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FOR IMMEDIATE RELEASE

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Wisconsin Stat. § 19.77 Annual Summary

MADISON, Wis. – The following is a summary of public records case law-related decisions for 2020, which the Department of Justice is required to compile pursuant to Wis. Stat. § 19.77.

The statute says that annually, the Attorney General shall summarize case law and attorney general opinions relating to due process and other legal issues involving the collection, maintenance, use, provision of access to, sharing or archiving of personally identifiable information by authorities. The Attorney General shall provide the summary, at no charge, to interested persons.

I. CASE LAW

Friends of Frame Park v. City of Waukesha, 2020 WI App 61, 394 Wis. 2d 387, 950 N.W.2d 831

This case addressed what constitutes a "prevailing party" for purposes of determining whether to award attorney's fees under the public records law when an authority voluntarily releases the requested records during the course of litigation rendering the lawsuit moot.

Friends of Frame Park (Friends) submitted a public records request to the City of Waukesha (City) for records related to the alleged plan to "build and operate a baseball stadium in Frame Park." The City denied the request. Friends filed a petition for writ of mandamus. Two days after the lawsuit was filed, the City released the draft contract to Friends stating that "the document was 'being released now because there is no longer any need to protect the City's negotiating and bargaining position." Friends filed an amended complaint stating that the production of the withheld records "does not

eliminate the violation" which was "the improper withholding of records" and sought costs and attorney's fees.

The City filed a motion for summary judgment stating that the lawsuit was moot because Friends received the records they sought. In response, Friends' argument focused on whether the City correctly invoked the "competitive or bargaining reasons" exemption under the open meetings law, pursuant to Wis. Stat. § 19.85(1)(e), when the City initially withheld the draft contract under the public records law, pursuant to Wis. Stat. § 19.35(1)(a).

The circuit court found that the City did not release the draft contract because of the lawsuit, but rather because there were "no longer any 'competitive or bargaining reasons' for nondisclosure." The court granted the City's motion for summary judgment, denied Friends' request for attorney's fees, and dismissed the lawsuit.

Friends appealed the circuit court's order. The court of appeals reversed the circuit court's decision, holding that: 1) when determining whether a party has "substantially prevailed and is eligible for attorney's fees" after the voluntary disclosure of records, the court should consider the "timing of release, causation, and whether plaintiff was entitled to disclosure" at an earlier time; 2) use of the "competitive or bargaining reasons" exemption under the open meetings law did not justify the City's nondisclosure of the draft contract under the public records law at the time of the request; and 3) Friends had prevailed "in whole or in substantial part" and was entitled to attorney's fees.

In the court's discussion regarding the City's unjustified use of the "competitive or bargaining reasons" open meetings law exemption, the court stated that the City had not shown any "type of competitive harm" it would have suffered if disclosure under the public records law had been made at the time of Friend's initial request. The City had also not provided evidence of any competition with another entity for the contract. The court also stated that "a governmental body cannot rely on the mere fact of a closed meeting to justify a blanket nondisclosure of all meeting documents." An authority must provide specific details to justify why "competitive or bargaining reasons" require nondisclosure under the public records law.

The court of appeals remanded the case to the circuit court with directions to grant summary judgment to Friends and award Friends reasonable attorney's fees.

***WITI-TV, Inc. v. Tony Evers*, No. 19-CV-3469 (Wis. Cir. Ct. Dane Cty. Nov. 16, 2020)**

This case addressed the interpretation of Wis. Stat. § 19.35(1)(h).

Governor Tony Evers (Governor) received three public records requests from WITI-TV, Inc (WITI-TV) for: (1) the Governor's 2019 calendars; (2) the Governor's emails sent and

received from June 14—30, 2019 and September 2—18, 2019; and (3) Maggie Gau's (Gau) emails sent and received from June 14—30, 2019 and September 2—18, 2019. The Governor's office provided the Governor's calendar but denied the request for emails "because they lack a subject matter." For the same reason, the Governor's office also denied two amended requests seeking the Governor's and Gau's emails for a seven-day period and a one-day period.

WITI-TV then filed a petition for writ of mandamus. WITI-TV argued that because a "limitation as to time" was provided in its requests, it was not required to also provide a "reasonable limitation as to subject matter."

The circuit court found that the Governor's denials "were based on an incorrect interpretation of Wis. Stat. § 19.35(1)(h)." The court stated that "the use of 'or' is disjunctive" and that only "one reasonable limitation is required under the statute and can be either as to subject matter or to length of time." Therefore, the court granted WITI-TV's motion for summary judgment and petition for writ of mandamus.

II. ATTORNEY GENERAL OPINIONS

In 2020, the Attorney General issued no formal or informal opinions within the scope of Wis. Stat. § 19.77.