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DATE: June 25, 2025

RE: Testimony on Assembly Bill 190

TO: The Senate Committee on Judiciary and Public Safety

FROM: State Representative Todd Novak

Thank you, Chairman Swearingen and members of the Committee on State Affairs, for holding this public hearing on Assembly Bill 190 (AB 190). This bill allows for the recovery of attorney fees and costs under the state's public records law when an authority voluntarily or unilaterally releases a contested record after an action has been filed in court.

Senator Wanggaard and I began drafting this bill in response to a 2022 Wisconsin Supreme Court opinion (*Friends of Frame Park, U.A. v. City of Waukesha)* which held that the statutory interpretation of "prevail" in public records law will require a final decision on the merits, calling into doubt whether a records requestor could recover attorney fees if the government simply released the records *after* a lawsuit was filed but *before* a court could render a judgment.

As a result of this ruling, a dangerous trend may arise where government entities have increased power to withhold records as the public will need to weigh whether the litigation costs are worth expending to compel the release of the records. Even in cases where a records requestor decides to pursue litigation, a government entity can simply render the issue moot by releasing the records before the issue ever reaches the judge.

Our bill alters the statutory definition of "prevail" to allow courts to award attorney fees in instances where the voluntary release of a record was substantially related to a record requestor filing a lawsuit, effectively returning to the methodology used prior to the *Friends of Frame Park, U.A. v City of Waukesha* decision. This standard is also substantially similar to the standard that applies for a requester to obtain attorney fees and costs under the federal Freedom of Information Act.

Under the bill, a requester has prevailed in whole or in substantial part if the requester has obtained relief through any of the following means:

1. A judicial order or an enforceable written agreement or consent decree.
2. The authority's voluntary or unilateral release of a record if the court determines that the filing of the mandamus action was a substantial factor contributing to that voluntary or unilateral release.

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This standard is substantially the same as the standard that applies for a requester to obtain attorney fees and costs under the federal Freedom of Information Act.

Prior to being elected to the state legislature, I worked in the newspaper industry as an editor for 25 years. Since 2012, I have also served as the Mayor of Dodgeville. In both roles, I have seen firsthand how important it is to have strong laws protecting the public's right to open government.

Local newspapers work hard every day to cover important issues related to government administration, the use of local taxpayer dollars, and to highlight issues of public significance. This vital work is supported by requests for government records and would not be possible otherwise.

Our proposal is supported by a broad coalition of supporters including the Wisconsin Newspapers Association, Wisconsin Broadcasters Association, Wisconsin Freedom of Information Council, Wisconsin Institute for Law and Liberty, Wisconsin Transparency Project and Americans for Prosperity – WI.

Thank you for your consideration of AB 190.

Van H. Wanggaard
Wisconsin State Senator

Testimony on Assembly Bill 190

Thank you, committee members for attending today's hearing on Assembly Bill 190, which strengthens Wisconsin's Open Records Law.

Open records laws allow for transparency at all levels of government, allowing the public to see the information that is used to develop and implement policy. The public can also receive information to see how our governments interact with each other and with the public. Open records requests can lead to the discovery of waste, fraud, and abuse. According to the Wisconsin Open Records Law, records must be produced "as soon as practicable, without delay."

Unfortunately, some governments and government officials try to "run out the clock" on open records requests. They will needlessly delay acknowledgement of a request and/or take forever to comply with requests. Recently, the Secretary of State was sued to turn over records related to the resignation of former Secretary of State, Doug LaFollette, and her appointment to the position after not acknowledging the request for 6 months. In another case, Superintendent Jill Underly was threatened with a lawsuit because she failed to turn over records related to the Milwaukee Public Schools financial scandal for 8 months. I would hope everyone here would agree that these situations are unacceptable.

Under Wisconsin law, if a party must sue to receive the records, the party can receive attorneys' fees if they prevail in obtaining the records. Until 2022, Wisconsin used a "nexus" or "balancing" test to recover attorney fees in an open records case. If a court determined that the record release was the result of litigation, attorneys' fees would be awarded.

In a 2022 decision, *Friends of Frame Park v. City of Waukesha,* the Wisconsin Supreme Court overturned the nexus standard, and required that a party must actually "win" or "prevail" in a legal action to collect attorneys' fees. As a result, unless a court orders the governmental entity to turn over the records, attorneys' fees cannot be collected. Even if a government waits until the last day of a trial, the government could turn over the records, and the requestor would get nothing. This new situation results in a fundamental shift in the transparency of government and open records.

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This bill restores the balance between transparent government and people requesting records to the level it was at prior to the *Frame Park* case. The bill allows for the recovery of attorneys' fees if a records release was the result of a judicial order, or enforceable written agreement, or a consent decree. That is a slight broadening of the *Frame Park* case, but along the same lines. The bill also allows for collection of attorneys' fees if a court determines that a filing of an action was a "substantial factor" in the release of the records.

I'm pleased to say that this bill has a wide variety of support from across the political spectrum. The ACLU, Wisconsin Institute for Law & Liberty, AFP, ORG and WMC are all in support. In addition, media groups, including the Wisconsin Broadcasters Association and Wisconsin Newspaper Association also support the bill.

I hope it has earned your support as well. Thank you.

ASSEMBLY COMMITTEE ON STATE AFFAIRS

ASSEMBLY BILL 190

TESTIMONY OF MAXTED LENZ
ON BEHALF OF THE
WISCONSIN NEWSPAPER ASSOCIATION

June 25, 2025

Mr. Chairman, members of the Committee, my name is Max Lenz. I am an attorney with the Madison office of Godfrey & Kahn, S.C, and I speak today on behalf of the Wisconsin Newspaper Association. Thank you for the opportunity to testify today in support of Assembly Bill 190.

Wisconsin's public records law is an enduring testament to this State's commitment to transparency and public accountability. The records law carries out this commitment in the simplest of ways, through a presumption that all government records are public.

Records authorities and records custodians are critical to the realization of the presumption of openness. They serve as gatekeepers of the government's records. Unfortunately, through its *Friends of Frame Park* decision, the Wisconsin Supreme Court has unintentionally created a disincentive for records custodians to comply with the public records law by nearly eliminating the threat that an authority will be required to pay a requester's reasonable attorney fees if they deny a request in violation of the law.

The *Friends of Frame Park* case began with baseball. The City of Waukesha had entered into negotiations to bring a semi-professional baseball team to the City. The team's new stadium was to be built in Waukesha's Frame Park. A group of concerned citizens submitted public records requests for agreements between the City and the team's owners or the semi-professional league. The City denied the request in part, refusing to produce a draft contract with the team owners. The citizen group hired a lawyer and sued for the records. The day after the lawsuit was filed, and before the circuit court took any action, the City produced the draft contract.

The Supreme Court considered whether the citizen group had "prevail[ed]" in the litigation, such that they were eligible to be compensated for attorney fees pursuant to Wis. Stat. § 19.37(2)(a). The Court ruled that the citizen group had not technically prevailed and that, without a court order forcing a custodian to disclose records or a ruling that a custodian had unlawfully delayed disclosure, public records plaintiffs could not receive attorney fees. Of course, this was simply due to the timing of the records release taking place after a suit was filed but before the court had time to act.

The Supreme Court's ruling in *Friends of Frame Park* flipped the public records law's presumption of openness on its head. The Court's decision has created a perverse incentive through which custodians and authorities can withhold records and effectively dare the public to sue, knowing they can then disclose the records with no penalty. This creates a chilling effect,

dissuading citizens from retaining attorneys that can effectively petition the government for public records and pursue litigation if a custodian violates the law.

Senate Bill 194 fixes that problem. Allowing public records plaintiffs to be eligible to recover reasonable attorney fees if an authority discloses records after the record seeker files a lawsuit will make it less likely that a requester will need to pursue litigation in the first place given the authority's exposure to paying fees if they inappropriately deny a request. Senate Bill 194 will restore the fundamental public policy of openness that Wisconsin's public records law embodies as authorities and custodians will no longer have an incentive to dare the public to sue. Instead, custodians will disclose government documents "as soon as practicable and without delay," as required by the public records law.

We therefore urge this committee to advance Assembly Bill 190 and urge its swift passage by the Assembly. Thank you again for the opportunity to testify.

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Testimony in Favor of Assembly Bill 190

Assembly Committee on State Affairs
June 25, 2025

Chairman Swearingen and members of the Assembly Committee on State Affairs,

Thank you for the opportunity to testify today in favor of Assembly Bill 190. My name is Luke Berg and I am a Deputy Counsel at the Wisconsin Institute for Law & Liberty (WILL), a non-profit law and policy center based in Milwaukee. First, I want to thank Representative Novak and Senator Wanggaard for your leadership in authoring this important bi-partisan legislation.

Wisconsin's public records law is designed to ensure the greatest transparency for the workings of state and local governments. Under Wisconsin Statute § 19.35, an individual may request to review written records maintained by a public entity, and in most cases the entity either provides copies of the requested records or makes them available for inspection.

When a government entity does not turn over records, however, Wisconsin law provides for a specific enforcement mechanism: a mandamus action. In a nutshell, a writ of mandamus is an order to a public official to comply with a clear legal duty. When such an action is filed, and a requester ultimately prevails in whole or in part, the requester is entitled to recover their attorney's fees from the government entity. In some cases, once a mandamus action has been filed, the government entity simply turns over the records, in which case the need for litigation is mooted and the case dismissed.

Historically, in such a case, a requester was still permitted to recover the attorney's fees incurred by the legal action. The requester was considered to have "prevailed" in the suit when the government entity voluntarily changed its behavior after the mandamus action was filed, and the requester could show that the lawsuit was at least a "cause" of the records being released. However, a recent Wisconsin Supreme Court opinion (*Friends of Frame Park v. Waukesha)* ordered that the statutory interpretation of "prevail" in public records law required a final decision on the merits before awards could be recouped, calling into doubt whether a requestor can recover fees in such instances.

Why is this important? While the hope is that government entities comply with open records law, there have been numerous examples showing that is not always the case. In practice, government actors could now refuse to release records until a citizen has undergone the time and expense of

filing a lawsuit, then release those records and potentially avoid having to pay the requestor's attorney's fees.

The inability to obtain attorney's fees upon prevailing in an open records lawsuit can make it prohibitively expensive for Wisconsinites to challenge the denial of requests or excessive delays in response times. As a result, fewer attorneys will be willing to bring open records cases on a contingent fee basis, putting greater transparency and accountability at risk.

In response to the *Friends of Frame Park* decision, WILL released a policy brief calling for legislative reforms that could restore the status quo and make certain that everyday citizens do not lose the ability to hold government accountable. Assembly Bill 190 would accomplish just this by altering the statutory definition of "prevail" to allow courts to award attorney fees in instances where the voluntary release of a record was substantially related to a record requestor filing a lawsuit, effectively returning to the methodology used before the *Friends of Frame Park* decision. This standard is also substantially similar to the standard that applies for a requestor to obtain attorney fees and costs under the federal Freedom of Information Act.

Before concluding, I wanted to note that this bill has passed the Senate unanimously two sessions in a row. I respectfully ask that you support Assembly Bill 190 and help get it across the finish line this session. Thank you for your time today, and I would be happy to answer any questions you may have.

Luke Berg
Deputy Counsel
Wisconsin Institute for Law & Liberty

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June 25, 2025

Chair Swearingen, Vice-Chair Green, and Honorable Members of the Assembly Committee on State Affairs:

The American Civil Liberties Union of Wisconsin appreciates the opportunity to provide written testimony in support of Assembly Bill 190.

Government openness and transparency are cornerstones of a healthy democracy. We can only hold our government accountable—and ensure that it is working on behalf of the people—when its actions are transparent and reviewable by those it serves. Wisconsin's open records law, as enacted by this legislature, recognizes as much, stating, in part, "[t]he denial of public access generally is contrary to the public interest, and only in an exceptional case may access be denied." Wis. Stat. § 19.31.

The ACLU of Wisconsin supports AB-190, which will help ensure transparency and public access across all levels of government. This access is crucial for many interests, including for medical and social science researchers who use public records to study trends and propose policy change; parents who need access to information to hold their schools accountable; journalists who uncover essential information to keep the public informed; and taxpayers who are entitled to know how their tax dollars are being spent. Transparency is also critically important for preventing corruption, waste, fraud, and abuse. Review of public action is only possible if there is free and complete access to government records, policies, and communications.

Like many other states, Wisconsin has long recognized the importance of open access to government records and ensured that individuals and organizations would have recourse if a governmental entity refused to provide those records. The legislature has protected this access by granting Wisconsinites access to court review of any refusals of requests and by explicitly creating a fee-shifting structure so that individuals seeking records are not burdened by significant legal expenses to enforce their rights to access.

More simply put, the legislature has already recognized that if an agency unlawfully denies a record request, the agency must pay the requestor's legal fees if they sue and win access to the records. In doing so, the legislature has recognized that no one should have to go to court and pay thousands of dollars in legal fees to obtain public records they are entitled to under the law.

The fee-shifting provision is not a punishment for a government agency, but rather a consideration of who ought to bear the cost of the government's refusal to release records. Nevertheless, it cannot be denied that the prospect of paying legal fees because of its non-compliance creates an incentive for governmental entities to fully and timely comply with the law by releasing public records, as the legislature has mandated they must. The threat of litigation and the fee-shifting provision are the only leverage that individual Wisconsinites have to demand compliance with the law. This means that without the fee-shifting provision, only those who can afford it are guaranteed access to public records.

Despite the legislature's clear intent to shift the costs of enforcing compliance to the governmental actor who made that enforcement necessary, the Wisconsin Supreme Court significantly narrowed the scope of the fee-shifting provision in Wisconsin's open records law in *Friends of Frame Park, U.A. v. City of Waukesha*, 976 N.W.2d 263 (Wis. 2022). In that case, the Court held that the specific language used in the statute requires that the fee-shifting provision can only be applied if the enforcement action proceeds all the way to a court judgment. In other words, if a government actor releases the records requested at any time during the court proceeding, it entirely exempts itself from the fee-shifting provision in the statute.

Before that ruling, Wisconsin courts had repeatedly held that the fee-shifting provision should apply in cases that did not proceed all the way to judgment if the lawsuit achieved at least some of the party's desired results by causing a voluntary change in the defendant's conduct. *See, e.g., WTMJ, Inc. v. Sullivan*, 204 Wis. 2d 452, 555 N.W.2d 140 (Ct. App. 1996); *Eau Claire Press Co. v. Gordon*, 176 Wis. 2d 154, 499 N.W.2d 918 (Ct. App. 1993); *State ex rel. Eau Claire Leader-Telegram v. Barrett*, 148 Wis. 2d 769, 436 N.W.2d 885 (Ct. App. 1989); *Racine Educ. Ass'n v. Bd. of Educ. for Racine Unified Sch. Dist.*, 145 Wis. 2d 518, 427 N.W.2d 414 (Ct. App. 1988); *State ex rel. Vaughan v. Faust*, 143 Wis. 2d 868, 422 N.W.2d 898 (Ct. App. 1988); *Racine Educ. Ass'n v. Bd. of Educ. for Racine Unified Sch. Dist.*, 129 Wis. 2d 319, 328, 385 N.W.2d 510 (Ct. App. 1986). Or, in other words, courts had previously recognized that if the government actor was only "voluntarily" releasing documents because of the lawsuit filed against them, they should still have to pay the requestor's legal fees.

The result of the Supreme Court's ruling in the *Friends of Frame Park* case is the creation perverse incentives for governmental actors to entirely refuse compliance with the open records law at any time they wish. This is true because if anyone objects, the only recourse that person has is to spend hundreds of dollars on filing fees and potentially thousands of dollars on attorney fees to file a mandamus action, at which time the government actor could *then* release the records with no obligation to reimburse the requestor's costs.

Many requestors will just give up, and the few who continue to court will be effectively charged for access. One judge recognized that this empowers government actors to "strategically freez[e] out the public's access to records." *See Friends of Frame Park, U.A. v. City of Waukesha*, 976 N.W.2d 263, 295 (Wis. 2022) (Karofsky, J., dissenting). Even worse than just waiting until a case is filed, the government actor could choose to delay even further, force the case to be set for a hearing or trial, drop the records on the requestor's desk halfway through the hearing, and still be exempt from the fee-shifting provision since they technically released records before the court's order was issued. All of this can, and does, result in months of delays and exorbitant costs for Wisconsinites to simply get access to materials to which they are entitled under the law.

By restoring the fee-shifting provision of the Wisconsin open records law to its pre-2022 application, the legislature will make significant strides in guaranteeing the transparency of our government and protecting every individual who seeks those records. The ACLU of Wisconsin strongly urges committee members to support AB-190.