STATE OF WISCONSIN CIRCUIT COURT DANE COUNTY
BRANCH 4

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

Case No.: 2015 CV 1289

v.

**SCOTT WALKER,**
OFFICE OF THE GOVERNOR,
WISCONSIN DEPARTMENT OF ADMINISTRATION,
NATHAN E. SCHWANZ, MICHAEL G. HEIFETZ,
PATRICIA REARDON AND
SCOTT NEITZEL,

Defendants.

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**PLAINTIFF CMD'S BRIEF IN SUPPORT OF PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT AND IN OPPOSITION TO DEFENDANTS' MOTION FOR SUMMARY JUDGMENT**

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## I. Introduction and Background

At the core of this case is a simple question: does the public have a right to know how Wisconsin laws are developed?

Throughout Wisconsin history, courts have repeatedly found the answer is yes. After all, Wisconsin law recognizes that "a representative government is dependent upon an informed electorate," and 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." Wis. Stat. § 19.31.

The records withheld in this case pertain to matters of citizen oversight that are central to self-government. The records help citizens remain informed about the

development of the two-year executive budget, which is the most important piece of legislation in a legislative session. Depriving Wisconsinites of the ability to exercise oversight over the budget development process undermines the Wisconsin Public Records law, which "reflects the basic principle 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." *Linzmeyer v. Forcey*, 2002 WI 84, ¶15, 254 Wis. 2d 306, 646 N.W.2d 811.

And under the circumstances in this case, the records may also help citizens determine whether their elected officials have engaged in a cover-up.

On February 3, 2015, Governor Walker's 2015-2017 Executive Budget was formally introduced in the legislature's Joint Committee on Finance as 2015 Senate Bill 21. Fischer Aff. Ex. A.

On February 4, 2015, one day after the executive budget was introduced, the Center for Media and Democracy reviewed the budget document and identified that it made sweeping edits to the University of Wisconsin System's mission statement, striking out language to the effect that the university should improve people's lives "beyond the boundaries of the campus" in its "search for truth." *Id.* Ex. B. The news about the budget's edits to the century-old "Wisconsin Idea" quickly sparked what was later described as a "political firestorm." *Id.* Ex. C. Amidst the growing controversy, the Governor told media that evening that the budget's changes to the mission statement were a "drafting error." *Id.* Ex D.

On February 5, 2015, the *Milwaukee Journal Sentinel* reviewed the executive budget bill's drafting files and found that, contrary to the Governor's public statement, Walker

officials from the Department of Administration (DOA) had specifically asked for the changes to the mission statement. *Id.* Ex. E. The newspaper also found evidence contradicting the Governor's statement that university officials had not raised concerns about the changes. *Id.* The Governor then issued a statement claiming that "my staff, the state budget team, and I did not have much discussion about the mission statement" and that the change to the mission "was a simple miscommunication during the natural back and forth of this process." *Id.* Ex. F.

That same day, the Center for Media and Democracy (CMD) submitted a request for communications between the Governor's Office and three individuals in the DOA about the "Wisconsin Idea" changes. CMD Compl. ¶6.

On February 6, Politifact Wisconsin gave the Governor a "Pants on Fire" rating for his public statements about the Chapter 36 changes in the executive budget, writing that his original "drafting error" claim "was not only inaccurate, but ridiculous." Fischer Aff. Ex. B.

On May 8, ninety-two days after CMD submitted its request, Defendants partially denied the request, declaring, among other things, that records were being withheld under the "common law balancing test," arguing specifically that the purported public interest in protecting the deliberative process outweighed the public interest in disclosure. CMD Compl. Ex. A (Def. Denial Letter to CMD, hereinafter Def. Denial).

CMD also received a similar denial from the DOA for a separate request pertaining to education changes in the budget. Fischer Aff. Ex. G. A similar denial was also issued to Plaintiffs Katy Lounsbury, the Progressive Inc., and Jud Lounsbury. Katy Lounsbury, Progressive Inc., and Jud Lounsbury Compl. (hereinafter Lounsbury Compl.) Ex. 2. That

same day, Defendants also issued at least nine other partial denials, containing nearly identical language, to newspapers and citizens who had sought records about the state budget, according to a later report by the *Milwaukee Journal Sentinel*. Fischer Aff. Ex. H. Another denial was issued a week later, for a total of 12 denials on the basis of what has now been described as a "deliberative process" argument. *Id.*

On May 19, Plaintiff CMD filed a complaint against the Office of the Governor asking this Court for a writ of mandamus. CMD Compl. Plaintiff particularly took issue with Defendants' claim that protecting the "deliberative process" was a valid public policy concern that could outweigh the strong public interest in disclosure. *Id.* On May 27, Plaintiffs Katy Lounsbury, the Progressive Inc., and Jud Lounsbury filed a separate complaint against the DOA seeking a writ of mandamus on a similar basis. Lounsbury Compl.

The filing of these lawsuits generated significant press attention, with open government advocates across the political spectrum criticizing Defendants' "deliberative process" arguments. Fischer Aff. Ex. I.

On July 3, the legislature's Joint Finance Committee passed a series of last-minute amendments to the budget known as a "Motion 999" that included sweeping changes to the Public Records law, including the creation of a "deliberative materials exception" defined broadly as anything "created or prepared in the process of reaching a decision concerning a policy or course of action." *Id.* Ex. J. This new exception closely mirrored Defendants' "deliberative process" arguments in the denial letters to Plaintiffs, and seem intended to have the effect of shielding many of the same records from disclosure under the Public

Records Law. *Id.* Ex. K. The proposal quickly prompted outrage across the political spectrum. *Id.* Ex. J.

On July 4, 2015, the public records changes were criticized in a nearly unprecedented front-page *Milwaukee Journal Sentinel* editorial. *Id.* Ex. L. By mid-afternoon of the Independence Day holiday, the Governor and legislative leaders had issued a statement declaring they would reverse the proposed changes. *Id.* Ex. M.

Lawmakers initially refused to say who asked for the changes. *Id.* Ex. N. Governor Walker told the press "the changes didn't come from us." *Id.* Ex. O. However, records would later show that the Governor's Office was involved in developing the failed effort to exempt "deliberative process materials" from disclosure under the Public Records Law. *Id.* Ex. P.

On August 24, 2015, Defendants filed their Motion for Summary Judgment and brief in support of the motion, and attempted to reframe their "deliberative process" public policy claim, after the failed attempt to codify their flawed legal reasoning via a last-minute amendment to the executive budget. *See* Def. Br. Now, in addition to trying to create a new deliberative process exemption from the Public Records Law, Defendants are attempting to expand the definitions of "drafts," "preliminary materials," and "like computations" beyond contrary to legal precedent and in a way that would do grave damage to the state's legal obligations to allow complete public access to the kinds of documents sought in this case..

## II. <u>Statement of Law and Undisputed Facts</u>

### A. Applicable Legal Principles Governing Summary Judgment

Summary judgment is appropriate where, based on evidence admissible at trial and provided to the Court, "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); *Voss v. City of Middleton*, 162 Wis. 2d 737, 748, 470 N.W.2d 625 (1991).

There are no material disputes of fact in this case. The issues presented are wholly legal ones. The relevant facts are established in Defendants' denial letter, averments in the Complaint, and admissions in the Answer.

Plaintiffs are entitled to judgment as a matter of law for the reasons set forth below.

### B. Applicable Legal Principles Governing Public Records

#### 1. The Wisconsin's Public Records Law Is Weighted in Favor of Protecting the Public's Right to Monitor the Government

Wisconsin's Public Records Law, Wis. Stat §§ 19.31-39, establishes the public's right to know what elected officials are doing in their name. Wisconsin law recognizes that "a representative government is dependent upon an informed electorate," and 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." Wis. Stat. § 19.31 (Declaration of Policy). The law's declaration of policy additionally states:

> 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.

*Id.*

Wisconsin law further admonishes:

> 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.

*Id. (emphasis added).*

As the Wisconsin Supreme Court has observed, the Public Records Law "reaffirms that the people have not only the opportunity but also the right to know what the

government is doing and to monitor the government." *Milwaukee Journal Sentinel v. City of Milwaukee*, 2012 WI 65, ¶4, 341 Wis.2d 607, 815 N.W.2d 357.

Wisconsin courts have long recognized that the public has a vital interest not only in knowing *what* has been done in its name, but also *why* those policies have been advanced and *who* was involved in their development. The law favors complete public access, which the Wisconsin Supreme Court has characterized as a "presumption [that] reflects the basic principle 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." *Linzmeyer v. Forcey*, 2002 WI 84, ¶15, 254 Wis. 2d 306, 646 N.W.2d 811; *see also The John K. MacIver Institute for Public Policy, Inc. v. Jon Erpenbach*, 2014 WI App 49, ¶32, 354 Wis. 2d 61. ("Public awareness of who is attempting to influence public policy is essential for effective oversight of our government.")

**2. Statutes and Common Law Govern the Process of Complying with a Records Request**

Upon receiving a records request, an authority 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 therefor." Wis. Stat. § 19.35(4)(a).

Upon compiling the documents responsive to the request, a custodian then must determine whether the documents meet the definition of "record" in Wis. Stat. § 19.32(2), or whether any of the documents, in whole or in part, fall under the list of exclusions in that statutory provision, including whether the documents can be considered "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). These exclusions are to be narrowly construed, and the custodian of the document bears the burden of proof in demonstrating a document falls under a 19.32(2) exception. *Fox v. Bock*, 149 Wis. 2d 403, 411, 417, 438 N.W.2d 589 (Wis. 1989).

The "[d]rafts, notes, preliminary computations, and like materials" exceptions apply only to documents that were either (a) "prepared for the originator's personal use" or (b) "prepared by the originator in the name of a person for whom the originator is working." Wis. Stat. § 19.32(2), 77 Op. Att'y Gen. 100, 101 (1988).[1] These phrases are to be construed narrowly. 77 Op. Att'y Gen. at 102. (Only the latter phrase is argued here. *See* Def. Denial.)

A document is not "prepared by the originator in the name of a person for whom the originator is working"--and thus cannot be considered "drafts," "notes," "preliminary computations," or "like materials"—if either (1) the document's recommendations were accepted by one's superior, *Fox*, 149 Wis. 2d at 413, or (2) the document was distributed to persons beyond those over whom the designated superior has jurisdiction. 77 Op. Att'y Gen. at 102, *Voice of Wisconsin Rapids* v. *Wisconsin Rapids Public School District*, 2015 WI App 53 ¶¶20-22, 29, 36, 37.

The Wisconsin Supreme Court has stated that:

> "the custodian of the document bears the burden of proof of facts demonstrating that it is a draft. The decision that a document is a draft under Sec. 19.32(2), Stats., is a legal conclusion. However, if there exists a factual dispute, the custodian has the burden of producing evidence and persuading the finder of fact that the proffered facts are true. (citing *Hochgurtel v. San Felippo,* 78 Wis. 2d 70, 86-87, 253 N.W.2d 526 (1977)). The custodian must satisfy the finder of fact by the greater weight of the credible evidence that the document is a draft."

*Fox*, 149 Wis. 2d at 411, 417.

[1] "[T]he terms 'drafts, notes, preliminary computations and like materials' are all modified by the phrases "prepared for the originator's personal use or prepared by the originator in the name of a person for whom the originator is working." 77 Op. Att'y Gen. 100, 102 (1988).

If the requested document is a "record," and no statutory or common law exemptions can deny access, the record must be disclosed unless "permitting inspection would result in harm to the public interest which outweighs the legislative policy recognizing the public interest in allowing inspection." *Osborn v. Board of Regents of University of Wisconsin System,* 2002 WI 83, ¶15, 254 Wis. 2d 266, 647 N.W.2d 158. This is known as the "balancing test." It is only in an "exceptional case" that the strong public interest in disclosure and the presumption of openness can be outweighed by a clearly recognized public policy interest favoring nondisclosure. *Hempel v. City of Baraboo*, 2005 WI 120, ¶ 63, 284 Wis. 2d 162, 699 N.W.2d 551; *see also State ex rel. Journal Co. v. County Court,* 43 Wis. 2d 297, 305, 168 N.W.2d 836 (1969). The balancing of interests must be conducted on a record-by-record basis. *Milwaukee Journal Sentinel v. Department of Administration*, 2009 WI 79, ¶ 56, 319 Wis. 2d 439, 768 N.W.2d 700. Public policies that may be weighed in the balancing test can be identified through their expression in other areas of the law, such as evidentiary privileges. Public policies that weigh in favor of disclosure include "evidence of official cover-up." *Hempel*, 2005 WI 120, ¶ 68.

Finally, the custodian must release all disclosable records, and provide *specific* and *sufficient* reasons for denying or partially denying access to any documents that were responsive to the request. *Hempel*, 2005 WI 120, ¶¶ 25-26. A denial letter serves two purposes: one, it ensures a records custodian did not act arbitrarily; and two, it gives "the requester notice sufficient to allow preparation of a challenge to the withholding." *Journal/Sentinel, Inc. v. Aagerup*, 145 Wis. 2d 818, 824, 429 N.W.2d 772 (1988). The Wisconsin Supreme Court has stated "the specificity requirement is not met by a mere citation to the exemption statute." *Id.*

A requester may challenge the adequacy of a custodian's asserted reasons for withholding requested records by filing a petition for writ of mandamus. Wis. Stat. § 19.37(1)(a). When reviewing a petition for mandamus, a court may consider only those reasons for denial given by the authority in their denial letter. *Osborn*, 2002 WI 83, ¶16. The court may not "hypothesize" other reasons for denial or "consider reasons to deny the request that were not asserted by the custodian." *Id.* (citing *Newspapers Inc. v. Brier,* 89 Wis. 2d 417, 279 N.W.2d 179 (1979)). "If the custodian states insufficient reasons for denying access, then the writ of mandamus compelling disclosure must issue." *Id.* (citing *Oshkosh Northwestern Co. v. Oshkosh Library Bd.,* 125 Wis. 2d 480, 486 373 N.W.2d 459 (Ct. App. 1985)); *see also Nichols v. Bennett*, 199 Wis. 2d 268, 275-76, 544 NW 2d 428 (1996) (refusing to consider an argument for withholding a record because it was not listed "as one of the specified reasons for denying [the requester's] request").

**C. Undisputed Facts**

On February 5, two days after Governor Walker introduced his 2015-2017 Executive Budget, the Center for Media and Democracy submitted a request to the Governor's Office for "All 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." CMD Compl. ¶6. The named individuals work in the Department of Administration (DOA), and Chapter 36 of the Wisconsin statutes governs the University of Wisconsin system.

On May 8, ninety-two days after CMD submitted its request, Defendants partially denied the request, declaring (in this specific order) that (1) records were being withheld under the attorney client communications and attorney work product exemptions, (2)

records were being withheld under the "common law balancing test," specifically that the purported public interest in protecting the deliberative process outweighed the strong public interest in disclosure, and (3) that those same records were not "records" at all but were "prepared by individuals working for the Governor on creation of the Governor's biennial budget" and fell under the narrow "drafts," "preliminary computations," and "like materials" exemptions in Wis. Stat. § 19.32(2). Def. Denial. A similar denial was also issued that day to Plaintiffs Katy Lounsbury, the Progressive Inc., and Jud Lounsbury. Lounsbury Compl. Ex. 2.

On May 19, Plaintiffs CMD filed a complaint against the Office of the Governor asking this Court for a writ of mandamus ordering Defendants to disclose the withheld records and comply with their responsibilities under the Public Records Law. CMD. Compl.

On May 27, Plaintiffs Katy Lounsbury, the Progressive Inc., and Jud Lounsbury filed a separate complaint seeking a writ of mandamus on a similar basis. Lounsbury Compl.

The Court consolidated the two cases on June 19, 2015, and Defendants answered both complaints on June 20. In their Answer to CMD's Complaint, Defendants abandoned their claim that the records could be withheld pursuant to the attorney-client privilege and as attorney work product, calling these arguments in their denial a "mistake." Def. Answer to CMD Compl. ¶11. On August 17, 2015, this Court issued the Scheduling Order, and on August 24, 2015, Defendants filed a Motion for Summary Judgment and brief in support of the motion. Plaintiffs now move for Summary Judgment on these claims.

## III. The Public Records Law Requires Defendants to Provide the Requested Records

### A. Wisconsin's "Presumption of Complete Public Access" Is Not Outweighed by Any Claimed Public Interest in Secrecy

Defendants improperly withheld the records under the "balancing test," because the significant public interest in these records outweighs any public interest in maintaining the secrecy of these records.

### 1. The Public Interest in these Records Favors Their Release

The communications involved in the development of public policy are of the utmost public interest. As described above, Wisconson law imposes a strong presumption in favor of complete public access favors disclosure, a presumption that is particularly weighty here, because the withheld records pertain to the core purpose of the Public Records Law: the "affairs of government." Wis. Stat. § 19.31.

The public interest in these records is heightened because they pertain to the two-year budget, which is the most important piece of legislation in a biennial legislative session. The law recognizes that "a representative government is dependent upon an informed electorate," and 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." Wis. Stat. § 19.31. Defendants' claim that transparency is served because "legislation is publicly available once it is introduced" undermines the oversight role that the Public Records Law is intended to promote. The Defendants' narrow view is inconsistent with the mandate to abide by the public's right to the "greatest possible information" about how laws that govern them are developed. As the Wisconsin Supreme Court has observed, "The right of the people to monitor the people's business is one of the core principles of democracy." *Schill v. Wisconsin Rapids School District*, 2010 WI 86, ¶2, 327 Wis. 2d 572, 786 N.W. 2d 177 (plurality opinion). Wisconsin's open records law "reaffirms that the people have not only the opportunity but also the right to know what

the government is doing and to monitor the government." *Milwaukee Journal Sentinel v. City of Milwaukee,* 2012 WI 65, ¶4, 341 Wis. 2d 607, 815 N.W.2d 367.

The public has a vital interest not only in knowing *what* has been done in its name, but also *why* those policies have been advanced and *who* was involved in their development. The public's interest in this matter is not only in the policy change itself, but how that change came into existence. The public has a very strong interest in these particular records, which pertain to changes to the University of Wisconsin System's mission statement and the "Wisconsin Idea," tenets that are core to the *public's* university—one of the crown jewels of Wisconsin and an institution whose mission has helped build Wisconsin's history and reputation as a state.

How the proposal to change this mission in the executive budget came about is of paramount public interest. "The Wisconsin Idea is embedded in our DNA," University of Wisconsin System President Ray Cross said when the proposed changes became public. "It is so much more than words on a page. It is the reason the UW System exists. It defines us and forever will distinguish us as a great public university." Fischer Aff. Ex. D.[2]

Even beyond this weighty interest, the public interest in these records is especially compelling because they may shed light on an apparent cover-up by Defendants.

The revelation that the governor used the budget to strike "the search for truth" and the "Wisconsin Idea" from the mission of the University of Wisconsin System—the subject of Plaintiffs' records request—attracted significant media attention in Wisconsin and around the country. Outlets ranging from the *Milwaukee Journal Sentinel* to the *Wisconsin*

[2] Karen Herzog, "Walker proposes changing Wisconsin Idea — then backs away," *Milwaukee Journal Sentinel* (Feb. 4, 2015): http://www.jsonline.com/news/education/scott-walkers-uw-mission-rewrite-could-end-the-wisconsin-idea-b99439020z1-290797681.html

*State Journal* to the *Washington Post* wrote multiple articles on the issue, as did editorial boards at outlets like the *New York Times*. *See* CMD Compl. Ex. B.

In the face of this broad public criticism, the governor initially stated that the proposed changes to the mission statement were the result of a "drafting error" in the budget. Fischer Aff. Ex. D. This claim to the press later earned a "Pants On Fire" rating from Politifact after the *Milwaukee Journal Sentinel* reviewed the budget drafting file and discovered that the DOA had specifically requested the changes. *Id.* Ex. C. The governor additionally claimed that the changes had been overlooked by University of Wisconsin officials, and issued a lengthy press release blaming "miscommunication" between his executive office and budget staff in the DOA. *Id.* Ex. E. Yet emails obtained through other public records requests by the *Milwaukee Journal Sentinel* further undermined those claims, and indicated that the change was intentional and that university officials had in fact disputed the changes but were rebuffed. *Id.*

Wisconsin courts have expressly recognized that one of the grounds that weigh in favor of disclosure include "evidence of official cover-up." *Hempel v. City of Baraboo*, 2005 WI 120, ¶ 68, 284 Wis. 2d 162, 699 N.W.2d 557. The Wisconsin Supreme Court has observed that such evidence "would be a very potent reason to disclose public records," since "[t]he public has a very strong interest in being informed about public officials who have been derelict in their duty." *Id.*

Accordingly, the scales weigh very heavily in favor of disclosure in this instance. The withheld records can shed light on how and why the Governor's executive budget took aim at a cherished state institution, and disclosure of these records serve the public's "very

strong interest" in being informed about public officials who've been caught in a "pants on fire" deception.

### 2. Protecting the "Deliberative Process" Is Not a Valid Public Policy Concern that Can be Weighed in the Balancing Test

Defendants are incorrect as a matter of law in asserting that "the deliberative process" of preparing the executive budget can be a valid public policy interest weighed in the public policy balancing test, much less one that outweighs the strong presumption of complete public access and the public interest in disclosure. *See* Def. Denial at 1, Def. Br. at pp. 23-36.

Whether Defendants choose to characterize their argument as the creation of an ad hoc "deliberative process privilege" or as the creation of a "deliberative process," public policy that can outweigh the public interest in citizen oversight of government, the effect is the same: to open a new loophole in Wisconsin's Public Records law and shield a wide new swath of previously-available records from public view.

#### a. The Federal FOIA Exemption for Deliberative Process Cannot Be an Independent Source of *Wisconsin* Public Policy that Can be Weighed in the Balancing Test in this Case

Having failed to find any Wisconsin statutory language that provides an exemption for the "deliberative process," and having failed in their effort over the Independence Day weekend to amend Wisconsin statutes to create such an exemption, Defendants now look to bind Wisconsin law with federal law that is quite distinct from our own.

Defendants assert that a federal exemption from the Freedom of Information Act (FOIA), 5 USC § 552(b)(5), "demonstrates a nationally recognized interest in protecting the integrity of the government's deliberative process." Def. Br. at 22, *see also* Def. Denial at 2.

This is incorrect. 5 USC § 552(b)(5) provides an exemption from disclosure under the federal Freedom of Information Act (FOIA) for "inter-agency or intra-agency memorandums or letters which would not be available by law to a party other than an agency in litigation with the agency." This FOIA exemption was intended to incorporate federal common-law privileges against discovery under federal civil procedure. Because federal law recognizes a common-law "deliberative process privilege" in discovery, federal courts have found that § 552(b)(5) incorporates a deliberative process exception to FOIA.[3]

In contrast, the Wisconsin Supreme Court has declared unequivocally that under Wisconsin law, "no such 'deliberative process privilege' has *ever* been recognized by the Wisconsin courts." *Sands v. Whitnall School District*, 2008 WI 89, ¶48 n. 12, ¶¶ 60-70, 312 Wis. 2d 1, 754 N.W. 2d 439 (emphasis added).

The federal FOIA law does not and cannot bind states, and FOIA exceptions do not provide an independent source of public policy in the state that can be weighed in the Wisconsin Public Records Law's balancing test. *State ex rel. Hill v. Zimmerman*, 196 Wis. 2d 419, 428 n. 6, 538 N.W.2d 608 (Ct. App. 1995). That is because, as the Court of Appeals has observed, "Wisconsin courts have more effectively enforced the public records statute, sec. 19.21, than federal courts have enforced the federal Freedom of Information Act." *In Re Wisconsin Family Counseling Servs., Inc. v. State*, 95 Wis. 2d 670, 672-73, 291 N.W.2d 631(Ct. App. 1980)).

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[3] *See, e.g.*, Dep't of Interior & Bureau of Indian Affairs v. Klamath Water Users Protective Ass'n, 532 U.S. 1, 8 (2001) (discussing requirements for application of FOIA Exemption 5, "it must fall within the ambit of a privilege against discovery under judicial standards that would govern litigation against the agency that holds it"); 2 Federal Evidence § 5:57, at 893 (Christopher B. Mueller & Laird C. Kirkpatrick, 4th ed. 2013) (discussing FOIA Exemption 5 and stating "in effect this language incorporates the common law definition of the deliberative process privilege").

In fact, unlike Wisconsin law, FOIA does not provide any statutory language requiring that it "be construed in every instance with a presumption of complete public access," and does not provide that "only in an exceptional case may access be denied presumption in favor of disclosure." Indeed, FOIA is so weak in this regard that it is only through executive branch action that federal agencies are—sometimes—told that they shall construe FOIA with a presumption in favor of public access. For example, in 2001, President George W. Bush's Attorney General John Ashcroft relied on FOIA's lack of a legally binding presumption of disclosure to issue a memorandum that called for a broad application of FOIA's statutory exemptions (particularly Section 5), superseding President Bill Clinton's previous order from 1993 urging federal agencies construe FOIA with a "presumption of disclosure" (which in turn superseded an earlier order favoring secrecy).[4] One of President Barack Obama's first actions was to rescind the Ashcroft interpretation and require that federal agencies, again, construe FOIA's exemptions in a way that favors public access through a "presumption of disclosure."[5]

In sum, FOIA contains no legal presumption in favor of disclosure--unlike Wisconsin, which provides that non-disclosure is permissible only in exceptional circumstances. And, the federal executive branch gets to decide unilaterally whether to construe FOIA in favor of disclosure, or not—unlike Wisconsin, where the presumption of disclosure is embodied in statute and remained consistent across administrations. And, FOIA contains an express provision incorporating the federal evidentiary "deliberative process privilege"—a

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[4] *See* Ashcroft Memorandum (Oct 15, 2001), *available at* http://www.fas.org/sgp/foia/ashcroft.html; *see also* Reno Memorandum (Oct. 4, 1993), *available at* http://www.fas.org/sgp/clinton/reno.html (which in turn overruled the Reagan-Bush legacy view on this issue).

[5] *See* Fred Kaplan, *A Presumption of Disclosure*, SLATE (Jan. 23, 2009), http://www.slate.com/articles/news_and_politics/war_stories/2009/01/a_presumption_of_disclosure.html.

privilege that does not exist in Wisconsin. Moreover, FOIA is built on federal case law that similarly does not mandate a legal presumption in favor of disclosure. Thus, federal exemptions and the rationalizations behind them have no place in construing Wisconsin's distinctively different approach, which emphatically favors disclosure and narrows the grounds not to disclose.

Accordingly, in contrast to the way federal courts have broadly interpreted FOIA's exemptions, Wisconsin courts have expressly declined to engraft onto Wisconsin's Public Records Law "very large loopholes which can be used to prevent access to significant categories of data." *In Re Wisconsin Family Counseling Servs.*, 95 Wis. 2d at n. 1.

Instead, Wisconsin courts have repeatedly recognized that the Wisconsin Public Records Law is more effective than the federal FOIA, in large part because FOIA includes much broader exemptions, which have allowed more federal records to be withheld from the public. *Zimmerman*, 196 Wis. 2d at 428 n. 6 (citing *In Re Wisconsin Family Counseling Servs., Inc.*, 95 Wis. 2d 670). At the very most, FOIA could only provide persuasive authority for interpreting Wisconsin's Public Records Law. *See Zimmerman*, 196 Wis. 2d at 428 n. 6 (citing *State ex rel. Lank v. Rzentkowski*, 141 Wis. 2d 846, 856 n. 5, 416 N.W.2d 635, 638 (Ct. App. 1987)). But in this instance, where federal law and state law are so distinct, reliance on FOIA seems particularly inapposite.

Indeed, no Wisconsin court has ever found that federal FOIA exceptions can provide an independent source of public policies that can be weighed in the balancing test. In one instance, the Court of Appeals in *Linzmeyer v. Forcey* found that in those limited circumstances where there is "overlap" between statutory exemptions in Wisconsin's Public Records law, public policies already clearly recognized under Wisconsin law, and

policies expressed in the FOIA statute, the FOIA framework could be a useful guide for records custodians to exercise their responsibilities. 2002 WI 84, ¶¶ 32-33, 254 Wis. 2d 306.

In *Linzmeyer*, the Wisconsin Supreme Court considered the release of certain law enforcement records under the Public Records Law, in response to a challenge from the subject of those law enforcement records.[6] In affirming the trial court's holding that the records must be disclosed, the Court conducted a balancing test and weighed explicit statutory exemptions for law enforcement records in Wisconsin's Public Records law and public policies that were already clearly recognized under Wisconsin law. *Linzmeyer*, 2002 WI 84, ¶¶24-31, 34-42.

The Court derived the relevant public policies to weigh in the balancing test from Wisconsin statutes and Wisconsin case law. *Id.* at ¶¶24-31, 34-42. The Court then only made a "note" that a FOIA exemption for law enforcement records "quite concisely lists factors that support these public policies . . . that we have already identified." *Id.* at ¶¶32-33. In fact, the Court did not even indicate that it was weighing the FOIA exception in its decision, but instead that the FOIA factors related to that section could "provide a framework" for records custodians in conducting the balancing test, but only "when coupled with our prior case law." *Id.* at ¶33. The Court additionally suggested that its

[6] The Appleton Post-Crescent newspaper sought the report of a closed police investigation into a high school teacher, which the city stated it would release, but the teacher sought an injunction to block its release. The Wisconsin Supreme Court affirmed the circuit court's finding that the public's interest in the disclosure of the report outweighed the public's interest in the protection of the teacher's privacy.

holding with regard to FOIA may only be applicable to certain kinds of law enforcement records. *Id*. [7]

In contrast with *Linzmeyer*, the FOIA exemption cited by Defendants does not overlap with statutory exemptions in Wisconsin law or with public policies already clearly recognized under Wisconsin law. That FOIA exemption, 5 USC § 552(b)(5), incorporates common-law evidentiary privileges. Because federal law recognizes a common-law "deliberative process privilege" in discovery, federal courts have found that § 552(b)(5) explicitly recognizes a deliberative process exception to FOIA. Yet the Wisconsin Supreme Court has declared unequivocally that "no such 'deliberative process privilege' has ever been recognized by the Wisconsin courts." *Sands*, 2008 WI 89, ¶50. Although recognized evidentiary privileges may reflect public policies that can be weighed in Wisconsin's balancing test, Wisconsin courts have declined to consider protection of the "deliberative process" as a valid public policy concern, because no common-law deliberative process evidentiary privilege exists under Wisconsin law.[8]

Accordingly, Defendants are trying to achieve indirectly what they could not achieve directly. Federal courts have read a deliberative process privilege into the FOIA exemption for common law evidentiary privileges because a common-law deliberative process privilege exists in federal law. In contrast, Wisconsin courts have refused to read a policy of protecting the deliberative process into Wisconsin's public records law, because no such common-law deliberative process privilege exists under state evidentiary law.

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[7] The Court wrote: "when coupled with our prior case law, these factors provide a framework that records custodians can use to determine whether the presumption of openness in law enforcement records is overcome by another public policy." Linzmeyer, 2002 WI 84, ¶33 (emphasis added).

[8] Unlike federal common law, under Wisconsin law evidentiary privileges cannot by themselves provide sufficient justification for denying access to public records, See, e.g., 1975 Judicial Council note to Wis. Stat. § 905.09, but they may reflect public policies that can be weighed in the balancing test.

Therefore, this court should reject Defendants' arguments that seek to interpose FOIA interpretations or rationales into the case at hand.

**b. The Wisconsin Supreme Court Has Already Rejected the Only Informal Attorney General Opinion Letter that Once Supported Defendants' Position**

Given this background, it becomes clear that the Wisconsin Supreme Court overruled the only interpretation of state law that could even arguably support Defendants' "deliberative process" claim.

The sole support for Defendants' claim that protecting the deliberative process is a valid public policy concern in Wisconsin comes from an informal 2007 letter from Assistant Attorney General Maureen McGlynn Flanagan to a requester. Letter from Maureen McGlynn Flanagan, Assistant Attorney General, to Gretchen Schuldt (July 9, 2007).

Flanagan suggested that what she called a "deliberative process privilege" could be weighed in the public policy balancing test. *Id.* at 4. However, at the time of her July 9, 2007 letter, an intermediate appellate court had construed Wisconsin law to imply a deliberative process privilege.

On December 7, 2006, the Court of Appeals in *Sands v. Whitnall* had sided with a school district's claim that Wisconsin statutes be construed to recognize an implicit deliberative process privilege. 2007 WI App 3, ¶¶ 10, 15, 298 Wis.2d 534, 728 N.W.2d 15; *see also Sands v. Whitnall School District*, 2008 WI 89, ¶2, 312 Wis. 2d 1, 754 N.W. 2d 439. Seven months later, Assistant Attorney General Flanagan would issue the letter finding that the "deliberative process privilege" could be a valid public policy interest, which comported with the Court of Appeals decision in *Sands*. However, one year after that letter, on July 11, 2008, the Wisconsin Supreme Court overruled the appellate court in *Sands* and declared

that the "deliberative process privilege" is not recognized under Wisconsin law, either implicitly or explicitly. *Sands*, 2008 WI 89, ¶50.

Accordingly, Flanagan's informal 2007 letter reflected Wisconsin law at the time, and therefore did not offer public officials seeking secrecy a way of achieving indirectly what they could not achieve directly. That memo was effectively overruled by the state's highest court when it overruled *Sands*, and therefore it should not be construed as having any persuasive authority in applying the balancing test in this case.

Flanagan's analysis in the 2007 letter simply no longer has any persuasive value after the Wisconsin Supreme Court's 2008 *Sands* ruling. This is particularly true because many of the same FOIA exemption 5 cases cited by the Assistant Attorney General were rejected by the Wisconsin Supreme Court as having little relevance to Wisconsin law. *Compare* DOJ Letter at 4, Def. Br. at 25-26 *with Sands*, 2008 WI 89, ¶63-65.[9] In rejecting the applicability of these cases, the Wisconsin Supreme Court held that the "deliberative process privilege recognized by federal courts as explicitly contained in the Freedom of Information Act's fifth exemption does not lend itself to recognition as an implicit privilege" in Wisconsin law, "because our state laws reflect a strong policy of transparency and access," *Sands*, 2008 WI 89, ¶68, which applies to "discovery statutes, open records laws, and open meetings laws alike." *Id.* ¶48 n. 12.

Additionally, Defendants are incorrect when they declare that the 2007 DOJ letter "expressly stated that Wisconsin did not recognize a deliberative process privilege." Def. Br. at 24, n. 6. Flanagan's letter actually states that "the Wisconsin cases do not recognize a

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[9] Enviro Tech International, Inc. v. United States Environmental Protection Agency, 371 F.3d 370 (7th Cir. 2004); Dep't of the Interior v. Klamath Water Users Protective Ass'n, 532 U.S. 1, 9, (2001); N.L.R.B. v. Sears, Roebuck & Co., 421 U.S. 132, 150(1975).

deliberative process privilege *per se*," Flanagan letter at 4, a position that comports with the Court of Appeals' declaration in *Sands* that it was not "specifically address[ing] whether Wisconsin should adopt the deliberate process privilege." 2007 WI App 3, ¶10 n. 4. Although the Court of Appeals may have declared it was not creating a *per se* deliberative process privilege in *Sands*, the Wisconsin Supreme Court nonetheless reversed the decision and made clear, for the first time, that "Wisconsin does not recognize a deliberative process privilege." *Sands*, 2008 WI 89, ¶67.

**c. Any "Deliberative Process" Interest Falls Away after the Legislation Is Introduced**

To the extent that a "deliberative process" privilege against disclosure is claimed to exist, it certainly does not apply to requests filed *after* a bill has been written, and *after* the legislation had already been introduced, under Wisconsin's Public Records Law.

This is also a key factual distinction between the informal Flanagan opinion and this case. The request described in the Flanagan letter was filed while the executive budget was still being developed, and prior to the budget's introduction, whereas Plaintiffs in this case filed their requests after the final budget document had been completed and introduced.[10] Plaintiffs' requests sought records that would shine light on how the final budget proposal was developed, as opposed to seeking a preview of the budget before it was introduced in the legislature.

10 The requester in the 2007 letter, Gretchen Schuldt, filed her request with DOA for records pertaining to the 2007-2009 budget on October 27, 2006. DOJ letter at 1. The 2007-2009 budget was not introduced until February of 2007, nearly four months later. In other words, Schuldt was seeking records pertaining to the budget while it was still being drafted, before it was introduced. In contrast, Plaintiffs in this case filed their requests after the final budget document had been completed and introduced. The 2015-2017 executive budget was introduced on February 3, 2015; Plaintiffs filed their requests on February 5, 2015.

Similarly, the 2007 Dane County circuit court case cited by Defendants, *Attorney General of Wisconsin v. Zien,* also dealt with a request for records about a bill that had not yet been introduced. No. 05 CV 2896 at 6-7, 12 (Dane Cnty. Cir. Ct. June 27, 2007) (cited in Def. Br. at 29). In *Zien* (which did not consider the balancing test), the circuit court held that the withheld documents retained their status as "drafts" under § 19.32(2) because they pertained to a bill that was still being drafted and had not yet been introduced in the legislature. *Id.* at 12. However, after the bill was introduced the documents were disclosed to the requester, since the withheld records no longer qualified for the "drafts" exception. *Id.* at 4. The circuit court did not find that the documents could be withheld indefinitely because they reflected advice or consultation, as Defendants suggest; on the contrary, the documents at issue in that case were disclosed after the bill was introduced.

**d. Even if the Deliberative Process Could Be Considered in Applying the Balancing Test, It Fails to Outweigh the Substantial Public Interests in Public Disclosure in this Case**

Wisconsin courts have never recognized the "deliberative process" as a valid public policy that can be weighed in the Wisconsin Public Records Law balancing test, and exemptions to federal FOIA law cannot provide an independent source of such public policies. Protecting the "deliberative process" is contrary to the holding of *Sands*, and even independent of that legally binding precedent, the interests in secrecy of deliberations do not outweigh the substantial public interest in disclosure, particularly in disclosure of records showing how public policy is developed.

Moreover, Defendants fail to articulate a significant public interest in maintaining the secrecy of deliberative records. They do not make any prima facie case for how maintaining the secrecy of those records would improve the budget drafting process or,

conversely, how disclosing the records, particularly after the executive budget has been introduced and enacted, would interfere with the drafting process.

The inapplicability of any policy rationale underlying the federal deliberative process privilege is demonstrated by longstanding practices in Wisconsin. In our state, unlike the federal government, the legislative drafting files—which show every draft version of a bill and all email correspondence between a legislative office, LRB attorneys, and interest groups deliberating over the various drafts—have long been automatically placed online (see https://docs.legis.wisconsin.gov/drafting_files), and any additional deliberative legislative records have been subject to disclosure under the Public Records Law. *See* State of Wisconsin Legislative Reference Bureau, "The Legislative Process in Wisconsin," Research Bulletin 14-2, December 2014 at 14-26. Yet Wisconsin's legislative process and exchange of ideas have not been impeded by decades of such transparency.

The desire to protect the secrecy of the Defendants' communications related to the drafting of budget legislation, whatever that interest may be, does not outweigh the strong public interest in disclosure of the records. This is particularly so with the evidence that the Defendants seek to withhold the records to avoid further contradiction of the Governor's claim of a "drafting error." Evidence of an official cover-up is a potent reason for disclosing records. *Hempel v. City of Baraboo*, 2005 WI 120, ¶ 68, 284 Wis. 2d 162, 699 N.W.2d 557.

**B. The Records Cannot Be Withheld as "Drafts," Preliminary Computations," or "Like Materials"**

Defendants give every indication of trying to reverse-engineer a justification for keeping embarrassing records a secret. Rather than conducting the record-by-record

review required under the public records law, Defendants apparently declared the records to keep secret first, then have spent months stumbling to justify withholding them.

Defendants' May 8 denial letter was focused almost entirely on their unsupportable "deliberative process" public policy argument. Defendants also argued some records could be withheld pursuant to "attorney-client privilege" and "attorney work product," which they now claim was a "mistake." At the end of the denial letter, Defendants made a brief mention that they believed all of the same records were supposedly not "records" at all with a citation to the exceptions in Wis. Stat. § 19.32(2).

However, in Defendants' Brief in Support of Summary Judgment, Defendants now claim that they are seeking to give independent meaning to the 19.32(2) terms "preliminary computations" and "like materials," and seeking to create their own self-serving definition of the terms "drafts" that completely disregards decades of precedent and would do grave damage to the intent of Wisconsin's Public Records Law and its historic commitment to government transparency. As a matter of law, defendants failed to meet their burden of proof in demonstrating that a document falls under a 19.32(2) exception. *Fox v. Bock*, 149 Wis. 2d 403, 411, 417, 438 N.W.2d 589 (Wis. 1989).

1. **These Records Cannot Be Withheld under 19.32(2) Exemptions Because They Were Not "Prepared by the Originator in the Name of a Person for Whom the Originator Is Working"**

The "drafts," "preliminary computations," and "like materials" exception apply <u>only</u> to documents either "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); 77 Op. Att'y Gen. 100, 101 (1988).[11]

Defendants' denial letter states they only withheld documents pursuant to the second part of this exclusion, writing that they were withholding "drafts, preliminary computations, and/or similar like materials that are prepared by individuals working for the Governor on creation of the Governor's biennial budget." Def. Denial at 2. When reviewing a petition for mandamus, a court may consider only those reasons for denial given by the authority in their denial letter. *Osborn v. Board of Regents of University of Wisconsin System,* 2002 WI 83, ¶16, 254 Wis. 2d 266, 647 N.W.2d 158.[12]

The phrase "prepared by the originator in the name of a person for whom the originator is working" was added to Sec. 19.32(2) via Assembly Substitute Amendment 1 to 1981 Senate Bill 250. Clarenbach Aff. Ex. A. According to the sponsor of that amendment, former Rep. David Clarenbach, the language was not intended to broaden the list of exempted documents from disclosure, and certainly was not intended to shield the executive budget drafting process from public view. Clarenbach Aff. ¶8, 9.

That phrase, "prepared by the originator in the name of a person for whom the originator is working," is to be construed narrowly. 77 Op. Att'y Gen. at 102. In writing

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[11] "[T]he terms "drafts, notes, preliminary computations and like materials" are all modified by the phrases "prepared for the originator's personal use or prepared by the originator in the name of a person for whom the originator is working...." 77 Op. Att'y Gen. 100, 102 (1988).

[12] Notably, in Defendants' Brief in Support of Motion for Summary Judgment, Defendants additionally claim that some records can be withheld under the "personal use" exclusion. Def. Br. at 21. Oddly, Defendants also claim that all of the withheld materials—including those prepared for an originator's "personal use"—were "prepared by the originator in the name of a person for whom the originator is working." *Id.*

As a preliminary matter, this appears to be a contradiction in terms: if a document is prepared exclusively for one's "personal use," it cannot also be prepared for one's superior. In any case, Defendants devote their entire argument to the latter part of the 19.32(2) exclusion, "prepared by the originator in the name of a person for whom the originator is working."

approvingly of this opinion, the Wisconsin Court of Appeals wrote: "Attorney General opinions in this context are not controlling, but have special significance as potential persuasive authority, particularly after an extended period of apparent legislative acquiescence." *Voice of Wisconsin Rapids, LLC v. Wisconsin Rapids Public School Dist.*, 2014AP1256 (citing *State v. Beaver Dam Area Development Corp*., 2008 WI 90, ¶37, 44, 312 Wis. 2d 84, 752 N.W. 2d 295); *Schill v. Wisconsin Rapids School Dist*., 2010 WI 86, ¶¶21, 49, 92, 94, 99-118, 122-26, 139, 327 Wis. 2d 572, 786 N.W. 2d 177; *see also Schill*, 2010 WI 86, ¶34 ("Despite revisions to other aspects of the public records law, failure to alter the definition of "record" could be seen as acquiescing to the 1988 attorney general opinion").

Specifically, under Wisconsin law, a document is not "prepared by the originator in the name of a person for whom the originator is working"—and thus cannot be considered "drafts," "preliminary computations," or "like materials"—if either (a) the document was used for the purposes it was commissioned, *Fox v. Bock*, 149 Wis. 2d 403, 413, 438 N.W.2d 589 (Wis. 1989); *see also Journal/Sentinel Inc. v. School Board of Shorewood*, 186 Wis. 2d 443, 438 N.S.2d 164 (Ct. App. 1994), or (b) the document was distributed to persons beyond those over whom the designated superior has jurisdiction, 77 Op. Att'y Gen. at 102.

As a matter of law, because all of the withheld records were both distributed widely and ultimately resulted in official action, none of those records can be withheld under the 19.32(2) exclusions, regardless of whether Defendants attempt to characterize them as "drafts," "preliminary computations, or "like materials" or use that terminology.

Additionally, Defendants admit that all of the withheld records consisted of emails and corresponding attachments. Def. Aswer. at 5-6. Under a plain-language reading of the statute, an email drafted in an originator's own name and sent from the originator's own

email account cannot have been prepared "in the name of a person for whom the originator is working." (What's more, an email can hardly be considered a "draft" after a recipient is specified and an originator hits "send.") Additionally, the Court of Appeals recently reaffirmed that e-mail messages that "have a clear connection to a government function– enactment of public policy" are records. *The John K. MacIver Institute for Public Policy, Inc. v. Erpenbach*, 2014 WI App 49, ¶18.

**a. The Withheld Records Cannot Be Exempted as "Drafts," "Preliminary Computations," or "Like Materials" because They Were Used for the Purpose for which They Were Commissioned**

The Wisconsin Supreme Court has long indicated that the exceptions in 19.32(2) turn on whether the document's recommendations were implemented. *Fox v. Bock*, 149 Wis. 2d 403, 413, 438 N.W.2d 589 (Wis. 1989). "[O]nce a government entity had begun taking official actions based on the document's suggestions, the document became a record," the Supreme Court has noted. *Schill v. Wisconsin Rapids School District*, 2010 WI 86, ¶71, 327 Wis. 2d 572, 786 N.W. 2d 177. The Court of Appeals has described this factor as a question of whether a document was used "for the purpose for which it was commissioned." *Journal/Sentinel Inc. v. Sch. Bd. Of Shorewood*, 186 Wis. 2d 443, 438 N.S.2d 164 (Ct. App. 1994) (*citing Fox*, 149 Wis. 2d at 413.). This logic applies equally to "drafts," "preliminary computations" and "like materials." *See e.g. Schill,* 2010 WI 86, ¶71.

Defendants admit that all of the withheld budget documents were, in fact, *used for the purposes for which they were commissioned*, and *resulted in official action based on the documents' suggestions*. Defendants admit that the withheld documents were created *for the purpose* of developing the executive budget. Def. Br. S.J. at 14-15. Defendants

acknowledge that the withheld documents consisted of recommendations adopted in the final written executive budget, writing:

> "[T]he documents withheld by Defendants constituted pieces of text in original, undeveloped form that *contained the main ideas and intentions of the later, more developed and final written executive budget."*
> *Id.* at 15. (emphasis added).

Wisconsin Supreme Court precedent on this matter is clear: after an agency "has begun taking official actions based on the document's suggestions, the document became a record." *Schill,* 2010 WI 86, ¶71. [13]

Disclosure of the records that lead to official action is well-supported, because discerning the motivations and intent of a bill's drafter are one of the reasons the public records law has a presumption favoring disclosure. That "presumption reflects the basic principle 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." *Linzmeyer v. Forcey*, 2002 WI 84, ¶15, 254 Wis. 2d 306, 646 N.W.2d 811.

The Defendants' failure to claim that any of the withheld documents contained proposals that were drafted for but not accepted by one's superior in their prior letters or briefs also should constitute a waiver against any late assertion to this effect.

It is well-established in Wisconsin that records showing the drafting process are disclosed after a bill is introduced. In fact, the legislative drafting files—which show every draft version of a bill, and all email correspondence between a legislative office and LRB

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[13] Defendants claim that "until the executive budget bill is introduced as legislation in the Senate or the Assembly, the purpose for which these preliminary documents are created cannot occur." Def. Br. S.J. at 14-15. Setting aside that this assertion runs contrary to decades of precedent, this argument would appear immaterial since Plaintiffs' requests were filed *after* the executive budget was publicly introduced.

attorneys and others discussing the various drafts—are automatically placed online (see https://docs.legis.wisconsin.gov/drafting_files). As a recent LRB publication has described:

> "Once a draft is introduced as a bill, the entire drafting file, including materials used by the attorney in preparing the draft, becomes a public record . . . many drafting records contain drafting and redrafting instructions, working drafts, e-mails between the drafting attorney and the requester or other persons referred to the drafter by the requester, the drafting attorney's notes of conversations with the requester, and other material used in preparing the proposal. This record is often useful to the legislature, the courts, administrative agencies, and the public in determining the legislative history or intent of a proposal."

State of Wisconsin Legislative Reference Bureau, "The Legislative Process in Wisconsin," Research Bulletin 14-2, December 2014 at 14-15; *see also Id.* at 18-26.

**b. The Withheld Records Cannot Be Exempted as "Drafts," "Preliminary Computations," or "Like Materials" since They Were Shared Widely between the DOA and the Governor's Office**

Under an Attorney General Opinion that has been in effect for over 25 years—across Republican and Democratic administrations—and that has been embraced by Wisconsin courts, a document is not "prepared by the originator in the name of a person for whom the originator is working" and thus is no longer eligible for a 19.32(2) exception "when it is distributed to persons beyond those over whom the designated superior has jurisdiction." *Id.*

Defendants acknowledge that this interpretation applies to each of the 19.32(2) antecedents, including "like materials" and "preliminary computations," Def. Br. Summ. J. at 20, a position supported by the Attorney General's interpretation. 77 Op. Att'y Gen. at 101.[14]

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[14] Although Defendants cannot argue in favor of a "personal use" exception, a similar standard applies to this requirement: documents shared or communicated with others for the purpose of communicating information, or retained for the purpose of memorializing agency activity, go beyond personal use and therefore would not be excluded from the definition of "record." 77 Op. Att'y Gen. 100, 102 (1988).

Defendants admit that the withheld budget documents were shared between the DOA and the Governor's Office. Heifetz Aff. ¶21. Hynek Aff. ¶¶18, 20. Indeed, records of communications about the budget between those two offices are precisely what plaintiffs sought in their original February 5 request, *See* Compl. ¶6, *Id.* Ex. A.

Therefore, under many years of well-established Wisconsin precedent, the documents cannot be exempted from the Public Record Law's definition of "record."

Additionally, Defendants' absurd claim that documents can be shared freely between the Governor's office and the entire Department of Administration without losing their "drafts," preliminary computations," or "like materials" status runs directly contrary to the "precedent" Defendants cite for their deliberative process claim. Letter from Maureen McGlynn Flanagan, Assistant Attorney General, to Gretchen Schuldt (July 9, 2007), *cited in* Def. Br. S.J. pp. 24-27. Although the 2007 DOJ letter's "deliberative process privilege" holding was contravened by a subsequent Wisconsin Supreme Court ruling, *see infra* at X, the letter's discussion of 19.32(2) reflected longstanding precedent.

Defendants argue that documents shared between the Governor's office and the DOA can be withheld pursuant to the 19.32(2) exceptions because all employees of both of those offices are working for the Governor. Def. Br. at 21. According to this logic, every document produced by every one of the many employees in these two offices can potentially be forever withheld from the public as a "draft," "preliminary computation," and "like material," regardless of how widely the document is shared between and across those offices.  This is incorrect.

In the 2007 letter, Assistant Attorney General Maureen McGlynn Flanagan acknowledged that budget documents shared between the DOA and the Governor's Office

for the purposes for which they were prepared cannot be withheld as "drafts." *Id.* The sharing of the documents disqualification applies equally to "preliminary computations" and "like materials." 77 Op. Att'y Gen. at 102-103. Flanagan wrote to an individual who had sought certain budget documents from the DOA:

> "I understand that the two documents partially responsive to your request that were originally held by DOA were, in fact, shared with the Governor's Office for the purpose for which they were prepared. Accordingly, I do not agree that these two documents can properly be characterized as 'drafts' as that term is used in section 19.32(2)."

For the DOJ, the mere fact that the documents in question were shared between the DOA and the Governor's Office was dispositive in determining that those documents could not be withheld under the 19.32(2) exceptions.

Defendants refused to answer Plaintiffs' interrogatories as to which individuals had accessed each withheld document. However, because Defendants admit that the withheld records were shared between the DOA and the Governor's office, those records cannot be considered "drafts," "preliminary computations," or "like materials," even though they have not yet disclosed the identities of all of the individuals among whom the materials were shared.

**c. The Governor Cannot Be Considered the "Superior" of Each Withheld Records' Originator**

Moreover, the premise of Defendants' argument is contradicted by longstanding precedent and the plain language of the statute. Defendants argue that, for purposes of the narrow exceptions in 19.32(2), the governor is the "superior" of not only every employee in the Governor's office, but also every employee in the entire Department of Administration. Def. Br. at 21. This novel assertion attempts to cast a net of secrecy over the entire

executive branch in Wisconsin, an interpretation of the Public Records law that is directly contradicted by years of precedent.

The Attorney General has indicated that the "prepared by the originator in the name of a person for whom the originator is working" provision would apply to an immediate superior that has a close and collaborative working relationship with the originator. The statute's own terms "contemplate interplay between the author and the author's superior," the Attorney General has noted. 77 Op. Att'y Gen. at 102*.*

Under this longstanding interpretation of the statute, the Governor cannot be considered the "superior" of every employee of both the Governor's Office and DOA for purposes of the records in question, since the Governor did not engage in the necessary "interplay" with each of those employees in developing those records.

In fact, the Governor told the public and the press practically the opposite: that "my staff, the state budget team, and I did not have much discussion about the [University of Wisconsin System's] mission statement," which was the subject of Plaintiffs' records request. Fischer Aff. Ex. F.

Notably, Defendants refused to answer Plaintiffs' interrogatories as to which individuals had accessed each withheld document. However, Defendants' lengthy explanation of the budget drafting process makes clear that the withheld documents did not constitute any sort of "interplay" between a document's author and the Governor himself. See Def. Br. at 7-10, 14-15.

Accordingly, the withheld records cannot be considered "drafts," "preliminary computations," or "like materials."

#### d. *Voice of Wisconsin Rapids* Supported Disclosure of These Records

Given that the withheld records were shared widely between offices and used for the purposes for which they are commissioned, they cannot fall under the 19.32(2) exceptions. The Court of Appeals in *Voice of Wisconsin Rapids LLC* recently reaffirmed this longstanding interpretation of Wisconsin law, holding that a document cannot qualify for a 19.32(2) exception if it is shared across offices, 2015 WI App 53*,* ¶¶29, 36, 37, and endorsing the 1988 opinion Attorney General opinion that Plaintiffs rely on above, ¶¶11, 20, 21, 34.

Defendants mischaracterize the *Voice of Wisconsin Rapids* holding (and incorrectly call it a Supreme Court case rather than a Court of Appeals case). The court absolutely did not find that "The Public Records Law expressly exempts raw materials" from the definition of record, nor did it find that documents that stop short of directly "establish[ing] a formal position or action of the authority" can qualify for the Sec. 19.32(2) exceptions, as Defendants claim. Def. Br. S.J. at 20.

If this characterization were correct, the Court of Appeals in *Voice of Wisconsin Rapids* would have overturned decades of well-established precedent holding that a key factor in determining whether a document is a "draft" or "preliminary computation" is whether its recommendations were implemented. 149 Wis. 2d at 413, 438 N.W.2d at 594; see also *Schill* at ¶71. In *Bock*, the Wisconsin Supreme Court found it determinative that a report was not a "draft" since its findings were used in a seminar and that its recommendations led to changes in county practices and procedures. *Id.* Yet under Defendants' warped interpretation of *Voice of Wisconsin Rapids*, the report in *Bock* would now be classified as a "draft"—since its recommendations were merely the "raw material"

for a seminar and the county's practices and procedures. The Court of Appeals in *Voice of Wisconsin Rapids* did not (and could not) reverse the Wisconsin Supreme Court in *Bock,* so Defendants' portrayal of the decision is erroneous.

The facts in *Voice of Wisconsin Rapids* are also distinct. For one, it was a case about "notes" (as opposed to "drafts," "preliminary computations," or "like materials") that were created "for the originator's personal use" (as opposed to "prepared by the originator in the name of a person for whom the originator is working").[15] The court of appeals sided with a school district in characterizing as "notes" a set of handwritten, barely legible documents such as post-it notes and telephone message slips that "reflect hurried, fragmentary, and informal writing." ¶16. Even so, the Court stated the withheld documents would lose their status as "notes" if they had been shared with others to communicate information or were retained for the purpose of memorializing activity. *Id.* ¶¶29, 36, 37.

The emails and attachments withheld in this case bear no similarity to the rough scrawls in *Voice of Wisconsin Rapids,* and by definition were shared with others to communicate information. Defendants admit the records they withheld constitute emails and attachments, Def. Aswr. to CMD Compl. at 5-6, which by their very nature are sent from one individual to another for the purpose of communicating information. Accordingly, the withheld records cannot be considered "drafts," "preliminary computations," or "like materials."

[15] The "notes" exclusion has long been affiliated with the "personal use" provision, and have been interpreted in a matter distinct from the "drafts," "preliminary computations," or "like materials" created "for the originator's personal use" provisions. 77 Op. Att'y Gen. 100, 102 (1988).

**C. Defendants' Denial on "Drafts," "Preliminary Materials," and "Like Materials" Grounds Failed to Meet the Specific and Sufficient Standard**

Because all of the withheld records were both distributed widely and ultimately were used for the purposes for which they were commissioned, they cannot fall under the "drafts," "preliminary computations," or "like materials" exceptions in Wisconsin Statute § 19.32(2).

Even if Defendants did have a legal basis for withholding the records on "drafts," "preliminary computations," or "like materials" grounds—and they do not—this basis could not be considered by this Court because they failed to provide specific and sufficient notice of these arguments in their denial.

The Wisconsin Supreme Court has held that an authority must state specific and sufficient reasons for withholding records in its denial letter. *Hempel v. City of Baraboo*, 2005 WI 120, ¶¶ 25-26, 284 Wis. 2d 162, 699 N.W.2d 551. The state's highest court has stated that "The specificity requirement is not met by a mere citation to the exemption statute." *Journal/Sentinel, Inc. v. Aagerup*, 145 Wis. 2d 818, 823, 429 N.W.2d 772 (1988).

With respect to Defendants' claim to withhold "drafts," "preliminary materials" and "notes," Defendants' denial letter failed to meet this standard. Defendants did little more than quote the exemption statute and declare that the withheld records fell under the statute. Defendants provided no notice in their denial they would be seeking to create new definitions of each of the cited terms; these novel arguments only arose after Plaintiffs filed this suit for mandamus.

Defendants denial letter asserted:

> The law specifically exempts from public disclosure 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. Stats. § 19.32(2). These preliminary analyses and deliberations are drafts, preliminary computations, and/or similar like materials that are prepared by individuals working for the Governor on creation of the Governor's biennial budget. Release of these preliminary materials would be contrary to the conduct of government business, running counter to § 19.32(2)'s exclusions and to the declaration of policy in Wis. Stat. § 19.31.

Courts have found that a denial letter serves two purposes: one, it ensures a records custodian did not act arbitrarily, and two, it gives "the requester notice sufficient to allow preparation of a challenge to the withholding." *Journal/Sentinel*, 145 Wis. 2d at 824.

In their denial letter, Defendants gave requesters zero notice that they would be seeking to give independent meaning to the terms "preliminary computations" and "like materials" that depend entirely on dictionary definitions, contrary to the way the terms have been interpreted as a legal matter in Wisconsin. Defendants gave zero notice they would seek to create their own self-serving definition of the term "drafts" that disregards decades of Wisconsin precedent. Defendants' denial letter failed to provide any explanation or legal support for their novel interpretation of these exemptions, much less why the withheld documents would fall under these unusual definitions. It was only after Defendants filed their motion for summary judgment on August 24, nearly four months after Defendants issued their denial letter, that Defendants revealed these positions.

Defendants' failure to provide specific reasons for withholding that were sufficient to provide Plaintiffs adequate notice for preparing their challenge is evidenced by both Plaintiffs' original complaints. After receiving nearly identical denials from Defendants on May 8, the two Plaintiffs in this case each filed suit independently, without conferring with one another about their legal arguments, yet each raised similar arguments in their challenges—neither of which addressed the provisions that Defendants now claim are central to their defense.

Notably, Defendants' May 8 denial letter provided more explanation for their claim that records were exempt from disclosure under a claim of attorney-client privilege, a claim that Defendants now say was a "mistake." *See* Def. Resp. to CMD Compl, ¶11 (Jul. 17, 2015). In other words, Defendants provided greater support for a "mistake" than for the provisions that are now central to their effort to avoid their responsibilities under the public records law. Statutory exemptions that were barely mentioned in Defendants' denial letter are now among the central precepts of their defense.

Accordingly, this Court should dismiss these elements of Defendants' claims. Established public records precedent holds that a court should not consider reasons for withholding that were not adequately asserted by the custodian in their denial letter. *Newspapers, Inc. v. Breier*, 89 Wis. 2d 417, 427-28, 279 N.W. 2d 179 (1979).

**Conclusion**

Defendants have failed to meet their burden of proof in showing that any of the withheld documents can fall under the narrow exceptions for "drafts," "preliminary computations," or "like materials" described in Wis. Stat. § 19.32(2).

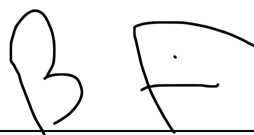
Accordingly, all records must be disclosed unless an "exceptional case" exists such that "permitting inspection would result in harm to the public interest which outweighs the legislative policy recognizing the public interest in allowing inspection." *Osborn v. Board of Regents of University of Wisconsin System,* 2002 WI 83, ¶15, 254 Wis. 2d 266, 647 N.W.2d 158.

No such "exceptional case" exists here. The law favors public access, which the Wisconsin Supreme Court has characterized as a "presumption [that] reflects the basic principle 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." *Linzmeyer v. Forcey*, 2002 WI 84, ¶15, 254 Wis. 2d 306, 646 N.W.2d 811. The scales weigh heavily in favor of disclosure in this instance, since the withheld records pertain to matters of citizen oversight that are central to self-government, particularly since they relate to one of the most important bills in a two-year legislative session. The withheld records can shed light on how and why the Governor's executive budget took aim at the mission of a cherished state institution, and disclosure of these records can serve the public's very strong interest in being informed about public officials who've been caught in a "pants on fire" deception.

Defendants have failed to identify any public policy interests recognized under Wisconsin law that can overcome the Public Records Law's strong presumption of disclosure and that outweigh the public's very strong interest in each of the withheld records.

For the reasons stated above, Plaintiffs respectfully request that this court deny Defendants' Motion for Summary Judgment, grant the Plaintiffs' Motion for Summary Judgment, declare that Defendants violated Wisconsin Public Records Law, issue a writ of mandamus ordering the disclosure of the withheld records, and award Plaintiffs its actual costs and damages, including attorney fees.



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