STATE OF WISCONSIN
COURT OF APPEALS
DISTRICT II

BILL LUEDERS,

Plaintiff-Respondent,

v. Appeal No. 2018AP0431

SCOTT KRUG,

Defendant-Appellant.

ON APPEAL FROM THE JANUARY 19, 2018, DECISION AND ORDER OF THE DANE COUNTY CIRCUIT COURT, CASE NO. 16-CV-2189, THE HONORABLE RHONDA L. LANFORD, PRESIDING

BRIEF OF PLAINTIFF-RESPONDENT BILL LUEDERS

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STATEMENT ON ORAL ARGUMENT AND PUBLICATION

Oral argument is not necessary to resolve the legal issues in this case, and would not be of such value as to justify the Court's time or the parties' resources.

The Court's decision will likely meet the criteria for publication, as it may clarify the rule of law regarding the provision of electronic records under Wisconsin's Open Records law and decide a case of substantial and continuing public interest.

STATEMENT OF ISSUES

1. The Wisconsin Open Records law, Wis. Stat. §19.31 *et seq.*, gives requesters a right to inspect government records and to make or receive a copy of such records. Wis. Stat. §§19.35(1)(a), (b). May an authority deny a request for an electronic copy of records that are already maintained electronically, based on the authority's previous provision of a printed-out version of the records in response to an earlier request?

The circuit court answered "No."

This Court should answer "No."

2. Wisconsin Statute §19.35(1)(i) makes the identity of a requester and the purpose of an Open Records request irrelevant to a requester's entitlement to records. Under Wis. Stat. §804.01(3)(a), is it unduly burdensome and oppressive for a legislator represented by the Wisconsin Department of Justice to take the deposition of a plaintiff in an Open Records

case based on the requester's identity and to learn why the requester desired records in a particular format, when the material facts are undisputed, and when taking the deposition would have a chilling effect on other requesters under the Open Records law?

The circuit court answered "No."

This Court should answer "No."

INTRODUCTION

The Open Records law, Wis. Stat. §19.31 *et seq*., declares it 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." Plaintiff-Respondent Bill Lueders ("Lueders") sought just such information when he requested an electronic copy of email messages state assemblyman and Defendant-Appellant Scott Krug ("Krug") had received about proposed water legislation.

No one disputes that the requested email messages were records subject to production under the law, that they were available in electronic format, and that no other provision of law prohibited their disclosure. Rather, Krug simply chose not to produce the electronic records, contending that it was sufficient to refer Lueders to a paper copy of the emails and other documents produced in response to an earlier request.

Krug's position lacks foundation in statute or case law, ignores the informational and logistical benefits of providing records in electronic form,

and above all, subverts the intent of the Open Records law to provide the public with the greatest possible information regarding the affairs of government. The circuit court properly granted Lueders' motion for summary judgment and denied Krug's, and also properly granted Lueders' motion to prevent a pointless and oppressive deposition of a plaintiff in an Open Records law case.

This Court should affirm the circuit court.

STATEMENT OF THE CASE

I. Facts

A. *The July 21, 2016 Request and Response*

Lueders is a news reporter for various media outlets. (R.30:5 ¶1; R.40:2 ¶1.) Krug is an elected member of the Wisconsin State Assembly. (R.30:5 ¶2; R.40:2 ¶2.) On July 21, 2016, Lueders submitted an Open Records request to Krug via email. The request stated in part:

> This is to request, under the state's open records law (19.31-39, state statutes) access to all emails received by your office in response to proposed changes to the state's water laws, from Jan. 1, 2016 to Feb. 29, 2016. This request is not for printed copies of these records; it is for the records in electronic form, as an email folder, or on a flash drive or CD.

(R.1:11, A-App.125; R.30:5 ¶3; R.40:2 ¶2.)

On July 26, 2016, Krug responded to the request. The response stated:

> As you know, "[t]he Public Records Law provides "except as otherwise provided by law, any requester has a right to inspect any record." Wis. Stat. §19.35(1)(a). The law requires copies of written documents be "substantially as readable" as the originals. Wis. Stat. §19.35(1)(b). Additionally, Wis. Stat. §19.35(1)(b) provides the custodian as the option to choose how a record will be copied. See Grebner v. Schiebel, 240 Wis. 2d 551 (2000)."

> Our standard policy is to make responsive records available to requesters through the office of the Assembly Chief Clerk. The Chief Clerk makes arrangements for the requester to review the records, provides any copies that may be requested, and collects any location or reproduction costs associated with the request. This policy is the most efficient way for our office to comply with records request [sic], while continuing the day-to-day operation of our official duties without disruption. Individual offices are not set up to accept cash or check as payment for records requests.
>
> Accordingly, we have provided you with access to review the records you have requested and the ability to receive copies of those records that are substantially as readable as the original. Those records were provided for your review in the Assembly Chief Clerk's Office. We now consider your request closed.

(R.1:12, A-App.126; R.30:5-6 ¶5; R.40:2 ¶5.)

Krug's statement that he had already provided the records to Lueders was an apparent reference to paper records he made available to Lueders on July 15, 2016, in response to a separate request from Lueders on June 21, 2016. (R.1:10, A-App.124; R.30:6 ¶6; R.40:2 ¶6.) Lueders had not received electronic records in response to the earlier June 21, 2016, request. (R.30:6 ¶7; R.40:2 ¶7.)

B. *The June 21, 2016, Request and Response.*

The June 21, 2016, request from Lueders to Krug was submitted by email, and stated in part:

> What follows is a cut-and-paste reiteration of Ron Berger's records request on April 29, in hopes that I can see the actual records that were provided in response to that request.
>
> I request access to review, under the state's Open Records Law §§19.31-39, Wisconsin Statutes) **any and all citizen correspondence**, including phone records, sent and/or received by Representative Krug or his/her staff, beginning January 1 through and including April 8, 2016, related to the following search terms:

AB600/SB459; AB603/SB477; AB804/SB654; AB874/SB239; stewardship fund; DNR scientists; state parks; conservation staff; high capacity wells; groundwater; lakeshore dredging; navigable waters; wetlands; water rights.

(R.1:10, A-App.124; R.30:6-7 ¶8; R.40:2 ¶8.)

The June 21, 2016, request's citation to Ron Berger referred to a member of a group of citizens known as We the Irrelevant, which regularly makes requests to legislators for their constituent correspondence in order to determine whether legislators are voting consistent with the views expressed in this correspondence. (R.30:7 ¶9; R.40:2 ¶9.) Mr. Berger's original request to Krug for the records asked that the records be supplied in electronic form. (R.30:7 ¶12; R.40:2 ¶12.) When Krug failed to produce all records requested by Mr. Berger, We the Irrelevant contacted Lueders in his capacity as President of the Wisconsin Freedom of Information Council. (R.30:7 ¶10; R.40:2 ¶10.)

Lueders contacted Krug's office about the issue via email and phone. (R.30:7 ¶11; R.40:2 ¶11.) In their phone call, Krug suggested Lueders make a request for the same records. Lueders did so through his June 21, 2016, request. (R.1:10, A-App.124; R.30:7 ¶11; R.40:2 ¶11.)

In response to Lueders' June 21, 2016, request, Krug's staff conducted an electronic search for records, including Microsoft Outlook emails, then printed and transmitted responsive records to the Assembly Chief Clerk's office. (R.30:7-8 ¶13; R.40:2 ¶13.) Krug's office notified Lueders that

responsive records were available for review in the Assembly Chief Clerk's office, which processed the request for billing purposes. (R.30:8 ¶14; R.40:2 ¶14.) Lueders made arrangements to see the records on July 19, 2016. (R.30:8 ¶14; R.40:3 ¶14.) When he arrived in the clerk's office, Lueders was presented with a large stack of printed documents in excess of 1,500 pages. (R.30:8 ¶15; R.40:3 ¶15.) The cost of copying the records was $0.15/page, or $225.00 total assuming 1,500 pages were copied. (R.30:8 ¶16; R.40:3 ¶16.) Lueders paid $21.45 for photocopies of one type of record within the 1,500-page stack: 143 pages of constituent contact reports, which contained a staff summary of constituent contacts. (R.30:8 ¶17; R.40:3 ¶17.)

C. *Krug's Processing of the July 21, 2016 Request*

Lueders' subsequent July 21, 2016, request to Krug sought only "emails received by your office i[n] response to proposed changes to the state's water laws," for the narrowed time period of January 1, 2016 to February 29, 2016. (R.30:8 ¶18; R.40:3 ¶18.) It also noted, the "request to receive the records in electronic form [is] a much simpler method of compliance that the law specifically requires. (*See* Attorney General's Compliance Guide, P. 52-59)" and that "given the ease with which archived electronic records can be retrieved and identified, as must have been done for the emails printed out and provided as paper copies, my request[] substantially simplifies the process of compliance." (R.30:8-9 ¶19; R.40:3 ¶19.)

Krug quickly involved others in developing a response to the July 21 request, including his staff members, Assembly Chief Clerk Patrick E. Fuller and Clerk's office staff Carol Reddell, and Zach Bemis, Policy Advisor and Legal Counsel with the Office of Assembly Speaker Vos. (R.18: 1 ¶3; 4-5; 20-25.) Krug sent Lueders' request by "high" importance email forward to Reddell, and she in turn forwarded the request to Fuller with a note that he should contact Krug. Fuller sent the request to Bemis on July 25, 2016, at 7:03 AM, stating in an email: "See below re: Krug. I want to still provide paper instead of electronic need your input [sic]." Bemis forwarded this email back to Krug's office at 1:43 PM, along with a draft denial; Krug replied "10-4 . . . thanks." (R.18: 1 ¶3; R.18:4-5; 20-22.)

Shortly thereafter, at 2:08 PM, Bemis emailed a draft message to Krug for responding to Lueders "that includes a couple options for how you could respond. . . Please let me know before you plan on responding." (R.30:9-10 ¶23; R.40:3 ¶23; R.18:30.) One option supplied by Bemis tracked Krug's eventual response on July 26, 2016, stating the records had already been provided. (R.30:10 ¶24; R.40:3 ¶24; R.18:31.) Another option stated "[i]n this instance we have agreed to modify our standard policy to provide you copies in electronic PDF format. A copy of those records are attached/available on a CD in the office of the Chief Clerk." (R.30:10 ¶25; R.40:3 ¶25; R.18:30-31.) The Assembly's open records response policy did not discuss the format in which records are provided to requesters. (R.18:32-33.)

Lueders did not receive electronic copies of the water legislation email messages in response to his July 21, 2016, request to Krug, and considered Krug's July 26, 2016, response a denial. (R.30:11 ¶28; R.40:3 ¶28.) This suit followed. (R.1.)

D. *The Email Messages and Use of Electronic Data*

Krug initially claimed in this case that the electronic copy of the email messages contained the "same information" as a printed copy. (R.18:6.) Lueders requested native, electronic copies of the email messages in discovery to assess this claim, and received them on a thumb drive in under three weeks. (R.18:12-13; R.30:11 ¶30; R.40:3 ¶30.)

The email messages sought by Lueders in his July 21, 2016, request were received and kept on a government server in the Microsoft Outlook email program. (R.30:11 ¶29; R.40:3 ¶29.) According to an analysis by an information technology expert retained by Lueders, the electronic copy of the messages did not contain the same information as a version of those messages printed on paper. (R.30:14 ¶40; R.40:4 ¶40.) The Microsoft Outlook email files from Krug contained metadata, or generally, embedded electronic data. (R.30:14-15 ¶44; R.33:6 ¶16.) In the email context, metadata is best understood as the email "headers" that both provide a record of how an email traveled from the sender to the recipient, as well as data that is interpreted by client applications to display information. (R.30:14-15 ¶43; R.33:6 ¶16.) For example, a short email from one constituent contained over 2,000 bytes of

human-readable text, only 10% of which was text that would appear in a printed copy of the email message. (R.30:14-15 ¶44; R.33:6 ¶16.) Metadata is not typically present in a printed copy of an email (R.44:9), and the paper copies of the emails Lueders reviewed were ordinary copies with no extra email header information included (R.37:1 ¶4).

Aside from metadata, Lueders' expert identified two other ways that native electronic records improve on paper copies in reviewability and usefulness. (R.30:14 ¶41; R.33:6 ¶15.) Electronic copies of email messages can be reviewed with much more efficiency than paper copies of the same document, with text searches orders of magnitude faster than an average adult's reading speed. (R.30:15 ¶45; R.33:7 ¶17.) Additionally, electronic copies of email messages can provide a much deeper analysis than review of a paper copy based on the semantic content of the message. (R.30:15-16 ¶46; R.33:7 ¶18.) The term "semantic" in this context refers to a broader understanding of a document, not just the words on a page, but their relationship to other words, the meanings of phrases, and the context of words and phrases. (R.30:15-16 ¶46; R.40:7, ¶ 46; R.33:7 ¶18.)

Copies of email messages converted directly from the native version to PDF-type documents are also more useful than paper copies, because they can typically be searched, though one may lose header information and some analysis capabilities. (R.30:16 ¶49; R.40:8 ¶49.) Printed copies of emails that

have been scanned with optical content recognition ("OCR") software can also be searched by a recipient of the record. (R.30:16 ¶48; R.33:8 ¶19.)

The benefits of obtaining electronic records are reinforced by recipients of records under Wisconsin's Open Records law, who commonly receive records in electronic format, including from state legislators. (R.30:16-17 ¶50; R.40:8 ¶50.) For example, journalist Patrick Marley has found electronic records include metadata that show when documents were created and who created them. (R.30:17 ¶51; R.40:8 ¶51.) Electronic documents can be searched for key words to help locate information within the record, something that is especially helpful when requests yield large numbers of documents. (R.30:17 ¶51; R.40:8 ¶51.) Information in electronic databases can be sorted, making it possible to identify trends. (R.30:17 ¶51; R.40:8 ¶51.) Electronic records are also typically cheaper to obtain. (R.30:19 ¶60; R.40, ¶60.) In these ways, documents provided in electronic format facilitate access to government information. (R.30:17 ¶51; R.40:8 ¶51.)

II. Procedural History.

After Krug denied his Open Records request in July 2016, Lueders initiated this action under Wis. Stat. §19.37(1)(a), seeking an order to direct Krug to produce the requested electronic records in electronic format. (R.1.)

The parties exchanged written discovery requests, and Krug took the deposition of Lueders' information technology witness. (*See* R.41, Exh. J.) Krug's Department of Justice counsel also notified Lueders' counsel that they

desired to take Lueders' deposition "because of who he is," as a frequent requester and "expert" on the Open Records law. (R.8 ¶¶11-12; R.59:3.) Krug subsequently served a deposition notice on Lueders. (R.9:1 ¶¶3-4, 3-4.) The request for deposition of a plaintiff under the Open Records law was unprecedented in the experience of Lueders' counsel and other attorneys representing plaintiffs in Open Records law cases. (R.9 ¶6.) Lueders moved for a protective order to prevent Krug taking his deposition, since a requester's identity and purpose in seeking records are irrelevant under the law. (R.8; *see also* R.11.)

The court held a hearing on the motion and granted the protective order, finding as follows:

> This is a unique case in that it is filed under the open records law. The open records law makes clear that the identity of the person requesting the information is not relevant. The reasons set forth both in the written materials and also by the defendant today actually lead the Court to find that a deposition of the plaintiff in this case and the reasons given for a deposition would be oppressive.
>
> And I say that because a requester's identity being irrelevant, being put under oath, and being forced to testify regarding one's motivations, regarding what one intends to do with open records, and the other matters that are discussed in the defendant's response as well as the arguments here today would, in this Court's opinion, having a chilling effect on other requesters under the open records law. I did not see when I researched any precedent for this type of deposition, and it isn't a typical type of civil litigation where a deposition of the plaintiff would reasonably be calculated to lead to the discovery of admissible evidence.

(R.61:10-11, A-App.120.) Krug filed a petition for interlocutory review of the protective order, which this Court denied. *Lueders v. Krug*, Opinion and Order, 4/14/17, Wis. Ct. App. Case No. 2017AP0488-LV.

The parties then filed cross motions for summary judgment and agreed at hearing that no material facts were disputed. (R.62-2 to 62-3.) On January 19, 2018, the circuit court entered a written decision granting Lueders' motion for summary judgment and denying Krug's. (R.55, A-App.101-10.)

The court found the Open Records statute itself contained no standard for judging a custodian's production of electronic records. The court rejected Krug's proposed "substantially as readable" standard for assessing sufficiency of a copy, because "[i]t is undisputed that words on a printed page consist of only a small part of what an electronic document actually contains," such as metadata, and that electronic records have other searchability and textual analysis capabilities. (R.55:4-5, A-App.104-105.) Instead, the court held that an authority must provide a copy of a requested electronic record that is "substantially as good" as the original record. (R.55:7, A-App.107 (citing Wisconsin Department of Justice's *Wisconsin Public Records Law Compliance Guide*.) For requesters who seek electronic records in a particular format, the "substantially as good" standard means "the custodian should produce the copy in that format unless doing so would be so burdensome as to be inconsistent with the conduct of governmental business." (R.55-8, A-App.108.) For others, the copy should be provided in the most usable format without resort to special technology. (*Id.*)

The court found that Lueders had "clearly communicated that printed copies would not serve his needs, and he specified several electronic formats

[such as an email folder, flash drive, or CD] that would facilitate his ability to work with the records." (R.55:8, A-App.108.) The circuit court thus held that Krug was required "to produce electronic copies of the records" Lueders requested. (R. 55:8-10, A-App.108-110.)

Krug's appeal followed. Meanwhile, another Open Records law case was filed against a state legislator for failure to provide records in the requested electronic format. (Docketing Stmt., 3/8/18 (citing *Roth v. Brostoff*, Dane County Circuit Court No. 18-CV-425).) As in this case, the defendant offered copies of emails in printed form rather than electronic, in reliance on the Assembly chief clerk's advice. Theo Keith, *Taxpayers on the hook for nearly $2,000 for Democratic State lawmaker's open records settlement*, Fox6Now.com, May 3, 2018.[1] The case was soon settled through production of the records electronically and payment of plaintiff's attorney's fees before a decision was rendered on the merits. *Id*.

STANDARDS OF REVIEW

This is a case under the Open Records law. The law's first sentences declare the state's official policy of virtually unfettered access to government information:

> In 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.

[1] *Available at* http://fox6now.com/2018/05/03/taxpayers-on-the-hook-for-nearly-2000-for-democratic-state-lawmakers-open-records-settlement/ (last checked June 18, 2018).

Wis. Stat. §19.31. "This statement of public policy in §19.31 is one of the strongest declarations of policy to be found in the Wisconsin statutes." *Zellner v. Cedarburg Sch. Dist.*, 2007 WI 53, ¶49, 300 Wis. 2d 290, 315, 731 N.W.2d 240, 252.

The presumption in favor of access creates rules for this Court's interpretation of the law. To serve the objectives identified in Wis. Stat. §19.31, "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," and "***only in an exceptional case may access be denied***." Wis. Stat. §19.31 (emphasis added).

Decisions on summary judgment are reviewed *de novo*. *WIREdata, Inc. v. Vill. of Sussex*, 2008 WI 69, ¶44, 310 Wis. 2d 397, 425, 751 N.W.2d 736, 749. The application of the public records law to undisputed facts is a question of law that this court reviews *de novo*, benefiting from the analyses of the circuit court. *Osborn v. Bd. of Regents*, 2002 WI 83, ¶12, 254 Wis. 2d 266, 647 N.W.2d 158

"Circuit courts have broad discretion in determining whether to limit discovery through a protective order." *Paige K.B.* ex rel. *Peterson v. Steven G.B.*, 226 Wis. 2d 210, 232, 594 N.W.2d 370, 380 (1999). This Court therefore reviews such a decision under the abuse of discretion standard. *Id.* at 232–33. "A circuit court properly exercises its discretion if it examines the relevant

facts, applies the proper standard of law and, using a rational process, reaches a conclusion that a reasonable judge could reach." *Id.* at 233.

ARGUMENT

I. Krug Unlawfully Denied Lueders' Request for Electronic Copies of Email Messages Related to Proposed Legislation.

Krug cannot meet his burden to show that his refusal to provide Lueders with an electronic copy of records was justified under the law. The circuit court should be affirmed.

A. *Krug Has the Burden to Show Denial of a Public Record Request was Justified Despite the Presumption in Favor of Access*.

"Except as otherwise provided by law, any requester has a right to inspect any record." Wis. Stat. §19.35(1)(a). A violation of the Open Records law occurs when 1) an authority, 2) withholds or delays granting access to, 3) a record or part of a record, 4) after a written request for disclosure is made. Wis. Stat. §19.37(1). Then it is up to the records custodian to defend its reasons for non-disclosure, if those reasons have been sufficiently articulated in the first place. *Osborn*, 2002 WI 83, ¶16. "If the custodian states insufficient reasons for denying access, then the writ of mandamus compelling disclosure must issue." *Id.* ¶16.

Krug claims that Lueders must have a "clear legal right" to the records that is "free from substantial doubt," relying on the four elements for a common law mandamus action. (Krug Br. at 9.) This argument muddies the clear statutory waters and undermines the presumption in favor of openness in

Wis. Stat. §19.31. (Krug Br. at 9.) Some appellate cases identify the four elements for a common law mandamus action, cited by Krug, as a prerequisite to relief in an Open Records law case. (Krug Br. at 9, 15). *E.g., Voces de la Frontera, Inc. v. Clarke*, 2017 WI 16, ¶11, 373 Wis. 2d 348, 891 N.W.2d 803 (citing mandamus elements); *but see Democratic Party of Wisconsin v. Wisconsin Dep't of Justice*, 2016 WI 100, 372 Wis. 2d 460, 888 N.W.2d 584 (excluding discussion of mandamus elements). The four mandamus factors introduce some elements that are not necessary for relief under the Open Records law's enforcement provision. *See* Wis. Stat. §19.37 (containing, *e.g.*, no requirement for "substantial damages"). Even cases that cite the four mandamus factors do not often apply them, focusing instead on the validity of the custodian's stated reasons for denial. *E.g., Voces de la Frontera*, 373 Wis. 2d 348, ¶¶2-3, 22.

Krug concedes that the "[e]mails are 'records' within the meaning of Wis. Stat. §19.32(2)." (*Id*. at 11, n.3). As such, it is his burden to show why the requested records should not be produced:

> [T] the general presumption of our law is that public records shall be open to the public unless there is a clear statutory exception, unless there exists a limitation under the common law, or unless there is an overriding public interest in keeping the public record confidential.

Hathaway v. Joint Sch. Dist. No. 1, City of Green Bay, 116 Wis. 2d 388, 397, 342 N.W.2d 682, 686–87 (1984); *see also Democratic Party of Wis.*, 2016 WI 100, ¶9 (finding defendant has burden to defend non-production in balancing test cases); *Fox v. Bock*, 149 Wis. 2d 403, 417, 438 N.W.2d 589, 595 (1989)

(holding custodian has burden to show record is a draft excluded from the definition of "record" in Wis. Stat. §19.32(2)).

Krug does not argue any of the usual statutory or common law bases for denial of a request. Instead, Krug's arguments hinge on whether the law allows him to provide something less than what a requester is seeking, based on the argument that the law does not compel him to do more. As the following will show, there is little room in the Open Records law for such arguments.

B. *No Interpretation of the Open Records Law Supports Providing a Paper Copy of a Record When an Electronic Copy is Available and Requested*.

No case has directly decided the issue presented in this case, but statute, case law, and secondary authority all support providing a record in electronic format when it is available and requested in that format. Krug's "substantially as readable" standard (Krug Br. at 10) is based on a wholly incorrect and misleading interpretation of Wis. Stat. §19.35(1)(b).

1. Copies of Electronic Records Should Be Provided in the Same Format as the Original Based on the Plain Statutory Language.

The first sentence of Wis. Stat. §19.35(1)(b) confirms the right of a requester to "inspect a record and to make or receive a copy of a record." The term "record" is defined in Wis. Stat. §19.32(2), and includes "**any material** on which written, drawn, printed, spoken, visual, or electromagnetic information or electronically generated or stored data is recorded or preserved,

regardless of physical form or characteristics, that has been created or is being kept by an authority" (emphasis added). The definition extends to "**any . . . medium** on which electronically generated or stored data is recorded or preserved." *Id*. (emphasis added). In other words, a record is defined to include not just its content—government information—but the medium on which it is recorded or stored.

The term "copy" is not defined in the statute.[2] However, a plain reading of the statute supports a definition of "copy" as identical in content and format to the original. *Merriam-Webster* defines "copy" as "an imitation, transcript, or reproduction of an original work … a duplicate."[3] "If a 'copy' differs in some significant way for purposes of responding to an open records request, then it is not truly an identical copy." *Stone v. Bd. of Regents of Univ. of Wisconsin Sys.*, 2007 WI App 223, ¶18, 305 Wis. 2d 679, 741 N.W.2d 774. Similarly, "reproduce" means "to produce a counterpart, an image, or a copy of. Inherent in this definition is the notion that the document or record is not altered, but simply copied." *Milwaukee Journal Sentinel v. City of Milwaukee*,

[2] Wis. Stat. § 19.35(1)(b)-(g) discuss how copies must be provided in certain circumstances, such as for audio recordings. Except in limited situations not applicable here, these provisions do not speak to whether the copy must be in the same format as the original, but are intended to ensure the requester's copy is of good quality. Lueders discusses Wis. Stat. §19.35(1)(b), which is the focus of Krug's brief, in Section I.B.4., *infra*.

[3] *See* www.merriam-webster.com, search "copy."

2012 WI 65, ¶31, 341 Wis. 2d 607, 620, 815 N.W.2d 367, 374. (lead opinion) (defining term as used in Wis. Stat. §19.35(3)(a)) (internal citations omitted).[4]

This interpretation is supported by *Milwaukee Police Association v. Jones*, which held that a custodian violated the law by providing an analog copy of an audio tape, when the requested digital audio tape ("DAT") recording contained more and different information than the analog copy. 237 Wis. 2d 840, ¶¶9, 13. Krug distinguishes this case because, *inter alia*, it concerned interpretation of "computer programs" under Wis. Stat. §19.36(4) (Krug Br. at 19-20), but the salient point is this Court's recognition that some "copies" may not satisfy a requester's demand because they are not true to the original or are missing attributes of the original.

Other case law has emphasized that the Open Records law requires custodians not to provide information, but to provide records. *See Journal Times v. Police & Fire Commissioners Bd.*, 2015 WI 56, ¶54, 362 Wis. 2d 577, 866 N.W.2d 563 ("The Commission was not required to provide information in response to a records request."). "While a record will always contain information, information may not always be in the form of a record." *Id.* ¶55. Contrary to this precedent, Krug would permit custodians to extract

[4] Krug interprets this case to mean a reproduction may occur when an authority prints a copy of an electronic document (Krug Br. at 13), but the format of the record copy was not at issue in *Milwaukee Journal Sentinel*.

information from records, instead of simply providing the "record" to which a requester is entitled.

The circuit court noted that requesters may not be able to open or access electronic copies of records in their original or native format, due to incongruity between computer programs available to or used by custodians and requesters. (R.55-6, A-App.106.) However, the Legislature has anticipated this problem. If the form of the record is not "comprehensible" to the requester, the requester may get "a copy of the information contained in the record assembled and reduced to written form on paper." Wis. Stat. §19.35(1)(e). Reviewing the legislative history, the Attorney General found the legislation's drafters "had computerized information in mind when they drafted this paragraph." 75 Wis. Op. Att'y Gen. 133, 144 (OAG-27-86) (August 12, 1986). (opining that Wis. Stat. §19.35(1)(e) was supplemental to requesters' rights to computer tapes under the Open Records law, that "in some cases I would expect that the computerized record would be meaningful and manageable only through access to the computer tape, and that a printout would be worthless").

Under the plain meaning of the statute, a copy of a record should generally conform to the original in content and format.

2. Records Should Be Provided in the Format Requested Based on *WIREdata*.

In addition, the Wisconsin Supreme Court has indicated that a records custodian should honor a requester's request for records in the format requested. *WIREdata*, 310 Wis. 2d 397, ¶96.

In *WIREdata*, the court held that providing an electronic, portable document format ("PDF") copy of property assessment data fulfilled the requester's initial request for an "electronic/digital" copy of the record. 310 Wis. 2d 397, ¶¶25, 93; *see also id*. ¶96 ("the PDF files did fulfill WIREdata's initial requests **as worded**") (emphasis added). The court did not reach the issue of whether the PDF copy satisfied the requester's subsequent "enhanced" request for the records in their native electronic format, because the "enhanced" request was not properly submitted to the custodian as a matter of law. *See id*. ¶¶93-94.[5] As Krug notes (Krug Br. at 15), the court also declined to address whether providing paper printouts of the database would have satisfied the plaintiffs' request for an "electronic/digital" copy. *WIREdata*, 310 Wis. 2d 397, ¶96 & n. 13.

[5] The court noted the PDF was missing some "characteristics" that the plaintiff sought, such as the ability to manipulate the data in its original electronic form, *id*. ¶96, but the court was also concerned about the risks of permitting requesters to have direct access to a municipality's electronic databases, such as the potential for disclosure of confidential information or for damage to the database. *Id.* ¶97. The court did not consider the metadata and other information that would have been available in the original electronic copy, *id*. ¶110 & n.19.

Nevertheless, the court's opinion demonstrates that the custodian should consider the requester's desire for a specific format, and that courts will look for compliance with a request for an "electronic/digital record." *WIREdata*, 310 Wis. 2d 397, ¶¶95-96.

3. The "Substantially as Good" Standard.

The circuit court in this case applied a "substantially as good" standard to assess whether the paper copies of the emails provided in this case complied with an explicit request for electronic records under the law. Though Krug's counsel disclaims it now (Krug Br. at 16-17), this standard is taken directly from the Wisconsin Department of Justice's interpretation of the law and advice to custodians and requesters.

The Wisconsin Attorney General has authority to interpret the Open Records law and give advice about its applicability to "any person." Wis. Stat. §19.39. One way it has done so is through its *Wisconsin Public Records Law Compliance Guide* (Nov. 2015).[6] *See Journal Times*, 362 Wis. 2d 577, ¶55 & n.24. The Attorney General's interpretations of the law are not binding on the courts, but are of persuasive value. *Milwaukee Journal Sentinel*, 341 Wis. 2d 607, ¶41.

[6] *Available at* https://www.doj.state.wi.us/sites/default/files/dls/2015-PRL-Guide.pdf. This brief relies on the 2015 Compliance Guide since it was the version available to the circuit court. The guide was updated in March 2018, *see* https://www.doj.state.wi.us/sites/default/files/office-open-government/Resources/2018%20PRL%20Compliance%20Guide.pdf.

The Compliance Guide acknowledges that email messages and other electronic records are "records" subject to production under the Open Records law. Compliance Guide, *supra*, at 3, 52-53. The Compliance Guide additionally notes that electronic documents may contain metadata, which in the case of email includes "transmission information in the original format that does not appear on a printed copy or when stored electronically." *Id*. at 55.

Under the heading, "Must the authority provide a record in the format in which the requester asks for it?" the Compliance Guide notes that Wis. Stat. §§19.35(1)(b)-(d) discusses the production of various kinds of records, and that copies of videotapes must be "substantially as good" as the originals." *Id*. at 56. "By analogy, providing a copy of an electronic document that is 'substantially as good' as the original is a sufficient response **where the requester does not specifically request access in the original format**." *Id*. (emphasis added) (citing *WIREdata*, 2008 WI 69, ¶¶97-98; *Jones*, 2000 WI App 146, ¶10). Where the requester **does** request records in a particular format, the Compliance Guide demurs, but warns that "it behooves the records custodian who denies a request that records be provided in a particular electronic format to state a legally sufficient reason for denying access to a copy of a record in

the particular format requested." *Id.* at 57.[7] For example, when a requester's inspection would permit "direct access to an agency's operating system" and thereby present a security risk, a custodian may be justified in providing access "instead on an alternative electronic storage device, such as a CD-ROM." *Id.* at 56.

The circuit court adopted the Compliance's Guide's two-pronged approach. It ruled that where the requester had specified a preferred format, "the custodian should produce the copy in that format unless doing so would be so burdensome as to be inconsistent with the conduct of governmental business." (R.55-8, A-App.108.) Where a requester does not specify a format, the circuit court reasoned that "substantially as good" means "the custodian should produce the record copy in a form that would be most useable to an average person without access to special technology." (*Id.*; *see also* R.45 (discussing, in a different circuit court case, the "substantially as good" test and holding that a paper copy of a Microsoft Excel spreadsheet was not a sufficient response to a request for an electronic copy in the Excel or text delimited format).)

Krug tries to minimize the Compliance Guide, describing it as merely "recommended practice." (Krug Br. at 17.) While the Compliance Guide

[7] Prior versions of the Compliance Guide more explicitly advised that unless such legally sufficient reasons exist for denying records in a specific requested format, "such access is ordinarily required." (R.38-7.)

does not itself have the force of law, its "best practices" are more likely than "worst practices" to demonstrate compliance with the policy objectives in Wis. Stat. §19.31. The same is true for an Executive Order issued by Governor Scott Walker in March 2016, which was also intended to "promot[e] open and transparent government through implementation of best practices." State of Wisconsin, Office of the Governor, Executive Order #189 (Mar. 11, 2016) (directing that all state agencies, *inter alia*, "facilitat[e] access to electronic records whenever possible").[8] This specifically included the directive, "[w]hen requested and whenever practicable, provide electronic copies of records that already exist in an electronic format, without charging reproduction fees on a per-page basis for providing such copies." *Id.*, ¶1.a.v. It was not error for the circuit court to rely in part on such resources.

Krug claims that considering a requester's needs under the "substantially as good" test impermissibly requires custodians to consider a requester's identity and purpose in seeking records before responding to a request. (Krug Br. at 18.) It does no such thing. Consistent with *WIREdata* and the Compliance Guide, the "substantially as good" test only requires custodians to consider what a requester has asked for in his or her request, then decide how to satisfy that request. The "what" and the "why" of a request are separate matters, and requesters could still make a request

[8] *Available at* https://walker.wi.gov/sites/default/files/executive-orders/EO_2016_189.pdf.

anonymously under this standard, as the law entitles them to do. Wis. Stat. §19.35(1)(i). Krug's objection is baseless.

Krug also claims the "substantially as good" test will be difficult to apply because a requester's preferences may not be clear, or custodians' interpretations of "substantially as good" may not be consistent. (Krug Br. at 20-21.) Krug never voiced these objections as a basis for denial of Lueders' request and it is accordingly improper to consider them here. *Newspapers, Inc. v. Breier*, 89 Wis. 2d 417, 427, 279 N.W.2d 179, 184 (1979) (holding the custodian is limited to the reasons for denial asserted in his response to requester).[9] Regardless, the Open Records law already accounts for these considerations. If the requester's preferences are unclear, the "substantially as good" test permits a custodian to provide records in the most useable format (R.55:8, A-App.108.) Alternatively, he or she can ask the requester for clarification, avoiding Krug's fear that custodians will have to "guess at" what a requester wants. (Krug Br. at 20.) Either option is preferable to providing a requester with a copy format he clearly does **not** want, as happened with Krug's response to Lueders. Furthermore, the "substantially as good" test should not be difficult for custodians to apply, because it is focused on what

[9] Since *Breier*, the Supreme Court has stated that a custodian may assert a "clear statutory exemption" for non-disclosure even if that exemption was not cited in the initial denial. *Journal Times v. Police & Fire Comm'rs Bd.*, 2016 WI 56, ¶ 76, 362 Wis. 2d 577, 866 N.W.2d 563; *see also State* ex rel. *Blum v. Bd. of Educ.*, 209 Wis. 2d 379, 388, 565 N.W.2d 140 (Ct. App. 1997). Krug does not appear to cite any "clear statutory exemption" for his argument, so the holding in *Journal Times* does not apply here.

the requester is seeking, or alternatively, what is most useable. (Krug Br. at 21.)

4. "Substantially as Readable" is Not the Applicable Legal Standard.

Despite the foregoing authority, Krug urges this Court to adopt a different standard: "substantially as readable," which he interprets to mean "what can be plainly seen with the eye." (Krug Br. at 13.) Krug is wrong that this is the standard, though even if it was, Krug reads it too narrowly.

Krug derives "substantially as readable" from the **second** sentence of Wis. Stat. §19.35(1)(b), which states,

> **If a requester appears personally** to request a copy of a record that permits copying, the authority having custody of the record may, at its option, permit the requester to copy the record or provide the requester with a copy substantially as readable as the original.

Wis. Stat. §19.35(1)(b) (emphasis added). Krug states that this language gives authorities the right to decide the format of the copy, even when a request is not made in person. (Krug Br. at 11.) However, his reading of the statute ignores a requester's separate right to obtain a copy in the **first** sentence of Wis. Stat. §19.35(1)(b) for requesters who do not appear in person. Krug's interpretation also renders the phrase "[i]f a requester appears personally" in the second sentence as surplusage, in violation of well-established principles of statutory construction. *State* ex rel. *Kalal v. Circuit Court for Dane Cty.*, 2004 WI 58, ¶46, 271 Wis. 2d 633, 663, 681 N.W.2d 110, 124 (providing statutes must be construed to avoid surplusage, giving reasonable effect to every word).

Krug's interpretation also undermines the Legislature's apparent recognition that in-person requests may be handled differently due to staffing demands, the unique characteristics of the requested record, or other considerations when copies are sought on the spot. Such was the case in *Grebner v. Schiebel*, where a requester appeared in person at a county clerk's office and sought to make copies of poll lists with his own portable photocopy machine. 2001 WI App 17, ¶4, 240 Wis. 2d 551, 554, 624 N.W.2d 892, 893. The court noted a municipal clerk's duty under Wis. Stat. §6.46 to preserve the integrity of poll lists, and determined the clerk could disallow the requester using "his or her own equipment without entering into a debate over the adequacy of the requester's equipment or the likelihood that it will destroy the document." *Id*. ¶13 & n.2.

Krug also cites *Grebner*, arguing it stands for the broad proposition that the custodian always has the choice to determine the format of a record, regardless of whether a requester appears in person. (Krug Br. at 11-12, 14.) But *Grebner* is clearly limited to its facts and the single, narrow issue that case decided: "whether the requester can select his or her own equipment to copy the public records without the clerk's permission." *Id*. ¶¶9-10. Because that case concerned a requester who appeared in person, it made sense for the court relying on Wis. Stat. §19.35(1)(b) to read the first and second sentences

of that statute together. *See Grebner*, 240 Wis. 2d 551, ¶¶11-12.[10] Krug's reading also does not fit with the overall statutory scheme. If the second sentence of Wis. Stat. §19.35(1)(b) applied to all record requests, there would be no need for Wis. Stat. §§19.35(1)(c)-(f), which contain rules for other, specified kinds of record copies. Again, the statute should be read to avoid such surplusage.

While Wis. Stat. §19.35(1)(b) is clear on its face and no resort to legislative history is necessary, *see Kalal*, 271 Wis. 2d 633, ¶51, Krug brushes off legislative history that is not favorable to him. (Krug Br. at 15.) Prior to 1991, the statute did not contain the "if the requester appears personally" language. *See State* ex rel. *Borzych v. Paluszcyk*, 201 Wis. 2d 523, 527, 549 N.W.2d 253, 254–55 (Ct. App. 1996) (explaining legislative history); 1991 Wis. Act 269, §26sm. "The legislature significantly changed the statute" to eliminate the custodian's ability to choose how a record was copied when a request is not made in person. 201 Wis. 2d at 527. Krug claims this was to address one problem only—requiring a requester to appear personally to make a copy (Krug Br. at 15)—but the statutory revision is not so narrow. 201 Wis. 2d at 528-29 & n.1 (Nettesheim, J., concurring). The Legislature's direct pivot away from Krug's interpretation precludes this Court from reviving it.

[10] The same is true for a 2014 Attorney General opinion Krug relies on (Krug Br. at 12). OAG 12-14, 2014 WL 7407211, at *4 (Wis.A.G. Dec. 30, 2014).

Even if "substantially as readable" were the standard for producing a copy of an electronic record, the Court should not adopt Krug's interpretation of this standard. Krug narrowly defines "readable" to mean "a readable typeface," or "what could be plainly seen with the eye." (Krug Br. at 12-13 (citing The American Heritage Dictionary (5th ed. 2016).) The circuit court rejected this standard because "the words on a printed page consist of only a small part of what an electronic document actually contains, and reading those words with the naked eye is far from the only way to meaningfully access an electronic record." (R.55-5, A-App.105.) Searchability and analysis also function to make a record more "readable" than what shows up when the record is printed. Compliance Guide, *supra*, at 55.

Should this Court adopt Krug's proposed standard, it should broadly define "readable" as not just the default text that emerges on a printed copy of an electronic record, but the electronic metadata and information that is ordinarily unprinted, as well as the readability of the record through search and analysis functions. This interpretation would better harmonize the presumption in favor of public access with technological advances. *See* Wis. Stat. §19.31; *Jones*, 237 Wis. 2d 840, ¶19.

C. *Krug Improperly Denied Lueders' Request for an Electronic Copy of the Water Legislation Email Messages*.

In this case, Lueders demonstrates all the elements for enforcement under Wis. Stat. §19.37(1), and Krug has not shown legally sufficient reasons

for denying Lueders' request for an electronic copy of the water legislation email messages.

1. Krug Withheld Records in Response to a Written Request for those Records.

First, it is undisputed that Krug, a state legislator, is an "authority" under the Open Records law. Wis. Stat. §19.32(1); R.30:5 ¶2; R.40:2 ¶2. Second, Krug withheld access to an electronic copy of the water legislation email messages. (R.1-12, A-App.126.) While Krug claims he complied with Lueders' request by referencing an earlier provision of a paper copy, there is no dispute that he did not provide the requested electronic copy and told Lueders "we now consider your request closed." (R.30:11 ¶28; R.40:3 ¶28.) This response is fairly construed as a denial, and Lueders took it as such. *Id.*; *Jones*, 237 Wis. 2d 840, ¶¶6-7 (describing a custodian's failure to provide records as a "denial," where the custodian claimed that he already complied by responding to a separate request for the same records in a different format); *WTMJ, Inc. v. Sullivan*, 204 Wis. 2d 452, 457, 555 N.W.2d 140, 142 (Ct. App. 1996).

Third, Krug concedes that the email messages are "records" subject to production under the Open Records law. (Krug Br. at 11, n.3.) He could not credibly dispute this fact because numerous courts have applied the law to include email messages, *e.g.*, *Schill v. Wis. Rapids Sch. Dist.*, 2010 WI 86, ¶4, 327 Wis. 2d 572, 786 N.W.2d 177 (plurality opinion), including email

messages sent to legislators "generally for the purpose of influencing the lawmaker's position on public policy [. . .] and maintained on a government e-mail system," *John K. MacIver Institute for Public Policy, Inc. v. Erpenbach*, 2014 WI App 49, ¶18, 354 Wis. 2d 61, 848 N.W.2d 862. Finally, Lueders made his request for the email messages in writing by his July 21 email request to Krug. (R.1:11, A-App.125.)

2. Krug Did Not State Legally Sufficient Reasons for Denying Lueders' Request for an Electronic Copy of the Email Messages.

With these elements satisfied, the inquiry then turns to Krug's reasons for denial. *Osborn*, 254 Wis. 2d 266, ¶16. Krug's response suggested that he had already complied by responding to Lueders' June 21 request by offering paper copies of the emails, that Assembly policy compelled his response, and that he had the option to decide the format for producing responsive records so long as the copy was "substantially as readable" as the original. (R.1:12, A-App.126.) To the extent these are legally cognizable reasons for denial, the circuit court correctly rejected them.

First, and contrary to Krug's claims (Krug Br. at 19-20), Lueders' June 21 and July 21 requests were not the same as to the dates of records requested or subject matter, with the second request significantly narrowed. *Compare* R.1:11, A-App.125 *with* R.1:10, A-App.124. The July 21 request was also, explicitly, for an electronic copy of the water legislation-related constituent emails, not paper copies of email messages. Wisconsin courts have

recognized and affirmed the use of a subsequent records request to follow up on and clarify records that were or should have been produced in response to a prior request. *See, e.g., WIREdata*, 2008 WI 69, ¶¶92-94 (noting requester's use of an initial and subsequent "enhanced" request); *Jones*, 2337 Wis. 2d 840, ¶10 (distinguishing original request for a copy of an audio recording from "subsequently enhanced" request for same recording in a different format). These cases treat the initial and later "enhanced" requests separately; compliance with one is not compliance with the other.

Second, no Assembly policy compelled Krug to provide a copy of the requested emails only in paper format. The Assembly policy cited in Krug's response speaks not to copy format one way or the other, but only to the administrative process of providing records to requesters and conducting billing through the Assembly Chief Clerk's office. (R.30:10-11 ¶27; R.40:3 ¶27; R.18:32-33.)[11]

Third, under any available standard for evaluating the sufficiency of a copy, Krug was wrong as a matter of law in denying Lueders' request for an electronic copy of the water legislation emails. As explained above, the plain language of the Open Records law compelled Krug to provide the copy in the format in which the original record was maintained, unless that form was not

[11] In the circuit court, Krug relied on the Assembly's *practice* of providing records in paper format based primarily on the preferences of the Assembly Chief Clerk, but it appears to have abandoned that argument on appeal. (*E.g.*, R.17:34-36; R.36:37-38.) In any case, that practice was not uniformly observed. (R.31:1-2.)

"comprehensible" to Lueders. *See* Wis. Stat. §§19.32(2), .35(1)(e). Because the records were maintained electronically, in Microsoft Outlook format (R.30:7-8 ¶13; R.40:2 ¶13), they should have been produced in that format. Offering a paper copy converted the records from their original format to a different format that was not identical to the original, in either content or other functions such as searchability. (R.30:14 ¶47; R.40:8, ¶47.) The paper copy did not fulfill Lueders' right to receive a copy of the records or comply with Lueders' request. Wis. Stat. §19.35(1)(b).

Similarly, employing the *WIREdata* standard, Krug should have provided the records in the format as worded by Lueders' request: "in electronic form, as an email folder, or on a flash drive or CD." (R.1-11, A-App.125.) The context of Lueders' request also made clear he was seeking an electronic copy that was searchable, since he indicated a desire to search for names in the email messages and match them up with names on the 143 pages of constituent contact reports he had already obtained. (*Id.*) Krug could have satisfied Lueders' request "as worded" by providing the records in their native Microsoft Outlook format, a PDF copy converted directly from Microsoft Outlook, or even a PDF copy of printouts that had been scanned with optical content recognition software. (R.33:8, ¶¶17, 20.) Krug's reference to the paper copy neither satisfied Lueders' request for an electronic copy of the emails, nor his request for a searchable copy.

Employing the "substantially as good" test as interpreted by the circuit court, Krug's denial is also deficient. The circuit court correctly found that Lueders had specified that he sought an electronic copy of the records "'as an email folder, or on a flash drive or CD'" and was entitled to receive the records in that format. (R.55:6-55:8, A-App.106-108.) Krug did not claim that producing the records electronically would be so burdensome as to be inconsistent with the conduct of governmental business. (R.1:12, A-App.126.) In fact, one of Krug's advisors prepared a draft response that would have released the records in electronic form, though Krug elected not to send it. (R.18:30-31) Even if Lueders had not specified his format, the paper copy was "not substantially as good" as the original because it was not as useful to an average person with access to ordinary technology, as a native, searchable PDF, or even scanned PDF copy would be. (R.55:8, A-App.108.) The paper copy was also costly.

Finally, even if the proper test were whether a copy is "substantially as readable" as the original, as Krug contends, he still should have provided electronic records to Mr. Lueders. The paper copy contained far less "readable" information than the original by excluding metadata and other properties, was not searchable, and could not be analyzed in the same manner as a native or other electronic copy. (R.30 ¶¶ 40-51; R.40 ¶¶ 40-51; R.24.) In other words, it was not "substantially as readable" as the original.

Krug's denial of Lueders' request for an electronic copy of the water legislation email messages did not comply with the Open Records law, and the circuit court should be affirmed.

D. *Krug's denial violates the strong policy of complete access underlying the Open Records law*.

The Open Records law's strong policy in favor of access also supports affirming the circuit court.

Krug's position, if accepted, would seriously hamper the public's understanding of the affairs of government by divorcing the public's right to records from the formats where those records are actually and increasingly maintained. This Court has specifically warned against this approach:

> As technology advances and computer systems are refined, it would be sadly ironic if courts could disable Wisconsin's open records law by limiting its reach… . A potent open records law must remain open to technological advances so that its statutory terms remain true to the law's intent.

Jones, 2000 WI App 146, ¶19.

Without access to emails, electronic documents, and databases, journalists are often hamstrung in their ability to determine how an agency is performing and whether an agency is acting in the public good. (R.30:18-19 ¶57; R.40:8 ¶57.) Providing paper copies of records that are otherwise readily available in electronic format, especially voluminous documents, is in fact a tactic to obstruct public access to information. (R.30:19 ¶59; R.40:9 ¶59.) This makes it harder to analyze documents and data and pull meaning from them, and successful use of this tactic may encourage other custodians to do the

same and further reduce or remove the value of documents and data. (R.30:19 ¶59; R.40:9 ¶59.) If records custodians had the option to provide electronic records solely in printed format, there is some information—such as metadata—which could never be conveyed to the public. (R.30:19 ¶61; R.31:2 ¶6.)

Producing electronic records electronically is also more efficient and less costly for requesters and custodians alike. These are important considerations, because "[i]ncreasing the costs of public records requests for a requester may inhibit access to public records and, in some instances, render the records inaccessible," contrary to Wis. Stat. §19.31. *Milwaukee Journal Sentinel*, 2012 WI 65, ¶40. Contrary to Krug's claim that authorities may lack the technological capability to provide records electronically (Krug Br. at 20-21), many already do so simply because it is easier and cheaper. The Attorney General's office issued guidance nearly four years ago on the mechanics of electronic record production and proper charges. (R.38:4) For records that

> already exist in the electronic format in which they are to be produced to the requester . . . [a]ll that needs to be done is to enter the computer commands necessary to transfer copies of the responsive records from the electronic location where they are stored to the electronic medium that will be used to produce the records to the requester. Email messages may be copied onto a thumb drive, for example[.]

(R.38:5.) Actual, necessary, and direct costs for reproduction are in this case limited to staff time for transferring the records—"perhaps only seconds"—and the cost of the medium used to produce the records. (*Id.*)

By contrast, producing electronic records on paper is costly and burdensome. For example, Krug's response to Lueders' initial June 21 request yielded over 1,500 pages of printed documents, which his staff had to expend time printing out from their original, electronic format. (R.30:7-8 ¶13; R.40:2 ¶13.) Records custodians are limited to charging their "actual, necessary, and direct cost of reproduction" in copying a record, but custodians often charge per-page fees with printed records. *See* Compliance Guide, *supra*, at 62. In this case, Lueders would have had to pay $0.15/page for printed copies of the emails—a significant cost for all 1,500 pages. (R.30:8 ¶16; R.40:3 ¶16.) Producing records electronically can avoid these per-page fees. Executive Order #189, *supra*, ¶1.a.v.

Providing records electronically, in a response to a request for records in their electronic format, advances the public's interest in and access to government information. Krug's denial of electronic records access in this case is an impediment to that access, and the circuit court should be affirmed.

II. The Circuit Court Properly Granted Lueders' Motion for a Protective Order to Prevent the Deposition of a Records Requester

The circuit court did not abuse its discretion in granting Lueders' motion for a protective order prohibiting Krug from deposing him. The deposition would not have generated any relevant information, and Krug's arguments otherwise rely on his misinterpretation of the circuit court's decision. (Krug Br. at 24.) Krug also mischaracterizes the circuit court's

decision as a "blanket prohibition of depositions in public records actions" when the circuit court based its inquiry on Krug's written submissions and motion argument, though also appropriately considered the policy implications of Krug's request. (R.61:10, A-App.120.) These findings were well within the circuit court's discretion.

A. *Discovery is Permitted to Collect Relevant Evidence Under the Substantive Law, When Not Oppressive or Harassing.*

Contrary to the statement of the law in Krug's brief (Krug Br. at 22-23), Krug did not have an unfettered right to depose Lueders.

Discovery is only available on matters that are **relevant** to claims or defenses. Wis. Stat. §804.01(2)(a) (2015-2016); *State* ex rel. *Amek bin Rilla v. Circuit Court for Dodge Cty.*, 76 Wis. 2d 429, 435, 251 N.W.2d 476, 480 (1977) ("The right to discovery only extends to material relevant to the subject matter involved in the pending action."). A party has no right to discover privileged or "clearly irrelevant" matters, or matters unlikely to be relevant. *See Mfg. Sys., Inc. of Milwaukee v. Computer Tech., Inc.*, 99 F.R.D. 335, 336 (E.D. Wis. 1983) (finding court can quash or modify a deposition subpoena where the matters sought are "privileged or clearly irrelevant").[12]

[12] In construing a Wisconsin rule of civil procedure which has a federal counterpart, Wisconsin courts consider as persuasive authority federal decisions construing the federal rule, if those decisions show a pattern of construction. *Schneider v. Ruch*, 146 Wis. 2d 701, 706, 431 N.W.2d 756, 758 (Ct. App. 1988)

"[C]ircuit courts have broad discretion in determining whether to limit discovery through a protective order," including by restricting or preventing depositions. *Paige K.B.*, 226 Wis. 2d at 223. Such orders are available where they would protect a party from annoyance, embarrassment, oppression, and undue burden or expense. Wis. Stat. §804.01(3).

Under the Open Records law, the facts and issues are limited, focusing on the defendant's conduct in denying the plaintiff's request. *See* Wis. Stat. §§19.35(1)(a), .37(1). Such suits are akin to agency review cases under Wis. Stat. §227.52, where the government's actions are in dispute—not the challenger's. As such, the government will typically possess all the relevant evidence, and discovery of the plaintiff must be carefully limited. *See City of Lakewood v. Koenig*, 250 P.3d 113, 117 (Wash. App. 2011) (reversing grant of motion to compel discovery of requester in government-initiated declaratory judgment action under the Washington State Public Records Act).

The Open Records law makes the motive and identity of the plaintiff in seeking records irrelevant to his or her entitlement to records. Wis. Stat. §19.35(1)(i). Discovery that intrudes into a requester's identity or purpose is thus annoying, embarrassing, oppressive, and unduly burdensome and expensive, and demonstrates good cause for a protective order. Wis. Stat. §804.01(3)(a). As a matter of practice, it is literally unheard-of for a defendant to request to take a plaintiff's deposition in a case under the Wisconsin Open Records law. (R.9:2 ¶6; R.61:10-61:11, A-App.120-121.)

B. *Lueders' Deposition Would Not Have Generated Relevant Evidence.*

1. Most Relevant Facts Were Undisputed.

In this case, the issues were narrow and most of the essential facts were already undisputed before Krug sought to depose Lueders. At that time, Krug had already admitted that:

- Lueders is a "requester" (R.1:3 ¶1; R.4:1 ¶1).
- Krug is an "authority" (R.1:3-4 ¶2; R.4:1 ¶2).
- Lueders made an open records request for an electronic copy of the email messages on July 21, 2016 (R.1:6 ¶13; R.4:3 ¶13).
- Krug sent Lueders a response on July 26, 2016, that did not provide the electronic copy (R.1:7 ¶14; R.4:3 ¶14).
- The requested email messages were a "'record' subject to disclosure under the Open Records law. (R.1:8 ¶ 19; R.4:4 ¶ 19.)

Further discovery on these facts would have been pointless and costly. *See Osborn v*, 254 Wis. 2d 266, ¶12 (application of the Open Records law to undisputed facts presents a question of law).

To the extent there were initial factual disputes, most of the parties' discovery centered on Krug's denial that "the electronic copy constitutes a 'record' distinct from the paper copy." (R.1:8 ¶19; R.4:4 ¶19). These facts were resolved through expert testimony and the parties agreed no material facts precluded summary judgment. (R.62:2-62:3.)

2. Lueders' Identity and Purpose in Seeking Records Were Irrelevant.

Krug cited a changing list of reasons he wanted to depose Lueders, but most improperly focused on Lueders' identity and purpose—irrelevant considerations under the substantive law.

Counsel for Krug initially stated her desire to depose Lueders "because of who he is" (R.9:1 ¶3), citing his expertise as a requester and "scholar in Wisconsin on public records" (R.59:2-3.) At oral argument on the motion for protective order, Krug's counsel's repeated focus was a desire to know "why the records that were given on the first request were not sufficient and **what it was that [Lueders] had wanted to do with the records**," and that "the defendant [has] the right to know why" the paper copy "wasn't good enough." (R.61:5, 7, A-App.115, 117 (emphasis added).) As recognized by the circuit court, Lueders was protected by law from disclosing his purpose in requesting the records or what he wished to do with them. (R.61:10, A-App.120.) Based on Krug's articulated reasons for seeking summary judgment, the circuit court found the deposition would be oppressive. (*Id.*)

Krug claims the circuit court's "substantially as good" test puts Lueders' purpose in seeking the records back in play, because a requester's "needs" as to a particular format are relevant to the form of a copy that must be generated. (Krug Br. at 24.) As explained above, Section I.B.3., *supra*, the court's order does no such thing, and requires a custodian only to assess what

a requester is asking for. (R.55-8, A-App.108.) This inquiry can be resolved based on what is contained in the four corners of an Open Records request, a custodian's knowledge of what formats are generally useable to average requesters, and any subsequent correspondence between requester and custodian while the custodian is filling the request. An after-the-fact deposition of the requester would provide no relevant information about the custodian's assessment of a requester's needs at the time of the request.

In fact, this case illustrates the futility of Krug's argument. An authority need only make a good faith effort to provide records in the appropriate format. *WIREdata*, 2008 WI 69, ¶96. However, here Krug clearly failed to make any effort at all, declaring Lueders' request "closed" based simply on the previous production of paper records. (R.1:12, A-App.126; R.30:5-6 ¶5; R.40:2 ¶5.) There was no doubt as to the appropriate format to fill Lueders' request, and Krug did not claim any confusion as to what Lueders was seeking. As the circuit court noted, Lueders had "clearly communicated that printed copies would not serve his needs, and he specified several electronic formats that would facilitate his ability to work with the records." (R.55:8, A-App.108.) Nothing about Lueders' deposition months later would explain Krug's failure to comply with Lueders' request.

Krug claims two recent cases open the door to inquiring into a requester's identity and purpose (Krug Br. at 23-24), but they are inapposite. *State* ex rel. *Ardell v. Milwaukee Bd. of School Directors* **reinforced** that the

identity and purpose of the requester are irrelevant, but permitted a school district to withhold records about an employee based on public safety considerations where the requester had a "violent history" with the employee and two prior violations of a domestic abuse restraining order. 2014 WI App 66, ¶17, 354 Wis. 2d 471, 482, 849 N.W.2d 894, 899. There are no comparable considerations here. *Democratic Party of Wisconsin* was a balancing test case where the Court considered the context of the record request and the public policy reasons that the plaintiff/requester offered in favor of disclosure **generally**, and not reasons that the requesters gave for their own use of the records. 2016 WI 100, ¶¶20, 23, 372 Wis. 2d 460, 477–78, 478, 888 N.W.2d 584, 592, 593. By Krug's admission, "this is not a balancing test case." (Krug Br. at 10.) Furthermore, in neither case did the court rule in favor of allowing defendants' inquiries into the requesters' identities or purposes through discovery.

The circuit court correctly found such inquiries irrelevant here.

3. Krug's Remaining Reasons for Seeking Lueders' Deposition Would Not Have Generated Relevant Evidence.

Krug generally cites other topics he might have explored through a deposition of Lueders (Krug Br. at 23), but these also would not have generated relevant evidence or facts Krug did not already have.

The first and last topics Krug identified—"the facts and circumstances alleged in the complaint" and "all matters alleged in the complaint" are very

general but nonetheless touch on matters that were not reasonably in dispute. (Krug Br. at 23; R.10:4-5.) Second, Krug states that he desired "clarity with respect to the relief [Lueders] sought," but relief is specified in and limited by the Open Records law, Wis. Stat. §19.37, and Lueders' Complaint (R.1:8). Any outstanding facts related to damages depended on Krug's undisputed conduct in denying the request, *see* Wis. Stat. §19.37(3), (4) (allowing penalties and punitive damages for "arbitrary and capricious" denials or delays). *See Doersching v. State Funeral Directors & Embalmers Examining Bd.*, 138 Wis. 2d 312, 325, 405 N.W.2d 781, 787 (Ct. App. 1987) (holding whether behavior "meets a legal standard of propriety or acceptability is a matter of law"). Any questions about damages strategy would have necessarily intruded into attorney-client privileged matters.

Krug's professed desire to "follow[] up on written discovery responses that [Lueders'] counsel objected to" is unclear. (Krug Br. at 23.) However, it suggests that Krug sought to ask questions that (1) Lueders already answered notwithstanding his objections in written discovery, or (2) that were objected to, but whose subject matter Krug intended to intrude into regardless. (R.10:4 & n.2.) Either rationale is problematic and further supported the need for the protective order.

Finally, Krug states that he wished to "discover[] whether Lueders intended to provide any expert testimony on the public records law." (Def's Br. at 23.) Krug's pursuit of Lueders' "expert" testimony only reinforced

concerns that Krug was deposing Lueders because of "who he is," or that Krug would attempt to elicit expert testimony on his own behalf. Krug had no right to "build a record" either based on Lueders' identity or expert testimony that is unwillingly provided. Wis. Stat. §§19.35(1)(i), 907.06(1); *Imposition of Sanctions in Alt v. Cline*, 224 Wis. 2d 72, 86, 589 N.W.2d 21, 26 (1999). As for other experts, Krug had the opportunity to learn of their identities in written discovery and in fact deposed Lueders' information technology expert. (R.41, Exh. J.)

Krug does not identify any additional or relevant facts that only Lueders' deposition could have supplied, and the circuit court correctly granted the protective order.

C. *The Reasons Against Allowing Krug's Deposition of Lueders Outweighed Krug's Proffered Reasons for Why he Should Have Been Allowed the Deposition.*

To the extent that information in Lueders' deposition had any possible relevance, the probative value of the information is substantially outweighed by the oppressive and harassing nature of the inquiry. Wis. Stat. §804.09(3).

The reasons Krug's counsel cited for pursuing Lueders' deposition were thin, and little would be needed to justify a protective order. Section II.B., *supra*. However, in the balance here were the serious reasons—described by Lueders and recognized by the circuit court—that the deposition would have been harassing and oppressive. (R.8:7-8 ¶16; R.61:6-10, A-App.116-20.) Lueders is a journalist, and Wisconsin law has long exhibited concerns about

the state compelling disclosure of newsgathering activities. *See* Wis. Const. art. I, §3; Wis. Stat. §885.14; *Kurzynski v. Spaeth*, 196 Wis. 2d 182, 538 N.W.2d 554 (Ct. App. 1995). Krug identified Lueders as an expert user of the Open Records law as a basis for seeking his deposition, but if requesters with a longer history of making requests are more susceptible to deposition, then citizen activists, journalists, political opponents, and other frequent requesters can expect searching discovery any time they file an Open Records law complaint. Not coincidentally, this group is more likely to be disfavored or even targeted by government or those in power.

Permitting the deposition would signal to potential Open Records plaintiffs that their identity and motive are subject to cross-examination by State's attorneys (or, as in this case, a state legislator), creating an intimidating and chilling effect on challenging denials or even making requests in the first place. It would also delay the efficient resolution of Open Records cases and production of records improperly withheld, needlessly frustrating the expedient and effective operation of the Open Records law. This undermines the entire purpose of the law to ease access to information and promote an informed electorate. *See* Wis. Stat. §19.31. The Court should not sanction this result.

The circuit court appropriately considered the burden to Lueders in this case, and to records requesters generally, in granting the motion for protective order.

D. *Any Error in the Circuit Court's Exercise of Discretion was Harmless.*

Finally, even if the circuit court did erroneously exercise its discretion in granting Lueders' motion for a protective order, it was harmless error because it did not affect the court's grant of summary judgment to Lueders.

"No judgment shall be reversed or set aside…for error as to any matter of pleading or procedure, unless…after an examination of the entire action or proceeding, it shall appear that the error complained of has affected the substantial rights of the party seeking to reverse or set aside the judgment." Wis. Stat. §805.18(2). "For an error 'to affect the substantial rights' of a party, there must be a reasonable possibility that the error contributed to the outcome of the action or proceeding at issue." *Martindale v. Ripp*, 2001 WI 113, ¶32, 246 Wis. 2d 67, 89, 629 N.W.2d 698, 707.

Krug does not, and cannot, show that his ability to depose Lueders would have likely changed the overall outcome of Lueders' mandamus action. First and foremost, Krug cannot point to a single fact that he could likely have gleaned only from deposing Lueders and that would have changed the court's ruling on the ultimate matter of the legal sufficiency of Krug's refusal to provide more than paper records.

Moreover, Krug was able to rely on his own witnesses and on Lueders' written discovery responses. Krug was even able to depose Lueders' expert witness. (*See* R.44.) Finally, although Krug's desire to depose Lueders hinged in part on Lueders' belief in his entitlement to punitive damages, the circuit

court ultimately ruled for Krug on that matter anyway. (Br. at 23; R.55-9, A-App.109.)

Any error by the circuit court was harmless, and its grant of Lueders' motions for protective order and summary judgment must stand.

CONCLUSION

The circuit court decision and order should be affirmed.

Respectfully submitted this 25th day of June, 2018.

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CERTIFICATION

I hereby certify that this brief conforms to the rules contained in Wis. Stat. §809.19(8)(b) and (c) for a brief produced with a proportional serif font. The length of this brief is 10,984 words.

Dated this 25th day of June, 2018.

/s/ Aaron G. Dumas

Aaron G. Dumas

CERTIFICATE OF COMPLIANCE WITH WIS. STAT. §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. §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 25th day of June, 2018.

/s/ Aaron G. Dumas

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