–175, *as recognized in Summers v. DOJ*, 569 F.3d 500, 503 (D.C. Cir. 2009). In such a situation, the court concluded, "One might say this plaintiff was a prevailing party, but nevertheless not say that the plaintiff substantially prevailed." *Id.*, *citing*

[5] Federal courts originally used the same "catalyst" theory of prevailing as Wisconsin courts, where a party could be considered "prevailing" even if a defendant turned over records voluntarily after a lawsuit was filed, without a court order. *Summers v. DOJ*, 569 F.3d 500, 502 (D.C. Cir. 2009). The U.S. Supreme Court eventually rejected the "catalyst" theory of "prevailing" in a different statute, which led to courts concluding that the catalyst theory was likewise unavailable in FOIA cases. *Id.* at 502-03, *citing Buckhannon Bd. & Care Home, Inc. v. W. Va. Dep't of Health & Human Resources*, 532 U.S. 598, 605 (2001). Congress eventually reversed that outcome by changing statutory language to expressly allow recovery in some cases where the defendant voluntarily produces records after suit is filed. *Id.* at 503, *citing* Pub.L. No. 110-175 & 5 U.S.C. § 552(a)(4)(E)(ii). That pendulum of standards, however, had no effect on the quantum of victory necessary to "substantially" prevail (whether by voluntary production or court order). Thus, *Oil* and similar cases from that period are still useful tools for deciding whether a requester has substantially prevailed.

Texas State Teachers Assoc. v. Gardland Indep. Sch. Dist., 489 U.S. 782, 789-92 (1989).

The *Texas State Teachers Association* case provides perhaps the most comprehensive analysis of what partial victories qualify plaintiffs for attorney fees.[6] The *Texas State* Court's entire discussion of the issue, 489 U.S. at 788-93, is worth reading, but several key points should be highlighted.

First, the case uses the same language Wisconsin uses for identifying a prevailing party. "'[P]laintiffs may be considered 'prevailing parties' for attorney's fees purposes if they succeed on any significant issue in litigation which achieves some of the benefit the parties sought in bringing the suit.'" *Id.* at 789, *quoting Hensley*, 461 U.S. at 433. The Court adopted this "significant issue" test, expressly rejecting the narrower "central issue" test advocated by the defendants. *Id.* at 790-91. The "touchstone" of the

[6] Although *Texas State Teachers Association* involved a "prevailing party" under civil rights law, federal courts have routinely concluded that "prevailing" and "substantially prevailing" are synonymous, and that the standards for a prevailing party under civil rights laws are the same for a substantially prevailing party under FOIA. *See U.S. v. $32,820.56*, 838 F.3d 930, 935 (8th Cir. 2016) ("Like other circuits that have examined the unadorned terms, we see 'nothing to suggest that Congress sought to draw any fine distinction between 'prevailing party' and 'substantially prevail.'") (citing and quoting several other cases); *Oil, Chemical & Atomic Workers*, 288 F.3d at 455 (concluding the Supreme Court's interpretation of "prevailing party" in another statute required an identical reading of "substantially prevails" in FOIA).

significant issue test, the Court concluded, was "the material alteration of the legal relationship of the parties" with regards to the rights protected by the relevant statute. *Id.* at 792-93 .

Second, the Court cautioned that the degree of the plaintiff's success – which claims the plaintiff had won and which he or she had lost – was a question that went to <u>how much</u> compensation would be appropriate for legal fees, and not whether the plaintiff was eligible for a fee award at all. *Id.* at 789, 790, 793. "[T]he *degree* of the plaintiff's success in relation to the other goals of the lawsuit is a factor critical to the determination of the size of a reasonable fee, not to eligibility for a fee award at all." *Id.* at 790 (emphasis in original). In Wisconsin as well, the degree of success is merely one factor among many in determining the appropriate size of a reasonable attorney fee award. *See* Wis. Stat. § 814.045(1)(g); *Eberle v. Dane County Bd. of Adj.*, 227 Wis. 2d 609, ¶52, 595 N.W.2d 730 (1999) ("[A civil rights] plaintiff who prevails on some claims but not others may nevertheless be entitled to full attorney's fees.").

Third, the Court acknowledged that some victories might be too minor to support fees. "[A] technical victory may be so insignificant, and may be

so near the situations addressed in *Hewitt*[7] and *Rhodes*,[8] as to be insufficient to support prevailing party status." *Texas State Teachers Assoc.*, 489 U.S. at 792. A party does not "prevail" and cannot be awarded fees "[w]here the plaintiff's success on a legal claim can be characterized as purely technical or *de minimis*." *Id.*

In the *Texas* case, a union challenged the constitutionality of several school district policies, including banning union representatives from accessing school facilities during school hours and banning union advocacy by teachers during school hours. *Id.* at 785. In the end, courts found the first prohibition constitutional but the second a violation of teachers' First Amendment rights. *Id.* at 786-87. Despite succeeding on only one of its two major claims, the Supreme Court concluded the union was a "prevailing party" entitled to fees under the "significant issue" test, *id.* at 793, even though lower courts had concluded that the union had not succeeded on its "central issue" and thus had not prevailed at all, *id.* at 787. The Court also noted that had a third issue the union won (challenging a requirement that a

[7] *Hewitt v. Helms*, 482 U.S. 755 (1987) (inmate who received no damages, no declaration, and no injunction not a "prevailing party" under 42 U.S.C. § 1982, even though he obtained appellate reversal of the initial dismissal of his case).
[8] *Rhodes v. Stewart*, 488 U.S. 1 (1988) (per curiam) (declaratory relief on "moot issue" does not support fees).

union must get permission to hold meetings outside of school hours) been the union's only victory, that might not have qualified the union as "prevailing," because it was "of minor significance" and the union had never been refused such permission. *Id.* at 792.

As previously noted, Wisconsin courts use this same "significant issue test" in other contexts. *See Footville*, 146 Wis. 2d at 539-40. Because the test aligns with federal law on determining whether a partially-successful plaintiff has prevailed, and because Wisconsin courts look to federal interpretations of FOIA for guidance on interpreting its own Open Records Law, this test should be used to determine whether a partial victory qualifies as "prevailing . . . in substantial part" under Wis. Stat. § 19.37(2)(a).

C) Meinecke Prevailed in Substantial Part

Meinecke "prevail[ed]" in the action below. She obtained "access to a record or part of a record," *see* Wis. Stat. § 19.37(1), and the circuit court "order[ed] release of the record[s]," *see* § 19.37(1)(a). She in fact received several records via court order. She therefore "succeed[ed] on a[] significant issue in litigation" and "achieve[d] some of the benefit sought by bringing suit. *See Texas State Teachers Assoc.*, 489 U.S. at 791; *Footville*, 146 Wis. 2d at 539-40.

On December 5, 2019, the Court released a decision finding that the Village improperly withheld all or a part of 15 of the 32 emails claimed to be attorney-client privileged. (R. 31.) On December 30, 2019, the Court reduced that decision to an order[9] granting in part Meinecke's "motion for summary judgment on her petition for writ of mandamus" with regard to those 15 emails. (R. 38.) As a direct result of that decision, Meinecke obtained 146 pages of records that the Village had actively fought to keep confidential.

And while Meinecke did not prevail "in whole," neither was her victory meaningless: she obtained more than just a *de minimis* amount of the records she was seeking. She obtained all or part of 15 of the 39[10] emails she filed this lawsuit to obtain. She obtained 146 of 329 pages of emails claimed to be attorney-client privileged.[11] She got about 40% of what she was looking for. That is a "substantial" victory. It is nothing like the insignificant victory hypothesized in *Oil, Chemical & Atomic Workers*, where obtaining a

[9] The fact that the court did not issue a document titled "Writ of Mandamus" is immaterial. *See* Wis. Stat. § 781.01 ("The remedy available by a writ of mandamus . . . may be granted by the final judgment or allowed as a provisional remedy in an action or proceeding. The use of a writ is not necessary.").

[10] 32 attorney-client emails plus one to-do email, three purely personal emails, and three personnel evaluation emails. (R. 27:2.)

[11] The record does not reveal how many pages were in the other seven emails.

"handful" of records out of "thousands" requested might not have qualified as substantially prevailing. 288 F.3d at 455.

This case is similar to a federal FOIA case, *Judicial Watch, Inc. v. DOC*, 384 F.Supp. 2d 163 (D. D.C. 2005), *reversed in part on other grounds*,[12] 470 F.3d 363 (D.C. Cir. 2006). There, Judicial Watch filed suit when the Department of Corrections failed to respond to a request for documents related to "the alleged sale of seats on DOC foreign trade missions in exchange for large donations to the Democratic National Committee." *Id.* at 166. After being sued, DOC turned over 28,000 pages of documents and withheld approximately 1,000 pages. *Id.* The District Court ruled that 153 of 306 documents had been improperly withheld under one statutory exemption, and an unstated number of documents were properly withheld under other exemptions. *Id.*

The court also found that DOC had performed an insufficient search and allowed Judicial Watch to take further discovery, which revealed that DOC had "wrongfully withheld documents, destroyed documents, and removed or allowed the removal of others, all with the apparent intention of

[12] Relevant to this case, the District Court's determination that Judicial Watch substantially prevailed was not challenged on appeal. 470 F.3d at 369. The Circuit Court, however, partially reversed the District Court as to Judicial Watch's entitlement to fees for discovery disputes involving third parties. *Id.* at 374-75.

thwarting the FOIA and the orders of this Court." *Id.* at 167. Although that discovery revealed no further responsive documents and Judicial Watch lost a second summary judgment motion seeking to compel the release of additional records, the court concluded that Judicial Watch had "substantially prevailed," over the objection of DOC. *Id.* at 167-69. The court awarded attorney fees to Judicial Watch, even though it had obtained less than half of the contested documents and had lost a summary judgment motion. *Id.* at 168. The court even awarded fees for all the later discovery (and fee petition work), even though it led to no additional documents, concluding that the time was spent in activities closely related to the claims Judicial Watch had succeeded on. *Id.* at 169-72, *aff'd on that issue*, 470 F.3d at 370-71.

In both this case and *Judicial Watch*, the custodian initially released a large number of documents and contested a much smaller subset. In both this case and *Judicial Watch*, the judge found fewer than half of the documents were unlawfully withheld. In both this case and *Judicial Watch*, counsel performed work on other claims that was nevertheless closely tied to their successful claims. In *Judicial Watch*, the plaintiff was found to have substantially prevailed and awarded attorney fees. Meinecke, too, should be

found to have substantially prevailed and be awarded attorney fees, costs, and damages under § 19.37(2)(a).

An award of costs, fees, and damages in this case also would serve the objectives of the Open Records Law. "[T]he purpose of sec. 19.37, Stats., is to encourage voluntary compliance" by record custodians. *Eau Claire Press,* 176 Wis. 2d at 160. Shifting the cost of enforcement onto authorities incentivizes custodians to fully and completely respond to future requests, which serves the public's interest in obtaining government information under Wis. Stat. § 19.31, as multiple cases have recognized. *E.g., id.*; *State ex rel. Young v. Shaw*, 165 Wis. 2d 276, 293, 477 N.W.2d 340 (Ct. App. 1991). Disallowing a successful requester's fees "would frustrate and indeed negate the purpose of the open records law rather than encourage compliance with it." *Young*, 165 Wis. 2d at 293. If there is any doubt as to Meinecke's eligibility for relief under Wis. Stat. § 19.37(2)(a), it should be resolved in her favor.

II) THE CIRCUIT COURT COMMITTED AN ERROR OF LAW BY CONCLUDING MEINECKE DID NOT PREVAIL

The Village raised several arguments, some of which the Circuit Court accepted, for why Meinecke did not "prevail[] . . . in substantial part." None are valid.

A) It Is Irrelevant that the Records Did Not Contain the Information Meinecke Hoped Would Be Revealed

The Village argued (R. 39:6-7), and the Circuit Court accepted (R. 55:5, 7-8, 9), that Meinecke did not prevail because she was seeking evidence of a conspiracy against her, and the records she obtained in the lawsuit did not contain such evidence. They equated "prevailing" in the lawsuit with uncovering the "dirt" she was hoping to find.

But whether the records contained the information Meinecke hoped they would contain is irrelevant to whether she "prevailed" in the legal sense. *See Radley v. Ives*, 2011 WI App 144, ¶9, 337 Wis. 2d 677, 807 N.W.2d 633 (a party prevails when they receive a "final determination on the merits" in their favor). She obtained a significant portion of the records she filed suit to obtain, that is all that matters. A requester's purpose in seeking records is generally irrelevant to the authority's legal responsibility to provide records. *See* Wis. Stat. § 19.35(1)(i) (requesters need not state the purpose of their requests); *Juneau County Star-Times v. Juneau County*, 2013 WI 4, ¶62, n. 33, 345 Wis. 2d 122, 824 N.W.2d 457.

Meinecke did not file this lawsuit as an action seeking to hold Thyes and Rice liable for what she believed was their collusion against her. She

filed the lawsuit seeking one thing: a writ of mandamus compelling the Village to turn over records she requested. That is what she got.

Related to this argument, the Circuit Court found it relevant that some of the records were repetitive and Meinecke should have already seen them because parts of them had been sent to all Grafton Trustees. (R. 55: 4, 5-6, 7.) Again, the content of the records is not relevant. Meinecke did not – and could not – know what was in the contested emails or if she had already seen them until after they had been released. The Open Records Law contains no exemption from production for records that a requester has already obtained elsewhere or that are repetitive.

B) It Is Irrelevant Whether the Village Acted in Good Faith

The Village argued that Meinecke did not prevail and attorney fees should not be awarded because "Thyes made a good faith effort to locate material responsive to [her] requests and determine whether the material should be disclosed." (R. 39:7.) It argued that Thyes reviewed 954 responsive emails and released 918 of them and that the Circuit Court found only 15 (1.5% of the total) were wrongly withheld. (*Id.* at 7-8.) The Circuit Court agreed, noting that there was no "wanton disregard for the open records" law (R. 55:5), "over 1,000 pages" were given to Meinecke (*id*. at

7), the people involved (presumably Thyes and Rice) "act[ed] in good faith [with] legitimate reasons to deny these records" (*id.* at 8), and that "what they believed they were doing was upholding the exception of attorney client" privilege[13] (*id.* at 9).

Good faith is not a defense to illegally withholding records. While the Village cited to *REA I* for the proposition that "it is appropriate for the circuit court to consider whether the agency made a good faith effort to locate responsive material and determine whether it should be disclosed" (R. 39:5), that case is inapposite. Unlike in *REA I*, *see* 129 Wis. 2d at 323, the Village did not voluntarily release the requested records and Meinecke did not obtain them until the Circuit Court ordered their release.

Moreover, the *REA I* court explained that a good faith effort at locating and providing records could excuse a <u>delay</u> in responding to a request, not an unlawful denial. *Id.* at 327 ("If . . . an unavoidable delay

[13] Taken literally, the verbatim transcript would seem to indicate that the Circuit Court thought Thyes did <u>not</u> believe the records fell under the attorney-client privilege: "Despite the fact that the Court did release some of them, I saw nothing in my review as to any indication whatsoever that what they believed they were doing was upholding the exception of attorney client." (R. 55:9.) Whether a transcription error or simply a verbal slip-up, context makes clear the Court meant the opposite – for example, the preceding sentence is a "specific finding that I think the respondents acted appropriately." (*Id.* at 8-9.) The Court seemed to be saying that even though the Court had found that some emails were <u>not</u> attorney-client privileged, there was no indication that Thyes had withheld them for any other reason than they were so privileged.

accompanied by due diligence in the administrative processes was the actual reason for the agency's failure to respond to a request, then it cannot be said that the complainant substantially prevailed in his suit."). When that case made it to the Court of Appeals a second time, this Court concluded that the authority had acted in good faith, excusing its delay, and therefore there was no causal nexus between the lawsuit and the voluntary release of the records. *Racine Educ. Ass'n v. Bd. of Educ. for Racine Unified Sch. Dist.*, 145 Wis. 2d 518, 524-25, 427 N.W.2d 414 (Ct. App. 1988) ("*REA II*").

The legal question in a mandamus action is whether the reasons the custodian gave for withholding records are legally valid. *See* Wis. Stat. § 19.37(1); *Portage Daily Register v. Columbia County*, 2008 WI App 30, ¶12, 308 Wis. 2d 357, 746 N.W.2d 525 (if a denial is found to be stated specifically enough, courts then "determine whether the stated reasons for withholding the records are sufficient to outweigh the strong public policy favoring disclosure"). The reasons are either valid or they are not. Good faith is no defense. *Compare* Wis. Stat. § 19.37(3) (punitive damage provision, containing a state-of-mind requirement, making good faith a defense) *with* § 19.37(2)(a) (attorney fee provision, no such requirement); *cf. Young*, 165 Wis. 2d at 294 (finding good faith to defeat a claim for punitive

damages, but still concluding that attorney fees would have been available, had the requester not represented himself).

Section 19.37(2)(a) sometimes places a significant burden on a custodian who tries hard to do the right thing but makes an honest mistake. But this Court has already considered and rejected the argument that the perceived iniquity in that result can negate the remedy the legislature created:

> We again note that the legislature has set the policy for this and other open records cases. . . . These are not always easy statutes with which to comply. There are many exemptions to Wisconsin's open records law throughout the statutes. A records custodian is required to quickly make difficult decisions. The penalty for inadequate compliance is severe; attorney fees can be substantial. But the legislature has decided that this is worth the benefit of openness.

WTMJ, 204 Wis. 2d at 462. If requesters could not obtain attorney fees when a custodian denied a request in "good faith," that would act as a powerful deterrent to requesters enforcing their rights in court, which in turn would remove a significant incentive for custodians to follow the law. *See Kolupar II*, 2007 WI 98, ¶55.

C) It Is Irrelevant that Meinecke Prevailed only in Part

The Village argued below (R. 39:5), and the Circuit Court mentioned as well (R. 55:7), that Meinecke succeeded in obtaining records in only one

of the categories she sought – and less than half of the records in that category.

However, there is no legal requirement that requesters must obtain every single record they seek in order to be awarded attorney fees. The statutory language itself precludes such an argument, stating that a requester need only prevail in whole or in something less than whole – a "substantial part." The court in *Young*, for example, ordered an award of costs, fees, and damages even though it upheld the denial of a dispatch report, and the requester only obtained some of what he sought. 165 Wis. 2d at 293.

Meinecke won the release of approximately 40% of the records she filed her lawsuit to obtain. Even if the Open Records Law precludes recovery for a *de minimis* victory, Meinecke obtained far more than that. Although the extent of her victory can be considered as one among many factors when calculating the amount of her reasonable attorney fees, *see* Wis. Stat. § 814.045(1)(g), it does not preclude her recovery altogether. *Cf. Eberle*, 227 Wis. 2d 609, ¶52 (civil rights plaintiffs who succeed on only some of their claims may still recover attorney fees); *Racine Unified Sch. Dist. v. LIRC*, 164 Wis. 2d 567, 608-10, 476 N.W.2d 707 (Ct. App. 1991) (same for a labor

law plaintiff); *Footville*, 146 Wis. 2d at 539-40 (same for a consumer rights plaintiff); *Judicial Watch*, 470 F.3d at 369 (same for a FOIA plaintiff).

D) It Is Irrelevant that Meinecke Did Not Ask Grafton to Waive the Attorney-Client Privilege

Finally, the Village argued that Meinecke did not prevail because she never asked the Grafton Village Board to waive the attorney-client privilege. (R. 39:5-6.) Although the Circuit Court did not rely on this argument (and did not even address it), the Village may ask this Court to rely on it as an alternative argument for affirming the decision. *See Paynter v. ProAssurance Wis. Ins. Co.*, 2018 WI App 27, ¶2, n. 2, 381 Wis. 2d 239, 911 N.W.2d 374 (Court of Appeals may affirm on different grounds).

The Village argued that in order for a requester to be a prevailing party, their lawsuit must be "reasonably necessary" to obtain the records sought, and that this lawsuit was not "reasonably necessary" because Meinecke might have obtained the records in another way: by asking the Village Board to waive the attorney client privilege. (R. 39:5-6.)

But the Village is trying to apply a legal test not appropriate for this situation. Whether a lawsuit was "reasonably necessary" is only relevant in a situation where the authority has <u>voluntarily</u> turned over records. In such a situation, the question of whether a requester has "prevailed" is harder.

Such requesters must satisfy a two-part test: (1) "that prosecution of the action could reasonably be regarded as necessary to obtain the information"; and (2) "that a 'causal nexus' exists between that action and the agency's surrender of the information." *WTMJ*, 204 Wis. 2d at 458 (emphasis added). By its own terms, that test cannot apply where the authority has not surrendered the records.

This test prevents a requester from recovering costs and attorney fees if the custodian was going to release the records anyway, even without a lawsuit. *See, e.g.*, *REA II*, 145 Wis. 2d at 522-23. In *REA II*, after remand for fact-finding in *REA I*, the circuit court concluded that the requester had substantially prevailed. *REA II*, 145 Wis. 2d at 520. The Court of Appeals reversed, concluding that there was no causal nexus between the lawsuit and release of the records because the custodian was going to release the records as soon as it had prepared them in electronic format for the Wisconsin Employment Relations Commission. *Id.* at 523-24. According to the Court of Appeals, "If the failure to timely respond to a request was caused by an unavoidable delay accompanied by due diligence in the administrative processes, rather than being caused by the mandamus action, the plaintiff has not substantially prevailed." *Id.* at 524.

Logically, such a test is unnecessary where a custodian refuses to voluntarily turn over records and a court order is necessary to secure their release. There is no need for a court in that situation to parse out whether a custodian might have turned over the records if no action had been filed. The custodian tells the court it will not turn over the records unless ordered.

Even if this test were applicable, it was reasonably necessary for Meinecke to file this lawsuit to obtain the records she sought. The Village denied her request and gave no indication that answer might change. The Village's suggestion that Meinecke should first have had to ask the Village Board to waive the Village's attorney client privilege has no support in statute or case law. Requesters are not required to make the same request multiple ways before filing a lawsuit. Section 19.37(1) creates a cause of action as soon as "an authority withholds a record or a part of a record . . . after a written request for disclosure is made."

To the contrary, courts have encouraged requesters to file lawsuits quickly and not wait for the possibility of the production of records at some future date. In *Capital Times*, the Court of Appeals found that no action to recover attorney fees could be brought after records had already been released, noting that "[h]ad the newspaper begun a mandamus action the

moment the Governor's office began dragging its feet, it likely could have prevented the outcome that occurred." 2011 WI App 137, ¶14. The court noted that its holding "encourages timely action by requesters to force timely compliance by government officials and timely public access to records, which, after all, was the intent of the legislature." *Id.*; *see also Wiredata, Inc. v. Village of Sussex*, 2008 WI 69, ¶54, 310 Wis. 2d 397, 751 N.W.2d 736 ("[A] requesting party may immediately bring an enforcement action if an open records law request is denied . . . ."), *citing State ex rel. Auchinleck v. Town of LaGrange*, 200 Wis. 2d 585, 597, 547 N.W.2d 587 (1996) (emphasis added).

Requiring requesters to exhaust all possible alternative avenues of obtaining a record is absurd. The Village's argument boils down to nothing more than an unsupported assertion that a requester must ask for records multiple times, in multiple ways, and wait and see what a custodian says before they can file a lawsuit to seek records. Adopting such reasoning would lead to a never-ending string of excuses for why requesters should not get fees if they could have asked a different way. The Village might as well have argued that Meinecke was required to "say please" or "ask again next Tuesday" and maybe then the Village would have turned over the records.

Meinecke did not have to ask the Village Board to waive the attorney-client privilege before filing this lawsuit. She had no guarantee – or even the tiniest reason to believe – they would grant her request, and a reasonable person would expect such a request to be a waste of time.

III) THIS COURT SHOULD REMAND FOR A CALCULATION OF REASONABLE ATTORNEY FEES

For the reasons stated above, this Court should reverse the Circuit Court and rule that Meinecke "substantially prevailed" as a matter of law. However, it need not calculate Meinecke's reasonable attorney fees and costs, but rather should remand for the Circuit Court to perform that work. *See John K. MacIver Institute v. Erpenbach*, 2014 WI App 49, ¶33, 354 Wis. 2d 61, 848 N.W.2d 862 ("[O]n remand, we direct the circuit court to determine the appropriate costs and fees to be awarded the Institute pursuant to Wis. Stat. § 19.37(2)(a)."); *WTMJ*, 204 Wis. 2d at 463 ("We conclude that the trial court erred by refusing to award fees for the rehearing, and we remand to permit it to do so.").

To avoid any opportunity for confusion, this Court should expressly instruct the lower court to include reasonable attorney fees for the prosecution of this appeal. *See Nichols v. Bennett*, 190 Wis. 2d 360, 365, 526 N.W.2d 831 (Ct. App. 1994) ("[W]e direct the trial court to award

damages and attorney fees under § 19.37(2)(a), STATS., covering the circuit court and appellate proceedings."); *Young*, 165 Wis. 2d at 294, *citing Palfrey v. DHSS*, 163 Wis. 2d 405, 419, 471 N.W.2d 295 (Ct. App. 1991) (statute awarding costs to 'prevailing party' includes reasonable attorney's fee on successful appeal).

CONCLUSION

Meinecke respectfully requests that this Court reverse the decision of the Circuit Court, find that she "prevail[ed] in . . . substantial part" under Wis. Stat. § 19.37(2)(a), and remand to the Circuit Court with direction to award her reasonable attorney fees, costs, and statutory damages, including costs and fees on appeal.

Dated this May 12, 2020

WISCONSIN TRANSPARENCY PROJECT
KAMENICK LAW OFFICE, LLC
Attorney for Petitioner-Appellant

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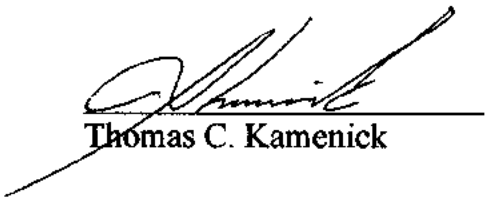
FORM AND LENGTH CERTIFICATION

I hereby certify that this brief conforms to the rules contained in section 809.19(8)(b) and (c) for a brief and appendix produced with proportional serif font. This brief is 8,562 words, calculated using the Word Count function of Microsoft Word 2016.

Dated: May 12, 2020



Thomas C. Kamenick

CERTIFICATE OF COMPLIANCE WITH SECTION 809.19(12)

I hereby certify that I have submitted an electronic copy of this brief, excluding the appendix, which complies with the requirements of section 809.19(12). I further certify that this electronic brief is identical in content and format to the printed form of the brief filed as of this date. A copy of this certificate has been served with the paper copies of this brief filed with the court and served on all opposing parties.

Dated: May 12, 2020

Thomas C. Kamenick

CERTIFICATION OF COMPLIANCE WITH SECTION 809.19(2)(a)

I hereby certify that filed with this brief, either as a separate document or as a part of this brief, is an appendix that complies with s. 809.19 (2) (a) and that contains, at a minimum: (1) a table of contents; (2) the findings or opinion of the circuit court; (3) a copy of any unpublished opinion cited under s. 809.23 (3) (a) or (b); and (4) portions of the record essential to an understanding of the issues raised, including oral or written rulings or decisions showing the circuit court's reasoning regarding those issues.

I further certify that if this appeal is taken from a circuit court order or judgment entered in a judicial review of an administrative decision, the appendix contains the findings of fact and conclusions of law, if any, and final decision of the administrative agency.

I further certify that if the record is required by law to be confidential, the portions of the record included in the appendix are reproduced using first names and last initials instead of full names of persons, specifically including juveniles and parents of juveniles, with a notation that the portions of the record have been so reproduced to preserve confidentiality and with appropriate references to the record.

Dated: May 12, 2020

Thomas C. Kamenick

PETITIONER-APPELLANT'S APPENDIX

Table of Contents

FILED
12-05-2019
Ozaukee County, WI
Mary Lou Mueller CoCC
2019CV000062

BY THE COURT:

DATE SIGNED: December 5, 2019

Electronically signed by Sandy A. Williams
Circuit Court Judge

STATE OF WISCONSIN CIRCUIT COURT BRANCH 3 OZAUKEE COUNTY

Susan Meinecke,
Plaintiff,
vs.

Jesse Thyes et al,
Respondent,

IN CAMERA INSPECTION DECISION
Case No. 2019CV000062

There were 40 emails not released to petitioner that were subject to an in camera review. Upon the court's receipt of said emails, it was determined that the respondent had in fact sent 8 of the 40 emails to the petitioner so the Court has conducted an in camera inspection of 32 emails. The court labeled the emails A-FF.

The court has determined that:

1. Emails A-1 through A-15 fall under the attorney/client privilege, containing work product and drafts of legal documents.
2. Emails B-1 through B-4 fall under the attorney/client privilege, containing legal advice of legal documents.
3. Emails C-1 through C-19 fall under the attorney/client privilege, containing work product and drafts of legal documents.
4. Emails D-1 through D-22 fall under the attorney/client privilege, containing work product and drafts of legal documents.
5. Emails G-1 through G-4 fall under the attorney/client privilege, containing work product and drafts of legal documents.
6. Emails L-1 through L-24 fall under the attorney/client privilege, containing work product and drafts of legal documents.
7. Email N-1 through N-2 fall under the attorney/client privilege, containing work product and advice on an issue; Email O-1 through O-2 are duplicates of N-1 through N-2.
8. Emails Q-1 through Q-2, R-1 through R-2, S1 through S-3 are all the same chain and fall under the attorney/client privilege, containing work product and drafts of legal documents.
9. Emails T-1, U-1 through U-2, V-1 through V-2, W1 through W2 are all the same chain and fall under the attorney/client privilege relating to legal questions and answers
10. Emails AA-1 through AA-2, BB-1 through BB-3 fall under the attorney/client privilege, containing advice on an issue.

The next group of emails contained some attorney/client privilege and some non- attorney/client privilege:

1. I-1 through I-52:

   I-I fall under the attorney/client privilege, containing work product and/or advice.

   I-2 through I-9 non attorney/client privilege and will be released

   I-10 through I-52 fall under the attorney/client privilege, containing work product and/or advice.

2. J-1 through J-31:

   J-1 through J-4 fall under the attorney/client privilege, containing work Product and/or advice.

   J-5 through J-31 non attorney/client privilege and will be released.

3. M-1 through M-8:

   M-1 through M-2 fall under the attorney/client privilege, containing work product and/or advice.

   M-3 through M-8 non attorney/client privilege and will be released.

4. X-1 through X-44:

   X-1 through X-2 some attorney/client and some non attorney client- Court redacted the attorney/client portion, the rest will be released.

   X-3 through X-32 non/attorney client and will be released.

   X-33 through X-44 attorney/client privilege, containing advice.

5. Y-1 through Y-15:

   Y-1 through Y-5 fall under the attorney/client privilege, containing work product and/or advice.

   Y-6 through Y-15 non attorney/client privilege and will be released.

6. Z-1 through Z-6:

   Z-1 falls under the attorney/client, containing work product and/or advice.

   Z-2 through Z-6 non attorney/client and will be released.

7. CC-1 through CC-13:

   CC-1 falls under the attorney/client privilege, containing work product and/or advice.

   CC-2 through CC-13 non attorney/client privilege and will be released.

8. DD-1 through DD-10:

   DD-1 falls under the attorney/client privilege, containing work product and/or advice.

   DD-2 through DD-10 non attorney/client privilege and will be released.

9. EE-1 through EE-9:

   EE-1 falls under the attorney/client privilege, containing work product and/or advice.

   EE-2 through EE-9 non attorney/client privilege and will be released.

10. FF-1 through FF-10:

    FF-1 falls under the attorney/client privilege, containing work product and/or advice.

    FF-2 through FF-10 non attorney/client privilege and will be released.

The next group of emails do not fall under attorney/client privilege and will be released.

E-1 through E-5, F-1 through F-7, H-1 through H-4, K-1 through K-3, and P-1.

CC: Atty Russell Karnes w/enclosure (via U.S. Mail)
Atty Matthew Hastings w/enclosure (via U.S. Mail)

FILED
12-30-2019
Ozaukee County, WI
Mary Lou Mueller CoCC
2019CV000062

DATE SIGNED: December 28, 2019

Electronically signed by Sandy A. Williams
Circuit Court Judge

STATE OF WISCONSIN CIRCUIT COURT OZAUKEE COUNTY

SUSAN MEINECKE
519 Greenfield Drive
Grafton, Wisconsin 53024,

Petitioner,

vs. Case No. 19-CV-62

JESSE THYES
860 Badger Circle
Grafton, Wisconsin 53024, and

WILLIAM Q. RICE
1413 13th Avenue
Grafton, Wisconsin 53024,

Respondents.

ORDER

This matter having come before the Court, the Honorable Sandy A. Williams, Circuit Court Judge, presiding, on October 18, 2019 on the parties' cross motions for summary judgment, the Court having issued an order on October 29, 2019 granting in part, quashing in part, and holding in abeyance in part the motion for summary judgment

on the petition for writ of mandamus, and the Court having subsequently conducted an in camera review of 32 emails. Based upon the pleadings and papers on file,

IT IS HEREBY ORDERED that Petitioner's motion for summary judgment on her petition for writ of mandamus is granted in part and denied in part, with respect to the forty (40) emails withheld by the Respondent, Jesse Thyes, as described the Court's December 5, 2019 In Camera Inspection Decision.

IT IS FURTHER ORDERED that Respondents' motion for summary judgment is granted in part and denied in part, with respect to the forty (40) emails withheld by the Respondent, Jesse Thyes, as described in the Court's December 5, 2019 In Camera Inspection Decision.

STATE OF WISCONSIN CIRCUIT COURT OZAUKEE COUNTY
BRANCH 3

SUSAN MEINECKE

PETITIONER,

vs. CASE NO.19-CV-62

JESSE THYES et al,

RESPONDENTS.

MOTION HEARING

BEFORE THE HONORABLE SANDY A. WILLIAMS
JANUARY 24, 2020

Russell Karnes, Attorney at Law, appeared on behalf of the petitioner.

Matthew Hastings, Attorney at Law, appeared on behalf of the respondents.

Nicole Claudon
Official Court Reporter
(262)284-8361

THE COURT: All right, good morning. This is 19-CV-62, Meinecke vs. Thyes et al. Appearances.

MR. KARNES: Good morning, Your Honor. Attorney Russell Karens from Gimbel, Reilly, Guerin & Brown appears on behalf of the petitioner.

THE COURT: Good morning.

MR. HASTINGS: Good morning. Attorney Matt Hastings appearing on behalf of the respondent, Jesse Thyes and William Q Rice.

THE COURT: Good morning. All right we're here on the plaintiff's request. Attorney Karsen, anything you wish to add?

MR. KARNES: I don't think so, Your Honor. We filed a motion and I know there's been a response brief and we filed a reply. So, I think the Court has enough to review. Assuming that you don't have any questions, I don't think that there's anything to add, Your Honor.

THE COURT: All right. And Attorney Hastings, anything?

MR. HASTINGS: I concur with counsel's assessment subject to any questions the Court may have.

THE COURT: All right. Well, let's just kind of go through everything then. We are here on the plaintiff's request asking for attorney fees and were you asking for the $100 in --

MR. KARNES: Damages, Your Honor. Yes.

THE COURT: And both sides have filed briefs on that. And I know that after the Court did the in camera inspection, the Court just sent out the documents that the Court believed should be released. And I wasn't quite sure how, organizationally, was best way of doing it. And I think my cover letter was as brief as it could be in terms of how the Court had labeled the documents and then with a very brief description, indicated why they were either released or not released. And of course, we're talking about just one category of requested documents where the respondents indicated that they wouldn't be releasing them under the attorney-client privilege which is an exception to the public records.

So, I think it's somewhat important that I just kind of briefly go over how the Court made its determination and -- before ruling on the request. Now, there were clearly a whole subset of documents were attorney client, then the ones that the Court determined were partially attorney client, and not attorney client. In that particular subset, that was probably where most pages were released. But I have to make it clear that when I was reviewing it, if I labeled it let's say E through E9, there would be a communication that was attorney client in one of the e-mails and then the rest of the attached papers were attachments that were part of the e-mail. When looking at the attachments, it made reference then to the

topic, I guess, of what the attorney client communication would have been about, but the documents in and of themselves were not privileged communication. And I also note that on many of those, it was clear that the plaintiff had received those attachments in her role as trustee. So, it wasn't like anything was -- I shouldn't say all of them, but a majority of them wasn't anything new that she hadn't seen in her role. I guess it might be easiest to give an example and it happens to be E1 through E9. And in this particular one, it's a letter from I take it as a private citizen who was involved with the homeowners within Cedarton Estates. I'm making a lot of assumptions here, but I'm assuming that's some kind of subdivision in the Village of Grafton, and that communication wasn't released. The whole core of it, E1 through E5, was a letter that Mr. Cotton had sent not all -- not only all of the trustees, but other people that must be involved with general development of subdivisions. I can only assume that by the titles behind people's names that were CCed on it.

Another example would be J5 through J30. That was an attachment to an e-mail that did contain attorney-client privilege. So, J5 through 30, obviously 25 some pages, was a civil lawsuit, the complaint. That's a public document, but it was attached as part of this communication. So, I released the civil lawsuit documents. Clearly that has no attorney client, but it became apparent

that the respondent, because it was included as part of the attorney client, that was the only reason it wasn't released. So, I couldn't going through it, I couldn't see any wanton disregard for the open records. I think it was maybe confusion not in the sense that someone doesn't understand open records, but because there was the attorney client initially in the e-mail and then the attachments were part of the e-mail, the whole e-mail wasn't sent.

Many of the things that I reviewed I kept thinking, why am I reviewing this? It has nothing to do with Ms. Meinecke's request because she made it very clear in her letters to the respondents what she was looking for. And then when I went back and read those letters, she used particular search words. One of them was elect. And then I looked through some of these e-mails that had nothing to do with the topics of which she was seeking, but maybe in a disclaimer, a part of the e-mail, the word was electronic and elect is part of electronic. So, I think that's why the respondents used those as; do I release or not because it does have part of that word, but it had nothing to do with the topics for which Ms. Meinecke was seeking public records. So, once I got through all of that, I was like, oh, boy, all right now I get why I'm looking at it. For example, there were a ton of pages I released, I think 45, but they were all labeled different. They were the last sections of double E, double D, but it was

one thing might change, but they attached, as part of that new e-mail was the old e-mails. So, even though there might have been 45 pages released, if you pared it down there was probably just ten pages total that were new. Am I making sense or do I need to be clearer on my example? Attorney Kasten, do you know what I'm talking about? It was the communication with the former Police Chief.

MR. KARNES: I actually don't have it in front of me, Your Honor, but if you are referring to perhaps a new e-mail chain that's a reply or forward, I certainly understand what the Court is describing.

THE COURT: So, there might be a lot in terms of numbers of pages that were released, they were in those different categories, at the end they were the same e-mail. It was nothing new. For example, one, it was a discussion of a draft letter to the Police Chief and then it had six other parts of the chain. Then the next set that wasn't released was they filled in dates on that particular letter. So, it was all the same attachments. So, it might have been a larger number of pages that were released, but it was all along the same topic, same e-mail chain.

All right, so why is the Court bringing that up? Because I think in plaintiff's request, it was pointed out that there were 145 pages released. And I would have to say -- or 140, I can't remember now what the exact number is. You

really can't look at it that way because, number one, as I just explained, in the last several that were released it was all the same but labeled differently. The civil lawsuit was 30 pages. So, it wasn't like a lot of communication actually from one of the respondents in an e-mail which was really what the plaintiff was looking for. I think it was respondents that have categorized this whole request that there were like six categories of denials and of the six the Court upheld five of them. And then in the fifth category, that being the attorney client, when you look at how many pages and what was released, it wasn't that much. Especially, when it was over 1,000 pages being requested or ultimately given to the plaintiff.

Now, one other thing that I want to comment, and maybe I should just stop here, but I understand that there can be a lot of emotional tension between individual people. I had commented at the last hearing that there were more baseless allegations contained in affidavits on behalf of the plaintiff than I have seen in a long time. Then after reviewing all of these documents, and these are even in the review where I upheld the attorney client, I don't think I'm speaking out of school in any way, even those documents had nothing to do with the plaintiff, nothing. It had to do with Village business. But within that there was advice being offered by the village attorney and that's why I didn't

disclose it. Nothing in terms of all of her allegations and reasons why she believed that the respondents were not complying with her request. And I'll even highlight one where she claimed that one respondent tried to backdoor the open records request by, after her filing this action, he sent all of these e-mails on to the village attorney so he could claim that as the reason he didn't. I looked at all of these e-mails and I carefully looked at the dates. That's just phooey. There's no basis for her to claim that and she never makes a factual allegation as to why she can conclude that the respondent did it that way. And the only reason I'm pointing some of these things out is it was frustrating going through that because, quite frankly, I think a lot of people's time and energy was wasted. Every person has a right to request records. I have no problem with that. And sometimes it is a time-consuming project for the record keeper to do. We accept that as part of our government because that's what makes our government great. We are an open government and should be an open government at all times. But when you have people acting in good faith and have legitimate reasons to deny these records, for some of the, I guess, nastiness perhaps for some ulterior motive outside of really the open records request, i.e., just promoting this I've been a person of conspiracy. It was baseless and somewhat frustrating for the Court.

I will make a specific finding that I think the

respondents acted appropriately. Despite the fact that the Court did release some of them, I saw nothing in my review as to any indication whatsoever that what they believed they were doing was upholding the exception of attorney client. And I guess that's part of the reason we have these reviews where someone will look it over and it was clear again that because for the most part, most of them I wouldn't have released but for the added one person, an employee of the village. And part of the communication whether it be a CC or an added party to the "to" line of these e-mails that broke the attorney-client privilege and that was the only reason I released them, but I further found that none of the records that the plaintiff was seeking was part of the things that they withheld. And that's to say that it kind of goes into the standard now. Did the plaintiff in whole or substantial, I'm emphasizing the word substantial, prevail? I can't find that she did. Had I really found that she even substantially prevailed, then we would have been addressing the issues of damages and attorney fees, but on this record I cannot find that she substantially prevailed, clearly she didn't in whole. And therefore I'm going to deny damages as well as costs and attorney fees. Do you want a written order to that effect?

MR. KARNES: I think we can submit one. I can send one over to counsel.

THE COURT: All right. And I think you had submitted

one --

MR. KARNES: Yeah, I think we can just reject that one.

THE COURT: I'm just out loud explaining that when it comes through, it will be not signed for reasons given in Court.

MR. KARNES: Yeah. I think we do need a written order in case my client decides to appeal.

THE COURT: Sure. Then prepare the order under the five day rule. And do you think that by next week you can forward that on?

MR. KARNES: Pardon me?

THE COURT: Do you think by the end of next week you can forward that on?

MR. KARNES: Yes. For sure, thank you.

THE COURT: Okay. Is that acceptable?

MR. HASTINGS: Yes.

THE COURT: All right. Anything else?

MR. KARNES: No, Your Honor. Thank you.

MR. HASTINGS: Nothing from respondents.

THE COURT: All right. Thank you.

MR. HASTINGS: Thank you.

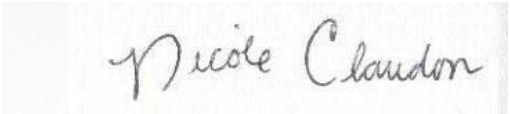
(End of proceedings.)

STATE OF WISCONSIN)
)
COUNTY OF OZAUKEE)

I, Nicole Claudon, hereby certify that I am the official court reporter for the Circuit Court, Branch 3, Ozaukee County, Wisconsin, that I have carefully compared the foregoing pages with my stenographic notes, and that the same is a true and correct transcript.

Dated at Port Washington, Wisconsin, this 18th day of February, 2020.

Nicole Claudon
Official Court Reporter



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Electronically signed by Sandy A. Williams
Circuit Court Judge

STATE OF WISCONSIN CIRCUIT COURT OZAUKEE COUNTY

SUSAN MEINECKE
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Grafton, Wisconsin 53024,

Petitioner,

vs. Case No. 19-CV-62

JESSE THYES
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Grafton, Wisconsin 53024, and

WILLIAM Q. RICE
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Respondents.

ORDER

This matter having come before the Court, the Honorable Sandy A. Williams, Circuit Court Judge, presiding, on petitioner's motion for costs, fees and damages. The Court having reviewed the record and file, and for the reasons set forth on the record, IT IS HEREBY ORDERED that petitioner's motion for costs, fees and damages is DENIED.

THIS IS A FINAL ORDER FOR PURPOSES OF APPEAL.