STATE REPRESENTATIVE
Garey Bies
1ST ASSEMBLY DISTRICT

Testimony of Representative Garey Bies
Assembly Committee on Government Operations and State Licensing

AB 26- Recovering the Cost of Redacting Information from a Public Record

Chairman August, committee members. Thank you for the opportunity to submit testimony in support of Assembly Bill 26.

Wisconsin's public records law allows any person to request government records and with few exceptions the records need to be released to the requester. The law also authorizes fees for reproducing and transcribing of a record, photographing and photographic processing; locating a record; and mailing or shipping copies or photographs of records.

The law however, doesn't allow a government entity to charge a person who requests public records for the time spent redacting confidential information that cannot be disclosed to the requester. Assembly bill 26 amends the public records law and provides that a record custodian may impose a fee upon the requestor for the actual, necessary and direct cost of deleting, redacting, or separating information that isn't subject to disclosure from a record.

In a case decided last year, the Wisconsin Supreme Court ruled that the plain language of the law doesn't allow charging for the process of redaction. However, the justices acknowledged the potential downside of the decision on governmental bodies. In her concurring opinion, Justice Roggensack noted that the court's decision will likely result in one of two scenarios: (1) taxpayers will be required to pay for the statutorily required separation of voluminous public record requests, rather than the person who will receive and use the records; or (2) public record requests will go unmet due to a lack of necessary personnel to do the separations, while at the same time continuing to carry on the normal operations of the custodial authority. Although the justices all agreed with the final conclusion reached by the court, several justices asked the legislature to revisit the law to consider the ramifications of the court's decision.

After the ruling, I was approached by a county supervisor in my district who asked me to look into this and shared some of the experiences they've had trying to comply with large requests. Often times the requestor never retrieves the results after staff spent a great deal of time fulfilling the request. I continue to hear similar stories from clerks and county administrators across the state.

First for Wisconsin!

Capitol: P.O. 8952, Madison, WI 53708-8952 • (608) 266-5350 • Fax: (608) 282-3601
Toll-Free: (888) 482-0001 • Rep.Bies@legis.wi.gov
www.legis.state.wi.us/assembly/asm01/news/

Home: 2520 Settlement Road, Sister Bay, WI 54234 • (920) 854-2811

As Justice Roggensack wrote in her concurring opinion: "fundamentally, this case implicates public policy choices: whether the taxpayers or record requestors should bear the financial burden of statutory record separations…"

This bill won't affect most public record requests, which can be handled easily without a great deal of staff time or expense. And under the law, a record custodian can waive any associated fees.

The goal of this bill isn't to limit access to public records, but rather to protect the integrity of the law.

Once again, thank you for taking the time to let me testify in support of Assembly Bill 26. I'd be happy to answer any questions you may have.

WISCONSIN
COUNTIES
ASSOCIATION

22 EAST MIFFLIN STREET, SUITE 900
MADISON, WI 53703
TOLL FREE: 1.866.404.2700
PHONE: 608.663.7188
FAX: 608.663.7189
WWW.WICOUNTIES.ORG

MEMORANDUM

TO: Honorable Members of the Assembly Committee on Government Operations and State Licensing

FROM: David Callender, Legislative Associate

DATE: February 27, 2013

SUBJECT: Support for Assembly Bill 26

The Wisconsin Counties Association supports Assembly Bill 26.

Under current law, the custodian of a public record may charge the requester of a record for "the actual, necessary and direct cost" of locating, copying, and mailing of a record that is subject to the state's open records law.

However, recent Wisconsin Supreme Court decisions as well as legislative changes have increased the need for counties and other public records custodians to redact certain information from public records before making the information public.

In *Milwaukee Journal Sentinel v. City of Milwaukee*, the Wisconsin Supreme Court ruled that a custodian's ability to charge for locating, copying, and mailing a record does not extend to cost of redacting personal and other information from a record. The Court stated that the Legislature must specifically act to include such costs before a local government can recover them.

WCA has long supported providing as much public access to public records as possible. However, when the cost of providing those records to individuals imposes a substantial burden to local taxpayers, then those costs should be borne by the requester, as the law already allows for locating, copying, and mailing of records. The cost of redacting information from a record is no different -- it is part of the cost of providing a record to an individual who requests it.

WCA believes that Assembly Bill 26 provides a common-sense approach to these costs and respectfully requests the Committee's support for the legislation.

Please feel free to contact WCA for further information.

Wisconsin Freedom of Information Council

DEVOTED TO PROTECTING WISCONSIN'S TRADITION OF OPEN GOVERNMENT

Rep. Tyler August, chairman
Committee on Government Operations and Licensing
Room 119 West, State Capitol
P.O. Box 8952
Madison, WI 53708

Feb. 27, 2013

Dear Rep. August, and members of the committee:

Thank you for this opportunity to comment on AB 26. I represent the Wisconsin Freedom of Information Council, a statewide group that seeks to protect access to public meetings and records. The group has about two dozen members, including representatives of its five sponsoring organizations: The Wisconsin Associated Press, Wisconsin Newspaper Association, Wisconsin Broadcasters Association, Wisconsin News Photographers and Society of Professional Journalists.

I have been a member of the Council for more than 20 years and its president for nine. This bill represents by far the most serious threat to open government in Wisconsin that I have seen during this time. I consider it the most serious threat to the state's Open Records Law since the law's current version was passed in 1981.

AB 26 effectively imposes a new tax on members of the public who seek to use the Open Records Law. It is intended to legalize a practice that the Wisconsin Supreme Court determined was illegal, and which the law as passed — and presumably as intended — does not allow.

Indeed, charges for reviewing and redacting appear contrary to the second sentence of the law's Declaration of Policy (19.31, state Stats.): ["P]roviding persons with ... information is declared to be an essential function of a representative government and an integral part of the routine duties of officers and employees whose responsibility it is to provide such information."

The law says it is an integral part of public officials' jobs to make records available. Doing what they are paid to do is not something for which they can charge extra.

And for more than two decades, they didn't. But in 2007, the Wisconsin Supreme Court issued a decision in a case called *Osborn v. the Board of Regents*. A conservative research group had sued the university system over its failure to release records. The court sided with the conservative group, and ordered that the records be released. But in its decision, the court included some imprecise language about the ability of custodians to charge for the cost of providing records, without specifying which costs could be passed on.

Thereafter, some but not all custodians began using this language to charge requesters for the cost of reviewing and redacting records, which had never been done before. In *Milwaukee Journal Sentinel v. the City of Milwaukee*, decided last year, the Wisconsin Supreme Court ruled unanimously that this practice is not permitted under the state's Open Records Law. This bill would change the law to allow these charges to be imposed.

The problem isn't that this bill may be used in some cases to help custodians recover their

actual, necessary and direct costs of providing records. The problem is that it will be inevitably be abused as a tool to beat back certain unwelcome records requests by making them unaffordable.

Wisconsin's Open Records Law contains few bright lines as to what must and what should not be released. For the most part, custodians are asked to balance the presumption that the public is entitled to maximum access against any harm that can come from releasing certain information.

Custodians respond to this duty in widely different ways, based on how they interpret their obligations under the law. Some redact, and some don't, under nearly identical situations.

I would like to give the committee a concrete example, concerning a pair of major open records requests made in early 2011.

One request was for the emails received by Gov. Scott Walker in response to his proposed changes to the state's collective bargaining law. In the end, the governor decided to release all of these emails — more than 50,000 of them — without a single redaction.

No one sued the state for violating his or her privacy, even though at least one person lost his job after his email to the governor came to light. I'm not aware that this wholesale release generated any complaints. And afterward, the governor took the simple step of posting a note on his website, at the portal used to receive email messages (see http://www.wisgov.state.wi.us/Contact-Us). It states:

"We encourage the citizens of Wisconsin to communicate with the Governor's Office. Please know that any communications may be subject to release under Wisconsin's public records law and that our policy is generally to release communications sent to the email address below. We encourage you not to disclose private, confidential, or personally identifying information if you do not want that information released to the media or general public."

Problem solved.

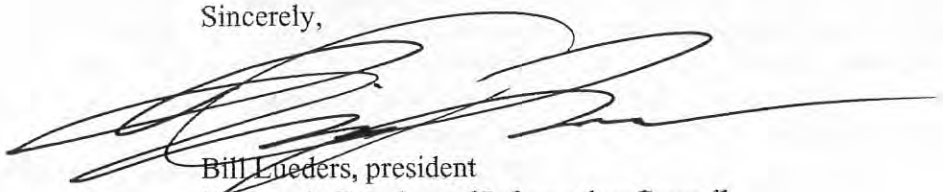
Around this same time, a member of the state Senate who left the state to avoid passage of the bill was asked by the MacIver Institute, a conservative think tank, to provide the emails he had received regarding the collective bargaining bill. That senator decided that these could not be released without extensive redactions of identifying information, which were performed.

The MacIver Institute is now suing this state senator, arguing that the redactions were illegal. Had this bill been law at the time the senator processed the request, he would have been able to charge the MacIver Institute upfront for however much time it took his staff or his lawyers to make what may ultimately be determined to be illegal redactions.

That is the problem with this bill. It could and it would be used by public officials as a tool to beat back records requests that they would rather not have to fulfill. It would impose and give the force of law to substantial fees that custodians have not charged in the past — except for a brief period, when they were doing so illegally.

AB 26 would undercut the state's Open Records Law in those cases where it matters most: when public officials really don't want something to become public. Please don't let that happen.

Sincerely,



Bill Lueders, president
Wisconsin Freedom of Information Council

River Valley Newspaper Group

Chris Hardie
Executive editor
chardie@lacrossetribune.com
401 N. Third St.
La Crosse, WI 54601
(608) 791-8223

Feb. 27, 2013

To honorable members of the Committee on Government Operations and State Licensing

My name is Chris Hardie, executive editor and weekly newspaper publisher with the River Valley Newspaper Group. We are based out of La Crosse and represent the La Crosse Tribune, Chippewa Falls Herald and nine other weekly papers in Wisconsin. I am also a vice president on the Wisconsin Newspaper Association board of directors representing many other papers throughout the state.

I ask that you please consider my testimony in opposition to AB 26.

It has been my privilege to have worked as a journalist in the newspaper industry for nearly 30 years. It has always been my sincere belief that I was called into this service and I take that role very seriously.

As a journalist, I have relied heavily on one of the great laws of Wisconsin, the Public Records Law. That law, in its simplest form, says that government records are open to public inspection, unless there is an exemption clearly provided for in the law. I believe the wisdom of the legislators who passed this law firmly believed – as I do – that the best government is one that conducts its business before the public.

So whenever there is a proposal to change to this law, I take a keen interest to ensure that that public access is not restricted. Although that may not be the intent of AB 26, I believe the broad parameters of the bill would open the door to less public access.

The court case involving the Milwaukee Journal Sentinel vs. the City of Milwaukee which is mentioned in the Legislative Reference Bureau analysis must be considered more closely. The newspaper asked for reports as part of an investigation of the Milwaukee Police Department and how it classified crime data.

The newspaper has already been provided 100 copies of the reports for free when the city demanded $4,000 that it says was to cover costs of redaction time. The newspaper found that police had misreported thousands of violent crimes, failed to correct the problems and failed to disclose them. Those findings were later confirmed by a consultant hired by the city, but only after the newspaper released its findings.

It may be a messy process at times, but that's how public access works. Departmental policy was corrected and improved after the public was informed that something was wrong. Clearly there were employees at the city of Milwaukee who were likely unhappy that the newspaper was examining how the police department was operating. But their feelings – or any feelings of any record custodian in the state – are moot. The law says public documents belong in the public view.

I routinely have reporters who filed request for public documents as we seek to inform the public. Examinations and scrutiny of public documents is a crucial part of our democratic system of checks and balances. Government serves its citizens best when it is done in the open, for all to see. And openness and access is for all citizens, not just journalists.

The state law already has clear instructions on charging people for actual and necessary costs of reproducing records. But AB 26 contains no parameters for redaction fees. This proposed change would make it convenient for custodians to throw an outrageous redaction fee as a roadblock to release public records. It would be far too easy under the law change for public officials who don't want records released to say that a highly paid attorney must review the records for redactions — even if they're not required — and quote a ridiculous charge, hoping that the requestor will simply go away.

Sadly, it's not uncommon that our requests for public documents are ignored, delayed or challenged under existing law. This redaction change would only add another layer of unnecessary obstruction to the public's right to know. And I must point out that making redactions on documents has always been a part of producing public documents.

I would be very skeptical of claims that record holders are being overburdened and harmed by overwhelming records request that require extensive redaction. A well-trained public official knows that most public records require no redaction. We all understand the budget restraints facing public officials, but if cost is a consideration; it must be put in the context of all other government expenditures. There are many more pressures on public budgets than those that come from redacting public records.

After all, isn't it the duty of public officials to provide public service? It is the public that pays for their means of living and the maintenance and inspection of public documents is part of their job. Making people pay for access to their own public records amounts to another tax on freedom.

Amending a good law with a bad amendment does not equal good government. In the end your conclusion should be as it always is under good Wisconsin government – by making the best decision for the public you represent. Restricting the public to more of the government's business is not the open Wisconsin government that we all treasure.

Respectfully submitted,

Chris Hardie

122 W. Washington Avenue
Suite 300
Madison, Wisconsin 53703-2715

608/267-2380
800/991-5502
Fax: 608/267-0645

E-mail: league@lwm-info.org
www.lwm-info.org

To: Assembly Committee on Government Operations and State Licensing
From: Curt Witynski, Assistant Director, League of Wisconsin Municipalities
Date: February 27, 2013
Re: AB 26, Charging Cost of Redacting Confidential Information from Public Records

The League of Wisconsin Municipalities supports AB 26, allowing governmental entities to charge records requesters the cost of redacting confidential information from a record before releasing it.

As Justice Roggensack stated in her concurring opinion in *Milwaukee Journal Sentinel v. City of Milwaukee*, 341 Wis.2d 607 (2012), which held that state law doesn't allow a public records custodian to charge a fee for redacting confidential information from a record:

> "*It would be helpful if the legislature were to revisit the cost issues that have become prominent in public record requests and determine whether the taxpayers should bear the full financial burden for public record requests or whether requesters should be active participants in the cost involved in required record separations.*"

In the majority of cases, municipalities are able to respond to public records requests rather easily without a lot of staff time or expense. However, when requests generate a large number of records requiring the redaction of confidential information, municipalities must spend extraordinary amounts of staff time and resources to comply with the request as required by law.

The League and its member municipalities have always strongly supported providing as much access to public records as possible. Open, transparent government is the cornerstone of our democracy. However, it cannot be ignored that making public records accessible comes with a cost. Moreover, local governments are operating in an era of extremely tight finances. It makes sense from a public policy perspective, therefore, to require records requesters to share in the cost of making records accessible.

Current law recognizes that the requester should bear some of the cost of accessing public records. The custodian of a public record may charge the requester of a record for "the actual, necessary and direct cost" of locating, copying, and mailing of a record. AB 26 merely extends this cost recovery authority to include the cost of redacting confidential information from a record.

Critics of the bill claim it will block access to public records. Yet, prior to the *City of Milwaukee* decision, at least some municipalities were charging for the cost of redaction without negative impacts on access. What AB 26 will do if enacted is cause records requesters to narrowly specify the record they seek, rather than make broad, open-ended requests that take time and cost money.

We urge you to recommend passage of AB 26. Thanks for considering our comments.

To: Assembly Committee on Government Operations and State Licensing
From: Curt Witynski, Assistant Director, League of Wisconsin Municipalities
Date: February 27, 2013
Re: AB 26, Recovering Cost of Redacting Confidential Information from Public Records

Comments and Examples of the Cost of Redacting Public Records from Several Communities

Eau Claire

I'm writing to follow up on our conversation yesterday about AB 26. The majority of our larger requests are at the police department for police reports and human resources for personnel files. They also tend to be on higher profile issues such as employee terminations, homicides, officer involved shootings, fire with deaths, etc., so there is a likelihood of a high volume of reports and potential information that legally must be redacted or at least reviewed for redaction. And, because the release of these types of records could be legally challenged, it is necessary to have a higher paid and properly trained employee do the redaction of the records.

Here are some past examples of the costs our organization has had for redaction that currently we could not charge for under the Milwaukee Journal Sentinel case of 2012.

- Suspicious death case: Police report at 1903 pages ($475.75 copy fee) plus 22 hours to review and redact ($394.95).
- Death case: Police report at 280 pages ($70 copy fee) plus 6 hours to review and redact ($107.71).
- Employee record request: payroll time sheets, personnel file estimated at 150 pages at 25 cents per page, $27 per hour for redaction (unknown number of hours).
- Contractor record request (7 projects): estimated 1,200-1,500 pages at 25 cents per page, 10 hours for redaction at approximately $250.
- Payroll records (2 construction projects): $312.50 for copies and redaction.
- City vehicle accident and personnel file: 253 pages ($154.16 copy fee) and $79.91 for redaction.
- Personnel file on multiple employees: 239 pages and appx. 5 hours of redaction time ($246.87 total)

The police department has many requests for records each day. A recent example was a neighbor who wanted to know about an incident at a nearby address. It was a 50 page report involving at least 8 juveniles. It took approximately 2 hours to redact.

Racine

Prior the *Milwaukee Journal-Sentinel* case, the City of Racine generally used the rationale found in *Osborne* and *WireData* for charging requesters the "actual, necessary and direct" cost of complying with records requests. As records cannot be released without individual review and possible redaction, it is an actual, necessary and direct cost to prepare the records for release. We had several cases (see examples below) where the City would have incurred substantial, unbudgeted-for costs simply because a requester desired large amounts of records. Often, requesters make broad requests for information without regard for the actual cost to comply with the requests. Currently, I have pending a request for the *entire* personnel files of three police officers involved in the arrest of the requester/defense attorney's client. These officers have been on the force for a collective 22 years, and careful review of each and every document within their files is required. Additionally, the requester wants the officers' health-related information, including health and medical related payment information, workers compensation information physician reports medical bills. Great care must be taken to review and redact such information, which I estimate conservatively to take me two days. At $50.00 per hour (wages plus benefits), the current status of the law means that the taxpayer must eat this $800.00 cost for the benefit of this private requester.

A few other examples:

1) Currently, I have pending a records request from a blogger for the Mayor's emails on a particular topic, which yielded results of 604 pages of emails and attachments. While we may charge for the actual copies, we cannot charge for staff time to review and redact them, which I estimate will take 4 hours.

2) In summer 2012, a blogger requested eight (8) months' worth of the mayor's e-mails. The Deputy City Attorney spent 4 hours reviewing and redacting them.

3) In summer 2012, several requesters made requests for election-related records, including same day voter registration records. The Deputy City Clerk spent at least 100 hours reviewing and redacting personal information from voter registration documents, costing the City approximately $1,280.00.

4) In mid-2012, the local newspaper made requests for records related to the search for a new police chief. The Deputy City Attorney spent 6 hours reviewing and redacting records.

5) In summer 2010, an elected official requested records kept by our Director of Environmental Health and related to her position on the Humane Society Board of Directors. The time estimate to review and redact the records was $400.00, or about 8

hours of work at a staff rate of $50.00/hour (wages plus benefits). We cited *Osborne* and *WireData* as authority to charge for actual, necessary and direct costs of complying with the request, and the requester chose not to pay the cost.

6) In 2009, a blogger requested seven (7) years' worth of e-mails of then-mayor Gary Becker. Our MIS Department estimated that there were 100 emails per day. A conservative estimate of 261 work days per year, that's 26,100 emails per year, or 182,700 emails over seven years, that required review and redaction. I estimated it would take me 168 hours to review the emails, which, at first glance seems high, but is a rate of 1,088 emails reviewed *per hour*.

7) Various requests from criminal defense attorneys seeking entire personnel files of law enforcement personnel, without regard to costs of complying with such requests and without regard to relevancy requirements, since the public records analysis is different from the *Brady* analysis and its requirements of relevancy.

Great care must be taken to ensure that the public has a right to its records. However, many requests are so time consuming and so burdensome and staff are regularly redirected from duties that benefit the general public to duties that benefit the few, due to the current state of the law. It is not unreasonable to shift the actual cost of that redirection on to the individual or entity so requesting it.

Greenfield

In order to comply with the requirements of the Driver Privacy Protection Act (DPPA) and State Statutes limiting the release of juvenile information, as well as the need to protect the identity of victims and witnesses particularly the victims of assault and abuse, our staff spends hundreds of hours reviewing and redacting reports prior to release.

Attached is a redacted copy of a police report from a 2009 sexual assault investigation. Because the report contains multiple juvenile victims and interviews with others who make reference to those juvenile victims, the redaction process is painstaking and time consuming. This report took 21 hours to redact and review at a cost to the taxpayers of more than $1,000.00. Our allowable charge under the statute (the charge to the requester) was $78.25.

This bill would particularly impact small and mid-sized law enforcement agencies. Unlike Milwaukee, we don't have a full-time records staff. Our command officers are responsible for public records compliance. Each day, a Police Captain spends 1 – 2 hours reviewing and redacting reports prior to release. That's a cost to the taxpayers of more than $20,000 annually!

City of Pewaukee

The City of Pewaukee has received a number of requests for information that require the redaction of records, including a number of requests that were specifically related to abolishing our police department.

Some of the types of records that were requested and required redaction included such items as:

- copies of personnel records/files.
- emails between parties that contained names and personally identifiable information – each document had to have all personally identifiable information redacted.
- Police reports such as accident reports and investigations. Depending on the type of event, there can be a great deal of information that requires redaction before it can be released.
- Copies of credit card statements that require the redaction of credit card numbers and any other personally identifiable information.
- Copies of ATF Form 5 related to specific weapons.

These projects can take a great deal of time to complete. Some of the projects have consumed entire days/weeks, depending on the magnitude of the issue and who is the holder of the record. Some of these projects cannot be assigned to clerical staff as it is of a sensitive nature and requires a supervisor to complete the request.

It would be a great benefit to the taxpayers of this community if the City would be able to recover the lost wages for the redaction of records.

Village of Fox Point

Upon advice of our Village Attorney we are redacting any information which was obtained from DOT records to comply with the Driver Privacy Protection Act. As you can imagine most of our records including accident reports and incident reports containing information derived from DOT files. My administrative assistant is spending on average 4 to 5 hours/week redacting this information. The reports are then reviewed by another staff member to insure accuracy. It would be very helpful if we could recoup some of those costs.

To: Wisconsin Assembly: Committee on Government Operations and State Licensing
From: Milwaukee City Attorney's Office
Date: February 27, 2013
Re: 2013 Assembly Bill 26

The City of Milwaukee supports proposed 2013 Assembly Bill 26 which would amend the Wisconsin Public Records Law by creating a new section that would allow a record custodian to charge its actual, necessary and direct costs of deleting, redacting or separating information that is not subject to disclosure by law. We estimate that ninety to ninety-five percent of all public records requests do not require extensive redaction, but the remaining requests result in substantial costs to record custodians.

Under the current law, there are limited specific provisions for charging the costs of complying with public records requests. The current law includes no specific provision to allow a record custodian to charge a requester for the costs of redacting confidential, non-disclosable portions of records. Government entities, while coping with severe budgetary constraints, must spend extraordinary amounts of staff time redacting records as required by law. These costs are passed on to the taxpayers.

In *Milwaukee Journal Sentinel v. City of Milwaukee*, 2012 WI 65, the Wisconsin Supreme Court held that a record custodian may not charge a requester for separation costs, i.e., costs for redacting non-disclosable information as required under section 19.36(6), since there is nothing in the Public Records Law that specifically allows charging these costs. *Id.* ¶¶ 6, 42. The court rejected the City's argument that prior Supreme Court decisions expanded the fees that a record custodian may charge beyond those allowable under the specific language of section 19.35(3)(a)–(d). The specific provisions under which a record custodian may charge a requester includes charging for the cost of reproduction and transcription of a record; photographic and photographic processing; locating a record if the total cost is $50.00 or more; and, mailing or shipping of a copy or photograph of a record. *Id.* ¶ 23. (Wis. Stat. § 19.35(3)).

In concurring opinions, a majority of the court agreed with the lead opinion but recognized the significant burden the court's decision would place on records custodians and asked the legislature to revisit the "cost issues that have become prominent in public record requests and determine whether the taxpayers should bear the full financial burden for public record requests or whether requesters should be active participants in the cost involved in required record separations." *Id.* ¶¶ 81, 83. (Roggensack, J., concurring). The concurrence further wrote that ". . . the court's decision will likely result in one of two scenarios: (1) taxpayers will be required to pay for the statutorily required separation of voluminous public records, rather than the person who will receive and use the records; or (2) public records requests will go unmet due to a lack of necessary personnel to do the separations, while at the same time continuing to carry on the normal operations of the custodial authority." *Id.* ¶ 68. In the concurrence the court recognized the policy under the public records law as one of openness with a presumption of complete access to government records, but also recognized that "[t]he statutes enacted to further those policies indicate that the legislature did not anticipate voluminous public records requests such as those that the Journal Sentinel and others have made recently." *Id.* ¶ 74.

These costs include compliance with public records requests that cost record custodians thousands of dollars in terms of staff time to properly process these public records requests, including the cost to redact confidential information, as required by law, prior to disclosure. These costs are passed to the taxpayer "without any participation by the requester of the records. This is a problem that the legislature needs to consider." *Id.* ¶ 79. As Justice Prosser stated in his concurring opinion, "[t]axpayers are paying for vast amounts of data. Now taxpayers may have to pay to give that data away so that others can make a profit." . . .. "I join Justice Roggensack in asking the legislature to revisit the law to consider the ramifications of this court's decision." *Id.* ¶ 66. A majority of the Wisconsin Supreme Court justices asked the legislature to reconsider this issue.

The Milwaukee Police Department (MPD) and the Milwaukee Public School District have expended hundreds of thousands of dollars in staff time responding to various public records requests. For example, in the Supreme Court case that led to this proposed amendment, *Milwaukee Journal v. Milwaukee Police Department, et al.*, 2012 WI 65, the Journal reporters requested all CAD reports and summary incident reports of all sexual assaults, attempted sexual assaults, rape and attempted rape in 2009 throughout the City of Milwaukee. The police department passed the costs to redact undisputedly confidential information from these records for a total of $3,390.00. This included a very conservative time estimate of a total of 84.5 hours of staff time, at $40.12 per hour. The second request at issue was for all dispatch reports and incident summaries for 15 crime categories throughout the City of Milwaukee for a two-week period of time, ranging from domestic violence battery to homicide to auto theft. The MPD painstakingly sampled 100 of the total 743 responsive records. It took 15 hours at $40.12 per hour to redact confidential information from the requested records.

After the Supreme Court decision, the Journal Sentinel updated its request for the sexual assault reports to include all dispatch reports and all incident reports for 2011. There were 669 responsive records and 3,372 narrative records. The MPD estimated it would take approximately 582 hours, or 14½ weeks of one employee working full-time on this request for a total cost to the police department of $26,103.00. After an officer worked full-time on this request for 180 hours, or 4 ½ weeks, the Journal decided to take the records he had redacted to date and withdraw, for now, the remainder of the request.

The types of confidential information that must be redacted includes: social security numbers, student identifying information as required by Wis. Stat. § 119.125(2), and certain elector information (driver's license number, social security number, date of birth included on voter registration cards, as required by § 6.36(1)(b)). In all, there are over 200 specific statutory exceptions that mandate redaction prior to disclosure. In order to the share the costs of public records law compliance, as anticipated by the law, 2013 Assembly Bill 26 should be passed.

189639/1049-2011-10

McGILLIVRAY WESTERBERG & BENDER LLC
ATTORNEYS

February 27, 2013

Rep. Tyler August, Chair
Committee on Government Operations and Licensing
Room 119 West, State Capitol
P.O. Box 8952
Madison, WI 53708

Re: *Assembly Bill 26, an act creating 19.35(3)(cm) of the statutes relating to fees charged to access for public records*

Dear Representative August and Members of the Committee:

Thank you for this opportunity to comment on Assembly Bill 26. I am an attorney in private practice, and I often make Open Records requests in the course of my work. I have also represented individuals and entities who use the Open Records and Open Meetings Law. Additionally, I am vice president of the Wisconsin Freedom of Information Council.

I write to oppose Assembly Bill 26, because the authorization to charge redaction and separation fees will undoubtedly deter access to public records. This bill opens the door to records custodians charging requesters potentially exorbitant fees that would price many requesters out of obtaining the records they seek. Government officials seeking to conceal potentially damaging records would need only charge a high redaction fee to keep these records confidential. Even good-faith redaction fees may be too steep for many requesters, and may cause citizens, taxpayers, and constituents to give up before they ever get the information to which they are entitled.

Let me give you an example. A few years ago, when we first started to see custodians charging redaction fees, a friend, Melissa Scanlan, asked the City of Milwaukee's Office of the Comptroller for copies of all the private bids for the City's water works. As you'll recall, the City's proposal then to sell the water works was an issue of significant public concern. Ms. Scanlan received a letter back informing her that the 15 proposals the City received amounted to 1,050 pages of documents, which would already cost her $262.50 at the $0.25/page copying rate. A copy of the letter is attached.

But then, the City informed Ms. Scanlan that she must pre-pay for redaction time at the rate of $50.00/hour for an estimated four hours. On top of this, the City wished to charge her two hours of attorney time at $90.00/hour to review the redactions and ensure compliance with the City's "disclosure decisions." The total staff time amounted to $380.00, which with the copying costs came to $642.50. And the City wanted this pre-paid! As Ms. Scanlan was informed, the City would not even begin processing her request until the pre-payment check was received.

As it happened, after much back-and-forth with the City, Ms. Scanlan convinced the City to waive the attorney's fee and she obtained the redacted records. But this illustration goes to show how redaction fees, even for discrete requests like Ms. Scanlan's, can quickly climb to hundreds of dollars.

This example also reveals more specific problems with AB 26. The bill fails to specify the rates the public may be charged, and says only that the "actual, necessary, and direct cost" of redacting and separating information may be charged. This language works where the charge is for goods, such as copies, *see* Wis. Stat. § 19.35(3)(a), but it does not work for redaction fees, assuming such fees will primarily be for staff time. For example, is the redaction fee the partial or full hourly rate of the employee performing the redaction? Are fringe benefits included in that rate? And can the custodian assign the highest-paid staff person to conduct the redaction, such as an attorney, when qualified lower-paid staff are available to do the work? These are questions I have already had to address, and they will only accelerate if AB 26 passes. These questions are also unsettling to the taxpayer, who is already paying the salary and benefits of government staff responding to the request.

Another problem with the redaction fee as authorized by AB 26 is that there is no guaranteed way to avoid it, other than the hope that a custodian will waive the fee. This is unlike other charges currently authorized by the law, such as per-page copying fees. For example, a person who wishes to see government documents can appear in person at the relevant office, view the records, and thereby avoid paying any copying fees. Frequently, this will be enough to give the person the information he or she is seeking. Yet the same person who wishes to see the same documents must always pay a redaction fee once the custodian determines redaction is necessary, even if the requester never obtains copies.

Ironically, AB 26 may also fail at its stated aim: to save government offices money. Should custodians begin charging high redaction and separation fees, more requesters may be forced to file suit to challenge these fees and obtain the information they seek. More litigation means more costs for requesters, the courts, and especially custodians, who must typically pay a prevailing records requester's attorneys fees and costs. Wis. Stat. § 19.37. Even short of litigation, however, custodians may have to spend more time calculating and negotiating redaction time with unhappy requesters, and may not find redaction fees worth the trouble.

What is the consequence of limited access to information? As the first section of the Open Records law provides, "a representative government is dependent upon an informed electorate." Wis. Stat. § 19.31. Thus, any limitation on access to government information is a limitation on our very democracy.

Thank you again for the opportunity to comment on AB 26. Please reject this tax on the public's right to know.

Sincerely,

Christa Westerberg/MLT

Christa Westerberg

encl.

City of Milwaukee

Office of the Comptroller

W. Martin Morics, C.P.A.
Comptroller

Michael J. Daun
Deputy Comptroller

John M. Egan, C.P.A.
Special Deputy Comptroller

Craig D. Kammholz
Special Deputy Comptroller

October 29, 2009

Melissa K. Scanlan
Founder & Senior Counsel
Midwest Environmental Advocates
1845 N. Farwell Avenue, Suite 100
Milwaukee, WI 53202

Re: Public Records Request for Proposals Relating to Sell Side Services

Dear Ms. Scanlan:

This letter responds to your October 23, 2009 letter, received by this office on October 27, 2009, in which you have requested certain records pursuant to the provisions of the Wisconsin Public Records Law. Wis. Stat. §§ 19.31-39. You have requested copies of all the bids received by the City of Milwaukee in 2009 for Sell Side Services, related to the Milwaukee Water Works.

The public policy in this state is to give the public the greatest amount of access to public records as possible. Wis. Stat. § 19.31. The general presumption is that public records are open to the public unless there is a clear statutory or common law exception. If there is no clear statutory or common law exception the custodian must "decide whether the strong presumption favoring access and disclosure is overcome by some even stronger public policy favoring limited access or nondisclosure." *Hempel v. City of Baraboo*, 2005 WI 120, ¶ 28 (citations omitted). Notwithstanding the presumption of openness, the public's right to access a public record is not absolute. *Journal/Sentinel v. Aagerup*, 145 Wis. 2d 818, 822 (Ct. App. 1988).

Under the public records law, a custodian may charge the requester a fee for locating the records if the cost is $50.00 or more. Wis. Stat. § 19.35(3)(c). A custodian may also charge the requester the actual, necessary and direct costs of complying with a public records request. *Osborn v. Bd. of Regents of Univ. of Wis. Sys.*, 2002 WI 83 ¶ 48; *WIREdata v. Village of Sussex, et al.*, 2008 WI 69, ¶ 107. A custodian may request prepayment if the costs to be charged are more than $5.00. Wis. Stat. § 19.35(3); *State ex rel. Hill v. Zimmerman*, 196 Wis. 2d 419 (Ct. App. 1995). Section 19.35(3)(f) is "clearly

intended to protect an authority from squandering staff time, supplies and equipment usage for a substantial copying project that a requester might later disavow." Id. I request prepayment.

The records you have requested include 15 proposals. There are a total of approximately 1,050 pages of records that may be responsive to your request. The Comptroller's Office charges $.25 per page for copying. Accordingly, the total copying costs is estimated at $262.50. Additionally, I estimate that it will take my staff approximately four hours, at an average hourly cost of $50.00 per hour, to review the responsive records and to remove portions of the records that may not be subject to disclosure under the public records law. If any portions of the responsive records are redacted or withheld we will provide all statutory, common law and public policy reasons for the redactions in our response. Examples of portions of the records that may not be subject to disclosure are the portions of the proposal that were provided under a specific pledge of confidentiality, or that may include trade secrets or other proprietary information. See, *Mayfair Chrysler-Plymouth, Inc. v. Baldarotta*, 126 Wis. 2d 142, 171-72 (1991); *State ex rel. Bergmann v. Faust*, 226 Wis. 2d 273, 283 (Ct. App. 1999); 60 Wis. Op. Atty. Gen. 284 (1971); Wis. Stat. § 19.36(5) and 134.90(1)(c).

Additionally, we will ask our legal counsel to review the records to be disclosed to ensure complete compliance with the public records law and other state laws that govern our disclosure decisions. We anticipate our attorney will require approximately two hours to review the records for disclosability. The hourly cost of our legal counsel is approximately $90.00. Thus, the total staff costs for complying with this request is $380.00, and the total estimated copying costs are $262.50. Accordingly, the total cost of complying with your request is $642.50. I will track the actual hours spent and refund any excess deposit or bill you for the additional time. Please make your check payable to the "City of Milwaukee." I will not begin processing your request until I have received the prepayment check.

In the meantime if you have you have any questions or concerns, or if you wish to narrow your request, you may feel free to contact me.

Sincerely

Michael J. Daun

W. Martin Morics
Comptroller

WMM: MD

Rep. Tyler August, Chairman
Committee on Government Operations and Licensing
Room 119 West, State Capitol
P.O. Box 8952
Madison, WI 53708

Feb. 27, 2013

Dear Rep. August, and Members of the Committee:

Thank you for the opportunity to speak to your committee about legislative proposal AB 26. I am here representing the Milwaukee Journal Sentinel.

Last year the Wisconsin Supreme Court, in the case of Milwaukee Journal Sentinel v. the City of Milwaukee, ruled unanimously that the law did not allow for the costs of redacting to be passed on to the requesters of the documents. We consider AB 26 to be a serious threat to the state's Open Records Law. This new proposal is intended to undermine the purpose of the Open Records Law -- providing information to the public about the affairs of government. We strongly believe that there is no need to revise the Open Records Law following the court's ruling. Here's why:

-- There is no problem with the current law, and we're not sure what wrong this bill is attempting to right. We know of no concrete examples or significant complaints related to redacting from any government body other than the Milwaukee Police Department. We routinely work closely and tirelessly with record-keepers to make sure our requests are focused, narrow and specific. We do this with every request for public records that the Journal Sentinel has filed with Milwaukee police. We are a news business that wants to obtain the records as soon as we can. It is not in our best interest to burden record-keepers with unnecessary work that would delay the release of records.

-- The Open Records Law currently allows custodians to charge requesters for the cost of locating the records when the fee exceeds $50. In addition, requesters already are paying for copying costs. Last year alone, the Journal Sentinel spent more than $22,400 to obtain open public records and database searches, and over the last five years we've spent more than $86,000 on public records requests. Those totals do not include legal fees. The real problem is that this bill will be used, and abused, to eliminate certain unwelcome records
requests by rendering them unaffordable. Adding more fees on top of what already is required in the statute will put many record searches out of the reach of many news organizations, let alone the general public.

-- It is the responsibility of record-keepers to maintain orderly records so they can be retrieved effectively and efficiently. Many record-keepers in Wisconsin and elsewhere already have converted records to digital formats in ways that keep sensitive material in specific columns so that information can be redacted with a key stroke. In the Milwaukee police case, we had reason to believe crimes were being under-reported and tried to audit just two weeks of records. The department provided 100 incident reports at no charge but kept asking what we were looking for. After finding reason to look further, we asked for 750 additional reports. The department suddenly changed tactics, demanded $4,000 in redaction fees and said it would take nine months. We then asked the state Justice Department and the Milwaukee County district attorney for case records. They were able to provide us with data from 60,000 Milwaukee police cases at minimal cost. Thanks to those two sets of records, the public learned that the Milwaukee Police Department had downgraded thousands of serious crimes, lowering the city's publicly reported crime rate. This bill would encourage government officials to use claims of redaction time and costs to keep records secret. It would discourage government units from organizing digital records in ways that offer easy and inexpensive public access. This is the opposite of the Legislature's intent when it passed the Open Records Law.

We believe, in our democracy, that the public owns and has the right to see the records of its government, with a few reasonable exceptions. The Legislature believed this when it passed the State Open Records Law. Public records do not belong to administrators and bureaucrats -- some of whom, experience tells us, would use these proposed redaction fees to hide problems from the public and keep taxpayers and voters from learning about potentially embarrassing or even incriminating documents.

For our democracy to work, people must know what their government is up to. We need openness and transparency. We believe that adding yet another cost to gain access to public documents increases the potential for abuse, waste and ineffective management, at all levels of government. We respectfully ask that this bill be rejected.

Sincerely,

Michael Juley
Assistant Metro Editor/Police and Courts
The Milwaukee Journal Sentinel

Midwest Environmental Advocates

Committee on Government Operations and State Licensing
Hearing on AB 26
February 27, 2013

Midwest Environmental Advocates is strongly opposed to AB 26. The proposed change is inconsistent with the Declaration of Public Policy stated in ss. 19.31, "In the recognition of the fact that a representative government is dependent upon an informed electorate, it is declared to be the public policy of this state that all persons are entitled to the greatest possible information regarding the affairs of government and the official acts of those officers and employees who represent them. Further, providing persons with such information is declared to be an essential function of a representative government and an integral part of the routine duties of officers and employees whose responsibility it is to provide such information. To that end, ss. 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. The denial of access generally is in contrary to the public interest, and only in an exceptional case may access be denied."

Midwest Environmental Advocates is a non-profit public interest law center that provides technical and legal assistance to ordinary citizens concerned about public health and the environment. It is common for citizens to need information which they must obtain through open records requests. We receive a regular stream of calls from people needing help to realize their legal rights to information. It is not uncommon for citizens to experience difficulties in having their requests responded to directly and in a timely manner. In addition to processes that make it difficult to get information they need, open records requests are becoming increasingly costly. Even though ss. 19.35 (3)(e) gives authorities the option of reducing or eliminating fees if "...waiver or reduction in the fee is in the public interest," we are consistently turned down when we request reductions or waivers. The bill adds an unnecessary expense and additional time to an already cumbersome system.

In fact, in addition to an absence of waivers, it is not uncommon for access to cost saving file reviews are not allowed. An active citizen in Northeast Wisconsin, was told she couldn't physically review a file at her region DNR office and was given the option of having the entire file copied. The cost was more than $300. When she contacted the agency to protest, she learned she should have come in and looked through the file to save money. In the end, she had the choice to pay, be sent to collections for non-payment, or to hire a lawyer to file an administrative challenge to the fee. The DNR staff in her region are so understaffed they can't properly regulate animal waste runoff that contaminates more than 30% of private wells in the area. She paid the fee rather than tie up valuable staff time, at considerable expense to her family. This is not a unique story.

I strongly oppose the rushing through of additional barriers to citizens' access to information. A better use of the committee's time to your constituents would be to invite them to share their experiences in trying to obtain information they are legally entitled to. Make sure the policy you are suggesting to alter is functioning as it should before adding additional barriers.

Current law gives officers and employees reasonable time to respond to requests in light of the nature of the request and their practical ability to respond. Citizens already face considerable expenses and long periods of time waiting for information. The added burden of charging citizens for the "routine duties of officers and employees whose responsibility it is to provide such information," is inconsistent with clearly stated public policy.

Please talk to your constituents about their experience before rushing through a bill that diminishes open government and citizen rights. The notice for this significant change in state law was minimal. Many public interest organizations just learned about this hearing yesterday. The ordinary people most disadvantaged by this bill had no meaningful chance to participate and be heard. The first wave of public information about the bill was distributed yesterday via electronic networks. Like me, those lucky enough to hear about today's hearing would have very little time to prepare. Most people can't arrange time off work, let alone absorb the expense of driving hours to Madison for the ability to be heard for a couple of minutes with very little time to prepare. Do the right thing, think of the people in your districts that need you to act in the public's interest and vote no on AB 26.

Kimberlee Wright, Executive Director
612 West Main Street
Madison, WI 53703
(608) 251-5047 ext 4

WOODWARD
RADIO GROUP
Good People. Real Solutions. Shared Results.

2800 East College Avenue
P. O. Box 1519
Appleton, Wisconsin 54912-1519
(920) 734-9226
FAX: (920) 739-0494

February 26, 2013

Wisconsin State Assembly
Madison, Wisconsin

I am writing reference your co-sponsorship and support of Assembly Bill 26, legislation that would allow public agencies to assess fees for allowing access to public records.

As a member of the media I frequently pursue access to those records in the course of my duties. For that reason, I am adamantly opposed to the provisions of AB 26 that would allow custodians of those records to levy a fee for providing copies and redacting information contained therein.

Elected officials from all political parties, in speeches, often reference transparency in government. I have never heard the term "for a fee" attached to that argument. I am certain the framers of the public records laws did not envision such a provision added to the legislation.

Therefore, as a media member and a constituent of the great state of Wisconsin I urge you not to allow AB 26 to move forward. The current system of access to public records has worked well. Please do not alter the system.

Thank you for your thoughtful consideration to my request.

Ray Waiter
WHBY Radio
Appleton, Wisconsin