STATE OF WISCONSIN

COURT OF APPEALS

DISTRICT IV

Case No. 2016AP2214

MADISON TEACHERS, INC.,

Plaintiff-Respondent,

v.

JAMES R. SCOTT, Chairman and Records Custodian, WISCONSIN EMPLOYMENT RELATIONS COMMISSION,

Defendant-Appellant.

APPEAL FROM A FINAL ORDER OF THE
DANE COUNTY CIRCUIT COURT,
THE HONORABLE PETER C. ANDERSON, PRESIDING

BRIEF OF DEFENDANT-APPELLANT JAMES R. SCOTT

BRAD D. SCHIMEL
Wisconsin Attorney General

STEVEN C. KILPATRICK
Assistant Attorney General
State Bar #1025452

Attorneys for Defendant-Appellant

Wisconsin Department of Justice
Post Office Box 7857
Madison, Wisconsin 53707-7857
(608) 266-1792
(608) 267-2223 (Fax)
kilpatricksc@doj.state.wi.us

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Cases

Statutes

Regulations

Other Authorities

INTRODUCTION

The records custodian and chairman of the Wisconsin Employment Relations Commission (WERC), James R. Scott, denied two public records requests made by Madison Teachers, Inc. (MTI) during the 2015 certification elections for collective bargaining representatives of school district employees. At two different points in time during the 20 day elections period, MTI sought the names of Madison Metropolitan School District (MMSD) employees who had voted. MTI demanded the records before the conclusion of the elections. The records would have allowed MTI to learn which employees had not voted. Notably, a non-vote is the same as a "no" vote.

Scott performed the public records balancing test and denied access to the requested records during the elections. He concluded that the public policy of elections being free from voter intimidation outweighed the policy of disclosure. Consistent with that, he was aware that, the previous year in another school district, some employees were allegedly coerced by union members into voting in favor of the union during the elections. After the elections concluded, however, Scott granted MTI's third request for the names of all the voters because the likelihood of voter coercion fell away and the public's right to know that WERC administered a fair election was paramount.

Scott's two denials, during the pendency of elections, should be upheld based on the balancing test. Further, regardless, the mandamus action was unnecessary to obtain the sought-after records and so no attorney's fees should be available. Both the merits decision and the circuit court's attorney's fees order should be vacated.

STATEMENT OF THE ISSUES

1. Denial of a public records request is proper when the policy of disclosure is outweighed by another public policy. Each public records balancing test is a fact intensive process performed on a case-by-case basis. Here, Scott believed that employees who had not voted could be intimidated into voting against their will if their names were disclosed, and determined that this outweighed the policy of disclosure. Did Scott properly deny MTI's two public records requests using the balancing test?

   The district court answered "No."
   This Court should answer "Yes."

2. A plaintiff is entitled to attorney's fees and costs if it prevails in whole or in substantial part in a Wis. Stat. § 19.37(1)(a) mandamus action. A party seeking fees must show that the action was reasonably necessary to obtain the records and that a causal nexus exists. Here, after the elections, Scott disclosed the records of voter names within a day, and MTI did not again request the records from during the election. Was MTI's mandamus action reasonably necessary to obtain the requested record and was the action the substantial reason Scott released the records?

   The district court answered "Yes."
   This Court should answer "No."

STATEMENT ON ORAL ARGUMENT AND PUBLICATION

Oral argument is unnecessary because the briefs, taken together, fully present the issues and relevant legal authority.

This Court's opinion should be published because it would apply an established rule of law to a factual situation significantly different from that in published opinions.

STATEMENT OF THE CASE

I. Legal background.

A. Public records law.

The Wisconsin public records law states that "it is declared to be the public policy of this state that all persons are entitled to the greatest possible information regarding the affairs of government and the official acts of those officers and employees who represent them." Wis. Stat. § 19.31. "This presumption reflects the basic principle that the people must be informed about the workings of their government and that openness in government is essential to maintain the strength of our democratic society." *Juneau Cty. Star-Times v. Juneau Cty.*, 2013 WI 4, ¶ 45, 345 Wis. 2d 122, 824 N.W.2d 457 (citing *Linzmeyer v. Forcey,* 2002 WI 84, ¶ 15, 254 Wis. 2d 306, 646 N.W.2d 811).

Although a presumption of disclosure applies, "[t]he next step is to determine whether any exceptions operate to overcome the general presumption of openness." *Democratic Party of Wis. v. Wis. Dep't of Justice*, 2016 WI 100, ¶ 10, 372 Wis. 2d 460, 888 N.W.2d 584. "Exceptions to the public records law's general presumption of disclosure exist because some requests conflict with other important policy considerations." *Id.* ¶ 11.

"[T]he legislature entrusted the records custodian with substantial discretion" in performing a disclosure analysis. *Hempel v. City of Baraboo,* 2005 WI 120, ¶ 62, 284 Wis. 2d 162, 699 N.W.2d 551. "[A] records custodian is permitted to engage in a balancing test to decide whether the strong presumption favoring disclosure is overcome by some even stronger public policy favoring limited access or nondisclosure." *Seifert v. Sch. Dist. of Sheboygan Falls,* 2007 WI App 207, ¶ 30, 305 Wis. 2d 582, 740 N.W.2d 177. The balancing test is a fact-intensive inquiry that must be performed on a case-by-case basis. *Kroeplin v. Wis. Dep't of Nat. Res.*, 2006 WI App 227, ¶ 37, 297 Wis. 2d 254, 725 N.W.2d 286. The records custodian must consider all factors favoring and disfavoring disclosure, considered in the context of the particular circumstances. *See, e.g., Hempel,* 284 Wis. 2d 162, ¶¶ 62–66.

When a custodian denies a public records request, a requester's exclusive remedy is in Wis. Stat. § 19.37. *Capital Times Co. v. Doyle*, 2011 WI App 137, ¶ 1, 337 Wis. 2d 544, 807 N.W.2d 666. "Mandamus is a remedy that can be used 'to compel a public officer to perform a duty of his office presently due to be performed.'" *Voces De La Frontera, Inc. v. Clarke*, 2017 WI 16, ¶ 11 (quoting *State ex rel. Marberry v. Macht*, 2003 WI 79, ¶ 27, 262 Wis. 2d 720, 665 N.W.2d 155).

B. Collective bargaining representative certification elections.

The Municipal Employment Relations Act specifically forbids employees "[t]o coerce or intimidate" another employee in the enjoyment of his or her rights, which include the right to join, and refrain from joining, a labor organization. *See* Wis. Stat. § 111.70(2), (3)(b)1. By statute, WERC conducts annual certification elections of exclusive collective bargaining representatives for municipal,

including school district, employees. *See* Wis. Stat. § 111.70(4)(d)3.b. These elections are be fair and without improper influence upon the voters. *See In re Nw. United Educators*, Decision No. 25681-A, 9 (WERC, Mar. 20, 1989)[1] ("[E]mployees . . . are entitled to an election climate which is free of conduct or conditions which improperly influence them and which is fair to all parties on the ballot."). Consistent with those goals, these elections must be conducted by "secret ballot." Wis. Stat. § 111.70(1)(e); Wis. Admin. Code § ERC 70.07(1). The election period in 2015 was open for 20 days. Wis. Admin. Code § ERC 70.06. (R. 1 ¶ 8, R. 15 ¶ 8.)

Since the passage of 2011 Wisconsin Act 10, to become the exclusive collective bargaining representative, a union must receive a majority of votes of the school district employees in the collective bargaining unit, not simply a majority of the votes cast. *See* Wis. Stat. § 111.70(4)(d)3.b. Thus, a non-vote is a "no" vote.

II. Statement of the facts.

The material facts are undisputed.[2]

MTI is a labor union and the exclusive representative of employees in five collective bargaining units (teachers, educational assistants, substitute teachers, clerical/technical employees and security assistants) employed by MMSD. Scott is Chairman of WERC and its records custodian.

---

[1] Decisions of the WERC can be found online at http://werc.wi.gov/decisions/pre-july_1989_decisions_list_by_date.htm (last visited Mar. 27, 2017).

[2] The facts are taken from the proposed findings of fact in MTI's circuit court summary judgment brief, which Scott did not dispute (R. 18, 21:4), and from Scott's circuit court summary judgment brief, which MTI did not dispute (R. 21, 24). This brief will include record citations in the Argument section, as needed.

Prior to the November 2015 elections, Scott was aware of a complaint filed with WERC by the Racine Unified School District alleging that voters were being coerced and harassed into voting during the 2014 annual certification elections. In one instance, a union representative allegedly entered a teacher's classroom, directed the teacher to her computer, brought up the voting website, directed her to enter her I.D. and password, and told her that voting "yes" would help the union get increased job security and wage increases. The representative reportedly watched the teacher reluctantly vote "yes." In another instance, a teacher was allegedly approached by two union representatives during instructional time and asked why she had not yet voted. The teacher asked that she be left alone.

WERC contracted with the American Arbitration Association (AAA) to provide the technological services necessary to run its 2015 certification elections. During voting, AAA would electronically maintain data for votes cast. Immediately following the voting period, AAA would "provide the WERC with a tally of the ballot cast by all unchallenged voters." The contract required AAA to email election results to WERC no later than one business day after the conclusion of the elections.

The services provided by AAA included a secure automated telephone voting system that used an interactive voice response system, an internet voting option where voters had the opportunity to cast votes on a secure online site, and an Oracle database to record, process and tabulate election results.

On October 26, 2015, MTI Executive Director John Matthews sent a letter to Scott advising him that MTI would be submitting three public records requests over the course of the upcoming 20 day election period seeking a list of the

employees who had voted as of the date of the request. The letter stated, in part:

> [I]f WERC does not maintain a record that lists the employees in each bargaining unit who have submitted a ballot, then MTI will request the right to inspect and copy the ballots received as of the date of the request, with voting information redacted to protect the secrecy of the ballot.

MTI represented that it would not engage in voter coercion or any other illegal election practices.

During the 20 day elections period, WERC and its staff engaged in a variety of time-sensitive tasks. For example, during the elections in question, MTI officials emailed Peter Davis, WERC chief legal counsel, to ask him to address voter complaints. The requested solutions included adding a voter to the eligible voter list, providing a voter with a new access code, providing confirmation that a vote had been registered, and resolving errors that prevented voters from voting by informing them that they had already voted.

MTI forwarded Davis an email from a voter who was blocked from voting because she was told that she had already voted. Davis forwarded this issue to Jon Ohmann, an employee of AAA, who replied, "This appears to have been someone's mis-entry. I have cleared that vote and [the voter] can revote." MTI also forwarded to Davis a question from a voter who had previously voted but had not received confirmation of her vote. One and a half hours later, Davis replied to verify that the vote was registered when she cast it on November 4.

Regarding MTI's records requests, on November 10, 2015, Matthews hand-delivered a letter to Scott, requesting records showing the names, by bargaining unit, of MMSD employees who had voted in the election as of the date of the

request. MTI specified that if WERC does not maintain a record listing the employees in each bargaining unit who have submitted a ballot during the recertification election, then MTI requested the right to inspect or copy the electronic ballots received as of the date of the request, with the voting information redacted to protect the secrecy of the ballot. MTI requested records showing the names of MMSD employees who had voted in the certification election "as soon as possible, but not later than 5:00 p.m., November 16."

On November 16, 2015, Scott advised Matthews in writing that his request for the names of MMSD employees who had cast a ballot in the certification elections, or copies of the ballots cast as of the date of the request, was denied based on the balancing test, among other reasons.

On November 17, 2015, Matthews delivered a second letter to Scott requesting disclosure of the records showing the names of MMSD employees who had voted in the certification election as of the date of that request. This letter asked for the records to be delivered as soon as possible, but no later than 5:00 p.m., November 20. Scott did not disclose any records by MTI's deadline.

On the afternoon of November 24, 2015, after the close of the elections, MTI requested lists of all MMSD employees in each bargaining unit who had voted in the election. The following morning, WERC staff provided to MTI spreadsheets containing those lists.

On November 30, 2015, Scott advised Matthews in writing that his second request, which had demanded release of the records within three days of the request, was denied for the same reasons as the first. That same day, MTI filed its mandamus action complaint.

On December 22, 2015, Davis emailed Ohmann at AAA, "Whenever convenient can you tell me if it [sic] still possible to identify who had voted as of noon Nov 10 and noon Nov. 17 in the various Madison Schools/Madison Teachers units. If it is possible, can you send me that info. unit by unit[?]" Ohmann promptly emailed Davis the spreadsheets fulfilling this request; one showed all voters as of November 10, and the other showed all employees who voted between November 10 and November 17.

III. Procedural history.

On November 30, 2015, MTI filed a complaint pursuant to Wis. Stat. § 19.37(1)(a) seeking an order for mandamus, punitive damages, and attorney's fees and costs, concerning Scott's responses to its first two public records requests. (R. 1.) MTI did not file a summons. Rather, on December 1, 2015, it filed a motion, ex parte, for an order reducing the number of days Scott had to file an answer from 45 to 20 days. (R. 2.) Two days later, the circuit court, the Hon. Juan B. Colás presiding, granted the ex parte motion. (R. 3.) On December 4, 2015, MTI served the complaint, motion, and order upon Scott. (R. 4–5.)

Scott filed a request for judicial substitution on December 8, 2015. (R. 7.) Three days later, the Hon. Peter C. Anderson was assigned the case. (R. 10.) That same day, Scott filed a motion and supporting brief to reconsider and vacate the court's ex parte December 3 order. (R. 11–12.) The court held a hearing on Scott's motion on December 15. (R. 13.) After hearing argument, the court construed Scott's motion to vacate as a motion to extend the time to answer beyond the timeframe established by the court's ex parte order. The court granted Scott 45 days from the December 4, 2015, service date to file an answer. (R. 14.) Scott filed his answer on January 19, 2016. (R. 15.)

MTI served discovery requests upon Scott. In response, on or about April 11, 2016, Scott provided the records MTI sought in its complaint—records showing the names of the bargaining unit employees who had voted at two different times during the 2015 annual certification elections. (R. 19:3 ¶ 12, 19:106–177.)

The parties then filed cross motions for summary judgment, along with supporting briefs and evidentiary materials. (R. 17–22, 24–25.) Upon completion of briefing, the court held a hearing on September 12, 2016. The court granted MTI's motion for summary judgment and denied Scott's. (R. 26.)

At the September 12 oral ruling, MTI also sought punitive damages, costs, and attorney's fees. The court scheduled another hearing on remedies. On November 2, 2016, the court held oral argument and issued its ruling. (R. 42.) The court modified its previous order to show that it denied MTI's motion for punitive damages and granted MTI $100.00 in statutory damages $41,462.50 in attorney's fees, and $301.35 in costs. (R. 43.) On November 4, 2016, the court issued a signed order. (R. 46, App. 101–02.)

Scott filed his notice of appeal on November 8, 2016.[3] (R. 47.)

---

[3] MTI filed a motion for contempt and supplemental relief on November 11, 2016. (R. 48–49.) Scott opposed. (R. 50–51.) On November 15, 2016, the parties appeared for a hearing and the court denied MTI's motion. (R. 53.) However, the next day, on November 16, 2016, the court issued a decision and order re-opening the judgment. (R. 54.) On November 21, 2016, during a telephone hearing, the court then vacated its November 16 order, stating that the November 4, 2016, order would be considered the final judgment for the purposes of appeal. (R. 55.) Two days later, the court issued a signed order to that effect. (R. 56.)

STANDARDS OF REVIEW

This Court reviews a record custodian's decision denying a public records request de novo. "Whether harm to the public interest from [disclosure] outweighs the public interest in [disclosure] is a question of law." *Democratic Party*, 372 Wis. 2d 460, ¶ 9 (quoting *Newspapers, Inc. v. Breier*, 89 Wis. 2d 417, 427, 279 N.W.2d 179 (1979)).

This Court also reviews a circuit court's decision on summary judgment independently. Summary judgment is appropriate when there are no genuine issues of material fact and the moving party is entitled to judgment as a matter of law. *Juneau Cty. Star-Times v. Juneau Cty.*, 2013 WI 4, ¶ 25 n.11, 345 Wis. 2d 122, 824 N.W.2d 457.

SUMMARY OF THE ARGUMENT

In response to MTI's first two public records requests, Scott considered several factors and properly concluded that—during the elections—the public policy of elections free from voter coercion and intimidation outweighed the policy of disclosure of the names of the bargaining unit employees who had not cast their ballots. This policy of fair elections free from voter coercion and intimidation is reflected in statutes and confirmed in WERC decisions. And Scott's disclosure of the names of all the voters immediately after the close of the elections, in response to MTI's third request, fulfilled the purpose of the public records law: transparency in government operations, and, here specifically, WERC's administration of fair elections. Scott's denials of MTI's requests demanding release of MMSD voters' names during the elections were proper.

Because the circuit court held that Scott violated the public records law, it concluded that MTI prevailed in whole as to its Wis. Stat. § 19.37(1) mandamus action and, thus, was entitled to recover all of its attorney's fees. But MTI should

not be entitled to fees for two reasons. First, MTI did not show that the prosecution of the mandamus action was necessary to obtain the names of the voters. Second, the circuit court made no finding that a causal nexus existed between the mandamus action and the release of the records. Rather, the fact that the elections were over resulted in the release of the records, not MTI's mandamus action.

ARGUMENT

I. Scott properly performed the Wis. Stat. § 19.35(1)(a) balancing test in denying MTI's two public records requests made during the certification election.

A. Scott's denials of MTI's first two requests were proper under the balancing test.

This Court is asked to determine whether the records custodian of WERC properly decided that—during the course of a certification elections—the policy of administering elections free from voter coercion and intimidation outweighed the policy of disclosure of the names of MMSD employee voters and non-voters. This Court should uphold Scott's decisions denying MTI access to the records during the ongoing elections.

The balancing test is a fact-intensive inquiry. *See Kroeplin*, 297 Wis. 2d 254, ¶ 37. The records custodian must determine whether the surrounding circumstances create an exceptional case not governed by the strong presumption of openness. *Hempel*, 284 Wis. 2d 162, ¶ 63. A records custodian is not expected to examine a public records request "in a vacuum." *Seifert*, 305 Wis. 2d 582, ¶ 31.

Public policies relevant to the balancing test are evinced through the constitution, state statutes, and case law. *Democratic Party*, 372 Wis. 2d 460, ¶ 34. Here, the public

policy of annual certification elections being free from voter intimidation and coercion is reflected in statutes, properly promulgated regulations, and WERC decisions.

The importance of the policy is made explicit in the statutes. Municipal employees have the right to join labor organizations, and the right to vote against such activity. Wis. Stat. § 111.70(2).[4] And it is a prohibited labor practice for a municipal employee, individually or in concert with others, to "coerce or intimidate a municipal employee in the enjoyment of the employee's legal right." Wis. Stat. § 111.70(3)(b)1. Also, the Legislature requires WERC to conduct annual collective bargaining certification elections by "secret ballot." Wis. Stat. § 111.70(1)(e), (4)(d)1., 3.b. In interpreting this law WERC has held that "employees . . . are entitled to an election climate which is free of conduct or conditions which improperly influence them and which is fair to all parties on the ballot." *In re Nw. United Educators*, Decision No. 25681-A, 9 (WERC, Mar. 20, 1989). That is because "[w]here the secrecy of the voting process itself is maintained, there is a strong presumption that the ballots actually cast reflect the true wishes of the employees participating." *Id.*

Here, when Scott received MTI's first two public records requests (R. 19:53, 58, App. 141, 144.), the 2015 certification elections were in progress. The statutory mandate requiring

---

[4] **"Rights of municipal employees.** Municipal employees have the right of self-organization, and the right to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in lawful, concerted activities for the purpose of collective bargaining or other mutual aid or protection. Municipal employees have the right to refrain from any and all such activities." Wis. Stat. § 111.70(2).

that elections are free from voter coercion or intimidation was in full force, as was the mandate to keep ballots secret. Further, Scott had knowledge of a complaint filed the year before by the Racine Unified School District alleging that, during the certification elections, employees who had not voted were harassed and influenced to vote in favor of union representation in the presence of union officials. (R. 22:3–4, App. 147–48.)

Scott considered WERC's statutory mandate and the surrounding circumstances, as was proper. In denying the requests, Scott explained that, in conducting "the common law balancing of the interests served by disclosure against the interest of nondisclosure, *see* § 19.35(1)(a), Stats., I would conclude that the interests of maintaining the secrecy of the ballot and of avoiding the potential for voter coercion while balloting is ongoing outweigh the interests favoring disclosure." (R. 19:55–56, 60–61, App. 142–43, 145–46.)

Scott believed that releasing—during the elections—the names of those MMSD employees who had not voted could reasonably lead to voter coercion and intimidation.[5] This possibility of voter coercion and intimidation existed here because, unlike many other types of elections, these elections were held open for 20 days. And, under the statute, an employee not voting is the same as casting a "no" vote. Wis. Stat. § 111.70(4)(d)3.b. Anyone who had not voted—and who may have intended that non-vote to serve as a "no" vote—would be subject to improper influence and attempts to get them to instead vote and register a "yes." It was proper to deny MTI's requests in these circumstances, especially given

[5] Although MTI asked for a list of names of employees who voted, because the names of all the eligible voters was known to MTI, *see* Wis. Admin. Code § ERC 70.05(1), MTI would know the names of employees in the bargaining unit who had not voted.

the statutory mandates to avoid undue influence and maintain secrecy of votes.

In addition, Scott properly considered the allegations coming out of Racine the year before. (R. 19:55–56, 60–61, App. 142–43, 145–46.) Courts recognize that records custodians may consider real world implications, including the occurrence of threats, harassment or reprisals. *See John K. MacIver Inst. for Pub. Policy, Inc. v. Erpenbach*, 2014 WI App 49, ¶¶ 23, 26, 354 Wis. 2d 61, 848 N.W.2d 862. Thus, the Racine allegations—where reluctant employees were cajoled into voting a certain way—further supported what was already logical: real time efforts to learn who had not voted opened up the process to coercion and intimidation.

The balance was different after the elections concluded. At that point, the concern of voter intimidation and coercion fell away and the policy of disclosure and transparency of government operations (i.e., the administration of annual certification elections) became paramount. Scott agrees with MTI that there "is a strong public interest in ensuring that recertification elections are as transparent and open as possible to protect the integrity of the election process." (R. 18:19.) That is why he granted MTI's third public records request immediately after the elections. (R. 15:8–121, R. 19:63–105.)

Scott's focus on sensitive timing was a proper consideration. The public records law creates no right to real time information, especially when there is a risk of misuse or of compromising the underlying governmental activity.

As a basic matter, Wisconsin's public records law does not require a response within any specific date and time, such

as "two weeks" or "48 hours." *Journal Times v. Police & Fire Comm'rs Bd.*, 2015 WI 56, ¶ 85, 362 Wis. 2d 577, 866 N.W. 2d 586. "[A]s soon as practicable and without delay" is the statutory standard. Wis. Stat. § 19.35(4)(a). "[A]n authority is not obligated to respond within a timeframe unilaterally identified by a requester." Wisconsin Public Records Compliance Guide, 15 (Nov. 2015). But this is exactly what MTI expected of Scott and WERC by its two requests for disclosure of the records within six and three days of receipt, respectively.

Further, as relevant here, the law does not compel disclosure of records when it could compromise an underlying governmental activity. For example, under Wis. Stat. § 19.36(10)(b), there is no right to a record containing information related to a current investigation of possible employee criminal misconduct. The rule is to keep records related to misconduct investigations closed while those investigations are ongoing, but provide public oversight over the investigations after they have concluded. *See Kroeplin*, 297 Wis. 2d 254, ¶ 31. The same reasoning applies to ongoing police investigations. *See Linzmeyer*, 254 Wis. 2d 306, ¶¶ 15–18.

That was Scott's reasoning here, as well. The public's temporary inability to obtain a public record about how government conducts its affairs, because of the possibility of improper influence of an ongoing matter, is an entirely appropriate consideration under the public records law.

B. None of the arguments that MTI has forwarded undermine Scott's reasonable decisions.

Before the circuit court, MTI raised three main arguments to support its view that Scott was required to

disclose the records during the elections. None show that Scott acted improperly.

First, MTI argued that there is evidence that Scott could have obtained the records from AAA and provided them to MTI within the timeframes demanded. (R. 18:14.) Not only is that claim unsupported by the evidence, but also it is irrelevant.

This Court has held that, while it a government function to respond to a public records request, an authority is not expected to stop ongoing operations to do so. "While this state favors the opening of public records to public scrutiny, [courts] may not in furtherance of this policy create a system that would so burden the records custodian that the normal functioning of the office would be severely impaired." *Schopper v. Gehring*, 210 Wis. 2d 208, 213, 565 N.W.2d 187 (Ct. App. 1997). What constitutes a reasonable time for a response to any specific request "depends on the nature of the request, the staff and other resources available to the authority to process the request, the extent of the request, and related considerations. [W]hether an authority is acting with reasonable diligence in a particular case will depend upon the totality of the circumstances surrounding the particular request." *WIREdata Inc. v. Vill. of Sussex*, 2008 WI 69, ¶ 56, 310 Wis. 2d 397, 751 N.W.2d 736.

Factually here, the only evidence in the record is the short amount of time it took WERC's chief legal counsel to obtain the names of MMSD voters from AAA in December—the month *after* the elections were over. (R. 19:107.) This is not evidence that Scott, and WERC staff, could have obtained the names from AAA in response to MTI's requests as quickly during the elections and provided the records to MTI. Indeed, at the time of MTI's requests—in November—over 300

certification elections for over 59,000 employees were ongoing. (R. 22-1 ¶ 2.)

Regardless, legally, the length of Scott's response time is irrelevant here because his denials were not based on time needed to respond. They were based on the merits of the requests. Thus, any continued argument by MTI about the timing of Scott's denials is a red herring.

Second, MTI argued that, under Scott's "secret ballot" reasoning, he violated the law by disclosing the names of MMSD voters at the conclusion of the elections. (R. 18:17.) The circuit court agreed, believing that Scott's denials, based in part on the "secret ballot" requirement *during* the election, were inconsistent with his decision in favor of disclosure *after* the election. (R. 58:41, 45, Tr. Sept. 12, 2016.) But these different decisions were based on different circumstances.

Scott's decisions were completely consistent with the basis for denying the first two requests: the effect of disclosure on the ongoing election. After balloting closed, there was no fear of voter coercion and intimidation. Thus, disclosure of the non-votes post-election presented a wholly different picture.

Third, MTI's later-asserted purpose does not change the analysis. The circuit court believed that MTI's purpose in making the public records requests was to further a union "get out the vote" campaign and that Scott should have considered this factor favorably in the balancing test. (R. 57:10, Tr. Dec. 15, 2015; R. 58:45, Tr. Sept. 2, 2016; R. 59:11, Tr. Nov. 2, 2016, App. 113.) Such a consideration by Scott would have been improper. The public records law does not permit a custodian to disclose records because of the requester's purpose, and Scott did not do so here.

The Legislature generally prohibits a records custodian from considering identity or purpose. *See* Wis. Stat. § 19.35(1)(i). This Court has held that the purpose of a request is not a factor in the custodian's balancing test decision. *See State ex rel. Ledford v. Turcotte*, 195 Wis. 2d 244, 252, 536 N.W.2d 130 (Ct. App. 1995). The only exception may be where the requester undermines its own request by stating a purpose that does nothing to further the purpose of transparency in government. For example, In *Democratic Party*, the supreme court held that a partisan motivation to a request may have negative results under the balancing test when weighed against the possible harms resulting from disclosure. 372 Wis. 2d 460, ¶ 23.

Here, Scott was correct not to consider, or favor, MTI's "get-out-the-vote" purpose behind its public records requests under the balancing test. There is no evidence that MTI stated this purpose prior to Scott's decision. And even if he had considered it, the possible harm—if the records were disclosed at all, not specifically to MTI—to the certification elections that the Legislature requires to be free from voter intimidation and coercion, still outweighed the interest of disclosure.

MTI also argued that Scott improperly ignored its promise that it would not use the voters' names to coerce employees to vote or engage in any other illegal activity. The Wisconsin Supreme Court recently recognized the irrelevancy of such a statement in a case about an organization's desire to obtain information about the immigration status of several detainees at a county jail: "If the information can be accessed by one party, then it can be obtained by any other organization or individual that seeks the same information. This, of course, includes those individuals or organizations with potentially less noble aspirations . . . ." *Voces*, 2017 WI 16, ¶ 34 n.20.

Here, even assuming MTI's promise was credible,[6] it was irrelevant. If Scott had disclosed the records to MTI, it would have been obligated to disclose the records to any other requester, including those unwilling to make promises or follow through on them.

Scott carried out his public records duties by balancing the interests at stake to preserve the integrity of the ongoing elections from coercion or intimidation, as required by law. His two denials of MTI's public records requests were proper and should be upheld.

C. There could be no violation after the elections were over because the requests had, by their own terms, expired.

The circuit court also held that Scott violated the public records law because he could have produced the records the day after the elections but he did not. (R. 58:50–51, Tr. Sept. 2, 2016.) That conclusion was in error. There are three legally sufficient reasons why Scott did not respond to the first two requests after the elections were over.

First, under the public records law, there is no such thing as an ongoing public records request. "The right of access applies only to records that exist at the time the request is made, and the law contemplates custodial decisions being made with respect to a specific request at the time the request is made." 73 Op. Att'y Gen. 37, 44 (1984). In fact, the custodian does not have discretion to consider what the circumstances might be in the future, or to wait for

---

[6] Logically, a likely result of releasing records in real time is employees who might be "coerce[d]" or "intimidate[d]" into voting, even though they may have chosen the path of voting "no" through inaction. *See* Wis. Stat. § 111.70(2), (3)(b)1.

circumstances to change: the decision must be based on the factors as they exist upon receipt. *See WTMJ, Inc. v. Sullivan*, 204 Wis. 2d 452, 457–58, 555 N.W.2d 140 (Ct. App. 1996). Here, Scott received MTI's first two requests during the elections. (R. 19:53, 58, App. 141, 144.) This meant that Scott's decisions to deny them were based on the circumstances occurring at that time. Since the elections were pending on the dates he received the requests, his denials considered that factor.

Second, MTI's requests had expired by their own terms. The requests sought release within just a few days—and before the conclusion of the elections. Thus, MTI did not *ask* for the records to be released after the elections were over.

Third, MTI never re-submitted its first two public records requests after the elections. MTI was fully aware that Scott granted its third request, supplying it with the names of all voters after the elections. (R. 19:63–105.) But MTI did not ask—after the elections—for the names of MMSD employees who had voted as of November 10 and 17. If it had, Scott would have made efforts to obtain the records and disclosed them. (R. 22:2 ¶ 9.)

For any of these reasons, a finding that Scott should have disclosed the real-time requests after the election ended is not sound. There was no public records law violation.

***

Wisconsin is "a State committed to open and transparent government, but if disclosure results in greater public harm than nondisclosure, the scale must tip in favor of nondisclosure." *Democratic Party*, 372 Wis. 2d 460, ¶ 24. Such is the case here. More harm than good would have come from disclosure of MMSD non-voters' names during the 2015

certification elections. The circuit court's decision should be reversed.

II. MTI is not entitled to recover any of its attorney's fees because it did not prevail in whole or in substantial part in the § 19.37(1)(a) mandamus action or, in the alternative, its fees should be substantially reduced.

Assuming, arguendo, that Scott violated the public records law, the circuit court erred in holding that MTI is entitled to recover all of its attorney's fees. If Scott must pay attorney's fees, at most MTI is entitled to them up to the point in time Scott provided the sought-after records during discovery.

A. MTI is not entitled to attorney's fees because it did not prevail in whole or in substantial part in the mandamus action.

Even if, for argument's sake, that MTI was entitled to a ruling about the real-time records, it would not be entitled to fees. Under the public records law, attorney's fees are reserved for situations where the proceeding is necessary to the release of records; it does not apply where, as here, a requester simply seeks an abstract legal ruling.

A requester who "prevails in whole or in substantial part" in a § 19.37(1) mandamus action "relating to access to a record or part of a record under s. 19.35(1)(a)" shall be awarded attorney's fees and costs. Wis. Stat. § 19.37(2)(a). A plaintiff "must [1] show 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 (brackets and numbers added). Mandamus is not backward looking: "[M]andamus will not lie to compel performance of an act by a public officer unless the act be one that is actually due from the officer at the time of the

application." *State ex rel. Racine Cty. v. Schmidt*, 7 Wis. 2d 528, 534, 97 N.W.2d 493 (1959) (citation omitted).

In a public records case, when the evidence of causation is documentary, this Court reviews the trial court's findings de novo. *Racine Educ. Ass'n v. Bd. of Educ. for Racine Unified Sch. Dist.*, 145 Wis. 2d 518, 521, 427 N.W.2d 414 (Ct. App. 1988).

Here, MTI received a legal ruling about past acts—failure to release records in real time—not documents. The "prosecution of the action" was not "necessary to obtain" a record, which is all the fees provision may cover. *WTMJ*, 204 Wis. 2d at 458–59. The action was not necessary to MTI receiving the records because Scott would have, if asked, disclosed the records sought after the elections—but he was not asked. (R. 22:2 ¶ 9.) Presumably, he was not asked because MTI no longer wanted the records after the election. Thus, this case does not present the normal situation where a requester seeks to disgorge a record via mandamus, and so the fees are not available.

The lack of a causal connection here is reinforced by the fact that the circuit court did not even issue a finding of fact regarding a causal nexus. This is crucial because "the mere filing of a complaint and the subsequent release of the documents is insufficient to establish causation." *WTMJ*, 204 Wis. 2d at 459. Because the trial court did not find that MTI's mandamus action was a substantial factor in contributing to the release of the records, MTI is not entitled to recovery of any of its attorney's fees.

B. MTI is not entitled to attorney's fees incurred after Scott released the records during the litigation.

In the alternative, even if MTI is entitled to some attorney's fees, it is not entitled to all of them. It should be cut off as of the date the real-time records were disclosed.

The fee subsection references the plaintiff's mandamus action "relating to access to a record." Wis. Stat. § 19.37(2). A fees award under § 19.37 can only be based on release of the sought-after record. Here, the circuit court properly refused to grant MTI's request for a mandamus order because Scott had already provided it with the sought-after records during discovery. Specifically, the circuit court held that Scott's disclosure mooted the § 19.37 remedy of mandamus. (R. 59:26, Tr. Nov. 2, 2016, App. 128.) Nonetheless, the circuit court decided the lawfulness of Scott's denials through a declaratory judgment. (R. 58:47–48, Tr. Sept. 2, 2016.)

Assuming the circuit court was correct that MTI's action met the exception for mootness because it was capable of repetition yet evading review (R. 58:11–12, Tr. Sept. 2, 2016), it still had no basis to force Scott to pay MTI attorney's fees associated with its choice to continue the litigation for a declaratory ruling. Once MTI had access to the records it sought, it lacked statutory authority to recover its attorney's fees from Scott. The civil action was no longer "relating to access to a record." Wis. Stat. § 19.37(2). Scott should not be required to pay the $23,941.50 in attorney's fees incurred for MTI's choice to seek a declaratory ruling after actually obtaining the records it sought.

If MTI is entitled to any attorney's fees, it is only for those incurred through the date of Scott's disclosure of the records during discovery. The fees award should be significantly reduced.

C. MTI is not entitled to attorney's fees for bringing an ex parte motion in an attempt to significantly reduce Scott's time to answer the complaint.

Finally, this Court should not permit MTI reimbursement for attorney's fees for all work related to its failed ex parte motion; a motion that was highly unusual and inappropriate to begin with.

On appeal, this Court will uphold the circuit court's award unless it erroneously exercised its discretion. *See Kolupar v. Wilde Pontiac Cadillac, Inc.*, 2004 WI 112, ¶ 22, 275 Wis. 2d 1, 683 N.W.2d 58. The circuit court must "employ a logical rationale based on the appropriate legal principles and facts of record." *Vill. of Shorewood v. Steinberg,* 174 Wis. 2d 191, 204, 496 N.W.2d 57 (1993). Fees are properly discounted when the work related to a frivolous motion s "easily separable" from the work on merits. *Radford v. J.J.B. Enterprises, Ltd.*, 163 Wis. 2d 534, 550, n.2, 472 N.W.2d 790 (Ct. App. 1991).

Here, Scott convinced the circuit court to vacate its earlier ex parte order. The court held that MTI had no basis for filing an ex parte motion against a state officer in his official capacity as records custodian and no basis under the public records law for reducing a record custodian's usual time to answer from 45 days to 20 days. (R. 14.) Nonetheless, the circuit court granted MTI its motion for attorney's fees—$2,970.00—for this work.[7]

This Court should reverse and follow its reasoning in *D.S.G. Evergreen F.L.P. v. Town of Perry*, 2007 WI App 115, 300 Wis. 2d 590, 731 N.W.2d 667. In that case, a condemnation proceeding, the court denied the plaintiff

[7] A brief chart detailing MTI's itemized billing on this issue is found in Scott's briefs filed with the circuit court. (R. 39:6.)

reimbursement for attorney's fees for time spent on an ultimately unsuccessful temporary restraining order. The court held these fees were not "reasonable" under Wis. Stat. § 32.28(1) because the plaintiff had not met the legal requirements of irreparable harm and inadequate remedy at law. *Id.* ¶¶ 1, 21–22.

Here, the circuit court erroneously exercised its discretion in awarding MTI its attorney's fees related to its unsuccessful ex parte motion after ruling that it had no legal basis to bring it in the first instance. MTI should not be rewarded for a near-frivolous act.

CONCLUSION

Appellant James R. Scott asks the Court to vacate the circuit court's order granting summary judgment to MTI, and instead grant Scott's summary judgment motion, dismissing the case against him. In the alternative, Scott asks this Court to vacate the circuit court's order awarding MTI attorney's fees and costs, or a significant portion of that award.

Dated this 27th day of March, 2017.

Respectfully submitted,

BRAD D. SCHIMEL
Wisconsin Attorney General

STEVEN C. KILPATRICK
Assistant Attorney General
State Bar #1025452

Attorneys for Defendant-Appellant

Wisconsin Department of Justice
Post Office Box 7857
Madison, Wisconsin 53707-7857
(608) 266-1792
(608) 267-2223 (Fax)
kilpatricksc@doj.state.wi.us

CERTIFICATION

I hereby certify that this brief conforms to the rules contained in Wis. Stat. § 809.19(8)(b), (c) for a brief produced with a proportional serif font. The length of this brief is 7266 words.

Dated this 27th day of March, 2017.

STEVEN C. KILPATRICK
Assistant Attorney General

CERTIFICATE OF COMPLIANCE WITH WIS. STAT. § (RULE) 809.19(12)

I hereby certify that:

I have submitted an electronic copy of this brief, excluding the appendix, if any, which complies with the requirements of Wis. Stat. § (Rule) 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 this 27th day of March, 2017.

STEVEN C. KILPATRICK
Assistant Attorney General

APPENDIX CERTIFICATION

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 Wis. Stat. § 809.19(2)(a) and that contains, at a minimum: (1) a table of contents; (2) the findings or opinion of the circuit court; and (3) 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 one or more initials or other appropriate pseudonym or designation, 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 this 27th day of March, 2017.

STEVEN C. KILPATRICK
Assistant Attorney General

CERTIFICATE OF COMPLIANCE WITH WIS. STAT. § (RULE) 809.19(13)

I hereby certify that:

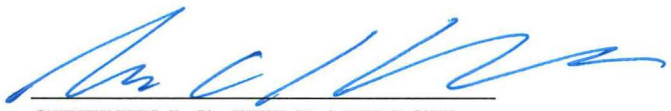
I have submitted an electronic copy of this appendix, which complies with the requirements of Wis. Stat. § (Rule) 809.19(13).

I further certify that:

This electronic appendix is identical in content to the printed form of the appendix filed as of this date.

A copy of this certificate has been served with the paper copies of this appendix filed with the court and served on all opposing parties.

Dated this 27th day of March, 2017.



STEVEN C. KILPATRICK
Assistant Attorney General