STATE OF WISCONSIN CIRCUIT COURT COUNTY OF DANE
BRANCH 4

CENTER FOR MEDIA & DEMOCRACY,
KATHLEEN METER LOUNSBURY,
THE PROGRESSIVE, INC., AND
JUD LOUNSBURY,

Plaintiffs,

v. Case No.: 15 CV 1289

SCOTT WALKER, OFFICE OF THE
GOVERNOR, WISCONSIN
DEPARTMENT OF ADMINISTRATION,
AND SCOTT NEITZEL,

Defendants.

SUMMARY JUDGMENT DECISION AND ORDER

Before the Court are cross-motions for summary judgment, which have been briefed as described below. On August 24, 2015, Defendants filed a motion for summary judgment. On September 23, 2015, Center for Media & Democracy ("CMD") and the remaining Plaintiffs ("Lounsbury Plaintiffs") filed two separate motions for summary judgment. Determinations as to all summary judgment motions are consolidated within this Decision.

For the reasons summarized herein, Plaintiffs' motions for summary judgment are granted in part and denied in part, and Defendants' motion for summary judgment is

granted in part and denied in part. The Court consequently grants mandamus relief under the terms described below.

MOTION TO EXCEED PAGE LIMITS

The Court pauses to briefly address a related motion before the Court: Plaintiffs' Motion to Exceed Page Limits filed on November 23, 2015. On February 29, 2016, Defendants noted that they did not object to this Motion. The Court therefore grants the Motion. The pages in excess of the local rule limits are therefore considered by the Court in rendering its decision.

BACKGROUND

This is a consolidated case stemming from two public record requests. On February 3, 2015, the Joint Committee on Finance introduced, by request of Governor Scott Walker, the 2015-17 Budget Bill. On February 5, 2015, CMD requested from the Office of the Governor ("OOG"):

> "[a]ll communications or contacts between the Office of the Governor, and the following individuals regarding the 2015-17 Executive Budget Bill's changes to ch. 36 of the Wisconsin statutes: Nathan Schwanz, Michael Heifetz, Mike Huebsch."

On February 6, 2015, Ms. Lounsbury made a similar request via email to the Department of Administration ("DOA") for:

> "all records, which either of you sent, received, or created anytime between October 1, 2014 and February 3, 2015, and which have anything to do with the language contained in sec. 36.01 of the Wisconsin Statutes, including any discussions or proposals whether that language should be changed."

On May 8, 2015, DOA and OOG provided documents to each requester; however, as to each requester, DOA withheld 60[1] pages while OOG withheld 35 pages plus a 167 page attachment. In its letter[2] to Ms. Lounsbury, DOA explained that some documents were withheld because they were drafts, and because the balancing test analysis, informed principally, if not exclusively, by the preliminary or deliberative nature of the documents, weighed in favor of nondisclosure. In its letter to CMD, OOG stated it withheld documents for the same reasons, with an added claim subsequently abandoned, that some of the withheld documents constituted attorney-client communications.[3]

Defendants provided a description of the withheld documents:

> "communications between the Budget Analyst, Team Leader, Deputy Budget Director, Budget Director, and Office of the Governor containing deliberations such as: asking for direction on how to proceed on details of the UW budget, explaining the strengths and weaknesses of various options, making recommendations, explaining the impact of tentative incremental decisions, discussing and drafting wording of the executive budget bill, and discussing content for Office of the Governor briefings. Defendants declined to provide materials that would reveal details regarding what options for the Governor's executive budget were being considered, when, and by whom, prior to the point in time that the decision-making on the executive budget was final . . . [t]hus the decision-making on the executive budget was not complete until then."

The Lounsbury Plaintiffs and CMD filed separate complaints for mandamus on May 19, 2015[4] and May 27, 2015[5], respectively. On June 22, 2015, the Court consolidated the two cases into Case Number 15 CV 1289.

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[1]DOA initially stated that it withheld 58 pages, but has since clarified that 60 pages were withheld.
[2]Defendants' letters relating to withheld documents may be referred to as the "denial letters".
[3]Given Defendants' Answer to CMD's Complaint and the subsequent summary judgment arguments presented to the Court, the Court understands that Defendants have abandoned the attorney-client privilege as a reason to withhold documents, so the Court will not address it further.
[4]Case Number 15 CV 1289.
[5]Case Number 15 CV 1367.

On August 24, 2015, Defendants filed a motion for summary judgment. On September 23, 2015, both groups of Plaintiffs filed a motion for summary judgment and a response to Defendants' motion for summary judgment. On November 9, 2015, Defendants filed a response to Plaintiffs' motions for summary judgment as well as a reply brief regarding Defendants' motion. Finally, on November 23, 2015, both groups of Plaintiffs filed sur-reply briefs in support of their motions for summary judgment and reply briefs in opposition to Defendants' summary judgment motion. Also on November 23, 2015, the Lounsbury Plaintiffs asked the Court to conduct an *in camera* review of the withheld documents, and further sought access to these documents pursuant to Wis. Stat. §19.37(1)(a).

On January 28, 2016, the Court ordered Defendants to produce the withheld documents for purposes of an *in camera* review, but denied the Lounsbury Plaintiffs' request for access to the withheld documents. Defendants timely produced these documents to the Court on February 29, 2016. The Court has maintained these documents under seal and has carefully reviewed them, and has considered Defendants' reasons for nondisclosure.

Altogether, Defendants produced for *in camera* inspection 262 pages of withheld documents. Many of the pages include duplicative documents that appear several times. For simplicity's sake, the Court distills the 262 pages into 9 attachments and 12 email strings. The Court also notes that, of the 262 withheld pages, some appear to be among the documents already disclosed by Defendants.

In drafting this Decision, the Court deliberately uses limited descriptive information as to the withheld documents. In so doing, the Court hopes to share sufficient information to provide context to the Court's determinations, while simultaneously recognizing a complete, detailed discussion of the documents could improvidently disclose rightfully withheld records and could possibly frustrate any meaningful appellate review of this Decision. Because the information within the withheld documents is already known to Defendants, a more detailed description of the withheld documents is attached to Defendants' copy of this Decision and is also placed under seal in the Court's file in the event it may assist any appellate review of this Decision.

SUMMARY JUDGMENT METHODOLOGY

"A court shall grant a motion for summary judgment when 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); *Johnson Controls, Inc. v. London Market*, 2010 WI 52, ¶23, 325 Wis. 2d 176, 784 N.W.2d 579.

DISCUSSION

The Wisconsin legislature and Wisconsin courts place great weight on the role of open records law informing the people of Wisconsin of the affairs of government.

> "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 . . . To that end, ss. 19.32 to 19.37 shall be construed in every instance with a presumption of complete public access, consistent with the conduct of governmental business. The denial of public access generally is contrary to the public interest, and only in an exceptional case may access be denied."

Wis. Stat. §19.31.

The Wisconsin Supreme Court regards the above as one of the strongest declarations of policy found in the Wisconsin statutes. *Zellner v. Cedarburg Sch. Dist.*, 2007 WI 53, ¶49, 300 Wis. 2d 290, 731 N.W.2d 240. The policy favors the broadest practical access to government. *Hempel v. City of Baraboo*, 2005 WI 120, ¶22, 284 Wis. 2d 162, 699 N.W.2d 551. Its goal is to provide access to records that assist the public in becoming an informed electorate. *Milwaukee Journal Sentinel v. City of Milwaukee,* 2012 WI 65, ¶40, 341 Wis. 2d 607, 815 N.W.2d 367. The records custodian must balance the strong public interest in disclosure of the record against the public interest favoring nondisclosure. *State ex rel. Journal Co. v. County Court for Racine County*, 43 Wis. 2d 297, 305, 168 N.W.2d 836 (1969). Defendants in open records mandamus cases are limited to the reasons for denying access originally stated by the custodian. *Osborn v. Board of Regents of the Univ. of Wis. Sys.*, 2002 WI 83, ¶16, 254 Wis. 2d 266, 647 N.W.2d 158.

The parties do not raise any genuine issues as to any material fact. The parties, however, disagree on two issues of law. First, the parties disagree as to whether the withheld documents, as a matter of law, constitute records under Wis. Stat. §19.32(2).

Second, the parties argue whether the balancing test favors disclosure or nondisclosure of the withheld records.

The Court finds that, except with regards to three attachments, Defendants have failed to establish that the withheld documents constitute non-records under Wis. Stat. §19.32(2). In the Court's view, Defendants' argued definition of drafts and like materials is overly broad and could conceal records from the public relating to any and all deliberations made by public employees, which is inconsistent with the long-standing principles of Wisconsin's Open Records Law. The Court concludes that the appropriate definition of non-records is much narrower than that advocated by Defendants.

The Court also finds that the balancing test favors disclosure with regards to all of the remaining withheld documents. Wisconsin law places a great importance on the presumption for disclosure. That presumption is only overridden by stronger public interests in nondisclosure. In this case, Defendants' public interest arguments, all related to the documents' "deliberative" status, do not outweigh the public policy interest in disclosure. Defendants invite the Court to permit documents to be withheld from public view solely because they may reflect governmental deliberations. The Court declines that invitation and concludes that to do so would be in contravention of the letter and spirit of Wisconsin's Open Records Law. Instead, the Court considered, *inter alia*, the deliberative nature of the records at issue in applying the balancing test. For the reasons summarized below, the Court concludes the strong presumption of disclosure outweighs any public interest in nondisclosure.

I. Whether the documents are records.

The Wisconsin statutes state that: "'[r]ecord' does not include drafts, notes, preliminary computations and like materials prepared for the originator's personal use or prepared by the originator in the name of a person for whom the originator is working . . ." Wis. Stat. §19.32(2). In other words, if a custodian withholds documents due to the documents' non-record status, the custodian must prove that the documents were (1) "drafts, notes, preliminary computations and like materials" and (2) "prepared for the originator's personal use or prepared by the originator in the name of a person for whom the originator is working." *Id.*

Defendants concede that several of the above examples do not apply to the withheld documents in this case. Defendants do not argue that the withheld documents constitute notes. In the denial letters, Defendants do not claim that the withheld documents were prepared for the originator's personal use. Defendants therefore must show that the withheld documents constitute drafts, preliminary computations or like materials that all were prepared by the originator in the name of a person for whom the originator is working.

"[P]repared by the originator in the name of a person for whom the originator is working", or as the Court characterizes, prepared by the originator in the name of a superior, has been defined by the Wisconsin Attorney General. 77 Op. Att'y Gen. 100 (1988) ("the AG Opinion"). The Plaintiffs and Defendants all cite to the AG Opinion for a definition of this key statutory phrase, and the Court considers it the most persuasive authority on the subject. The AG Opinion provided three examples that sketch out a

definition of "prepared by the originator in the name of a superior". First, the exclusion applied to a draft in the name of a bureau director if the draft was circulated only amongst bureau colleagues under the bureau director. Second, the exclusion covered the same bureau staff employee's draft for a division administrator, even if the draft was circulated amongst several bureaus, so long as the circulation remained within the jurisdiction of the division administrator. Third, a document made in the name of a department secretary remained a draft insofar as it was not circulated beyond the department.

While the Opinion did not go one step further—from a department secretary to the governor—there is no indication within the AG Opinion to suggest why the same analysis would not apply. Through the affidavits presented to the Court, Defendants have shown that several public entities, including the Legislative Reference Bureau ("LRB"), OOG, and DOA, work together in drafting the Budget Bill that is eventually introduced by the Joint Committee on Finance by request of (*i.e.*, in the name of) the Governor.

It is not enough, however, that a withheld document be simply related to the drafting process for an executive Budget Bill to constitute a draft. In applying the analysis laid out by the AG Opinion, the Court notes an important term used in both in the AG Opinion and in Wis. Stat. §19.32(2): the phrase "in the name of". This is an additional requirement beyond proving how many employees or institutions work on certain documents, and it is a fact that Defendants must establish for withheld documents to be considered drafts.

Defendants must therefore show, for each withheld document, that the document was drafted or prepared "in the name of" a superior—applied in this case, as Defendants

argue, in the name of the Governor. The Court determines that, if emails or attachments were not intended to be documents drafted in the name of the Governor, these documents do not constitute non-records under Wis. Stat. §19.32(2). To the contrary, such documents are completed communications by others, and constitute records under Wisconsin Open Records Law.

To illustrate further, a DOA employee communicating with another DOA, LRB or OOG employee is not speaking on behalf of the governor via every attachment created or email sent. Likewise, presentation materials used by a DOA employee in a meeting to discuss Budget Bill updates do not constitute a document within the Wis. Stat. §19.32(2) exclusions. Questions posed by DOA to OOG, although perhaps relevant to ongoing drafts, do not constitute drafts in and of themselves. Unless the draft document was intended to be eventually finalized into a document in the name of a superior (here, the Governor), the document is not a draft, preliminary computation or like material.

To withhold all of the documents asked by Defendants under their analysis would be to recognize a definition of "in the name of a [superior]" that is untenably massive in scope. Accepting Defendants' argument would potentially create a blanket exception for any communication or document that had any relevancy to ongoing Budget Bill debates. In effect, such a definition would constitute a protection identical to a deliberative process privilege, which has not been recognized in Wisconsin and flies in the face of long-held policies underlying Wisconsin's Open Records Law.

The Court finds that all of the withheld emails constitute records. The emails consist of communications between DOA, OOG, and LRB. They are, on the whole,

communications about the Budget Bill. None of the withheld emails constitute a draft, preliminary computation or like material because none of the emails were written with the intent to be finalized in the name of the Governor. Indeed, the emails are all discreet, final versions of communications between sender(s) and recipient(s), and are therefore records under Wisconsin's Open Records Law.

The analysis regarding the withheld attachments is not as simple. There are 9 attachments included in the withheld documents. Some of the attachments are copied in several places within the withheld documents.

The Court offers an observation that applies, to varying degrees, to every attachment. For nearly all of the attachments, the Court can not reliably determine the author. For some of the attachments, the Court is at a loss as to its precise purpose or substance. Wisconsin Open Records Law requires custodians to explain the reasons for nondisclosure for *each* withheld document. Based on the information furnished by Defendants, the Court concludes it has at best an incomplete understanding as to the nature of some of the withheld attachments. The Court analyzes the available information to determine whether Defendants have satisfactorily established that any or all of the attachments constitute drafts, preliminary computations, or like materials.

a. ATTACHMENT 1[6]

This attachment is a 3 page document, which appears to have been disclosed to Plaintiffs as a response to the original open records request. The document is seemingly an edit of a statute—most likely intended to be part of the final Budget Bill—with some text crossed out and some text underlined.

The Court is satisfied that the attachment is a draft made in the name of the Governor. The Court concludes that the document was made with the intention for it to be part of the eventual final Budget Bill submitted by the Governor. Therefore, it is a draft prepared in the name of a superior and not a record under Wis. Stat. §19.32(2).

b. ATTACHMENTS 2[7] AND 3[8]

These attachments are two lists of questions compiled by DOA employees intended for OOG. The Court analyzes them together because the documents were sent together and because the documents appear to serve identical purposes. The lists were clearly not intended to have a future use in the name of the Governor. Rather, the documents were communications tangentially related to the drafting of the Budget Bill. One of the two lists appears to even be questions directed *at* the Governor, not questions made on his behalf. Therefore, the lists of questions were not prepared in the name of a superior, and Defendants have failed to meet their burden to establish that these attachments are drafts. Attachments 2 and 3 are therefore records under Wisconsin Open Records Law.

[6]Located at Bates stamp page numbers 0025-0027, 0030-0032, 0034-0036, and 0065-0067.
[7]Located at Bates stamp page numbers 0037 and 0068.
[8]Located at Bates stamp page numbers 0038 and 0069.

c. ATTACHMENT 4[9]

The attachment is a set of columns consisting of comments from the UW to DOA and then DOA to OOG regarding potential changes to Budget Bill edits. The document is 20 pages. On each page, the word "draft" is stamped. The Court notes that, with exception to a single rightmost column, Attachment 4 was previously disclosed by Defendants; therefore, the Court focuses its analysis on that column.

Labeling each page of a document "draft" does not indefinitely qualify a document as a draft for public records purposes. *Fox v. Bock*, 149 Wis. 2d 403, 417, 438 N.W.2d 589 (1989). Furthermore, the rightmost column includes language, for example, "checking to see if this is necessary" or "Deny", it is evident that the drafters did not intend that language to be made in the name of the Governor. Instead, the document appears to be an internal communication between the drafters, commenting on proposed changes. While the proposed changes might arguably be drafts, the commentary on the changes is not.

Defendants have failed to establish that Attachment 4 is a draft. It is therefore a record under Wisconsin Open Records Law.

d. ATTACHMENT 5[10]

The attachment is a single page document. The document was sent as an attachment from DOA to OOG per OOG's request. The document includes a table of numbers with bullet point notes.

[9]Located at Bates stamp page numbers 0040-0059.
[10]Located at Bates stamp page number 0063.

It is not clear how the document constitutes a draft, preliminary computation or like material. On one hand, the table might have been used in the Budget Bill drafting process, with the numbers acting as preliminary computations used by the Governor. On the other hand, the Court has no information provided by Defendants regarding the contextual use of the document. The Court finds that Defendants have failed to meet their burden to establish that this specific document constitutes a draft, preliminary computation or like material made in the name of a superior. It is therefore a record under Wisconsin Open Records Law.

e. ATTACHMENT 6[11]

The document appears to be a table of numbers sent from DOA to OOG. Accompanying emails indicate that the attachment was eventually sent to the UW. In the email, a DOA employee sends the attachment to OOG with no text. OOG responded with the message: "Yep. Fine to send to UW". The Court notes again that this document already appears to have been disclosed.

The Court is satisfied that Attachment 6 is a preliminary computation. The table of numbers was likely intended to be used in the final Budget Bill prepared in the name of the Governor. While the document was later sent to the UW, as it was presented to the Court, it was sent between two state employees working on the Budget Bill for part of the submission in the name of the Governor. Therefore, because of its preliminary computation status, Attachment 6 is a draft and was properly withheld.

[11]Located at Bates stamp page number 0071.

f. ATTACHMENT 7[12]

This attachment is a 13 page Powerpoint authored by someone other than the Governor. The substance of the Powerpoint appears to be connected with the Budget Bill, though to what extent is not exactly clear. Based on the accompanying email string, it appears that the Powerpoint was intended as a presentation by DOA to OOG regarding its progress with the Budget Bill or other projects.

The Court is not satisfied that this attachment is a draft, preliminary computation, or like material made in the name of a superior. Attachment 7 is therefore a record under Wisconsin Open Records Law.

g. ATTACHMENT 8[13]

This attachment is one page, with eight bullet points. The bullet points discuss general comments on either the final Budget Bill or some preliminary version of the Bill. The attachment is clearly not a preliminary computation. The Court can not see how the document is a draft. The most reasonable inference is that this document was a communication of talking points or something similar from DOA to OOG, and not a draft of a speech or communication for the Governor himself.

Defendants have not established that the document constitutes a draft. The Court therefore finds that this attachment constitutes a record under Wisconsin Open Records Law.

[12]Located at Bates stamp page numbers 0074-0086.
[13]Located at Bates stamp page number 0088.

h. ATTACHMENT 9[14]

This attachment is a draft created in the name of a superior and therefore is not a record under Wisconsin Open Records Law. From the title of the document and its substance, this document appears to be a draft of the Budget Bill eventually finalized and submitted in the name of the Governor. The attachment includes no other information except a draft of the Budget Bill itself. Therefore, the Court is satisfied that the document constitutes a draft made in the name of the Governor.

To summarize, the Court finds that three of the withheld attachments, Attachment 1, Attachment 6 and Attachment 9, constitute non-records and were therefore properly withheld by Defendants. The Court further finds that the remaining withheld documents (Attachments 2, 3, 4, 5, 7, and 8 and the emails) are records under Wisconsin Open Records Law and not drafts.

The Court now proceeds to apply the balancing test as to only those withheld documents determined to be records.

II. Whether the balancing test tips in favor of disclosure or nondisclosure.

For the reasons summarized below, the Court determines that the balancing test weighs in favor of disclosure for all of the withheld records.[15] As stated previously, Wisconsin places great importance on the role of open records disclosure informing the people of Wisconsin on the affairs of government. That policy directly informs, and gives great weight to, the public interest component of the balancing test. On the other

[14]Located at Bates stamp page numbers 0090-0256.
[15]As noted above, "withheld records" in Section II only encompasses the withheld documents that the Court has defined as records in Section I.

side of the scale, assessing the weight of the public interest in nondisclosure, the Court declines Defendants' invitation to, in essence, adopt a deliberative process privilege. The Court instead finds that the balancing test weighs heavily in favor of disclosure of all of the withheld records.

Policy favors the broadest practical access to government. *Hempel*, 2005 WI 120, ¶22. The presumption favoring disclosure is strong, but not absolute. *Id.* at ¶28. The records custodian must balance the strong public interest in disclosure of the record against the public interest favoring nondisclosure. *Journal Co.*, 43 Wis. 2d at 305.

Upon a demand for inspection, the custodian of withheld documents "must state specific public-policy reasons for the refusal. These reasons provide a basis for review in the event of court action." *Fox*, 149 Wis. 2d at 416, (*citing Beckon v. Emery*, 36 Wis. 2d 510, 516, 153 N.W.2d 501 (1967); *State ex rel. Youmans v. Owens*, 28 Wis. 2d 672, 682, 137 N.W.2d 470 (1965)). "If the custodian states no reason or insufficient reasons for refusing to disclose the information, the writ of mandamus compelling disclosure must issue." *Osborn*, 2002 WI 83, ¶16.

Unlike federal law and law in other states, Wisconsin has not recognized a deliberative process privilege. *Sands v. Whitnall Sch. Dist.*, 2008 WI 89, ¶¶60-70, 312 Wis. 2d 1, 754 N.W.2d 439. The federal Freedom of Information Act does not apply to states except for purposes of informing the common law balancing test. *State ex. rel. Hill v. Zimmerman*, 196 Wis. 2d 419, 538 N.W.2d 608 (Ct. App. 1995); *Linzmeyer v. Forcey*, 2002 WI 84, ¶¶32-33, 254 Wis. 2d 306, 646 N.W.2d 811.

Generally there are no blanket exemptions, and the balancing test must be applied with respect to each individual record. *Milwaukee Journal Sentinel*, 2012 WI 65, ¶56. The records custodian must determine whether the surrounding circumstances create an exception that overcomes the strong presumption of openness. *Hempel*, 2005 WI 120, ¶120. The existing public availability of a document weakens any argument for withholding the same information under the balancing test. *Milwaukee Journal Sentinel*, 2012 WI 65, ¶62.

Following *Fox* and related cases, the Court reviews the specific reasons outlined by Defendants in the two May 8, 2015 denial letters sent to Plaintiffs. The first letter is from DOA to the Lounsbury Plaintiffs. The second is from OOG to CMD. Although the letters are not exactly the same, each letter's text relevant to the balancing test contains identical language. Each denial letter states:

> "A candid, complete, and creative evaluation of the state's finances within DOA and within the Governor's office is inherent to the development of the Governor's executive budget. Making these internal discussions just as open to disclosure as the final version of the budget would inhibit the free exchange of ideas, opinions, proposals, and recommendations among those involved in deciding what to include in the final legislation. Disclosure of this narrow category of records—limited to discussions within DOA, within the Governor's office, and between the two—would discourage frank internal discussion and harm the quality of the final executive decision. Further, it would disincentivize the free exchange of emails and written documentation necessary to hone the precise language and calculations that are key to proper budget development. Without a doubt, this would significantly inhibit the efficiency and efficacy of the employees who develop the detailed language and financial calculations for the budget. In addition, disclosure would risk public confusion as a result of publishing non-final proposals, which may not ultimately have been adopted."

As to the denial letters' arguments for public policy for disclosure, each letter states that "[a]ll legislation is publicly available once it is introduced, and numerous documents are produced and released to the public explaining and justifying the specifics of the executive budget".

The Court applies the balancing test to all of the withheld records under a single analysis, as Defendants' arguments for nondisclosure under the balancing test were identical for every withheld email and attachment.

Wisconsin Open Records Law has long-held that the public interest in disclosure—the right of the people of Wisconsin to know what their government is doing—is a strong presumption for every record. Plaintiffs ask the Court to recognize that this case has an even higher public interest towards disclosure. To that end, Plaintiffs have supplied the Court with many newspaper and interest articles discussing the importance of the Budget Bill and issues surrounding it. The Court recognizes that the withheld documents, if released, would serve to inform the electorate. with information regarding how Wisconsin created its most recent Budget Bill.

Defendants' arguments against disclosure are insufficient to overcome the presumption for disclosure. Defendants offer two main arguments: (1) that disclosure would have a chilling effect on the drafters to create a budget, harming the quality of the final product and (2) that disclosure would confuse the public as to understanding what document was the final Budget Bill.

The Court places very little if any weight with the latter, "confusion" argument. Most of the withheld documents presently before the Court subject to the balancing test

are emails and attachments that were not in any form or substance similar to a Budget Bill. To in essence assert that the public would not be able to differentiate between a piece of legislation and an email or Powerpoint presentation is not persuasive or logical. To the extent Defendants argue that readers of these records may misunderstand them, it seems to the Court that Defendants may be underestimating those readers. In any case, this argument is insufficient to support nondisclosure.

The Court considers the concerns behind deliberative process issues under the balancing test, and finds that these concerns are insufficient to outweigh the presumption of disclosure. Because Defendants use this rationale uniformly for all of the withheld documents, and because it is the only remaining argument against disclosure for the whole balancing test analysis, their argument in the Court's view is an attempt to recognize a deliberative process privilege.

There is no recognized deliberative process privilege recognized in Wisconsin. It has been all but rejected in *Sands v. Whitnall Sch. Dist.* To the extent that the federal system or other states have adopted such a privilege, the Court recognizes that the nature of documents created during a deliberative process may be considered in applying the balancing test. The concerns Defendants raise are valid public interest issues; they are, however, not enough to override the public interest in disclosure as applied here.

The Court notes that the document requests and the respective denials all occurred *after* the Budget Bill was finalized. This fact may be important here. To the extent that any chilling effect or any other negative consequence might befall a public entity from disclosing a preliminary deliberative document, such effects and consequences largely

evaporate once the Budget Bill or other final document has already been released to the public.

To the extent Defendants argue that future budget deliberations might be impacted, the Court makes these observations. Such a possible impact is insufficient to outweigh the strong presumption of disclosure, and is speculative at best. The Court further observes that, in its review of the withheld records, the records facially appear to be professional communications and information. They do not appear to be of a type that, if disclosed, would detract somehow from future exchanges of ideas, recommendations, etc.

Hempel instructs court to only allow nondisclosure in "extraordinary" cases. The Court finds that Defendants have not established an overriding public interest supporting nondisclosure for the withheld documents. It is certainly possible that under different circumstances some deliberative documents might be properly withheld under the balancing test. However, branding the withheld records in this case as deliberative documents does not in and of itself make those documents extraordinary and therefore immune from disclosure.

CONCLUSION AND ORDER

Upon review and analysis of the withheld documents, the Court determines that, of the 12 email strings and 9 attachments, all 12 email strings and 6 of the 9 attachments were records erroneously withheld by Defendants. Three attachments were properly withheld by Defendants. The Court accordingly grants Plaintiffs' Motions for Summary Judgment in part and denies in part, and grants Defendants' Motion for Summary

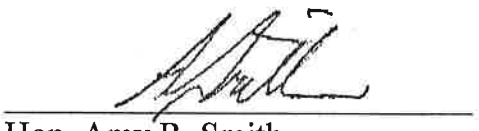
Judgment in part and denies in part. Mandamus should therefore issue as to the erroneously withheld documents.

The Court grants mandamus relief accordingly. Defendants are therefore ordered to release all of the withheld documents except Attachment 1, Attachment 6 and Attachment 9. Using the Bates stamp pagination, Defendants are therefore ordered to release pages 0001-0024, 0028-0029, 0033, 0037-0064, 0068-0070, 0072-0089, and 0257-0262.

Given the parties' possible interest in appealing this Decision, or seeking a stay of this Order, the Order is made effective 7 days from the Court's signing of this Decision and Order. **SO ORDERED**. This is a final order for purposes of appeal.

Dated this 27th day of May, 2016.

BY THE COURT:



Hon. Amy R. Smith
Circuit Court Judge, Branch 4

c: Attorney Gregory David Murray
Attorney Brendan Fischer
Attorney April Rockstead Barker
Attorney Elisabeth Eve Winterhack
Attorney David J. Rabe

Attachment: Attachment A is appended only to Defendants' copy of the Decision and Order, and placed under seal for reasons stated herein.

STATE OF WISCONSIN | CIRCUIT COURT BRANCH 4 | COUNTY OF DANE

CENTER FOR MEDIA & DEMOCRACY, KATHLEEN METER LOUNSBURY, THE PROGRESSIVE, INC., AND JUD LOUNSBURY,

Plaintiffs,

v. **Case No.: 15 CV 1289**

SCOTT WALKER, OFFICE OF THE GOVERNOR, WISCONSIN DEPARTMENT OF ADMINISTRATION, AND SCOTT NEITZEL,

Defendants.

SEAL ORDER

For the reasons stated in the Summary Judgment Decision and Order issued on today's date, Attachment A to that Decision and Order is hereby placed under SEAL until further order of the Court.

SO ORDERED. Dated this 27th day of May, 2016.

BY THE COURT:

The Honorable Amy R. Smith

c: Attorney Brendan Fischer
Attorney April Rockstead Barker
Attorney Gregory David Murray
Attorney Elisabeth Eve Winterhack
Attorney David J. Rabe