STATE OF WISCONSIN CIRCUIT COURT DANE COUNTY

MIDWEST ENVIRONMENTAL ADVOCATES, INC.

Plaintiff,

Case No. 2021-CV-2526

v.

FREDERICK PREHN, WISCONSIN NATURAL RESOURCES BOARD, and WISCONSIN DEPARTMENT OF NATURAL RESOURCES

Defendants.

AMENDED MOTION TO DISMISS OF DEFENDANT FREDERICK PREHN

Dr. Frederick Prehn, by his attorney Mark Maciolek, Murphy Desmond S.C., hereby submits his amended motion to dismiss for failure to state a claim upon which relief may be granted, amending his motion to dismiss previously filed as R. 18, pursuant to Wis. Stat. § 802.09(1), permitting amendment of the pleadings as a matter of right within six months of the filing of the summons and complaint. Since October 19, 2021 is the date of the filing of the complaint, this amendment is timely.

AMENDED NOTICE OF MOTION AND AMENDED MOTION TO DISMISS

PLEASE TAKE NOTICE, that at a time and place to be determined by the Court, Defendant, Frederick Prehn, by his attorneys, Murphy Desmond S.C., will move the Court pursuant to Wis. Stat. §§ 802.06(2)(a)(6) and 784.07 to dismiss this action against him for failure to state a claim upon which relief can be granted.

The grounds for this motion are:

First, Dr. Prehn is not an "authority" under Wis. Stat. § 19.32(1). The MEA has not alleged a personal cause of action against Dr. Prehn. The entire Complaint against Dr. Prehn is premised upon the MEA's mistaken assertion that Dr. Prehn is an "authority."

Second, the communications requested by the MEA do not constitute a "record" under Wisconsin's Public Records law.

A. Because Dr. Prehn is not an "authority" under Wisconsin law, none of the remedies the MEA seeks against him are available to MEA.

To be an "authority," a person's position in Wisconsin's government must be one that is described in § 19.32(1). Anyone, such as an elected official, or any entity that § 19.32(1) defines as an "authority" owes important duties to the people of Wisconsin to properly curate and care for public records. Most government workers are not "authorities," even if they are paid for their work, unlike Dr. Prehn, who is a volunteer member of the Wisconsin Natural Resources Board, the NRB.

The full text of § 19.32(1) reads:

> (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; a governmental or quasi-governmental corporation except for the Bradley center sports and entertainment corporation; a special purpose district; 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.

The complaint alleges Dr. Prehn is "As a Member of the NRB, Dr. Prehn is a state officer and is thus an "authority" under the Public Records Law . . ." Complaint, ¶ 2. That is not so.

Of the multiple categories of "authorities" § 19.32(1) defines, "elective official" is the only real, living person. The rest of the list consists of non-human entities. While anyone elected to office is an "authority," Dr. Prehn was not elected. He was appointed. See Wis. Stat. 15.34(2)(a). The Legislature deliberately chose to designate elective officials as authorities, making elected officials individually all "authorities." By contrast, the entities that comprise the rest of the statute's categories are largely run and staffed by appointed officials, like Dr. Prehn. The "authority" in these categories is the entity. In this case, that means the NRB is the "authority," not Dr. Prehn.

If every "state officer" were an "authority," the number of "authorities" in Wisconsin government would be unwieldy. Compliance with public record laws is already a complex obligation, and a multitude of "authorities" would exacerbate compliance complexities. There would also be no need to define "elective officials" as "authorities," were it the case that every "state officer" is an "authority." The plain language of § 19.32(1) fails to support the MEA's cause of action.

If Dr. Prehn is not an "authority," then he should not be a party to this lawsuit. MEA offers no other theory of liability than Dr. Prehn's alleged status as an "authority." MEA offers no argument or citation as to how Dr. Prehn is an "authority." MEA's requested relief relies on Dr. Prehn being an "authority." Public records law applies to "authorities." *Wis. Prof'l Police Ass'n v. Wis. Ctys. Ass'n,* 2014 WI App 106, ¶ 4, 357 Wis. 2d 687, 690, 855 N.W.2d 715, 717. Because Dr. Prehn is not an "authority," the Complaint fails to state a claim upon which relief may be granted, Wis. Stat. § 802.06(2)(a)(6).

B. The communications the MEA sought in its request do not request a "record" under Wisconsin law.

Wisconsin's public records law is broad and intended to promote disclosure of information to the public, but MEA is not entitled to copies of every communication that Dr. Prehn has engaged in about the NRB. Rather, MEA is entitled to communications that meet the definition of "record." The definition of "record" as the Supreme Court of Wisconsin explained, is found in § 19.32(2), as well as the Legislature's statement of intent found at § 19.31, prior construction of public records law, and prior executive interpretations of the term "record." *Schill v. Wis. Rapids Sch. Dist.,* 2010 WI 86, ¶ 21, 327 Wis. 2d 572, 587, 786 N.W.2d 177, 185. The legislative statement of intent serves to "qualify access to information" held by government officials. *State v. Beaver Dam Area Dev. Corp.,* 2008 WI 90, ¶125, 312 Wis. 2d 84, 135, 752 N.W.2d 295, 320. Accordingly, not every communication sent or received by a public official is a "record." To be a "record," the communication must have something to do

with "the affairs of government," "the official acts of officers and employees," or "the conduct of governmental business." *Schill* at ¶16.

MEA sought:

> All 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, 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 on the Board. R. 4, ¶ 7.

The MEA's request should have been denied. By its terms, the request does not seek information that is connected to any "official acts" of Dr. Prehn, nor the "conduct of governmental business." His decision to hold over, i.e. not resign from the NRB is not an official act, and it is not connected to conducting NRB business. The request does not seek any information about NRB policy, or any attempt to influence policy-making on the NRB. See *John K. Maciver Inst. for Pub. Policy, Inc. v. Erpenbach,* 2014 WI App 49, ¶19, 354 Wis. 2d 61, 75, 848 N.W.2d 862, 869. Therefore, the request does not seek a "record."

To be sure, the decision to remain on the NRB has some connection to the NRB. There does not appear to be any authority delimitating the difference between a personal communication about a public office that is not a "record," and a communication about a public office that is sufficiently connected to the official acts and governmental business to be a "record." This court should hold that the personal decision to remain on the NRB is akin to the private decision of an elected official to seek reelection or not. Were it the case that elected incumbents had to release their private communications about their campaigns and their decisions to run for office as public "records," serial public records requests seeking information about election campaigns would be the norm. Such personal decision-making is

not tied to the official function of a government office, or government business to be deemed a "record."

To the extent that MEA is claiming that by remaining on the NRB, Dr. Prehn has behaved unlawfully, and MEA's request for information seeks information about official misconduct, that question will soon be resolved. The MEA offers no theory of official misconduct on Dr. Prehn's part, except remaining on the NRB. The Supreme Court of Wisconsin will decide if Dr. Prehn lawfully holds over on the NRB in 2021AP1673. Briefing is nearly complete in 2021AP1673, with the State's reply brief due January 20, 2022. Oral argument is likely to be scheduled for March 10, 2022. This Court should await the Supreme Court's decision in 2021AP1673, as whether Dr. Prehn lawfully holds over on the NRB is important to this Court's decisions in this case.

Moving to dismiss the Complaint because he is not an "authority" and the communication the MEA seeks are not a "record," does not mean that Dr. Prehn refuses to disclose public records. Dr. Prehn values Wisconsin's Public Records Law, and is committed to fully disclosing any properly requested materials that meet the legal definition of "record," and fully complying with Wisconsin's Public Records Law. He does not need to be a party to this lawsuit to cooperate with the NRB and its legal custodian of public records to fulfill his commitment to Wisconsin's laws, which also protect his private communications; the vast majority of his personal text messages are, naturally, private messages with family and friends.

RELIEF REQUESTED

Dr. Prehn requests the court dismiss the complaint against him, and award him any further relief that the court deems just and equitable.

Dated this 19th day of January, 2021.

MURPHY DESMOND S.C.
Attorneys for Defendants

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