TODD NOVAK

STATE REPRESENTATIVE • 51ST ASSEMBLY DISTRICT

(608) 237-9151
Toll-Free: (888) 534-0051
Rep.Novak@legis.wi.gov

P.O. Box 8953
Madison, WI 53708-8953

DATE: November 15th, 2023

RE: Testimony on Assembly Bill 145

TO: Assembly Committee on Government Accountability and Oversight

FROM: State Representative Todd Novak

Thank you Chairman Steffen and members of the Assembly Committee on Government Accountability and Oversight for holding this public hearing on Assembly Bill (AB 145). This bill allows for the recovery of attorney fees and costs under the state's public records law when an authority voluntarily or unilaterally releases a contested record after an action has been filed in court.

Senator Stroebel and I began drafting this bill in response to a 2022 Wisconsin Supreme Court opinion (*Friends of Frame Park, U.A. v. City of Waukesha)* which held that the statutory interpretation of "prevail" in public records law will require a final decision on the merits, calling into doubt whether a records requestor could recover attorney fees if the government simply released the records *after* a lawsuit was filed but *before* a court could render a judgment.

As a result of this ruling, a dangerous trend may arise where government entities have increased power to withhold records as the public will need to weigh whether the litigation costs are worth expending to compel the release of the records. Even in cases where a records requestor decides to pursue litigation, a government entity can simply render the issue moot by releasing the records before the issue ever reaches the judge.

Our bill alters the statutory definition of "prevail" to allow courts to award attorney fees in instances where the voluntary release of a record was substantially related to a record requestor filing a lawsuit, effectively returning to the methodology used prior to the *Friends of Frame Park, U.A. v City of Waukesha* decision. This standard is also substantially similar to the standard that applies for a requester to obtain attorney fees and costs under the federal Freedom of Information Act.

Under the bill, a requester has prevailed in whole or in substantial part if the requester has obtained relief through any of the following means:

1. A judicial order or an enforceable written agreement or consent decree.
2. The authority's voluntary or unilateral release of a record if the court determines that the filing of the mandamus action was a substantial factor contributing to that voluntary or unilateral release.

TODD NOVAK

STATE REPRESENTATIVE • 51ST ASSEMBLY DISTRICT

(608) 237-9151
Toll-Free: (888) 534-0051
Rep.Novak@legis.wi.gov

P.O. Box 8953
Madison, WI 53708-8953

This standard is substantially the same as the standard that applies for a requester to obtain attorney fees and costs under the federal Freedom of Information Act.

Prior to being elected to the state legislature, I worked in the newspaper industry as an editor for 25 years. Since 2012, I have also served as the Mayor of Dodgeville. In both roles, I have seen firsthand how important it is to have strong laws protecting the public's right to open government.

Local newspapers work hard every day to cover important issues related to government administration, the use of local taxpayer dollars, and to highlight issues of public significance. This vital work is supported by requests for government records and would not be possible otherwise.

As the Mayor of Dodgeville, I have earned the trust and reputation as an effective leader through good governance and transparency. Public records hold local governments accountable and ensure that we are acting in the best interest of our constituents.

I am proud of the broad coalition of support we have built on this issue. Our proposal is supported by a broad coalition of supporters including the Wisconsin Newspapers Association, Wisconsin Broadcasters Association, Wisconsin Freedom of Information Council, Wisconsin Institute for Law and Liberty, Wisconsin Transparency Project and Americans for Prosperity – WI.

Thank you for your consideration of AB 145.

DUEY STROEBEL

STATE SENATOR • 20TH DISTRICT

Testimony on AB 145

November 15, 2023

Thank you Chairman Steffen and committee members for holding today's public hearing on Assembly Bill 145, a bill I authored with Representative Novak to clarify the definition of the term "prevail" under the section of the statutes governing the enforcement of Wisconsin's public records law. The purpose of AB 145 is to restore prior longstanding practice that would ensure our public records law functions as intended when a government actor gets taken to court for violating it. The Senate companion to AB 145 (SB 117) unanimously passed the Senate earlier this year.

If a records custodian wrongfully refuses to fulfill a public records request, current law allows the requester to file an action asking a court to order the release of the records. A requester can be awarded reasonable attorney fees to recover their legal costs if the requester "prevails" in the action. Since the modern public records law was enacted in 1982, requesters were generally deemed to have "prevailed" if the requested records were either (a) ordered to be released by the court, or (b) voluntarily released by the custodian following the filing of the court action, provided the requester could prove to the court that the action resulted in the release.

In July 2022, the Wisconsin Supreme Court ruled in *Friends of Frame Park v. City of Waukesha* that the definition of "prevail" in a public records action meant obtaining a judicial order directing the custodian to turn over the requested records. Consequently, a records custodian who gets taken to court has a perverse incentive. The custodian could make the case moot and prevent the requester from obtaining attorney fees by simply turning over the records before the court orders them to do so. The result will cause problems when implemented.

Historically, the enforcement of Wisconsin's public records law has been left almost entirely to a small number of private attorneys, as the attorney general and district attorneys rarely bring charges against records custodians. Attorneys who file public records lawsuits use contingency agreements that rely on fee-shifting provisions. In other words, a public records attorney's work relies on having some degree of certainty that a defendant will pay their fees if they are found to have violated the public records law. Without this certainty, it could become significantly more expensive and difficult for requesters to seek recourse for public records law violations, to the detriment of transparency and government accountability in Wisconsin.

AB 145 would define "prevail" under the public records law to be consistent with the methodology Wisconsin courts had traditionally employed for roughly four decades. The bill clarifies that a requester has "prevailed in whole or substantial part" if the requester obtained relief through either (a) a judicial order requiring the release of the records, or (b) the voluntary release of the records by the custodian, if the court determines that the lawsuit was a substantial factor in causing the release.

Thank you for your consideration of AB 145, and I would welcome any questions from the committee.

Capitol Office: PO Box 7882 • Madison, WI 53707-7882 • (608) 266-7513 • (800) 662-1227 • Fax: (608) 282-3560 • Sen.Stroebel@legis.wi.gov
District: (262) 343-2764

WISCONSIN INSTITUTE FOR LAW & LIBERTY, INC.
330 E. Kilbourn Avenue, Suite 725, Milwaukee, WI 53202-3141
414-727-WILL (9455) | Fax 414-727-6385 | www.will-law.org
Lucas@will-law.org | Direct: 414-727-7415

Testimony in Support of Assembly Bill 145

Assembly Committee on Government Accountability and Oversight

Chairman Steffen and members of the Committee:

Thank you for the opportunity to testify today in favor of Assembly Bill 145. My name is Lucas Vebber and I am an attorney at the Wisconsin Institute for Law & Liberty. To start, I'd like to thank Representative Novak and Senator Stroebel for your leadership in authoring this important bi-partisan legislation.

Many citizens and organizations have expressed interest—especially since the pandemic—in how the government is functioning: everything from how taxpayer dollars are being spent, and what is being taught in the classroom. Citizen access to public documents is important for government accountability and transparency. AB 145 would restore a key mechanism for holding government accountable.

Wisconsin's open records law is designed to ensure the greatest transparency for the workings of state and local government entities. Under Wis. Stat. § 19.35, an individual may request to review written records maintained by a public entity, and in most cases, the entity either provides copies of the requested records or makes them available for inspection.

When a government entity does not turn over records, Wisconsin law provides for a specific enforcement mechanism: a type of civil court action called mandamus. In a nutshell, a mandamus action allows an individual to go to court to seek the issuance of a writ of mandamus, which is an order to a government official to comply with a clear legal duty. That is, mandamus is a mechanism to compel government officials to act. Now, in my experience, most government actors comply with the law and go to great lengths to fulfill requests. But that is not always the case.

When an open records mandamus action is filed, and a requester prevails in whole or in part, under state law the requester is entitled to recover their attorney fees from the government entity. In some cases, once a mandamus action has been filed, the government entity simply turns over the records; in which case, the need for litigation is mooted and the case dismissed.

Historically, even if records were voluntarily turned over in this way, a requester was still permitted to recover the attorney fees incurred by the legal action. The requester was considered to have "prevailed" in the suit when the government entity voluntarily changed its behavior after the mandamus action was filed, and

the requester could show that the lawsuit was at least a "cause" of the records being released.

In a still somewhat recent Wisconsin Supreme Court opinion, Friends of Frame Park v. Waukesha, the court held that the statutory interpretation of "prevail" in open records law required a final decision on the merits before attorney fees could be recouped. Since the Friends of Frame Park ruling, it has become difficult to envision a scenario in which a requester can recover attorney fees if records are voluntarily turned over after a mandamus action was filed, but before a final decision on the merits.

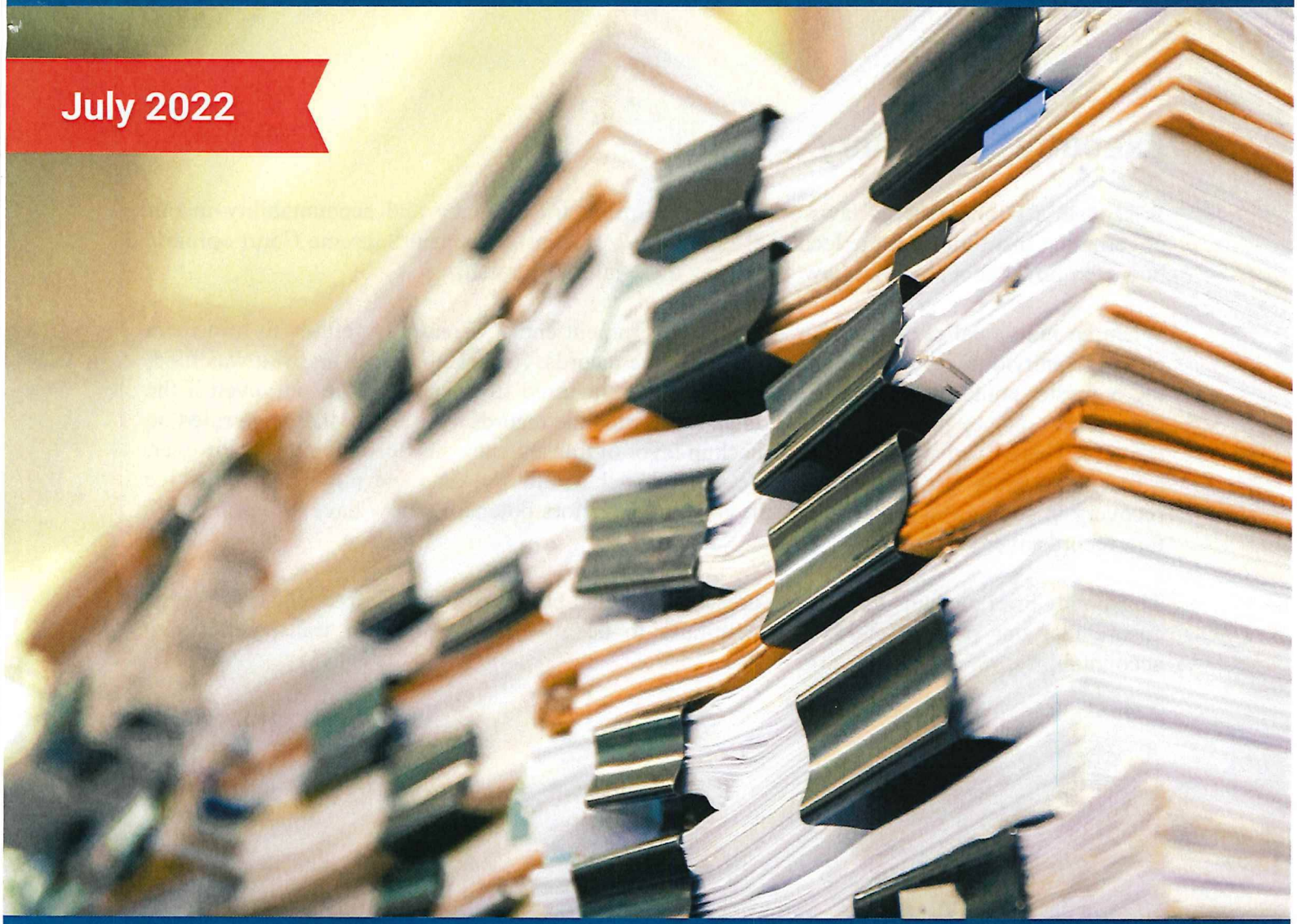
Why is this important? While the hope is that government entities comply with open records law (and again, in most cases that is exactly what happens), there have been numerous examples showing that is not always the case. In practice, government actors can now refuse to release records until a citizen has undergone the time and expense of filing a mandamus action (including hiring an attorney), to only then release those records, and potentially avoid having to pay any attorney fees.

Inability to obtain attorney fees upon prevailing in an open records lawsuit can make it prohibitively expensive for Wisconsinites to challenge denial of requests or excessive delay of responses. As a result, fewer attorneys will be willing to bring open records cases on a contingent fee basis, and the transparency and accountability that our open records law is meant to secure will be at risk.

In response to the Friends of Frame Park decision, WILL released a policy brief calling for legislative reforms that could restore the status quo, and make certain that everyday citizens do not lose this tool for holding government accountable. AB 145 would accomplish just this by altering the statutory definition of "prevail" to allow courts to award attorney fees in instances where the voluntary production of a record was substantially related to a record requestor filing a lawsuit. The standard in AB 145 is also substantially similar to the standard that applies under the federal Freedom of Information Act. Effectively, this legislation would return the practice back to what it was understood to be before the Friends of Frame Park decision.

I respectfully ask that you support Assembly Bill 145. Thank you for your time today. I would be happy to answer any questions.

July 2022



POLICY BRIEF

Broken Records

A Call for Legislative Reform in Wisconsin Public Records Law

Lucas Vebber
Deputy Counsel

Samantha Dorning
Bradley Foundation Legal Fellow

WILL
WISCONSIN INSTITUTE
FOR LAW & LIBERTY

Executive Summary

Wisconsin's public records laws are meant to ensure transparency and accountability in our government institutions at the local and state level. A recent Wisconsin Supreme Court opinion, however, unveiled a potential flaw in the way these laws are crafted.

When an individual requests records, and a government entity wrongfully refuses to turn them over, the individual may file a lawsuit to obtain the records. Historically, once that suit was filed, the requester could recover the attorney's fees they incurred from bringing the suit, even if the government agency promptly backed down and turned the records over before the judge ruled on the case. This served as an important check in favor of transparency and accountability. However, a recent Supreme Court decision made clear that the statutory language might *not* allow fee recovery in such instances—as a result, government actors potentially now have a reason not to turn records over promptly.

This policy brief explains the issue in greater detail, and proposes a very simple legislative fix to ensure that our public records law continues to be an effective tool for transparency and accountability.

Introduction: The Public Records Law

Wisconsin's public records law is designed to ensure the greatest transparency for the workings of government. Wisconsin's public records law operates similarly to its more popularized federal counterpart, the Freedom of Information Act. Under Wisconsin Statute § 19.35, an individual may request to review written records maintained by a public entity and in most cases the entity either provides copies of the requested records or makes them available for inspection.

When a government entity does not turn over records, however, Wisconsin law provides for a specific enforcement mechanism: a mandamus action. In a nutshell, a writ of mandamus is an order to a public official to comply with a clear legal duty. When such an action is filed, and a requester ultimately prevails in whole or in part, the requester is entitled to recover their attorney's fees from the government entity.

In some cases, once a mandamus action has been filed, the government entity simply turns over the records, in which case the need for litigation is mooted and the case dismissed. Historically, in such a case, a requester was still permitted to recover the attorney's fees incurred by the legal action. The requester was considered to have "prevailed" in the suit when the government entity voluntarily changed its behavior after the mandamus action was filed, and the requester could show that the lawsuit was at least a "cause" of the records being released. However, a recent Wisconsin Supreme Court opinion ordered that the statutory interpretation of "prevail" in public records law required a final decision on the merits before awards could be recouped, calling into doubt whether a requestor can recover fees in such instances.

Friends of Frame Park, U.A. v. City of Waukesha

In *Friends of Frame Park, U.A. v. City of Waukesha*, the court determined that "to 'prevail[ ] in whole or in substantial part' means the party must obtain a judicially sanctioned change in the parties' legal relationship." 2022 WI 57, ¶ 3, 976 N.W.2d 263. In concurring opinions, various Justices explained that this means that a party can only "prevail" under Wisconsin law when a court makes "a final decision on the merits" and "grants a judgement for one party over the other." Id. ¶ 22. (plurality op., Hagedorn, J., joined by Ziegler, C.J and Roggensack, J., quoting *DeGroff v. Schmude*, 71 Wis. 2d 554, 568, 238 N.W.2d 730 (1976)).

In the underlying case, the plaintiffs sought information from the defendant about the City's plans to install an amateur baseball field. They sent a public records request for the City's potential contracts and letters of intent with various baseball leagues. The defendant responded two weeks later with all documents except a draft contract with one of the league teams. The defendant stated that it could not yet disclose the contract for competitive bidding purposes, even though it had already been presented to the party with whom the City was negotiating. Approximately three months later, the plaintiffs filed a mandamus action under Wis. Stat. § 19.37 seeking the draft

contract, attorney's fees, and other expenses. However, the day after the suit was filed, the City's Common Council finished their negotiations on the contract and released the records to the plaintiffs.

On the issue of attorney's fees, the circuit court ruled in favor of the defendants, declining to award the fees, stating that it was the ending of negotiations that "caused" the release of the records, not the initial lawsuit. Accordingly, the plaintiffs appealed. Historically, the Wisconsin courts have followed a causal-nexus test (i.e., whether the filing of lawsuit itself was a cause of the release of the records) for determining when a party "prevailed" under the public records law. In *Friends*, the Court of Appeals applied that test, and went further to conclude that the City was acting contrary to the law. It ruled that the plaintiffs may be awarded some fees and costs under the law, and remanded the case. The City then petitioned the Supreme Court for review.

The Supreme Court rejected the appellate court's interpretation of "prevails" under Wis. Stat. § 19.37 and, instead, declared that "to 'prevail[ ] in whole or in substantial part' means the party must obtain a judicially sanctioned change in the parties' legal relationship." *Id.* ¶ 3. This is the only part of the opinion that had a clear majority on the Court, so it leaves some uncertainty as to the reasoning of the Court and how this will be applied going forward.

Nonetheless, this interpretation of "prevail" could significantly impact enforcement of Wisconsin's public records law. The Wisconsin Supreme Court's interpretation may not allow parties to recoup attorney's fees if the governmental entity eventually releases the records between the time a suit is filed and the time the circuit court makes a decision (this is because, in almost all cases, releasing the records first could moot the mandamus action and thus may lead to the dismissal of the case).

As a result, under the Wisconsin public records statute, individuals would be forced to bear their own costs. Many of the enforcement actions brought under the public records law are done on a "contingency fee" basis, since attorneys would be able to recover their costs at the end. If that is no longer a clear option, there will necessarily be less enforcement. Since government entities may not be responsible for paying those legal fees any longer, they would have no incentive to release legitimately requested records quickly to avoid mounting costs. In turn, this will make it prohibitively expensive for Wisconsinites to enforce open records requests that government actors refuse to comply with. Citizens' fear of bearing upfront costs and the scarcity of contingency fee options thwart the transparency and accountability that open records laws are meant to secure.

Future Implications

Failure to amend this statute could result in significant burdens on any individual seeking to request the public documents they are entitled to view. For example, parents who have requested teaching materials from their school district risk thousands of dollars in legal expenses if the district initially refuses to comply. The local taxpayer requesting details on a new park building may hesitate to file a suit even if the city refuses or severely delays the release of documents, due to the uncertainty of being able to recover expenses. Non-profit groups or government watchdogs may be financially

barred from conducting their necessary research into government actions if the cost to litigate a public records issue is too burdensome.

These examples are only a very few of the possible scenarios in which the current law may well erode community engagement with public institutions. People will be forced to choose between self-preservation and civic involvement, and the desired goals of open and accountable government will be lost.

Proposed Reforms

Below we propose simple reforms that would effectively return the law to the previous understanding of "prevail" prior to the *Friends* decision. That way, in situations where a record holder releases records after a suit has been filed even but before a final judicial ruling, a party still would clearly be allowed to seek fees and costs. We propose three options for reforms, which are not necessarily mutually exclusive in all cases, but would help accomplish these goals.

Option 1

One option is to write the causal-nexus test into the statute to award attorney's fees. This test would simply require the court to find that the litigation itself caused the records to be released in order to award fees. This one change would shift the balance of power back to the public, rather than the government entity.

19.37(2)(a) is amended to read:

> 19.37(2)(a): Except as provided in this paragraph, the court shall award reasonable attorney fees, damages of not less than $100, and other actual costs to the requester if the requester prevails in whole or in substantial part in any action filed under sub. (1) relating to access to a record or part of a record under s. 19.35 (1) (a). If the requester is a committed or incarcerated person, the requester is not entitled to any minimum amount of damages, but the court may award damages. Costs and fees shall be paid by the authority affected or the unit of government of which it is a part, or by the unit of government by which the legal custodian under s. 19.33 is employed and may not become a personal liability of any public official. A requester "prevails" under this section where an authority releases records which were the subject of an action filed under sub. (1) and where the court determines there was a causal nexus between the requester bringing the action and the authority providing those records.

Option 2

Another way of reaching a similar outcome could be to simply adopt the same definition of "prevail" that exists under Federal law (see 5 USC § 552):

19.37(2)(am) is created to read:

> (am) A party "prevails in whole or in substantial part" under this section where the complainant has obtained relief through either:
>
> 1. A judicial order, or an enforceable written agreement or consent decree; or
> 2. A voluntary or unilateral change in position by the authority, if the complainant's claim is not insubstantial.

Option 3

In addition to those, another proposal would be to allow other forms of relief in public records suits beyond simply a mandamus action, the only option for relief currently allowed under state law. For example, in the context of open meetings, the law may be enforced by seeking "legal or equitable relief, including but not limited to mandamus, injunction or declaratory judgment, as may be appropriate under the circumstances." Wis. Stat. § 19.97(2). While tools like these can overlap with mandamus in terms of result achieved, they also differ in important ways. For example, obtaining an injunction (an order to do or refrain from doing something) can be easier than obtaining a writ of mandamus because the government defendant's duty need not be perfectly clear. And declaratory relief is focused on clarifying the meaning of the law even if it does not result in a coercive order. A similar "toolbox" could be incorporated into the public records law, thus giving more avenues for the law to be enforced.

Conclusion

This policy report highlights the rising tension between historical expectations of Wisconsin public records law and the Wisconsin Supreme Court's interpretation of "prevailing" in a mandamus action. The opinion in *Friends* reveals that our current laws may no longer adequately protect public record requesters—and their pocketbooks—from government entities arbitrarily withholding and releasing documents.

It is now time for the legislature to ensure the law does not impede citizens' access to public documents. By amending § 19.37 and essentially restoring the prior status quo, it will be clear that "prevailing" in a public records request means release of records after a mandamus action is filed. Such a change will not only incentivize government entities to release public records immediately upon request but also punish them when they force and moot litigation by releasing the records after a claim is filed.

Lucas Vebber is a Deputy Counsel at the Wisconsin Institute for Law and Liberty. He can be reached at Lucas@will-law.org.

Samantha Dorning is a Bradley Foundation Legal Fellow at the Wisconsin Institute for Law and Liberty.

WISCONSIN INSTITUTE
FOR LAW & LIBERTY

330 East Kilbourn Ave.|Suite 725
Milwaukee, WI 53202

will-law.org
414-727-9455

@WILawLiberty

Bill Lueders
Wisconsin Freedom of
Information Council
blueders@gmail.com

Nov. 15, 2022

Rep. Dave Steffen, Chairman
Assembly Committee on Government Accountability and Oversight
Room 323 North, State Capitol, PO Box 8953
Madison, WI 53708

Dear Rep. Steffen and members of the committee:

Thank you for this opportunity to present testimony on AB-145, which offers a simple fix to a serious problem. I am the president of the Wisconsin Freedom of Information Council, a nonprofit and nonpartisan group that works to protect public access to meetings and records. The Council, now in its 45th year, is made up of about two dozen representatives from media, academia, the legal profession, and others. Our sponsoring organizations are the Wisconsin Newspaper Association, the Wisconsin Broadcasters Association, the Wisconsin Associated Press, and the Society of Professional Journalists.

The Wisconsin Supreme Court, in a 2022 ruling known as *Friends of Frame Park v. City of Waukesha*, ill-advisedly and perhaps unintentionally created a new standard for fee recovery under the state's open records law, one that has already chilled the ability of media and others to obtain public records.

Prior to this ruling, it was understood that if records were released after a requester filed a lawsuit to challenge an illegal denial, the requester could recover reasonable attorney fees. The new standard said fees can only be recovered if a court rules that the denial was wrongful, which would not happen in a case where records are belatedly provided and the action is dismissed.

This ruling actually incentivizes public officials to illegally withhold records, because it forces requesters to incur legal costs that may never be recovered. AB-145 and its companion, SB 117, solves this problem by allowing requesters to recover fees when they can prove that suing was "a substantial factor" in securing the release of public records.

I would like to thank Rep. Todd Novak and Sen. Duey Stroebel for sponsoring this legislation, and the Wisconsin Institute for Law & Liberty for the work that it has done to highlight the problem caused by the court's ruling—especially its July 2022 report, "Broken Records." This is truly a case that proves the state's tradition of open government transcends political and party lines. It is supported by people across the political spectrum and it deserves to pass the Legislature with broad bipartisan support.

Thank you.