

**FILED**  
**03-08-2022**  
**CIRCUIT COURT**  
**DANE COUNTY, WI**  
**2021CV002526**

**BY THE COURT:**

**DATE SIGNED: March 8, 2022**

Electronically signed by Judge Everett D. Mitchell  
Circuit Court Judge

**STATE OF WISCONSIN**

**CIRCUIT COURT  
BRANCH 4**

**DANE COUNTY**

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**MIDWEST ENVIRONMENTAL  
ADVOCATES, INC.,**

**Plaintiff,**

**v.**

**Case No. 21-CV-2526**

**FREDERICK PREHN, WISCONSIN  
NATURAL RESOURCES BOARD,  
And WISCONSIN DEPARTMENT  
OF NATURAL RESOURCES,**

**Defendants.**

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**DECISION AND ORDER  
ON MOTION TO DISMISS**

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Before the Court is an Amended Motion to Dismiss for failure to state a claim upon which relief may be granted pursuant to Wis. Stat. § 802.06(2)(a)6. filed by the Defendant, Frederick Prehn (hereinafter “Defendant”), on January 19, 2022. Plaintiff, Midwest Environmental Advocates, Inc., (hereinafter “Plaintiff”), filed a sur-reply on February 22, 2022. For the reasons stated below, the Defendant’s Motion to Dismiss is DENIED.

**BACKGROUND**

The Complaint filed in this matter seeks a mandamus order requiring the Defendant to immediately search for and produce all records responsive to Plaintiff’s June 29, 2021 records

request for Defendant's communications, including text messages, regarding his tenure on the Natural Resources Board (hereinafter "NRB"). Defendant alleges that Plaintiff failed to state a claim upon which relief can be granted because he is not an "authority" under the Public Records Law and that the communications requested by the Plaintiff do not constitute "records" under the Public Records Law.

### **SUMMARY OF LAW**

A complaint subject to a motion to dismiss for failure to state a claim upon which relief can be granted must be liberally construed and the facts set forth in the complaint must be taken as true. *Northridge Co. v. W.R. Grace and Co.*, 162 Wis. 2d 918, 924, 471 N.W. 2d 179 (1991). A motion to dismiss will usually only be granted when "it is quite clear that under no conditions can the plaintiff recover." *Wilson v. Cont'l Ins. Cos.*, 87 Wis. 2d 310, 317, 274 N.W. 2d 679 (1979).

### **ANALYSIS**

Defendant brings this Motion to Dismiss alleging that Plaintiff failed to state a claim upon which relief can be granted arguing that Defendant is not an "authority" and the communications sought are not "records. Plaintiff's Complaint, however, does state a claim upon which relief can be granted. Pursuant to the Open Records Law, any requester has the right to inspect any record unless otherwise provided by law. Wis. Stat. § 19.35(1)(a). When an authority withholds or delays access to a record or a part of a record after a written request for disclosure is made, the requester may bring a mandamus action against that authority to obtain the record. Wis. Stat. § 19.37(1). For the following reasons, the Court finds that Defendant is an "authority" pursuant to Wis. Stat. § 19.32(1) and the communications sought are "records" pursuant to Wis. Stat. § 19.32(2).

#### **I. Authority**

The Defendant first alleges that Plaintiff failed to state a claim upon which relief can be granted because Defendant is not an “authority” under Wis. Stat. § 19.32(1). Wis. Stat. § 19.32(1) states:

(1) “Authority” means any of the following having custody of a record: a state or local office, elective official, agency, board, commission, committee, council, department or public body corporate and politic created by the constitution or by any law, ordinance, rule or order; any court of law; the assembly or senate; a nonprofit corporation which receives more than 50 percent of its funds from a county or a municipality, as defined in s. 59.001(3), and which provides services related to public health or safety to the county or municipality; a university police department under s. 175.42; or a formally constituted subunit of any of the foregoing.

Plaintiff argues that it impleaded Defendant in his official capacity as a Member and Chair of the NRB because he is a state officer who occupies a state office which makes him an authority under Wis. Stat. § 19.32(1).

In analyzing Plaintiff’s argument that Defendant is a state official occupying a state office, the Court must first determine the plain meaning of “state office.” When determining the plain meaning of statutory language, the Court must include the language of surrounding or closely-related statutes. *State ex rel. Kalal v. Cir. Ct. for Dane Cty.*, 2004 WI 58, ¶46, 271 Wis. 2d 633, 681 N.W.2d 110. In doing so, the Court looks to Wis. Stat. § 19.32(4), which incorporates the definition of “state public office” set forth in Wis. Stat. § 19.42(13). Wis. Stat. § 19.42(13) defines “state public office,” in part, “all positions to which individuals are regularly appointed by the governor . . . .” Each member of the NRB is appointed by the Governor for staggered 6-year terms with the advice and consent of the Wisconsin Senate. Wis. Stat. § 15.34(2); Wis. Stat. § 15.07(1)(a). The intersection between the previously discussed statutes clearly indicates that each member of the NRB is a “state office” under the plain meaning of the term in Wis. Stat. § 19.32(1).

Further, the Wisconsin Supreme Court has stated that, under the Public Records Law, state

offices cannot be divorced from the individuals who hold those offices. See *Moustakis v. Wisconsin Department of Justice*, 2016 WI 42, ¶ 45, 368 Wis. 2d 677, 880 N.W. 2d 142. The court in *Moustakis* also found that a district attorney is both a state office and an elected official, demonstrating potential overlap between categories of authorities. *Id.* at ¶ 43. In the present case, Defendant is a state official who occupies a state office. As state in *Moustakis*, Defendant may not be divorced from the state office that he occupies and therefore is a state office when acting in his official capacity as a Member and Chair of the NRB. Furthermore, this interpretation is consistent with the presumption of complete public access and the Legislature's commitment to ensuring all persons have access 'to the greatest possible information regarding the affairs of government.' Wis. Stat. § 19.31.

Regarding the element of "having custody of a record" required to be deemed an "authority" under Wis. Stat. § 19.32(1), Defendant has custody of the records being sought by Plaintiff, namely his communications regarding his tenure on the NRB. Custody of a record has been found to mean possessing or controlling a record. See, e.g., *Journal/Sentinal, Inc. v. Shorewood Sch. Bd.*, 86 Wis. 2d 443, 455, 521 N.W. 2d 165 (Ct. App. 1994). Taking the facts set forth in the Complaint as true, the Defendant has custody of his communications because they are in his possession or control on his personal or professional devices.

For the reasons set forth above, the Court finds that the Defendant is an "authority" pursuant to Wis. Stat. § 19.32(1) because he holds a state office and has custody of records.

## **II. Record**

The Defendant next alleges that the communications sought by the Plaintiff does not constitute "records" under Wis. Stat. § 19.32(2). A "record" is defined as "any material on which written, drawn, printed, spoken, visual, or electromagnetic information or electronically generated

or stored data is recorded or preserved, regardless of physical form or characteristics that has been created or is being kept by an authority.” Wis. Stat. § 19.32(2). Communications relating to “the affairs of government,” “the official acts of officers and employees,” or “the conduct of governmental business” are “records” under the Public Records Law. *Schill v. Wis. Rapids Sch. Dist.*, 2010 WI 86, ¶ 16, 327 Wis. 2d 572, 786 N.W. 2d 177. When determining whether a communication is a record, the focus is on the content of the communication. *Id.* at ¶ 22. If the content of the communication demonstrates a connection to a government function, it is a record. *Id.*

In the present case, Plaintiff requested all communications sent to or from the Defendant “regarding his tenure on the Natural Resources Board, including but not limited to any communication about remaining on the board past the expiration of his term or otherwise declining to vacate his position.” Doc. 4 ¶ 7. In Plaintiff’s records request, the content of the records requested was specifically tailored to communications relating the “the affairs of government” and “the conduct of governmental business” as they are about his office as a Member and Chair of the NRB. Additionally, the Defendant’s tenure on the NRB has a relationship to state natural resource policy decisions, the decision-making process, and the Governor’s ability to appoint new members to the NRB. Further, the records sought are not purely personal communications, as the Defendant argues, because they clearly have some connection to the affairs of the NRB. For these reasons, the Court finds that the records sought by the Plaintiff are “records” as defined by Wis. Stat. § 19.32(2).

### CONCLUSION

For the reasons stated above, the Defendant’s Motion to Dismiss for failure to state a claim upon which relief can be granted is DENIED.

SO ORDERED. This is a final decision for the purposes of appeal.