STATE OF WISCONSIN CIRCUIT COURT DANE COUNTY
BRANCH 4

MIDWEST ENVIRONMENTAL ADVOCATES, INC.,

Plaintiff,

v.

Case No. 2021-CV-2526

FREDERICK PREHN, WISCONSIN NATURAL RESOURCES BOARD, and WISCONSIN DEPARTMENT OF NATURAL RESOURCES,

Defendants.

BRIEF IN SUPPORT OF PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT

Plaintiff Midwest Environmental Advocates, Inc. ("MEA" or "Plaintiff") has waited over a year for public records that Defendants Wisconsin Department of Natural Resources ("DNR"), Wisconsin Natural Resources Board ("NRB"), and Dr. Frederick Prehn ("Prehn") originally said do not exist. MEA filed a written request for these records under Wisconsin's Public Records Law, Wis. Stat. §§ 19.31-.39[1], to better understand why Prehn, a member and former chair of the NRB, has refused to step down from his office despite the expiration of his term on May 1, 2021. As part of that request, MEA explicitly requested text messages related to Prehn's tenure on the NRB. Defendants' initial response contained no text messages. After MEA made inquiries, Defendants confirmed that Prehn had searched for responsive text messages but that none were found. When an entirely separate public records request uncovered a responsive text message between Prehn and another NRB member, MEA had reason to believe that additional records

[1] All citations are to the 2019-20 version of the Wisconsin Statutes unless otherwise noted.

existed that were either inadequately searched for, withheld without justification, or unlawfully deleted. Accordingly, MEA brought this case pursuant to Wis. Stat. § 19.37(1)(a) to recover those records.

Although the Parties have agreed to a Forensic Inspection Protocol and Schedule for a third-party digital forensic expert to search Prehn's cellular phone and tablet for responsive text messages and for all non-privileged records to be turned over to MEA, *see* Docs. 50 & 53, there are still important issues for this Court to decide. Based on the undisputed facts and applicable legal framework set forth below, the Court should grant Plaintiff's Motion for Summary Judgment and find that:

(1) Defendants violated Wisconsin's Public Records Law by unlawfully withholding and delaying access to public records responsive to Plaintiff's June 29, 2021 written records request;

(2) Plaintiff is entitled to a mandamus order directing Defendant Prehn to search for and locate, and Defendants to produce, all records responsive to MEA's June 29, 2021 written records request in compliance with the Forensic Inspection Protocol previously filed in this case, *see* Docs. 50;

(3) Defendants' violations of Wisconsin's Public Records Law were arbitrary and capricious, entitling Plaintiff to punitive damages under Wis. Stat. § 19.37(3); and

(4) Plaintiff has substantially prevailed and is entitled to reasonable attorney fees under Wis. Stat. § 19.37(2)(a).

STATEMENT OF FACTS

On June 29, 2021, MEA submitted a written public records request for Defendant Prehn's communications regarding his tenure on the NRB. Docs. 18 & 21, ¶¶ 7-8. Specifically, MEA requested:

> All communications sent to or from Dr. Frederick Prehn, between the dates of June 29, 2020 and June 29, 2021, regarding his tenure on the Natural Resources Board, including but not limited to any communication about remaining on the Board past the expiration of his term or otherwise declining to vacate his position on the Board.

Id. ¶ 7. In the request, Plaintiff specifically defined communications to include "public records such as electronic mail, text messages, or other forms of written communications sent or received on any professional or personal device, such as a cell phone, tablet, personal computer, or smart watch, or through any professional or personal accounts or through any other means." *Id.* ¶ 8 (emphasis added).

DNR staff purportedly granted Plaintiff's June 29, 2021 public records request in full on August 13, 2021. *See* Docs. 18 & 21, ¶ 19. The response included two links to batches of records and an explanation of records that were redacted or withheld. Doc. 4 at 21 of 39; *see also* Docs 18 & 21, ¶ 19. Defendants explained that, pursuant to the balancing test, personally identifiable information (names, addresses, and phone numbers) as well as information related to law enforcement techniques and strategy were redacted from within e-mails. *Id.* Additionally, e-mails were withheld or redacted because they were subject to attorney-client privilege or could potentially subject private individuals to harassment. *Id.* No mention was made of withheld or redacted text message communications in the August 13th release, and no written denial or justification thereof was provided for failing to include text message communications, such as Prehn not qualifying as an "authority" or that text messages are not "records" according to the definitions of those terms contained in Wis. Stat. § 19.32. *See* Docs. 18 & 21, ¶ 27.

Following review of the released records, Plaintiff noted that the response did not include any text communications and sought to remedy a potential oversight or error by Defendants by ensuring Defendants knew Plaintiff was requesting text messages. Docs. 18 & 21, ¶ 21. *See also id.* ¶ 26 (Defendants admitting that responsive text messages were not provided in response to MEA's June 29, 2021 request). After internally conferring with "relevant staff," DNR responded via e-mail on September 3, 2021, confirming "that [the relevant staff] did search for text messages as part of their record searches and they did not locate any text message records responsive to your request." Doc. 18 & 21, ¶ 21. Responsive records from a separate public records request that MEA submitted to Defendants on September 3, 2021, which sought all communications Prehn sent or received about Plaintiff's June 29, 2021 public record request that is the subject of this case, indicates that both former NRB Liaison Laurie Ross, a DNR staff member in the DNR Secretary's Office that coordinates between DNR and the NRB, and Defendant Prehn were aware that the June 29, 2021 request included text messages. Lee Aff. Exh. RDL-2 at 003. In response to Plaintiff's inquiry asking Defendants to clarify that text messages were searched for, Ross stated: "Confirmed: text message searches were included in this request." *Id.* Prehn's response was that he had "no text on my phone for that." *Id.*

Despite both Prehn and DNR staff indicating that they had searched for text message communications responsive to Plaintiff's June 29, 2021 request, another response to a public records request that Plaintiff submitted to Defendants NRB and DNR on September 13, 2021 said otherwise. In that request, Plaintiff sought "[a]ll text messages Natural Resources Board Member Bill Smith sent to or received from Dr. Frederick Prehn, between April 1, 2021 and September 13, 2021," and DNR subsequently produced a text message that was responsive to Plaintiff's June 29, 2021 request that is the subject of this case. That text message had not been

previously disclosed. Doc. 4 at 31. The message, dated April 26, 2021, was from Prehn to Smith, and stated:

> I've got to decide if I'm going to stay on until the next appointee is confirmed. Evers notified me he's not going to reappoint me I guess he thinks there's some pretty big agenda items that I might no agree with LOL.

Docs. 18 & 21, ¶ 24.

The discovery of this text message prompted Plaintiff to file, on October 19, 2021, this mandamus action against Defendants for unlawfully withholding and delaying access to public records that were requested pursuant to Wis. Stat. § 19.37(1)(a). In a combined Answer, Notice of Motion, and Motion to Dismiss, filed on November 11, 2021, Defendant Prehn articulated for the first time new reasons for withholding the records. Doc. 18. Specifically, Defendant Prehn asserted that he was not an "authority" under Wisconsin's Public Records Law. *Id.* ¶ 2. Prehn also denied that the text messages sought "necessarily constitute 'records.'" *Id.* ¶ 22. *See also* Doc. 24 at 2. In March 2022, this Court rejected Prehn's arguments, ruling that he is an "authority" and is therefore subject to the requirements of Wisconsin's Public Records Law. Doc. 44 at 3-4. The Court ruled further that the text messages MEA seeks—text messages related to Prehn's tenure on the NRB and his decision to holdover past the expiration of his term—are "records." *Id.* at 4-5. The Court denied Defendants' motion to dismiss that had articulated these arguments. *See generally* Doc. 44.

Defendants NRB and DNR also filed an Answer and Affirmative Defenses to Plaintiffs' Complaint on November 16, 2021, in which it was admitted, among other things, "that no DNR employee or state public official has access to e-mail or text messages received by Dr. Prehn unless they are the sender or recipient." Doc. 21 at ¶ 15.

Following the Court's denial of Prehn's Amended Motion to Dismiss, Prehn responded to Plaintiff's discovery requests. *See* Lee Aff. Exh. RDL-1. Notably, Defendant Prehn identified his process for searching for responsive records. As it related to text messages, Defendant Prehn's process was described as follows: "He viewed his iPhone messages to try to find any responsive records." *Id.* at 005 (Answer to Interrogatory No. 6). In response to discovery, Defendant Prehn also provided an additional text message exchange with former Wisconsin Governor Scott Walker that had not been previously disclosed in response to Plaintiff's June 29, 2021 request, follow up inquiries with DNR staff, or separate records requests. *Id.* at 006. (Defendant DNR also received those records through discovery, processed them, and delivered them to MEA as a supplement to its August 13, 2021 response to Plaintiff's June 29, 2021 public records request. Lee Aff. Exh. RDL-4 at 001.) In the text message exchange, which occurred on November 11, 2020, Prehn wrote:

> Hello governor, sorry to bother you this is Doc Prehn. Don't even know if this gets to you anymore this number.
>
> My question is simple. My term for the NRB is up in May. In January I'll be elected to my third year as chairman. I heard from legislators they do not intend on confirming anybody soon. And of course the chances of Evers reappointing me are slim to none. I'm wondering if you think it's improper for me to stay on until somebody's confirmed. I know it's been done in the past but is it really the proper thing to do.? I can understand if you don't want to comment.
>
> The change in priorities with the NRB is becoming staggering in the last 6 to 10 months. Maybe they realize they've only got a couple of years
> If I stay on, Your appointees with hold majority for a while longer
>
> thanks for your time

Id. at 006. To which former Governor Walker responded, "If possible, stay on. Any voices that can counter their racial view of the world are good." *Id.* at 007.

In April 2022, and in light of the Court's denial of Defendant Prehn's motion to dismiss, counsel for Defendant Prehn approached Plaintiff to identify an agreeable protocol for release of responsive records through a third-party forensic search. To facilitate the forensic search, the parties agreed on a Forensic Inspection Protocol, including search terms and a schedule for review and disbursement of responsive records. *See* Docs. 50 & 53. Initial returns from the keyword search of Defendant Prehn's messages indicate that at least dozens of responsive records were withheld. *See* Lee Aff. Exh. RDL-3. As of this filing, Defendant Prehn has not fully complied with the Forensic Inspection Protocol or the associated Scheduling Order. Lee Aff. ¶ 5. *See also* Docs. 50 & 53. Counsel for Prehn is still reviewing and sorting those text messages according to whether they are responsive, non-responsive, or privileged. Lee Aff. ¶ 6.

However, on August 31, 2022, Plaintiff did receive a first batch of 159 communications from Digital Intelligence via e-mail. *See* Lee Aff. Exh. RDL-3. Some of those communications were sent to politicians and lobbyists in the days and weeks leading up to MEA's initial records request, and shortly after Prehn's term on the Board expired. Prehn also regularly communicated with board members Greg Kazmierski and Julie Anderson throughout the time period established by Plaintiff's request. *See id.*

As just a few examples, on June 24, 2021, just five days before Plaintiff submitted its request for public records regarding Prehn's tenure on the NRB, Prehn sent this text message to former Wisconsin Lieutenant Governor Rebecca Kleefisch—who at the time was preparing to run for Governor:

> Yesterday's meeting was unbelievable Rebecca
>
> How today's article big one after social media on my practice trying to destroy me.
>
> If the conservatives don't rally up against this

> I'm not sure I can keep this up. They're trying to disrupt the meeting so they become non- functional and then I have no choice but to step down
>
> Yesterday was a shit show, the secretary Preston call even defied a board order we gave him and said he'll take it under advisement
> An order we actually passed To the department.
>
> Probably in an effort to sure that we're not a legitimate board now

Id. at 011 (emphasis added). "Preston" likely refers to Preston Cole, the Secretary of the DNR who attends NRB meetings.[2]

On that same day, in a text message to U.S. Representative Tom Tiffany, Prehn wrote:

> Yesterday was a shit show. Protesters outside., Marcy West challenged the legitimacy of my being there and being elected chairman last January,
>
> Preston Actually defied board order we gave him
> Said he would take it under advisement.
> Unbelievable
>
> Then this morning call Smith went after me again posted my dental website which got blasted and I had to take it down from comments.
>
> I'm trying to go on the offense here
> But if the cavalry doesn't arrive soon in the sportsman I'm not sure I'll be here
>
> Staying quiet it's just not going to work. They're trying to make the board dysfunctional, challenging legitimacy in public opinion which then would be wrong to stay around.

Id. (emphasis added). Marcy West is an NRB member who was appointed by Governor Tony Evers.[3]

And, on May 3, 2021, Prehn received the following text message from Republican Attorney and Lobbyist Lane Ruhland:

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[2] *See* WI Dept. of Nat. Res., *Secretary and Executive Team*, https://dnr.wisconsin.gov/about/secretary (last visited Sept. 23, 2022)
[3] *See* WI Dept. of Nat. Res., *Board Member Information*, https://dnr.wisconsin.gov/about/NRB/members.html (last visited Sept. 23, 2022)

> Doc, I got a glimpse at the resumes of some potential new chairs. We NEED you, maybe more than ever in that spot. You let me know what I can do to help. You've been an incredible champion and we will be screwed without you in that spot

Id. at 007. To which Prehn responded over three successive text messages:

> Well I'm only Sherman till January. I'm contemplating sticking around. But it's a tall order. Because I will be persona non grata down in Madison. Which doesn't surprise me or really bother me but I'm gonna catch a lot of flak if I stay seated
>
> Yep there's some real radicals
>
> Chairman I mean
>
> Then I'm just a regular board member I'll see if I can hang on till Becky gets in.

Id. All of these messages would have been responsive to Plaintiff's request.

Similarly, Defendant Prehn continued to send and receive text messages about his tenure on the NRB and decision to holdover in July and August of 2021 while Plaintiff was following up with DNR staff to confirm that text messages had been searched for as part of its June 29, 2021 public records request. *Id.* at 013-015. For example, on August 31, 2021, the day after indicating that he had no responsive texts on his phone, Prehn exchanged text messages with fellow NRB member Greg Kazmierski about whether Prehn was contemplating "throwing in the towel." *Id.* at 015.

While additional responsive records may be forthcoming, Plaintiff has maintained at all times that recovery of records in this matter requires urgency. *See, e.g.,* Doc. 4 (Petition); Doc. 5 (Ex Parte Motion to Shorten Time); Doc. 23 (Notice of Motion and Motion for Particularized Discovery). Accordingly, Plaintiff now seeks the final relief sought in the Complaint filed almost one year ago.

APPLICABLE LEGAL STANDARDS

I. SUMMARY JUDGMENT

Summary judgment is appropriate "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Wis. Stat. § 802.08(2). The purpose of summary judgment is to "to avoid trials where there is nothing to try." *Rollins Burdick Hunter of Wisconsin, Inc. v. Hamilton*, 101 Wis. 2d 460, 470, 304 N.W.2d 752 (1981). When deciding on a summary judgment motion, "[p]leadings are to be liberally construed, with a view toward substantial justice to the parties." *Green Spring Farms v. Kersten*, 136 Wis. 2d 304, 317, 401 N.W.2d 816 (1987).

A court must determine whether a moving party's affidavits and other proofs present a prima facie case for summary judgment. *Helland v. Kurtis A. Froedtert Mem'l Lutheran Hosp.*, 229 Wis. 2d 751, 756, 601 N.W.2d 318 (Ct. App. 1999). The mere allegation of a factual dispute will not defeat a properly supported motion for summary judgment. *Id.* "A party opposing a summary judgment motion must set forth 'specific facts,' evidentiary in nature and admissible in form, showing that a genuine issue exists for trial. It is not enough to rely upon unsubstantiated conclusory remarks, speculation, or testimony which is not based upon personal knowledge." *Id.* (citations omitted).

When the only disputed issues present matters of law, further fact-finding is not necessary. *See*, *e.g.*, *Acuity Mut. Ins. Co. v. Olivas*, 2007 WI 12, ¶ 31, 298 Wis. 2d 640, 726 N.W.2d 258 ("[C]ourt[s] ordinarily decide[] questions of law."); *Hellenbrand v. Hilliard*, 2004 WI App 151, ¶ 8 n.3, 275 Wis. 2d 741, 687 N.W.2d 37 ("Findings of fact [] are not made in the course of deciding summary judgment motions…the purpose of summary judgment methodology is to determine whether a lawsuit may be resolved without fact finding.").

II. THE PUBLIC RECORDS LAW

Wisconsin's Public Records Law must be interpreted consistent with its statement of policy, which provides:

> 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. Further, providing persons with such information is declared to be an essential function of a representative government and an integral part of the routine duties of officers and employees whose responsibility it is to provide such information. **To that end, ss. 19.32 to 19.37 shall be construed in every instance with a presumption of complete public access, consistent with the conduct of governmental business**.

Wis. Stat. § 19.31 (emphasis added). "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, 731 N.W.2d 240; *see also Portage Daily Register v. Columbia Cty. Sheriff's Dep't*, 2008 WI App 30, ¶ 10, 308 Wis. 2d 357, 746 N.W.2d 525 ("[T]he legislature has created a statutory presumption that all government records are public.").

Given the presumption of complete access to public records, "[t]he denial of public access generally is contrary to the public interest, and only in an exceptional case may access be denied." Wis. Stat. § 19.31. The exceptional cases for which a custodian may deny access are "statutory or specified common law exceptions, or, if there is an overriding public interest in keeping the record confidential." *Portage Daily*, 2008 WI App 30, ¶ 30.

ARGUMENT

Based on the undisputed facts set forth above, Defendants violated Wisconsin's Public Records Law, and Plaintiff MEA is entitled to summary judgment as a matter of law. Defendant Prehn, as a member of the NRB and an authority under the Public Records Law, failed to produce records that are connected to important government functions and responsive to

Plaintiff's June 29, 2021 written request. Defendants further violated the law by failing to justify their denial with a formal written explanation. These actions have significantly delayed access to important information about Prehn's motivations for remaining on the NRB while he continues exercising power over natural resource policy—including on high-profile issues such as toxics regulation, Wisconsin's wolf hunt, and public land management—in this State despite the expiration of his term in May 2021. Based on Defendants' withholding of records without justification that continues to delay access those records, this Court should grant Plaintiff's Motion for Summary Judgment. The Court should also find the withholding was arbitrary and capricious and warrants punitive damages, and that Plaintiff is entitled to its attorneys fees, costs, and actual damages under Wis. Stat. § 19.37(2).

I. DEFENDANTS VIOLATED THE PUBLIC RECORDS LAW BY WITHHOLDING PUBLIC RECORDS AND DELAYING ACCESS THOSE RECORDS.

A. Defendants Have Unlawfully Withheld and Delayed Access to Responsive Records.

When a records custodian receives a request for records, it must "as soon as practicable and without delay, either fill the request or notify the requester of the authority's determination to deny the request in whole or in part and the reasons therefore." Wis. Stat. § 19.35(4)(a).[4] "If an authority denies a written request in whole or in part, the requester shall receive from the authority a written statement of the reasons for denying the written request." Wis. Stat. § 19.35(4)(b).

[4] While the law does not require a specific response time, it should be reasonable. Importantly, compliance at some future, unspecified time is not authorized; rather, the records custodian has two choices: comply or deny. *See* Wisconsin DOJ Open Records Law Compliance Guide at 15 (Oct. 2019) (citing *WTMJ, Inc. v. Sullivan*, 204 Wis. 2d 452, 457, 555 N.W.2d 140 (Ct. App. 1996)), *available at* https://www.doj.state.wi.us/sites/default/files/office-open-government/Resources/PRL-GUIDE.pdf

A custodian cannot withhold records unless provided by law because there is a general presumption "that all public records shall be open to the public. This presumption reflects the basic principal that the people must be informed about the workings of their government and that openness in government is essential to maintain the strength of our democratic society." *See Linzmeyer v. Forcey*, 2002 WI 84, ¶ 15, 254 Wis. 2d 306, 646 N.W.2d 811 (internal citations omitted). In reviewing a decision to withhold a record, a court will look to explicit statutory or common law exceptions to the Public Records Law; if none apply, courts apply a balancing test "to determine whether permitting inspection of the records would result in harm to a public interest which outweighs the public interest in opening the records to inspection. *Id*. at ¶ 25.

Here, there are no statutory or common law exceptions to justify withholding text message records responsive to Plaintiff's June 29, 2021 request. The Wisconsin Department of Justice ("DOJ") provides a comprehensive list of exceptions taken from state statute, federal statute, and common law. Wisconsin DOJ Open Records Law Compliance Guide at 22-31 (Oct. 2019). None apply here.

The balancing test requires that the custodian weigh public policy considerations favoring nondisclosure. More importantly though, a custodian cannot provide a blanket exception for nondisclosure under the balancing test; rather, "the balancing test must be applied with respect to each individual record." *Milwaukee Journal Sentinel v. Wis. Dept. of Admin.*, 2009 WI 79, ¶ 56, 319 Wis. 2d 439, 768 N.W.2d 700 (emphasis added). Defendants did not apply a balancing test to justify withholding responsive records, nor would the balancing test provide Defendants with the ability to wholesale withhold text message records.

The Court should disregard post-hoc assertions of exceptions that were not provided to Plaintiff in the records response. Wisconsin's Public Records Law provides an explicit process

by which custodians identify relevant exceptions and notify the requester of those exceptions. That process, when correctly followed, provides an opportunity to challenge the proffered exemptions. Defendants did not avail themselves of that process here. Rather, Plaintiffs were denied wholesale access to text communications, without justification.

As evidenced by the dozens of responsive text messages now uncovered because of this litigation, *see* Lee Aff. Exh. RDL-3, Defendants withheld public records and failed to fulfill MEA's June 29, 2021 request in its entirety and thus denied that request in part. *See* Wis. Stat. § 19.35(4)(a). *See also* Docs. 18 & 21, ¶ 26 (admitting that responsive text messages were not provided in response to MEA's request). To date, Plaintiff has identified 72 messages that were responsive to its June 29, 2021, request, but that were not provided.

Prehn says he "viewed his iPhone to try and find responsive records," Lee Aff. Exh. RDL-1 at 005, but that is clearly not the case. Prehn sent text messages about his tenure on the NRB to former Wisconsin Lieutenant Governor Rebecca Kleefisch and U.S. Representative Tom Tiffany just five days before MEA submitted its records request. Lee Aff. Exh. RDL-3 at 011.

Upon receiving Plaintiff's request, and one day after responding that he had "no text on my phone for that" to MEA's follow up inquiry as to whether responsive text messages had been searched for, Lee Aff. Exh. RDL-2 at 003, Prehn was again texting fellow NRB member Greg Kazmierski about Prehn's tenure on the NRB. Lee Aff. Exh. RDL-3 at 015. The number of text messages Defendant Prehn was sending and receiving about his tenure on the NRB and/or his decision to holdover past the expiration of his term in the weeks and days leading up to MEA's June 29, 2021 public records request, combined with the fact that Prehn continued to send and receive text messages about the same while MEA's request was still being processed, means he knew or should have known that responsive records existed. This two-faced approach to

transparency is not only a violation of the law, but it is arbitrary and capricious under Wis. Stat. § 19.37(3), as further discussed below. *See infra* Sec. II.D.

While Defendants DNR and NRB did not have possession of the records, they too bear some responsibility for the failure to produce them. For example, DNR staff produced the text exchange between Prehn and Bill Smith, in response to a request for Smith's records. That should have been a tipoff to DNR that the response related to Prehn was at best incomplete and required search and follow up. The most recent partial release of records from Prehn shows that he also had multiple conversations with Greg Kazmierski, NRB member and current chair of the NRB, and Julie Anderson, NRB member at the time. *See generally* Lee Aff. Exh. RDL-3. However, DNR did not ask other board members to search their messages. Implicit in the statutory duty to fulfill a request or notify of a denial is the duty to adequately search for and locate requested records. Wis. Stat. § 19.35(4)(a). *See also* Wis. Stat. § 19.31 ("[P]roviding parties with such information is declared to be . . . an integral part of the routine *duties* of officers and employees whose responsibility is to provide such information.") (emphasis added).[5] The Public Records Law itself recognizes this necessary step to fulfilling records requests by allowing authorities to impose a fee on requesters for the time it takes to locate a record. Wis. Stat. § 19.35(3)(c). *See also* Wisconsin DOJ Open Records Law Compliance Guide at 21 (Oct. 2019) (noting that the first step in responding to an open records request is to determine if the requested record exists).

As recognized in the Freedom of Information Act ("FOIA") context, "[i]t is axiomatic that '[a]n inadequate search for records constitutes an improper withholding…'" *Rodriguez v. U.S. Dep't of Defense*, 236 F. Supp 3d 26, 34 (D.D.C. 2017) (quoting *Schoenman v. F.B.I.*, 764

[5] This Court has already held that Defendant Prehn is a state officer and authority under Wisconsin's Public Record Law. See Doc. 44 at 3-4.

F. Supp. 2d 40, 45 (D.D.C. 2011)).[6] Under FOIA, the agency has an obligation to make "a good faith effort to conduct a search for the requested records, using methods which can be reasonably expected to produce the information requested." *Oglesby v. U.S. Dep't of the Army*, 920 F.2d 57, 68 (D.C. Cir. 1990). It is the agency who has the burden to show "beyond material doubt that its search was reasonably calculated to uncover all relevant documents." *Valencia-Lucena v. U.S. Coast Guard*, 180 F. 3d 321, 325 (D.C. Cir. 1999) (internal quotation marks omitted). The DNR and NRB did not adequately search for records and are culpable for the violation of the Public Records law at issue here, too.

Prehn's withholding is still ongoing, as Defendant Prehn has yet to fully comply with the Forensic Inspection Protocol or the associated Scheduling Order on file with the Court. Lee Aff. ¶ 5. Accordingly, and as further explained below, Defendants have violated and continue to violate the Public Records Law by unlawfully withholding public records and delaying access thereto. *See* Wis. Stat. §§ 19.35(4)(a), .37(1).

Plaintiff is entitled to summary judgment as a matter of law and its Motion should be granted, and the Court should also enter a mandamus order directing the production of any outstanding records.

B. Defendants Violated the Public Records Law By Failing to Inform Plaintiff of the Denial or Provide Any Justification for Withholding Responsive Records.

Related to Defendants' failure to produce responsive records is its failure to notify Plaintiff that any records were withheld at all.

[6] FOIA cases may be persuasive in interpreting Wisconsin's Public Records Law. *See Racine Educ. Ass'n v. Bd. Of Educ. For Racine Unified Sch. Dist.*, 129 Wis. 2d 319, 326, 385 N.W.2d 510, 512 (Ct. App. 1986) (stating that "federal court decisions are persuasive authority for the interpretation of similar language"); *State ex rel. Vaughan v. Faust*, 143 Wis. 2d 868, 873, 422 N.W.2d 898, 900 (Ct. App. 1988).

"The denial of public access generally is contrary to the public interest, and only in an exceptional case may access be denied." Wis. Stat § 19.31. These exceptional cases are "statutory or specified common law exceptions, or, if there is an overriding public interest in keeping the record confidential." *Portage Daily*, 2008 WI App 30, ¶ 11. For authorities and legal custodians to overcome the presumption of public access and deny an open records request, courts must first decide "whether the custodian's denial of access was made with the requisite specificity." *Id.* ¶ 12 (citing *Mayfair Chrysler-Plymouth, Inc. v. Baldarotta*, 162 Wis. 2d 142, 162, 469 N.W.2d 638 (1991)).

When an authority denies a public records request, either in full or in part, it must "as soon as practicable and without delay . . . notify the requester of the authority's determination to deny the request in whole or in part and the reasons therefore." Wis. Stat. § 19.35(4)(a). "If an authority denies a written request in whole or in part, the requester shall receive from the authority a written statement of the reasons for denying the written request." Wis. Stat. § 19.35(4)(b).

A denial of a records request is sufficiently specific if it "provide[s] the requester with sufficient notice of the grounds for denial to enable him to prepare a challenge to the withholding and to provide a basis for review in the event of a court action." *Mayfair Chrysler*, 162 Wis. 2d at 160; *see also Portage Daily*, 2008 WI App 30, ¶ 26. In *Mayfair Chrysler*, the Wisconsin Department of Revenue denied release of documents because "the records would reveal the name of a confidential informant who had been given a pledge of confidentiality by the Department in exchange for the information." *Mayfair Chrysler*, 162 Wis. 2d at 149. The court held that "by stating that the requested records would reveal the identity of a confidential informant who had been given a pledge of confidentiality, the Department stated a legally

specific reason for denying [the plaintiff's] record request." *Id.* at 155. The court reasoned that "[t]his information was more than sufficient to permit [the plaintiff] to make an informed decision whether to challenge the denial and to provide a basis for the court to review the sufficiency of the denial." *Id.* at 162-63.

The court arrived at the opposite conclusion in *Portage Daily*, where the sheriff's department denied release of records of an investigative report because the documents "had been forwarded to the district attorney's office and [were] part of an open investigation." *Portage Daily*, 2008 WI App 30, ¶ 1. The court held that "the generalized statement did not provide sufficient notice to the [plaintiff] to enable it to prepare a challenge as to the withholding of the record . . . [and thus,] [was] not made with the requisite specificity." *Id.* ¶ 26. The court further found that a legally sufficient denial must include both factual and legal bases for withholding of documents. *Id.* ¶ 25; *see also Oshkosh Northwestern Co. v. Oshkosh Library Bd.*, 125 Wis. 2d 480, 485-86, 373 N.W.2d 459 (Ct. App. 1985).

Here, Defendants withheld and delayed access to at least dozens of responsive text messages, failing to fulfill MEA's June 29, 2021 request in its entirety and thus denying that request in part. Wis. Stat. § 19.35(4)(a). *See also* Docs. 18 & 21, ¶ 26 (admitting that responsive text messages were not provided in response to MEA's request). However, Defendants failed to provide a written justification for such denial that cited any statutory or common law exception or engaged the public interest balancing test. Wis. Stat. § 19.35(4)(b). *See also* Docs. 18 & 21, ¶ 21. The only identified information that was withheld were redacted personally identifiable information found within e-mail records and "two emails that [were] referred to law enforcement for review." Doc. 4 at 21. Despite repeated requests from Plaintiff to search for and produce a specific type of records with reasonable limitations as to subject matter and time frame, *see* Wis.

Stat. § 19.35(1)(h), Defendants asserted that DNR staff "did search for text messages as part of their record searches and they did not locate any text message records responsive to [our] request." Docs. 18 & 21, ¶ 21.

To the extent that Defendant Prehn believed his text messages did not constitute "records" or that he is not an "authority" as those terms are identified under Wis. Stat. § 19.32, *see, e.g.,* Doc. 18 ¶¶ 16, 22; Doc. 24, he should have communicated as much to DNR staff. DNR staff, in turn, could have informed Prehn that he was mistaken and taken action to recover the records themselves, or, if they agreed with Prehn, could have notified MEA that its request was being denied in part and stated the justification for that denial. *See* Wis. Stat. § 19.35(4)(a). Instead, he insisted that he had "no text on his phone for that." Lee Aff. Exh. RDL-2 at 003. Given that no text records were located, aggregated, reviewed for any applicable statutory or common law exceptions, or subjected to a balancing test or intentionally withheld, no specific denial of access to responsive text messages was provided.

Were it not for MEA's discovery, through an entirely different public records request, of the responsive text message between Defendant Prehn and his fellow NRB board member Bill Smith, MEA may not have been able to bring the present action. That is because MEA would not have known that its request was being partially denied, much less that it had grounds to bring a challenge to the withholding, which is precisely why the requirement in Wis. Stat. § 19.35(4)(a)-(b) was enacted*, See Mayfair Chrysler*, 162 Wis. 2d at 160. And when, as here, "the custodian gives no reasons or gives insufficient reasons for withholding a public record, a writ of mandamus compelling the production of the records must issue." citing *Newspapers, Inc. v. Breier*, 89 Wis.2d 417, 427, 279 N.W.2d 179 (1979).

The public's entitlement to records under the Public Records law should not depend on such happenstance. Defendants violated the Public Records Law by failing to deny Plaintiff's written records request and failing to provide any justification for withholding responsive text message records, and Plaintiff is therefore entitled to summary judgment as a matter of law.

II. PLAINTIFF IS ENTITLED TO RECOVER ATTORNEYS FEES, COSTS, AND DAMAGES UNDER WIS. STAT. § 19.37.

Based on the violations explained above, the remedies Plaintiff seeks through this Motion, and the Court's orders to date, the Court should find that Plaintiff is entitled to its attorney's fees and costs in this matter and set further proceedings to determine the amount of costs and fees that should be awarded.

A. Prevailing or Substantially Prevailing Plaintiffs are Entitled to Attorneys Fees and Costs in Public Records Cases.

Wisconsin's Public Records Law contains a mandatory fee-shifting provision, which states in relevant part:

> (2) COSTS, FEES AND DAMAGES. (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).

Wis. Stat. § 19.37(2) (emphasis added).

"[T]he purpose of sec. 19.37, Stats., is to encourage voluntary compliance" by records custodians. *Eau Claire Press Co. v. Gordon*, 176 Wis. 2d 154, 159, 499 N.W.2d 918, 921 (Ct. App. 1993). More generally, "an important purpose of fee-shifting statutes is to encourage injured parties to enforce their statutory rights when the cost of litigation, absent the fee-shifting provision, would discourage them from doing so." *Kolupar v. Wilde Pontiac Cadillac, Inc.*, 2007 WI 98, ¶ 55, 303 Wis. 2d 258, 735 N.W.2d 93 (internal citation omitted). Further, disallowing fees "would frustrate and indeed negate the purpose of the open records law rather than

encourage compliance with it." *State ex rel. Young v. Shaw*, 165 Wis. 2d 276, 293, 477 N.W.2d 340 (1991) (finding plaintiff entitled to fees when defendants voluntarily produced some of the records).

As such, to encourage plaintiffs to assert their rights under the law, and to vindicate the public's right to information, the Public Records Law sets a low bar for obtaining costs, fees, and damages, as made clear in Wis. Stat. § 19.37(2). MEA clears that bar and is entitled to recover its attorneys' fees for the entirety of this litigation

B. A Ruling in Plaintiff's Favor on Summary Judgment and Mandamus Order entitles Plaintiff to Fees and Costs.

"[A] mandamus litigant has prevailed in substantial part, and thus is entitled to fees, when the requester obtains access to improperly withheld public records through a judicial order." *Meinecke v. Thyes*, 2021 WI App 58, ¶ 8, 399 Wis. 2d 1, 7, 963 N.W.2d 816. It is immaterial for a plaintiff's eligibility for fees that they did not obtain all the records they sought through an action. *See id*. at ¶ 21. The statute does not require complete victory on every aspect of the case as a prerequisite to obtaining costs, fees and damages. Wis. Stat. § 19.37(2)(a) (allowing relief to plaintiffs who prevail "in whole or in substantial part" (emphasis added)).

As outlined above, Defendants withheld and delayed access to records responsive to Plaintiff's request. Given the undisputed facts, Prehn did not produce responsive text messages when prompted by Plaintiff's request or DNR staff's follow-up e-mails, and Defendants DNR and NRB did not question Prehn's statement that he lacked records, despite evidence to the contrary. *See* Lee Aff. Exh. RDL-2 at 003. Following filing of this action, Defendant Prehn finally took steps to identify records pursuant to a list of terms Plaintiff was tasked with producing. However, even forensic analysis was delayed by Prehn's Motion to Dismiss and,

more recently, by a failure to meet the deadlines of the Forensic Inspection Protocol and Scheduling Order.

Given the inadequate search, extensive and ongoing delay, and the lack of release of records as of the filing of this motion, the Court should order that Defendants' actions violated the Public Records Law and order release of any remaining records. This decision would, by its nature, decide that Plaintiff is a prevailing party, and as such, is entitled to fees, costs, and damages.

C. Plaintiff has already Substantially Prevailed as a Result of Multiple Judicially Sanctioned Changes in its Relationship with Defendants.

In *Friends of Frame Park*, a splintered majority of the Wisconsin Supreme Court ruled that to "prevail[] in whole or substantial part" under the fee-shifting provision of the Open Records law, Wis. Stat. §19.37(2)(a), a requester "must obtain a judicially sanctioned change in the parties' legal relationship." 2022 WI 57, ¶ 3, 403 Wis. 2d 1, 976 N.W.2d 263 ("*FOFP*") (motion for reconsideration filed; remittitur pending). In this case, Plaintiff is already entitled to reasonable attorney fees, costs, and damages because we have already obtained a judicially sanctioned change in our relationship to Defendants.

The obvious forms of a "judicially sanctioned change" include a judgment, order, or decree in favor of a party. *Id*. ¶ 20 (Hagedorn, J., lead op.) (citing *Buckhannon Bd. & Care Home, Inc. v. W. Va. Dep't of Health & Hum. Res.*, 532 U.S. 598, 603 (2001)); ¶¶ 82-87 (R.G. Bradley, J., concurring). These actions impress a favorable result with a "judicial imprimatur." *Id.* ¶ 20 (Hagedorn, J., lead op.) (citing *Buckhannon*, 532 U.S. at 605). In *FOFP*, there was no such judgment, order, or decree from the circuit court finding that the government authority's initial denial was illegal, because the circuit court ruled against the requester. *Id*. ¶ 9.

In the FOIA context, a party can "substantially prevail" before a court order directing release of records or a decision on the merits, while a case is still pending. For example, the D.C. Circuit Court has held that a court order to process and provide records responsive to a FOIA request is sufficient to create a judicially sanctioned change in the legal relationship of the parties. *Edmonds v. F.B.I.*, 417 F.3d 1319, 1322–23 (D.C. Cir. 2005) Specifically, the court in *Edmonds* held that a "judicial direction" requiring the FBI to produce documents by a specific date amounted to a "judicially sanctioned change in the legal relationship of the parties. *Id*.

Here, the Court has issued several orders and decrees that have changed the relationship between the parties. To date, the Court has issued an order to shorten time for an answer (Doc. 7), two scheduling orders (Docs. 26 & 53), and an order denying Defendant Prehn's Motion to Dismiss (Doc. 44). Each of these orders altered the relationship between the parties. For example, in denying Defendant Prehn's Amended Motion to Dismiss, the Court held that Defendant Prehn, in his capacity as Chair and member of the NRB, is an "authority" subject to Wisconsin's Public Records Law and that the communications sought in Plaintiff's June 29, 2021 records request are "records." Doc. 44. Following the decision, the statutory stay on discovery was lifted and responsive records were produced (both through discovery and as a supplemental response to our June 29, 2021 records request). Additionally, following the ruling, Defendant Prehn promptly approached Plaintiff to confer on an agreeable protocol for voluntary release of responsive records through a third-party forensic search.

Similar to the D.C. Circuit Court ruling in *Edmonds*, by issuing the July 26, 2022 scheduling order, the Court established a process and timeline by which Defendant Prehn had to produce responsive records. Doc. 53. In the Scheduling Order, the Court also established timelines to provide a privilege log and a means for parties to review and challenge decisions to

withhold potentially responsive records. *Id*. The order created a timely avenue for Plaintiff to recover responsive records and a process to challenge determinations to withhold records.

The Court need not draw a line in the sand as to when a party officially prevails in whole or in substantial part. Rather, the Court need only find that Plaintiff has prevailed here. To date, the Court's rulings have changed the relationship between the parties in numerous ways. Those orders placed additional obligations on Defendant to respond to Plaintiff's complaint, discarded Defendant Prehn's arguments for withholding records, and established obligations on Defendants to provide records by a date certain. As such, the Plaintiff is already entitled to fees and costs pursuant to Wis. Stat. §19.37(2)(a) and based on the framework and test outlined in *FOFP*.

D. The Court should Award Punitive Damages Against Prehn Under Wis. Stat. § 19.37(3).

Finally, the Court should award punitive damages to MEA. An award of punitive damages is appropriate where an authority "has arbitrarily and capriciously denied or delayed response to a request." Wis. Stat. § 19.37(3). Defendant Prehn's denial and withholding of the existence of responsive records, as outlined above, was both arbitrary and capricious.

Regarding punitive damages, when the facts are undisputed, whether a decision is arbitrary or capricious is a question of law. *Shaw*, 165 Wis. 2d at 294. "A decision is arbitrary and capricious if it lacks a rational basis or results from an unconsidered, willful and irrational choice of conduct." *Id.*; *Eau Claire Press Co.*, 176 Wis. 2d at 163. However, "an inadvertent act cannot be arbitrary and capricious within the meaning of [Wisconsin open records law]." *State ex rel. Ledford v. Turcotte*, 195 Wis. 2d 244, 252 n.4, 536 N.W.2d 130, 133 n.4 (Ct. App. 1995).

Here, Defendants arbitrarily and capriciously denied or delayed access to responsive records. Prehn likely failed to perform even the most basic search of text communications while likely knowing that he had created responsive records in the days and weeks leading up to

Plaintiff's request. Alternatively, Prehn intentionally chose not to perform a search or opted against informing DNR and NRB staff of his decision to withhold responsive records. Regardless, Prehn's denial of access is not simply inadvertent; indeed, the discovery of dozens of responsive messages confirms the arbitrariness of the search.

Finally, the court of appeals has indicated that an award of actual damages is a prerequisite to an award of punitive damages under Wis. Stat. § 19.37(3). *Cap. Times Co. v. Doyle*, 2011 WI App 137, ¶ 11, 337 Wis. 2d 544, 807 N.W.2d 666. Wis. Stat. § 19.37(2)(a) requires the Court to award "damages of not less than $100" where the plaintiff in an open records case has prevailed in whole or substantial part. *See Shaw*, 165 Wis. 2d at 294. Because MEA has prevailed in substantial part, as explained above, it is automatically entitled to at least $100 in actual damages. Plaintiff has thus satisfied any necessary prerequisite to obtain punitive damages and the Court should set further proceedings to determine the amount of costs, fees, and damages that should be awarded.

CONCLUSION

For the reasons set forth above, the Court should grant Plaintiff's motion for summary judgment; determine Plaintiff is entitled to fees and costs, $100 in actual damages, and punitive damages; and set further proceedings in accordance with those findings.

Respectfully submitted this 23rd day of September, 2022.

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