STATE OF WISCONSIN DANE COUNTY BRANCH 8
CIRCUIT COURT

WISCONSIN MANUFACTURERS
AND COMMERCE INC.,

Plaintiff,

v. Case No. 23-CV-3275

WISCONSIN DEPARTMENT
OF JUSTICE,

Defendant.

PLAINTIFF'S RESPONSE OPPOSING DEFENDANT'S MOTION FOR JUDGMENT ON THE PLEADINGS AS TO COUNT 1 OF THE COMPLAINT

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INTRODUCTION

Plaintiff Wisconsin Manufacturers and Commerce Inc. ("WMC") filed this mandamus action under Wis. Stat. § 19.37, part of Wisconsin's public records law. (R. 2:2; 14:2.) WMC raised two counts in its complaint. In Count 1, WMC alleged that Defendant Wisconsin Department of Justice ("DOJ") had unlawfully delayed by taking approximately 18 months to deny WMC's public records request in writing. (R. 2:7–10.) In Count 2, WMC alleged that DOJ had unlawfully withheld the requested records. (R. 2:10–12.)

DOJ filed a motion for judgment on the pleadings with respect to Count 1—essentially, a motion to dismiss Count 1 for failure to state a claim. (R. 15.) This Court should deny that motion because DOJ's arguments conflict with binding case law. Under Wis. Stat. § 19.37, a record requester may file a mandamus action seeking access to records. In such a lawsuit, the requester may seek damages and attorney fees for the record custodian's unlawful delay in responding to the record request.

LEGAL STANDARD

An argument that the plaintiff has failed to state a claim "tests the legal sufficiency of the complaint." *Data Key Partners v. Permira Advisers LLC*, 2014 WI 86, ¶ 19, 356 Wis. 2d 665, 849 N.W.2d 693. "[T]he sufficiency of a complaint depends on substantive law that underlies the claim made because it is the substantive law that drives what facts must be pled. Plaintiffs must allege facts that plausibly suggest they are entitled to relief." *Id.* ¶ 31.

ARGUMENT

This Court should deny DOJ's motion for judgment on Count 1.

A. In a mandamus suit seeking access to records, a plaintiff may seek attorney fees and damages for a custodian's unlawful delay in responding to a request for records.

The viability of Count 1 hinges on whether, in a mandamus action seeking access to records, the plaintiff may also seek attorney fees and damages for the custodian's unlawful delay in responding to the record request. A plaintiff may seek such relief for an unlawful delay. The statutory framework of the public records law and binding case law compel this conclusion.

As explained more fully below, and as relevant here, the public records law works as follows. Wisconsin Stat. § 19.37(1)(a) allows a requester to file a mandamus action seeking access to a record after a record custodian has denied access. In such a mandamus action, the requester may seek the following relief: (1) access to the requested record; (2) costs, damages, and attorney fees for the unlawful denial of access; (3) costs, damages, and attorney fees if the custodian unlawfully delayed in providing the denial; (4) punitive damages for the unlawful denial of access; and (5) punitive damages for the unlawful delay. Regardless of whether a court ultimately orders release of a record, a plaintiff may receive monetary relief for an unlawful delay.

1. The statutory framework allows a record requester to bring a claim of unlawful delay in a mandamus action seeking access to records.

Count 1 of WMC's complaint is legally viable because, in a mandamus action seeking access to records, the requester may also seek damages and attorney fees for the custodian's unlawful delay in responding to the record request.

"[O]bviously, the legislature contemplated mandamus as a possible answer to delays as well as denials." *Capital Times Co. v. Doyle*, 2011 WI App 137, ¶ 11 n.9, 337 Wis. 2d 544, 807 N.W.2d 666. "The open records law, specifically Wis. Stat. § 19.35(4)(a), requires an authority to either comply with or deny a request 'as soon as practicable.'" *WIREdata, Inc. v. Village of Sussex*, 2008 WI 69, ¶ 58, 310 Wis. 2d 397, 751 N.W.2d 736. "If an authority withholds a record or a part of a record or *delays granting access* to a record or part of a record after a written request for disclosure is made, the requester . . . may bring an action for mandamus asking a court to order release of the record." Wis. Stat. § 19.37(1)(intro.) & (1)(a) (emphasis added).

When a record requester "elects to proceed under § 19.37(1)(a), the potential remedies include access to the records and the recovery of costs, attorney fees, actual damages and punitive damages." *State v. Zien*, 2008 WI App 153, ¶ 34, 314 Wis. 2d 340, 761 N.W.2d 15 (citing Wis. Stat. § 19.37(1)(a), (2)(a) & (3)). A "court shall award reasonable attorney fees, damages of not less than $100, and other actual costs to the requester if the requester prevails in whole or in substantial part in any action filed under sub. (1) relating to access to a record or part of a record . . . ." Wis. Stat. § 19.37(2)(a).

This fee-shifting provision "is mandatory" because "it is not within the circuit court's discretion to deny fees to a substantially prevailing party under § 19.37(2)(a)." *Meinecke v. Thyes*, 2021 WI App 58, ¶ 10, 399 Wis. 2d 1, 963 N.W.2d 816. "The 'purpose of [Wis. Stat. § 19.37(2)(a)] is to encourage voluntary compliance' with the public records law." *Id.* ¶ 15 (alteration in original) (citation omitted). "The language of the statute recognizes that consistent enforcement of its fee-shifting provision is necessary to achieve *full* compliance with the law." *Id.* (emphasis added).

There are multiple ways for a plaintiff in a § 19.37 action to substantially prevail. The plaintiff substantially prevails by obtaining (1) a judicial order compelling the release of at least part of one record, or (2) a judicial declaration that the custodian violated the public records law.

To the first scenario, "a mandamus litigant has prevailed in substantial part, and thus is entitled to fees, when the requester obtains access to improperly withheld public records through a judicial order." *Meinecke v. Thyes*, 2021 WI App 58, ¶ 8, 399 Wis. 2d 1, 963 N.W.2d 816. "[A] requester can prevail 'in whole or in substantial part' in actions seeking 'access to a record' or even 'part of a record.'" *Id.* ¶ 12 (quoting Wis. Stat. § 19.37(2)(a)). "Thus, fees are available even when the requester receives a single record, or even only part of a record." *Id.*

To the second scenario—and crucially here—a plaintiff also "substantially prevail[s] under the law when the court determine[s] the public officials failed to comply with the public records law." *See Meinecke*, 2021 WI App 58, ¶ 13 (citing *ECO, Inc. v. City of Elkhorn*, 2002 WI App 302, ¶ 30, 259 Wis. 2d 276, 655 N.W.2d 510). In

other words, a court's determination that a custodian "violated the public records law" is a "'change in the parties' legal relationship,'" thus entitling the requester to attorney fees. *See Wisconsin State Journal v. Blazel*, 2023 WI App 18, ¶¶ 3, 78, 407 Wis. 2d 472, 991 N.W.2d 450 (quoting *Friends of Frame Park, U.A. v. City of Waukesha*, 2022 WI 57, ¶ 3, 403 Wis. 2d 1, 976 N.W.2d 263).[1]

A record custodian's unlawful delay is one type of violation that entitles a record requester to damages and attorney fees. As noted, a custodian must either fulfill a record request or deny it in writing "as soon as practicable and without delay." Wis. Stat. § 19.35(4)(a). And if a custodian "failed to comply with the requirements of Wis Stat. § 19.35(4)(a)," then a plaintiff in a mandamus action "is entitled to costs, fees and damages pursuant to Wis. Stat. § 19.37(2)." *See Journal Times v. Police & Fire Comm'rs Bd.*, 2015 WI 56, ¶ 99, 362 Wis. 2d 577, 866 N.W.2d 563 (quoting *ECO*, 2002 WI App 302, ¶ 30). A judicial determination of unlawful delay thus entitles a plaintiff to monetary relief under § 19.37(2) in a mandamus action. *See Blazel*, 2023 WI App 18, ¶ 104 (Fitzpatrick, J., concurring in part & dissenting in part) (summarizing the majority opinion).

[1] In *Friends of Frame Park*, the supreme court held that "to 'prevail[ ] in whole or in substantial part' means the party must obtain a judicially sanctioned change in the parties' legal relationship." *Friends of Frame Park, U.A. v. City of Waukesha*, 2022 WI 57, ¶ 3, 403 Wis. 2d 1, 976 N.W.2d 263 (alteration in original). The court thus abrogated the "causal nexus" test that courts had previously used for determining whether a requester substantially prevailed in a Wis. Stat. § 19.37 action. To preserve the issue for possible supreme court review, WMC maintains that *Friends of Frame Park* was wrongly decided and should be overturned. In any event, this Court should deny DOJ's motion for judgment on Count 1 for the reasons stated in this brief. Paragraph 3 is the only controlling portion of *Friends of Frame Park*, and it says nothing about claims of unlawful delay.

To determine whether a custodian has unlawfully delayed in responding to a request, courts ask whether the custodian acted with reasonable diligence. A plaintiff substantially prevails if the record custodian does not "demonstrate that delay was reasonable." *See State ex rel. Vaughan v. Faust*, 143 Wis. 2d 868, 873, 422 N.W.2d 898 (Ct. App. 1988), *abrogated on other grounds by Friends of Frame Park*, 2022 WI 57. Conversely, "if a custodian acts with reasonable diligence, a requester is not entitled to reasonable attorney fees, damages, and other actual costs under § 19.37(2) on grounds of unlawful delay." *Journal Times*, 2015 WI 56, ¶ 57. A custodian can rebut a plaintiff's claim of unlawful delay by showing any delay was both "unavoidable" and "accompanied by due diligence in the administrative processes." *See id.* (citation omitted).

* * *

In sum, and as relevant here, Wis. Stat. § 19.37(1)(a) allows a requester to file a mandamus action seeking access to a record after a custodian has denied access. In such a mandamus action, the requester is entitled to costs, damages, and attorney fees under § 19.37(2)(a) if the requester substantially prevails. One way for the requester to substantially prevail is to obtain a court order compelling the release of the requested record. Another way for the requester to substantially prevail is to obtain a judicial determination that the custodian violated the public records law, such as by unreasonably delaying the response to the record request.

2. WMC can pursue Count 1 (a delay claim) under the public records law.

Here, if the Court ultimately concludes that DOJ did not act with reasonable diligence by taking 18 months to deny WMC's record request, WMC will be entitled to attorney fees, costs, and damages on Count 1 due to DOJ's unlawful delay. *See* Wis. Stat. § 19.37(2)(a). Count 1 is thus legally viable.

In arguing otherwise, DOJ overlooks a crucial and undisputed point: this case *is* a mandamus action under Wis. Stat. § 19.37(1)(a) seeking access to records. The parties have already agreed this case is a mandamus action under Wis. Stat. § 19.37(1)(a). (R. 2:2; 14:2 (admitting paragraph 5 in the complaint).) The parties are correct to agree on this point because Count 2 seeks access to records.

Yet DOJ argues that "[n]either the text of section 19.37(1) nor binding case law permits WMC's Count 1—a *non-mandamus action* under section 19.37(1) for delay of an ultimate denial of the public records request, seeking damages." (R. 16:6 (emphasis added).) According to DOJ's characterization, "WMC alleges that, because DOJ took several months to ultimately deny its public records request, it may bring a cause of action for a violation of Wis. Stat. § 19.35(4)(a) through Wis. Stat. § 19.37(1)(a)." (R. 16:5.)

DOJ is wrong in two related respects. It conflates an "action" with a "cause of action" and views Count 1 in isolation.

DOJ's first error is characterizing Count 1 as "a non-mandamus action." (R. 16:6.) Count 1 is a *claim* with a specific *cause of action*. It is not itself an *action* (*i.e.*, a lawsuit). A "cause of action," also known as a "theory of relief," is part of a

"claim." *St. Augustine Sch. v. Underly*, 78 F.4th 349, 352 (7th Cir. 2023). "A claim is the set of operative facts that produce an assertable right in court and create an entitlement to a remedy." *Id.* "A theory of relief is the vehicle for pursuing the claim; it may be based on any type of legal source, whether a constitution, statute, precedent, or administrative law." *Id.* "The specific theory dictates what the plaintiff needs to prove to prevail on a claim and what relief may be available." *Id.* "One lawsuit may raise multiple claims, and each claim may be supported by multiple theories." *Id.*

The present *case* is a mandamus *action* under Wis. Stat. § 19.37(1)(a) because this case seeks access to records, as DOJ has conceded in its answer. (*See* R. 2:2; 14:2.) WMC raises two counts in its complaint. (R. 2.) Count 1's "claim" is that DOJ unreasonably delayed by taking 18 months to deny WMC's record request. Count 1's "cause of action" (*i.e.*, theory of relief) is that a plaintiff in a § 19.37(1)(a) mandamus action may receive monetary relief under § 19.37(2)(a) for a custodian's unlawful delay. Count 1 has a viable cause of action. Count 1 itself is not an "action" (a lawsuit).

DOJ's second error is that, by viewing Count 1 in isolation, DOJ is misstating WMC's position and the nature of this case. Contrary to DOJ's characterization, WMC is *not* suggesting that a record requester may bring "a non-mandamus action . . . seeking damages." (R. 16:6.) Instead, WMC is simply arguing that when a requester files a mandamus action seeking access to records, the requester may also seek damages and fees for the custodian's unlawful delay in denying the request. It might be an open question whether a requester may bring an *action* seeking *only*

damages and fees under Wis. Stat. § 19.37(2)(a)—but that question is not relevant here because WMC is seeking access to records.

Given the parties' agreement that this case is a mandamus action under Wis. Stat. § 19.37(1)(a), WMC may seek monetary relief under § 19.37(2)(a) for DOJ's violation of § 19.35(4)(a). If the Court concludes that DOJ "failed to comply with the requirements of Wis. Stat. § 19.35(4)(a)" by taking 18 months to deny WMC's record request, then WMC will be "entitled to costs, fees and damages pursuant to Wis. Stat. § 19.37(2)." *See ECO*, 2002 WI App 302, ¶ 30. The statutory framework discussed above compels this conclusion, and the case law discussed below confirms it.

3. WMC's claim of unlawful delay fits within the procedural posture of several binding precedents.

Wisconsin appellate court decisions are consistent with the statutory framework discussed above. Binding case law illustrates the following points: (1) after a custodian denies a request for records, the requester may file a mandamus action seeking access to the records; (2) in that mandamus action, the requester may seek damages and attorney fees for the custodian's unlawful delay and unlawful denial; and (3) the requester's entitlement to damages and attorney fees for the custodian's unlawful delay does *not* hinge on whether the court orders the custodian to produce the requested records. These cases rebuff DOJ's argument that Count 1 is not legally viable.

In *Journal Times*, the plaintiff filed a mandamus action under Wis. Stat. § 19.37(1)(a) after the defendant denied the plaintiff's record request. *Journal Times*, 2015 WI 56, ¶ 2. Shortly after the lawsuit was filed, the custodian provided the

requested information (but not the requested record because none existed) to the plaintiff. *Id.* ¶¶ 26, 28. Although the plaintiff was no longer seeking access to a record, the plaintiff continued the mandamus action to seek attorney fees, damages, and other actual costs under Wis. Stat. § 19.37(2)(a) on the grounds that the custodian's denial *and delay* had violated the public records law. *Id.* ¶¶ 2, 4–5. The supreme court held that the plaintiff "did not prevail in substantial part in this action and is therefore not entitled to reasonable attorney fees, damages, and other actual costs under Wis. Stat. § 19.37(2), because the [defendant] did not unlawfully deny or delay release of the subject record." *Id.* ¶ 7. Regarding the custodian's delay, the court held that "the [plaintiff] has not prevailed in substantial part in this action because the [defendant] acted with reasonable diligence." *Id.* ¶ 89.

In *Racine Education Association*, the plaintiff filed a mandamus action under Wis. Stat. § 19.37(1)(a) seeking access to records. The defendant released the records during the lawsuit, so "the trial court dismissed the action as moot." *Racine Educ. Ass'n v. Bd. of Educ. for Racine Unified Sch. Dist.*, 145 Wis. 2d 518, 519, 427 N.W.2d 414 (Ct. App. 1988). The court of appeals "agreed that the action was moot but remanded for a determination of [the plaintiff's] possible entitlement to attorney's fees." *Id.* at 519–20. When the case was appealed a second time, the court of appeals held that the plaintiff had not substantially prevailed and thus was not entitled to attorney fees because "the request was filled as soon as practicable." *Id.* at 524.[2]

[2] To the extent that the *Racine Education Association* court relied on a "causal nexus" test for determining whether a plaintiff has substantially prevailed, it has been abrogated by *Friends of Frame Park*, 2022 WI 57, ¶ 3. But the *Racine Education Association* court's discussion of custodian delay is still good law. *See supra* note 1.

In *Vaughan*, a requester filed a mandamus action seeking records after receiving no response from the custodian. *Vaughan*, 143 Wis. 2d at 869. Weeks after the lawsuit was filed, the custodian "supplied the requested information and apologized for her lateness in responding to [the plaintiff's] request." *Id.* The only issue on appeal was whether the plaintiff was entitled to costs, fees, and damages under Wis. Stat. § 19.37(2). *See id.* The court of appeals concluded that he was entitled to that relief because he had "prevailed in substantial part." *Id.* at 873. The court reasoned that a custodian is "in a much better position to demonstrate that delay was reasonable," and the custodian there had "voluntarily ceased her unexplained delay in complying with [the plaintiff's] requests after he instituted this mandamus action."[3] *Id.*

Journal Times, *Racine Education Association*, and *Vaughan* show that a claim of unlawful delay is viable regardless of whether a claim seeking access to records is still viable. These three cases thus show that a request for damages and attorney fees for an unlawful delay is *in addition to* a claim seeking access to records.

Blazel and *ECO* also make that latter point clear. In *ECO*, the plaintiff filed a mandamus action under Wis. Stat. § 19.37(1)(a) after its first record request went unanswered and its "virtually identical" second request was denied. *ECO*, 2002 WI App 302, ¶¶ 2–6. Regarding the plaintiff's first record request, the court of appeals noted that "under § 19.35(4)(a), receipt of an open records request triggers either a

[3] To the extent that the *Vaughan* court relied on a "causal nexus" test for determining whether a plaintiff has substantially prevailed, it has been abrogated by *Friends of Frame Park*, 2022 WI 57, ¶ 3. But the *Vaughan* court's discussion of custodian delay is still good law. *See supra* note 1.

duty to respond to the request or a duty to produce the requested records." *Id.* ¶ 24. The court concluded that the custodian "did not provide any response whatsoever [to the first record request] and therefore did not comply with open records law." *Id.* The court thus also concluded that "[b]ecause the [defendant] failed to respond to [the plaintiff's first] request and thus failed to comply with the requirements of Wis. Stat. § 19.35(4)(a), [the plaintiff] is entitled to costs, fees and damages pursuant to Wis. Stat. § 19.37(2)." *Id.* ¶ 30. Regarding the plaintiff's second record request, the court held that the custodian had improperly denied access and, therefore, the plaintiff was entitled to damages. *Id.* ¶¶ 27–28, 30.

Like in *ECO*, the court of appeals in *Blazel* awarded damages and attorney fees for an unlawful delay in addition to awarding access to records. The custodian in *Blazel* denied a request for records, the requester filed a mandamus action under Wis. Stat. § 19.37(1)(a), and several months later the custodian provided redacted copies of the records mid-lawsuit. *Blazel*, 2023 WI App 18, ¶ 1. The plaintiffs amended their complaint to allege that the custodian had "violated the public records law in two respects: (1) withholding and *delaying* release of the requested records; and (2) providing redacted versions of the requested records." *Id.* ¶ 13 (emphasis added).

The court of appeals granted relief on both counts. It considered the claim of unlawful denial and delay because a ruling on the merits in the plaintiffs' favor would entitle them to damages and attorney fees on that claim under Wis. Stat. § 19.37(2)(a). *Blazel*, 2023 WI App 18, ¶ 43. On the plaintiffs' first claim, the court held that the defendant's initial denial had "violated the public records law" and,

hence, the plaintiffs were "entitled to attorney fees for their challenge to the [defendant's] initial outright denial of their records requests." *Id.* ¶ 3. On the plaintiffs' second claim, the court held that the defendant had "violated the public records law with respect to all but one redaction, and that the [plaintiffs] are, consequently, entitled to attorney fees on their challenge to the improper redactions." *Id.* ¶ 4. The court made clear that it was addressing the first claim "separately" from the second claim, and the plaintiffs were "entitled to attorney fees under the statutory prevailing-party test articulated in *Friends of Frame Park* as to both sets of violations." *Id.* ¶ 93.

So under *Blazel* and *ECO*, a plaintiff in a § 19.37(1)(a) action seeking records is entitled to damages and attorney fees under § 19.37(2)(a) if a court determines that the custodian unlawfully delayed. Furthermore, this entitlement to monetary relief for an unlawful delay is independent of any relief providing access to records. *See Blazel*, 2023 WI App 18, ¶¶ 104–05 (Fitzpatrick, J., concurring in part & dissenting in part) (recognizing the majority opinion awarded attorney fees on the plaintiffs' first claim solely based on the court's conclusion that the record custodian had unlawfully delayed); *ECO*, 2002 WI App 302, ¶ 30 (holding the defendant's violation of Wis. Stat. § 19.35(4)(a) entitled the plaintiff to costs, damages, and attorney fees); *see also Journal Times*, 2015 WI 56, ¶ 100 (noting the custodian in *ECO* had not acted with reasonable diligence).

The same goes for claims seeking punitive damages under Wis. Stat. § 19.37(3) on grounds of unlawful delay. In *Eau Claire Press Co. v. Gordon*, 176 Wis. 2d 154,

157–58, 499 N.W.2d 918 (Ct. App. 1993), a custodian denied a record request, the requester filed a mandamus action, and then the custodian provided the requested records to the plaintiff mid-lawsuit. The court of appeals held that the custodian's delay in granting access to the records did not entitle the plaintiff to punitive damages under § 19.37(3), reasoning that the delay was not arbitrary and capricious. *Id.* at 162–63. *Eau Claire Press* thus shows that a mandamus plaintiff may seek punitive damages under § 19.37(3) for an unlawful delay even if the plaintiff drops its claim seeking access to records.

All those cases—*Journal Times*, *Racine Education Association*, *Vaughan*, *Blazel*, *ECO*, and *Eau Claire Press*—show that a plaintiff may seek damages and attorney fees for a custodian's violation of the public records law (including an unlawful delay) in an action seeking access to records. All those cases show that such a claim requesting monetary relief is distinct and separable from a claim seeking access to records. In all those cases, the plaintiffs were seeking records *when they filed* their mandamus actions. Yet in all those cases except for *Blazel* and *ECO*, the plaintiffs were not seeking records when their cases were appealed—and the appellate courts considered their claims for damages and attorney fees anyway. In *Blazel*, *ECO*, and *Vaughan*, the court of appeals awarded attorney fees for an unlawful delay.

The procedural posture of the present case fits comfortably alongside the procedural posture of those cases. If anything, WMC's claim of unlawful delay is even more viable than the claims of delay in most of those cases because WMC is still

pursuing access to records. In other words, unlike most of those cases, the present case does not raise a mootness issue. WMC may pursue attorney fees and damages on grounds of unlawful delay in addition to seeking access to records, just like the plaintiffs in *Blazel* and *ECO* successfully did.[4]

* * *

In sum, this Court should allow WMC to proceed with Count 1. Wisconsin Stat. § 19.37 allows a record requester to bring a claim of unlawful delay in addition to a claim seeking access to a record. As noted, "[i]f a custodian acts with reasonable diligence, a requester is not entitled to reasonable attorney fees, damages, and other actual costs under [Wis. Stat.] § 19.37(2) on grounds of unlawful delay." *Journal Times*, 2015 WI 56, ¶ 57. If the Court ultimately concludes that DOJ's 18-month delay did not entail reasonable diligence, WMC will be entitled to attorney fees and damages on Count 1 under § 19.37(2)(a). And if the Court concludes that DOJ's 18-month delay was arbitrary and capricious, WMC will be entitled to punitive damages on Count 1 under § 19.37(3).

B. DOJ's arguments are not persuasive.

In arguing that Count 1 is not viable, DOJ relies on inapplicable case law and ignores the controlling precedents discussed above.

[4] Also, DOJ's 18-month delay here far exceeds the delays that courts have found reasonable or unreasonable in other cases. In *Vaughan*, the plaintiff received attorney fees because of the custodian's approximately two-month unexplained delay. *See Journal Times v. Police & Fire Comm'rs Bd.*, 2015 WI 56, ¶¶ 94–95, 101, 362 Wis. 2d 577, 866 N.W.2d 563 (discussing *Vaughan*). In other cases, courts held that delays of 35 days, 41 days, two days, and two weeks were reasonable. *See id.* ¶¶ 87, 101. WMC can argue the merits of DOJ's 18-month delay in a separate brief if the Court allows WMC to pursue this claim.

1. DOJ's arguments mirror a dissenting opinion.

DOJ's arguments are essentially Judge Fitzpatrick's dissenting view in *Blazel*. Indeed, DOJ favorably cites that dissenting opinion in its brief. (R. 16:10.)

In that partial dissent, Judge Fitzpatrick argued that a delay in producing a requested record is not an independent basis for relief under Wis. Stat. § 19.37. *Blazel*, 2023 WI App 18, ¶¶ 101–08 (Fitzpatrick, J., concurring in part & dissenting in part). He noted that the court's "majority opinion determine[d] that the [defendant] violated the public records law by delaying production of the records." *Id.* ¶ 102. He argued that the plaintiffs could not prevail on that claim because there was no "responsive record left to produce." *Id.* He disagreed with the majority opinion's conclusion that the plaintiffs had prevailed on that claim simply because the court had determined the delay was unlawful. *Id.* ¶¶ 103–04.

DOJ's reliance on Judge Fitzpatrick's dissenting view is misplaced. "A dissent is what the law is not." *State v. Perry*, 181 Wis. 2d 43, 49, 510 N.W.2d 722 (Ct. App. 1993). While the dissenting opinion in *Blazel* might support DOJ's argument, the majority opinion in *Blazel* refutes it. DOJ's argument for judgment on Count 1 conflicts with the controlling opinion in *Blazel*.

2. DOJ's arguments conflict with binding case law.

DOJ seems to advance multiple arguments on the viability of claims alleging unlawful delay under Wis. Stat. § 19.37. DOJ is wrong in every respect. Its arguments conflict with the binding case law discussed above.

First, DOJ suggests that a claim of unlawful delay must seek "a court order to release the record."[5] (R. 16:6 (quoting Wis. Stat. § 19.37(1)(a)).) That argument conflicts with *Journal Times*, *Racine Education Association*, *Vaughan*, and *Eau Claire Press*. In each of those cases, the court considered the reasonableness of a delay even though the plaintiff was no longer seeking access to records. *See supra* at 11–13, 15–16. DOJ's argument also conflicts with *Blazel*, where the court granted relief under Wis. Stat. § 19.37(2)(a) for an unlawful delay separately from the relief granting access to records. *See supra* at 14–15.

DOJ's stance is wrong for yet another reason: a custodian's delay in responding to a record request is *not* a basis for ordering the custodian to produce the record. *State ex rel. Ledford v. Turcotte*, 195 Wis. 2d 244, 248, 536 N.W.2d 130 (Ct. App. 1995).

Second, DOJ suggests that a requester may bring a claim of unlawful delay only *before* a custodian has denied or complied with a record request. (*See* R. 16:6–7.) DOJ's apparent view is that, *after* a custodian has provided a written denial of access, a requester may challenge the denial but may no longer challenge the *delay* in providing the denial. (*See* R. 16:6–7.) That view conflicts with *Journal Times*, where the supreme court first determined the legality of the custodian's denial of access and then separately determined the reasonableness of the custodian's delay. *See Journal Times*, 2015 WI 56, ¶¶ 62–76 (concluding that the custodian lawfully denied the plaintiff's record request); *id.* ¶¶ 77–103 (concluding that the custodian's delay

[5] DOJ suggests that a mandamus action is available under Wis. Stat. § 19.37 only if "the requester does have the records by the time it files suit." (R. 16:6.) Presumably, DOJ means "does not have" instead of "does have."

involved reasonable diligence). DOJ's view also conflicts with *Blazel*, where the court granted relief under Wis. Stat. § 19.37(2)(a) for an unlawful delay separately from the plaintiffs' claim challenging partial redactions. *See supra* at 14–15. Finally, DOJ's view also conflicts with *Vaughan*, *Racine Education Association*, and *Eau Claire Press*, where the courts considered the reasonableness of the custodians' delays even though the custodians had already denied and subsequently fulfilled the record requests. *See supra* at 12–13, 15–16. Notably, the appellate courts in those five cases never suggested that a claim of unlawful delay is non-cognizable after a record request has been denied or fulfilled. DOJ's contrary view has no legal basis.

3. DOJ is essentially advancing a meritless argument that its written denial rendered its 18-month delay moot.

Although DOJ does not frame its argument in terms of mootness, it is essentially arguing that Count 1 is moot because the Court cannot award any relief on this claim. (*See* R. 16:6–7.) In other words, DOJ is suggesting that its written denial of WMC's record request made DOJ's 18-month delay moot. (*See* R. 16:6–7.)

The court of appeals has rejected similar mootness arguments in cases under Wis. Stat. § 19.37. As explained above, in *Racine Education Association*, the court considered the plaintiff's request for attorney fees although its claim seeking records was "moot" after the custodian provided the requested records. *Racine Educ. Ass'n*, 145 Wis. 2d at 519–20.

Blazel also dispels any mootness concern here. As the court in *Blazel* explained, "the voluntary disclosure of a requested record does not render the action moot because a ruling on the merits 'will have the practical effect of determining the

[requester's] right to recover damages and fees under Wis. Stat. § 19.37(2)(a) based upon the [custodian's] denial of its request.'" *Blazel*, 2023 WI App 18, ¶ 43 (quoting *Portage Daily Reg. v. Columbia Cnty. Sheriff's Dep't*, 2008 WI App 30, ¶ 8, 308 Wis. 2d 357, 746 N.W.2d 525). The court thus held that the plaintiffs' claim challenging the defendant's initial denial of access to requested records was *not* moot. *Id.* The court reasoned that "a decision on the merits of the [plaintiffs'] challenge to the [defendant's] initial outright denial of their records requests will have a practical effect on the [plaintiffs'] entitlement to attorney fees." *Id.* Specifically, "if a court were to rule in favor of the [plaintiffs] on this challenge," then they would be entitled to costs and attorney fees on that claim. *Id.*

So too here. If the Court determines that DOJ's 18-month delay was unlawful, WMC will prevail on Count 1 and thus be entitled to costs, damages, and attorney fees on this claim.

DOJ's argument would work if a court order granting access to a record were the *only* relief available under Wis. Stat. § 19.37, but it is not. This statute mandates an award of costs, damages, and attorney fees to a requester who prevails in substantial part in a lawsuit filed under § 19.37(1)(a). The present case is indisputably a lawsuit filed under § 19.37(1)(a). (*See* R. 2:2; 14:2.) WMC may recover costs, damages, and attorney fees on Count 1 if WMC prevails on this claim—*i.e.*, if the Court determines that DOJ did not exercise reasonable diligence in responding to WMC's record request. Count 1 is legally viable.

4. DOJ relies on case law that is readily distinguishable.

To support its motion for judgment on Count 1, DOJ heavily relies on *Capital Times*, 2011 WI App 137, and other cases citing *Capital Times*. (R. 16:7–10.) DOJ cites *Capital Times* for the notion that "damages-only actions do not exist under Wis. Stat. § 19.37(1)." (R. 16:8.)

DOJ's reliance on *Capital Times* is misplaced for three reasons. That case does not support DOJ's view of the public records law, that case is factually distinguishable from the present case, and that case hurts DOJ's arguments to the extent it is relevant here.

First, the court in *Capital Times* merely held that "a civil action for punitive damages under § 19.37(3) . . . does not exist." *Capital Times*, 2011 WI App 137, ¶ 12. In *Capital Times*, the plaintiff "file[d] an ordinary civil action seeking punitive damages instead of using the mandamus procedure outlined in our state's open records statutes." *Id.* ¶ 2 (citing Wis. Stat. § 19.37(1)). In other words, the plaintiff did *not* file a mandamus action under § 19.37(1). *See id.* Instead, the plaintiff argued that it could pursue a stand-alone action for punitive damages under § 19.37(3). *Id.* ¶ 5. Relatedly, the plaintiff argued that compensatory damages under § 19.37(2) were not a prerequisite to punitive damages under subsection (3). *Id.* ¶¶ 8–9, 11.

The court of appeals rejected the plaintiff's arguments. The court held that punitive damages under § 19.37(3) are available only in a mandamus action filed under subsection (1). *Cap. Times*, 2011 WI App 137, ¶ 6. The court also held that

compensatory damages are a prerequisite to punitive damages under § 19.37(3). *Id.* ¶¶ 6–7, 11.

DOJ is thus mischaracterizing *Capital Times* by suggesting that it held that "damages-only actions do not exist under Wis. Stat. § 19.37(1)." (R. 16:8.) Rather, *Capital Times* addressed a punitive-damages-only action under § 19.37(3). The court *never* suggested that a claim seeking attorney fees and damages under § 19.37(2)(a) on grounds of unlawful delay is not viable in a § 19.37(1)(a) suit seeking access to records. Such a holding would conflict with the case law discussed above. *See supra* at 11–16.

Second, *Capital Times* is factually distinguishable here because the present case does *not* seek *only* punitive damages under Wis. Stat. § 19.37(3). Instead, DOJ has conceded that the present case is a mandamus action filed under Wis. Stat. § 19.37(1)(a). (*See* R. 2:2; 14:2 (admitting paragraph 5 in the complaint).) In this case, WMC seeks compensatory damages, punitive damages, *and access to records*. (R. 2:7–13.) By contrast, the plaintiff in *Capital Times* was not seeking compensatory damages or access to records. In fact, the plaintiff filed that lawsuit *after* receiving the requested records. *Cap. Times*, 2011 WI App 137, ¶ 1. *Capital Times* is not factually analogous to the present case. Because WMC properly filed this suit under § 19.37(1)(a) to seek access to records, *Capital Times* does not support DOJ's arguments.

Third, if *Capital Times* is relevant here at all, it hurts DOJ's arguments for judgment on Count 1. The court in *Capital Times* recognized that a plaintiff may seek

damages for a violation of the public records law in a mandamus action under Wis. Stat. § 19.37. *Cap. Times*, 2011 WI App 137, ¶ 8. As the court explained, "The mandamus court decides whether there is *a violation* and, if so, whether it caused actual damages. Then, the mandamus court may consider whether punitive damages should be awarded under § 19.37(3)." *Id.* (emphasis added). The court also noted that "the legislature contemplated mandamus as a possible answer to *delays* as well as denials." *Id.* ¶ 11 n.9 (emphasis added). *Capital Times* thus strongly suggests that Wis. Stat. § 19.37(2)(a) authorizes damages for violations of the public records law, including unlawful delays, in cases filed under subsection (1)(a).

Capital Times is thus consistent with the case law discussed above. *See supra* at 11–16. As explained above, *Blazel*, *Journal Times*, *Racine Education Association*, *Vaughan*, *ECO*, and *Eau Claire Press* show that a plaintiff in a Wis. Stat. § 19.37(1)(a) lawsuit may seek damages and attorney fees for a custodian's delay. And all those cases show that a lawsuit is brought under § 19.37(1)(a) if it seeks access to records at the outset, even if the plaintiff ultimately drops the claim seeking access to records and only maintains the request for monetary relief.

DOJ ignores all this controlling precedent in its brief, except for its citation to the *dissenting* opinion in *Blazel*. *See supra* at 18. This case law defeats DOJ's motion for judgment on Count 1. *See supra* at 11–17.

5. DOJ's argument about the statutory language is misplaced.

In arguing that Count 1 is not viable, DOJ latches onto the words "delays granting access" in Wis. Stat. § 19.37(1). (R. 16:6–7.) DOJ seems to argue that this

language means that WMC may not pursue a claim of unlawful delay because DOJ has not provided WMC with access to any records. (R. 16:7.)

Even if that view of the law is correct (it is not), it does not justify granting judgment to DOJ on Count 1. Because DOJ may eventually grant WMC access to the requested records, DOJ's motion for judgment on Count 1 is premature at best, even under DOJ's own apparent logic.

In addition, DOJ does not cite any case law to support its novel view of the meaning of "delays granting access" in Wis. Stat. § 19.37(1). As explained above, *Blazel*, *Journal Times*, *Vaughan*, *ECO*, and *Racine Education Association* show that a claim of unlawful delay is cognizable under Wis. Stat. § 19.37(2)(a). *See supra* at 11–17. The published opinions of the court of appeals and supreme court are binding on this Court. *See Cook v. Cook*, 208 Wis. 2d 166, 186, 189, 560 N.W.2d 246 (1997). These cases trump DOJ's novel statutory construction.

DOJ's argument also ignores key statutory language and the way it fits together. As explained above, the statutory framework allows a requester to seek damages and attorney fees under Wis. Stat. § 19.37(2)(a) for a violation of the public records law, including an unlawful delay, in a case seeking access to records. *See supra* at 5–8. This statutory framework allows WMC to seek damages and attorney fees for DOJ's unlawful delay in addition to seeking access to the requested records. *See supra* at 9–11.

* * *

WMC may seek damages and attorney fees under Wis. Stat. § 19.37(2)(a) and punitive damages under subsection (3) for DOJ's 18-month delay in denying WMC's public records request. This Court should allow WMC to proceed with Count 1.

CONCLUSION

This Court should deny DOJ's motion for judgment on Count 1.

Dated this 22nd day of February 2024.

Respectfully submitted,

Electronically signed by

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CERTIFICATE OF SERVICE

I certify that in compliance with Wis. Stat. § 801.18(6), I electronically filed a Plaintiffs' Response Opposing Defendant's Motion for Judgment on the Pleadings as to Count 1 of the Complaint with the clerk of court using the Wisconsin Circuit Court Electronic Filing System, which will accomplish electronic notice and service for all participants who are registered users.

Dated this 22nd day of February 2024.

Electronically signed by

Scott E. Rosenow

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