FILED
02-14-2023
CIRCUIT COURT
DANE COUNTY, WI
2021CV002526

BY THE COURT:

DATE SIGNED: February 14, 2023

Electronically signed by Judge Everett D. Mitchell
Circuit Court Judge

STATE OF WISCONSIN CIRCUIT COURT DANE COUNTY
BRANCH 4

MIDWEST ENVIRONMENTAL ADVOCATES, INC.,

Plaintiff,

vs. Case No. 21-CV-2526

FREDERICK PREHN, et al.,

Defendants.

DECISION AND ORDER

INTRODUCTION

Frederick Prehn ("Prehn") refused to produce records of his official acts on the Wisconsin Natural Resources Board ("NRB") for sixteen months. This is a public records case brought to compel the release of those records. In June 2021, Midwest Environmental Advocates, Inc., ("Midwest") sought digital records like text messages and emails from Prehn, the NRB, the Wisconsin Department of Natural Resources ("DNR"). Although both the DNR and NRB promptly responded, Prehn failed to provide responsive records until October 5, 2022, sixteen months later, and Prehn also failed to provide any lawful reason for this delay.

However, I must resolve this case based on two facts: (1) Midwest produces no evidence

to dispute that Prehn has now produced the records Midwest asked him to produce, and (2) there has never been "a judicially sanctioned change in the parties' relationship." This means that Midwest has not "prevailed" and, under *Friends of Frame Park, U.A. v. City of Waukesha*, Midwest cannot recover any remedy under the public records law. 2022 WI 57, ¶3, 403 Wis. 2d 1, 976 N.W.2d 263. So, although I find that Prehn arbitrarily delayed and denied access to public records, I must also grant summary judgment in his favor and dismiss the Complaint.

I cannot help but observe this result conflicts with "the public policy of this state that all persons are entitled to the greatest possible information regarding the affairs of government …" Wis. Stat. § 19.31. This is an important policy that has long defined our government:

> If Wisconsin were not known as the Dairy State it could be known, and rightfully so, as the Sunshine State. All branches of Wisconsin government have, over many years, kept a strong commitment to transparent government.

Schill v. Wisconsin Rapids Sch. Dist., 2010 WI 86, ¶1, 327 Wis. 2d 572, 786 N.W.2d 177. Whether or not Midwest has shown it is entitled to any remedy, there is no dispute that Prehn dishonored this commitment to transparent government: there is no dispute that he delayed access to the records of his official acts as a government official for over one year and there is no dispute that he had no lawful reason to do so. Prehn's explanations—to blame other government officials, or to blame his own inefficient recordkeeping, or to blame his unfamiliarity with technology—do not excuse him from the "routine duties of officers and employees whose responsibility it is to provide such information." Wis. Stat. § 19.31.

Simply put, the public asked Prehn for information about his business as a government official. Wisconsin law required Prehn to answer "as soon as practicable and without delay." Wis. Stat. § 19.35(4)(a). Prehn did not answer for sixteen months. But because he has now produced the requested records, and because there has never been "a judicially sanctioned change in the

parties' relationship," the binding precedent set forth in *Friends of Frame Park* requires this court "to reward [Prehn] for strategically freezing out the public's access to records." 2022 WI 57, ¶103 (Karofsky, J., dissenting). Perhaps this is the correct result of Midwest's decision to negotiate with Prehn about how he should search for records. But whether or not this is what the legislature intended shall remain a "question for another day." *Id.* ¶25 (Hagedorn, J., op.).

I. BACKGROUND

A. Midwest's records requests.

On June 29, 2021, Midwest submitted a written request seeking records from the Prehn, the DNR, and the NRB. Compl. Ex. 1. All three are "authorities" responsible for their records under the public records law. Wis. Stat. § 19.32(1). Among other things, Midwest sought "communications sent to or from Dr. Frederick Prehn, between the dates of June 29, 2020 and June 29, 2021, regarding his tenure on the Natural Resources Board …" *Id.; See State ex rel. Kaul v. Prehn*, 2022 WI 50, ¶¶4-9, 402 Wis. 2d 539, 976 N.W.2d 821 (discussing the background of Prehn's unusually long tenure in office and the Attorney General's quo warranto action to remove him.). Midwest's requested materials are "records" under the public records law. Wis. Stat. § 19.32(2). Over the next few days, both the NRB and DNR responded to confirm they had received Midwest's records request. Compl. Exs. 2-3. On August 13, 2021, DNR provided a set of records purporting to fulfill Midwest's request. Compl. Ex. 4. However, this set of records did not contain any of Midwest's requested text message communications, even though DNR said they had searched for text messages. Compl. Ex. 5. Midwest then sent a second records request specifically seeking text messages. Compl. Ex. 6.

This time, Midwest did receive responsive text messages, including this text that Prehn sent to another NRB member on April 26, 2021.

> I've got to decide if I'm going to stay on until the next appointee is confirmed. Evers notified me he's not going to reappoint me I guess he thinks there's some pretty big agenda items that I might not agree with LOL.

Prehn text message to Bill Smith (April 26, 2021), Compl. Ex. 7.

The date and subject matter of Prehn's April 26, 2021 text message, sent in response only to Midwest's second request, would have made it responsive to Midwest's first records request, too. So on October 19, 2021, Midwest commenced this action upon the theory, later proven correct, that this text "indicates the existence of additional text messages that may be responsive." Compl. ¶25. Midwest sought a mandamus order commanding the DNR, NRB, and Prehn to search for and produce the records responsive the Midwest's first records request. Midwest further sought the damages available under the public records law.

Prehn responded by moving to dismiss the Complaint. Dkt. 24. The gist of Prehn's argument was that he was not an "authority" subject to the public records law, or that requested records were not "records" at all because they did not relate to any "official act." Prehn Amend. Mtn. to Dismiss, dkt. 24. I rejected both of these arguments in a written order and denied Prehn's motion. Amend. Decision and Order (Mar. 29, 2022), dkt. 44.

B. The Forensic Inspection Protocol.

The parties next appeared for a status conference on July 13, 2022. Midwest said that the parties had reached a four-page written agreement about how Prehn would search for responsive records. The parties would later refer to this agreement as the "Forensic Inspection Protocol." *See* dkt. 50 (a copy of the Forensic Inspection Protocol.). No party has ever asked the Court for any involvement in this protocol and Midwest does not explain why it made this agreement. The public is not required to negotiate with the government to receive information it is entitled to receive under the public records law.

Prehn's description of how he searched for records is not consistent. Prehn's attorney, Mark Maciolek ("Mark"),[1] testified that he outsourced the initial search for text messages to a third-party business called Digital Intelligence. Mark Aff., ¶8, dkt. 72. This is generally what the Forensic Inspection Protocol required Prehn to do. *See* dkt. 50, ¶5 ("Digital Intelligence shall proceed as follows …"). According to Mark, the search for digital records went like this:

> I engaged Digital Intelligence … to perform keyword searches upon forensic copies of [Prehn's] personal iPhone and iPad devices …
>
> [Midwest] specified the keywords for Digital Intelligence to search … From the specified keyword searches, Digital Intelligence produced spreadsheets of text message conversations containing keywords, in order to preserve the context of the conversation … as well as native message files and any associated files, such as attachments.

Mark Aff. ¶¶8-9. Mark says that he took the spreadsheets Digital Intelligence had produced and then sorted the results into three categories based on whether: (1) the message, despite containing one of Midwest's keyword, was actually unresponsive to Midwest's request, or (2) the message was privileged, or (3) the message was a responsive record that would be produced. *Id.* ¶11. Mark says he delegated this sorting process to a paralegal, but that ultimately, Mark produced the responsive records to Midwest. *Id.* ¶13.

The paralegal working under Mark's supervision describes the process differently. According to the paralegal, Hana Maciolek ("Hana"), Digital Intelligence did not produce a spreadsheet of communications that contained Midwest's keywords. Instead, Hana describes how she received an unedited spreadsheet "contain[ing] 144,064 separate rows of communications, each row representing a separate text or chat communication …" Hana Aff. ¶11, dkt. 71. It is clear that this enormous spreadsheet was not the result of any of Digital Intelligence's efforts because

[1] For clarity, the Court refers to Atty. Mark Maciolek as "Mark" and paralegal Hana Maciolek as "Hana."

Hana proceeded to "use the native search function in Microsoft Excel to search for the keyword terms that I understand Midwest supplied …" *Id.* ¶¶11-12. Hana says she did this on Digital Intelligence's suggestion, *id.,* which is strange because Mark already testified that Digital Intelligence had completed this process, as required by the Forensic Inspection Protocol. But in any event, according to Hana, she searched for Midwest's keywords herself and "the vast majority of search terms Midwest supplied did not return responsive results." *Id.* ¶16.

It is unclear what Digital Intelligence actually did, who searched for communications containing Midwest's keywords, or how Mark and Hana somehow filtered those communications to produce responsive records. However, Midwest does not provide any evidence suggesting Prehn failed to search for records, nor does Midwest infer any failures based on the inconsistencies in Prehn's submitted affidavits. The Court will not step out of its neutral role to develop inferences the parties have not asked it to draw.[2] *Serv. Emps. Int'l Union. Loc. 1 v. Vos*, 2020 WI 67, ¶24, 393 Wis. 2d 38, 946 N.W.2d 35.

In any event, by October 5, 2022, Prehn said that he had supplied "all responsive messages that can reasonably be located …" and that "further searching of his data is unlikely to produce any further responsive results …" Mark Maciolek Aff. ¶13, dkt. 72. Midwest does not dispute that

[2] There are other problems in Prehn's affidavits. Hana provides a spreadsheet of Midwest's keywords. Hana Aff., dkt. 71:5. Midwest confirms this spreadsheet is accurate. Second Rob Lee Aff., dkt. 75, ¶5. However, despite the parties' agreement, the spreadsheet remains confusing.

One of the keywords is misspelled. Four other keywords are actually multiple keywords that appear in a format like: "Natural + Board" or "Open+Record." But the paralegal does not explain how "the native search function" of Microsoft Excel processes the "+" symbol. None of the terms containing a "+" symbol returned even a single responsive result. This is highly suspicious because, for example, "Board" returned 987 messages and "NRB" returned another 285, but "Natural + Board" returned 0 messages.

Thus, it appears possible that the paralegal's search function actually searched for a "+" symbol, which would rarely appear in any form of messages, instead of a combination of two keywords. That is, the parties ask the Court to believe that Prehn wrote or received 987 messages using the word "board" and 285 messages containing the acronym for the Natural Resources Board, but precisely none of those messages contained both of the words "natural" and "board."

it received these records. Second Lee Aff. ¶8, dkt. 75.

C. Summary judgment motions.

Both Prehn and Midwest now seek summary judgment. The parties have each fully submitted briefing and supporting materials and, on November 16, 2022, appeared for oral argument.

II. LEGAL STANDARD

A party moving for summary judgment must "show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Wis. Stat. § 802.08(2). In the first step of the summary judgment procedure, a court "examines the pleadings to determine whether claims have been stated and material factual issues presented." *Tews v. NHI, LLC*, 2010 WI 137, ¶41, 330 Wis. 2d 389, 793 N.W.2d 860. Then, "[i]f the moving party has made a prima facie case for summary judgment, the court must examine the affidavits and other proof of the opposing party to determine whether a genuine issue exists as to any material fact or whether reasonable conflicting inferences may be drawn from undisputed facts." *Id.*

There are two pending motions for summary judgment. Midwest seeks summary judgment against all three defendants. Prehn seeks summary judgment against Midwest. "[T]he summary judgment methodology is the same whether one party, or multiple parties, move for summary judgment." *Millen v. Thomas*, 201 Wis. 2d 675, 683 n.2, 550 N.W.2d 134 (Ct. App. 1996). Accordingly, I address the parties' motions for summary judgment in turn, beginning with Midwest.

III. MIDWEST'S MOTION

I begin with Midwest's motion and decide whether it is entitled to judgment against each of the Defendants. Midwest seeks remedies under distinct two sections of the public records law,

each with distinct elements.

A. Wis. Stat. § 19.37(3) provides that punitive damages may be awarded if an authority arbitrary delays or denies a response.

The first section under which Midwest seeks relief does not directly require a party "to prevail." Under Wis. Stat. § 19.37(3), courts may award punitive damages, the purpose of which are "to punish a wrongdoer or deter the wrongdoer and others from engaging in similar conduct in the future." WIS JI-CIVIL 1707.1; *See Wangen v. Ford Motor Co.*, 97 Wis. 2d 260, 302-303, 294 N.W.2d 437 (1980). This section provides:

> If a court finds that an authority … has arbitrarily and capriciously denied or delayed response to a request or charged excessive fees, the court may award punitive damages to the requester.

Wis. Stat. § 19.37(3). "A decision is arbitrary and capricious if it lacks a rational basis or results from an unconsidered, willful and irrational choice of conduct." *Eau Claire Press Co. v. Gordon,* 176 Wis. 2d 154, 163, 499 N.W.2d 918 (Ct. App. 1993).

An award of punitive damages requires "a threshold award of actual damages." *Capital Times Co. v. Doyle*, 2011 WI App 137, ¶7, 337 Wis. 2d 544, 807 N.W.2d 666. This is an important limitation because it means that damages cannot automatically follow from the Court's conclusion, based on the totality of the circumstances of this case, that Prehn's refusal to produce public records was clearly arbitrary. *See J. Times v. Police & Fire Com'rs Bd.,* 2015 WI 56, ¶56, 362 Wis. 2d 577, 866 N.W.2d 563 ("whether an authority is acting with reasonable diligence in a particular case will depend upon the totality of the circumstances …"). To explain why he took so long to provide these records, Prehn says that his "training regarding public records compliance did not include instructions about how to handle text message communications …" Prehn Aff. ¶26, dkt. 70. He blames unspecific DNR staff for telling him that "cell phone communications were not

something I needed to be concerned about …" and that other government officials "offered no support in searching for communications." *Id.* ¶¶27, 34. Somehow, despite the fact that Prehn admits he "exchanged text messages with other NRB members," *id.* ¶12, and "with political figures" *id.*, ¶13, and with "a wide variety of people," *id.* ¶14, and despite the fact that Prehn's digital devices had sent and received at least 144,064 text messages, Prehn says he "was unable to locate any responsive text message communications." *Id.* ¶37.

At oral argument, Prehn's attorney advanced an additional two arguments to explain Prehn's delay. First, he argued that Prehn's delay in producing records was not arbitrary because it was "up to defense … to navigate the thorny thicket" of Prehn's badly-organized records. So what? Prehn should not have stored the public's records in a thicket to begin with. Second, he pointed out that the public records law was created before computers, presumably, as a means to say that government transparency is a relic of the pre-digital age. I need not address the dubious conclusion of this argument because its premise is clearly wrong. *See* Wis. Stat. § 19.32(2) ("'Record' means any material on which … electronically generated or stored data is recorded …").

Considering all of the circumstances of this case, Prehn's explanations are barely plausible and certainly not rational. Prehn fails to explain any rational basis for what apparently was a confusing mixture of private and public records that made his search for records burdensome. Prehn cites no authority for why some unspecific DNR officials should have been responsible for his records, and he also fails to explain any rational basis for why, even assuming he lacked basic understanding of his responsibility as a government official, he refused or was unable to produce records for approximately sixteen months.

Our legislature has chosen to make the production of public records "an integral part of the

routine duties of officers and employees whose responsibility it is to provide such information." Wis. Stat. § 19.31. To these ends, the Wisconsin Supreme Court has held that a delay of only four months "defeats the purpose of the open records …" *State ex rel. Auchinleck v. Town of LaGrange,* 200 Wis. 2d 585, 595, 547 N.W. 2d 587 (1996). Similarly, the Wisconsin Attorney General instructs that "[r]equests for public records should be given high priority" and that "10 working days generally is a reasonable time for responding to a simple request for a limited number of easily identifiable records." Wisconsin Dep't of Justice, *Public Records Compliance Guide,* https://www.doj.state.wi.us/sites/default/files/office-open-government/Resources/PRL-GUIDE.pdf, last visited January 11, 2023.

So, although I conclude that Prehn's initial denial, which he followed with an egregious delay, were both arbitrary, I emphasize that the Court may not award punitive damages unless Midwest first demonstrates that it is entitled to the necessary threshold award of actual damages. *Cap. Times,* 2011 WI App 137, ¶7. Actual damages could include, for example, the mandatory $100 damages to a prevailing party under Wis. Stat. § 19.37(2). I turn to that section next.

B. Wis. Stat. § 19.37(2) provides that costs and fees may be awarded to a prevailing party.

The second section under which Midwest seeks relief allows a requester to recover attorney fees and actual costs:

> [T]he 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 under s. 19.35 (1) (a).

Wis. Stat. § 19.37(2). Under the plain statutory text, whether fees and costs must be awarded in a public records case thus turns entirely on the question of "what does it mean to 'prevail' under these statutes?" *Friends of Frame Park,* 2022 WI 57, ¶14 (Hagedorn, J., op.).

C. Midwest fails to show it is entitled to judgment as a matter of law against any of the defendants.

1. To "prevail," a party must obtain a judicially sanctioned change in the parties' legal relationship.

I turn, next, to whether Midwest is a prevailing party. In *Friends of Frame Park,* the Wisconsin Supreme Court held that a public records requester does not "prevail" and cannot recover fees and costs under Wis. Stat. § 19.37 unless it obtains "a judicially sanctioned change in the parties' legal relationship:"

> Four justices agree that to "prevail[ ] in whole or in substantial part" means the party must obtain a judicially sanctioned change in the parties' legal relationship. Accordingly, a majority of the court adopts this principle.

Id. ¶3 (maj. op.). These two sentences are the entirety of the majority decision. No majority of justices assented to any of the remaining 138 paragraphs. *See Friends of Frame Park,* 403 Wis. 2d at 3 (explaining the justices' participation).

Two non-majority opinions continued to explain why the statutory requirement that a party "prevail" requires a "judicially sanctioned change." Justice Hagedorn's lead opinion distinguished two competing theories for what it means to prevail. Under the first theory, the "causal-nexus test," or "catalyst theory," a party prevails even in the absence of a court order if it "achieves the desired result because the lawsuit brought about a voluntary change in the defendant's conduct." *Id.* ¶17 (Hagedorn, J., op.) (quoting *Buckhannon Bd. & Care Home, Inc. v. W. Va. Dep't of Health and Hum. Res.,* 532 U.S. 598, 601 (2001).). Wisconsin courts frequently applied this test in the past. *See e.g. Racine Educ. Ass'n v. Bd. of Educ. for Racine Unified Sch. Dist.,* 129 Wis. 2d 319, 385 N.W.2d 510, *overruled by Friends of Frame Park,* 2022 WI 57, ¶3 (whether a party prevails "is largely a question of causation…"). In other words, the first theory requires nothing more than "a causal nexus between the requestor bringing the action and the defendant providing the requested

records." *Friends of Frame Park*, 2022 WI 57, ¶18 (Hagedorn, J., op.). A majority of justices rejected this theory because it "do[es] not track the meaning of the words the legislature used." *Id.* ¶2 (Hagedorn, J., op.); *See id.* ¶42 (R. G. Bradley, J., concurring) (cases applying the causal nexus theory "are objectively wrong …").

The second theory for a "prevailing party" tracks the definition in *Black's Law Dictionary,* as a "party in whose favor a judgment is rendered …" *Id.* ¶20 (Hagedorn, J., op.) (citing *Buckhannon,* 532 U.S. at 603-605). Applying this theory, the lead opinion recognized that "the idea that a party could prevail in a lawsuit in the absence of court action was unknown in Wisconsin when this statute was adopted…" *Id.* ¶23 (Hagedorn, J., op.). The concurring opinion agreed for similar reasons. *See id.* ¶100 (R. G. Bradley, J., concurring). Thus, a majority of justices agreed that a litigant does not prevail under Wis. Stat. § 19.37(2) without first obtaining a "judicially sanctioned change in the parties' legal relationship…" *Id.* ¶3.

2. Midwest fails to show it has already prevailed.

I next apply the test set forth in *Friends of Frame Park* to the present case. As best I can tell, Midwest has two distinct arguments for why it has prevailed: first, because the Court has already issued several procedural orders and, second, because Midwest can show there is no genuine dispute that Prehn has not produced the requested records, so the Court should order Prehn to do so now.

Midwest's first argument is that it prevailed *even before anyone answered its Complaint*. It points to four Court orders as having changed the parties' legal relationship:

> Here, the Court has issued several orders and decrees that have changed the relationship between the parties … an order to shorten time for an answer, two scheduling orders, and an order denying Defendant Prehn's Motion to Dismiss.

Midwest Br., dkt. 59:23. This is an unhelpful reduction of what it means to prevail. "Our respect for ordinary language requires that a plaintiff receive at least some relief on the merits of his claim before he can be said to prevail." *Buckhannon,* 532 U.S. at 603 (internal alterations and quotations omitted, emphasis added); *See Friends of Frame Park*, 2022 WI 57, ¶24 (Hagedorn, J., op.) ("*Buckhannon's* interpretation comports with Wisconsin law."). Midwest has not received relief on the merits of its claim, so it fails to show it has already prevailed. And, because Midwest's remaining argument for summary judgment addresses only Prehn's individual failures, Midwest fails to show that it is entitled to judgment as a matter of law against either the DNR or the NRB. Accordingly, I deny Midwest's motion for summary judgment against the DNR and the NRB, and I proceed to determine only whether Midwest is entitled to judgment against Prehn.

3. Midwest fails to show that there is no genuine dispute that it should prevail now.

Midwest next argues that even if the Court has not yet sanctioned any change in the parties' relationship, it should do so now. It says "[b]ased on the record developed in this case, responsive records are likely still being withheld …" Midwest Reply Br., dkt. 74:2. Midwest's burden, on a motion for summary judgment, was to support this proposition with evidence. Wis. Stat. § 802.08(3). Midwest does not meet this burden.

Instead, Midwest vaguely complains that Prehn, after producing responsive records, "did not state which terms that release covered" or that Prehn did not discuss "the status of the search overall…" Second Lee Aff. ¶8, dkt. 75. These facts are not material to a claim for mandamus relief because the public records law does not require an authority to explain the status of his search. Midwest further criticizes Prehn for vaguely complaining about the difficulty of searching for records. I agree with Midwest that the public records law cannot reward an authority who, after

arbitrarily making their own records production difficult, then complains about the difficulty of producing those records. But here is what the evidence in this case shows:

- Prehn testified that he "agreed to have Digital Intelligence receive and search the extraction of [his] iPhone and iPad." Prehn Aff. ¶50, dkt. 70.

- Prehn further testified that he "reviewed the results of those searches, with the assistance of Attorney Maciolek and his paralegal." *Id.*

- The testimony of Atty. Maciolek and his paralegal, although at times confusing, tends to support this testimony. Mark Maciolek Aff. ¶13, dkt. 72 ("I believe Dr. Prehn has produced all responsive messages …"); Hana Maciolek Aff. ¶19, dkt. 71 ("I am confident my efforts discovered all of the responsive communications …").

This testimony appears to "set forth specific facts showing that there is a genuine issue for trial." Wis. Stat. § 802.08(3). On this basis, the Court could deny Midwest's motion for summary judgment.

However, Midwest continues to argue that even if Prehn has produced every requested record, several court of appeals decisions have held that a court may "reach the merits of a record denial or delay after 'voluntary' production." Midwest Resp. Br., dkt. 69:7.[3] Only one of the cases Midwest cites, *Portage Daily Register v. Columbia Cnty.*, 2008 WI App 30, 308 Wis. 2d 357, 746 N.W.2d 525, addressed the issue of mootness when an authority provides records after litigation began.[4] In that case, a newspaper "received a copy of the sought-after report from [a different authority]" after commencing a mandamus action. *Id.* ¶7. The court of appeals refused to dismiss the case as moot for two reasons: first, without any elaboration, because the court thought it should

[3] For organizational purposes, the Court considers arguments Midwest makes in its response to Prehn's summary judgment briefing.

[4] The first two cases Midwest cites do not involve voluntary production of records. In the first case, *ECO, Inc. v. City of Elkhorn*, 2002 WI App 302, ¶5, 259 Wis. 2d 276, 655 N.W.2d 510, the requester received a confirmation letter, then "never received any further response." And in the second case, *Meinecke v. Thyes*, 2021 WI App 58, ¶2, 2021 WI App 58, 99 Wis. 2d 1, 963 N.W.2d 816, the requester "received many, but not all, of the documents she requested."

determine a remedy under Wis. Stat. § 19.37(2)(a). This is not persuasive here because *Friends of Frame Park* has now made clear that a court should not determine a remedy unless it finds "a judicially sanctioned change in the parties' relationship." 2022 WI 57, ¶3. The second reason the court of appeals did not moot the case in *Portage Daily Register* was because of several appellate exceptions to mootness.[5] Those exceptions have little application to the circuit court.

Finally, Midwest argues that allowing attorneys fees even after the voluntary production of records "was expressly endorsed by a majority of the justices in [*Friends of Frame Park.*]" Midwest Resp. Br., dkt. 69:7. Midwest appears to read the three dissenting justices plus Justice Hagedorn's opinion to agree on what happens after voluntary production of records. The Court does not share this reading of *Friends of Frame Park*—what Justice Hagedorn actually says is that he would "reserve this question for another day." *Friends of Frame Park*, 2022 WI 57, ¶25 (Hagedorn, J., op.).

In sum, Midwest fails to meet its burden to show there is no genuine dispute as to any material fact and that it is entitled to judgment as a matter of law. Its motion for summary judgment must be denied.

IV. PREHN'S MOTION

A. Prehn shows there is no dispute that the case is moot.

Prehn's motion for summary judgment is relatively simple. Prehn says that the case is moot

[5] Appellate courts make exceptions to the mootness doctrine for several reasons:

> [W]here the issue is of great public importance; the identical issue arises frequently and a decision is needed to guide trial courts; the issue will likely rise again and should be resolved; the issue is likely of repetition yet evades review; or it involves a statute's constitutionality

Portage Daily Register, 2008 WI App 30, ¶8 (citing *State v. Leitner*, 2002 WI 77, ¶14, 253 Wis. 2d 449, 646 N.W.2d 341).

because he has already produced the records Midwest seeks. "An issue is moot when its resolution will have no practical effect on the underlying controversy." *PRN Assocs., LLC v. DOA,* 2009 WI 53, ¶25, 317 Wis. 2d 656, 766 N.W.2d 559 (citing *State ex rel. Riesch v. Schwarz*, 2005 WI 11, ¶11, 278 Wis. 2d 24, 692 N.W.2d 219).

To prove that there is no genuine dispute as to any issue material to mootness, Prehn submits the three affidavits discussed above. Prehn Aff., dkt. 70; Mark Aff., dkt. 72; Hana Aff., dkt. 71. The unrebutted testimony in those affidavits is that Prehn searched for and produced the public records Midwest asked him to produce. Accordingly, although he arbitrarily withheld public records for approximately sixteen months, Prehn has mooted this action by providing those records before any judicially sanctioned change in the parties' relationship. And because there is no genuine dispute as to whether Midwest is entitled to any remedy under *Friends of Frame Park,* 2022 WI 57, ¶3, Prehn's motion must be granted.

ORDER

For the reasons stated, the Court denies Midwest Environmental Advocates' motion for summary judgment and grants Frederick Prehn's motion for summary judgment. The Complaint is dismissed.

This is a final order for purpose of appeal.