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GREGG WALKER, Publisher | RICHARD MOORE, Columnist

Another week, another disastrous attack on open records

Last week, in a decision that was too clever by half, the Wisconsin Supreme Court issued yet another egregious ruling that took aim at the heart and soul of the state's open records law.

As we report today, the court, in *Friends of Frame Park, U.A., v city of Waukesha*, overturned decades of precedent in open records case law, ruling that a denied records requester must prevail in a court ruling to win any attorneys fees and court costs.

In the past, as we report today, state courts awarded attorneys fees and costs not only when a requester prevailed in court but also in cases where the records were released after a lawsuit was filed but prior to a court order, if the requester could show that the filing of the lawsuit prompted the release of the records.

That ability to recoup costs before a court decision is critical because government officials often deny citizens access to records they know should be released and then bet that those citizens won't take them to court. But, if and when they are ever actually sued for the records, officials release them to avoid legal fees and court costs.

Now they can do so with impunity. As a leading open government attorney in Wisconsin, Tom Kamenick, the president of the Wisconsin Transparency Project, said, the decision will give custodians perverse incentives to delay and withhold records.

Even more maddening is that conservatives, along with the imbecilic justice Brian Hagedorn, drove the decision. That is to say, the three dissenting liberals were right on the call. Especially disappointing is the concurring opinion by justice Rebecca Bradley, who prides herself on being a textualist, and who claimed that she was just reading the plain text of the open records statute, when she obviously was creating legal word salad.

So here's what the text says: "[t]he court shall award reasonable attorney fees, damages … and other actual costs to the requestor if the requester prevails in whole or in substantial part in any action filed … relating to access to a record or part of a record under [the open records law.]"

To the majority, that clearly means that a "prevailing party" in an open records lawsuit—one who actually wins in court—is entitled to fees and costs, and, what's more, only a prevailing party is so entitled. Therefore, if a government releases records prior to a court decision because they know the gig is up, no fees and costs will be awarded, in the court's view.

Again, that just invites records custodians to stonewall records requests, knowing there are no consequences for doing so.

To back up the "clear meaning" of the statute, the majority consults Black's Law Dictionary, which does define a prevailing party as someone who wins in court, and also cites a federal Supreme Court decision in a similar case known as *Buckhannon* — whether one could win courts costs and fees without a court determination.

In that case, the federal court ruled the same way as our Supreme Court, but Congress stepped in and amended the law to restore the ability to collect those costs and fees if the plaintiff prevailed prior to a court order.

OK, so a "prevailing party" is one who wins in court. The thing is, that singular point does not provide us with a whole lot of "clear meaning" when it comes to the open records statutory language.

For one thing, as the dissenting opinion written by justice Jill Karofsky points out, the term "prevailing party" appears nowhere in that statute:

"An interpretation that equates the two phrases is flawed because a 'term of art' is 'a word or phrase having a specific, precise meaning in a given specialty, apart from its general meaning in ordinary contexts.' The fact that a phrase is a term of art does not mean each word within that phrase, when used separately and independently, carries the same special meaning. Specifically, a specialized meaning for 'prevailing party' does not impose that meaning on the independent use of either 'party' or 'prevail.'"

Indeed, in her concurring opinion, Bradley even cites the late justice Antonin Scalia in an analysis in which he acknowledges that someone can prevail in an action without being a prevailing party in a lawsuit. Because the statute talks about "prevails" and not a "prevailing party," why would Bradley assume the latter to be the case?

Well, because she hangs her hat on *Buckhannon* and on Black's Law Dictionary. But there are objections to that hat rack.

The first comes from a *Buckhannon* dissent by justice Ruth Bader Ginsburg, who pointed out that Black's Law Dictionary did not mean its definition of 'prevailing party' to be exclusive:

"One can entirely agree with Black's Law Dictionary that a party in whose favor a judgment is rendered prevails, and at the same time resist, as most Courts of Appeals have, any implication that only such a party may prevail. In prior cases, we have not treated Black's Law Dictionary as preclusively definitive; instead, we have accorded statutory terms, including legal 'term[s] of art,' a contextual reading."

In that dissent, too, Ginsburg pointed out that the *Buckhannon* decision contradicted an earlier U.S. Supreme Court decision, *Maher v. Gagne*, which held that a consent decree could qualify a plaintiff as "prevailing." She quoted the case:

"We also find no merit in petitioner's suggestion that respondent was not the 'prevailing party' within the meaning of § 1988. The fact that respondent prevailed through a settlement, rather than through litigation, does not weaken her claim to fees."

To be sure, Ginsburg's opinion was a dissent, but Bradley is disingenuous in not exploring the legal terrain behind the dissent and the decision, especially — and this is most important — after Congress stepped in and overturned *Buckhannon*, declaring that the majority had misread congressional intent and essentially ratifying Bader's dissent.

Simply put, Bradley and the majority were not playing honestly: At the very least, the statute is not clear on the point, no matter how much word salad the majority makes, and, when that happens, the court must look to intent, insofar as they can find it.

And in that search a compelling case emerges that the legislature deliberately did not use the term 'prevailing party' or 'party' in describing how court costs and fees could be awarded. Again, the statute reads: "[t]he court shall award reasonable attorney fees, damages … and other actual costs to the **requestor** if the requester **prevails** in whole or in substantial part **in any action filed** … relating to access to a record or part of a record under [the open records law.]"

Wisconsin statutes are littered with the use of both "prevailing party" and "party" in connection with litigants in court cases. But here the reference is to a requester, not to a party or prevailing party. Presumably, if the legislature had intended to tie the recoverability of attorneys' fees and costs to a litigant, it would have used the precise term, as it has done throughout the statutes, instead of the less formal term "requester." As Karofsky explains:

"The use of 'requester' rather than 'party' is instructive as 'party' connotes litigation while 'requester' places the phrase in the broader context of the records request."

And because the phrase 'the requester prevails' lacks a specialized or technical meaning, Karofsky writes, the common, ordinary, and accepted meaning of those words control "to obtain the relief sought in an action." Under the legal definition, a requester 'prevails' if the requester files a mandamus action seeking a record's release and then receives that record because it obtained the relief sought.

We believe it's important to also look at the language that states that a requester can prevail "in any action filed." It simply does not state "in any action decided."

If anything is clear, it's that the legislature recognized the trap that would be laid if a requester had to prevail in court, and so it wrote language to prevent it. This is especially so if one considers the open records statutory purpose statement that the law "shall be construed in every instance with a presumption of complete public access, consistent with the conduct of governmental business. The denial of public access generally is contrary to the public interest, and only in an exceptional case may access be denied."

The open records law passed in 1982 and enacted in 1983 was the end of a long legislative process that had started after Watergate, as a public still engaged by the passions of the 60s sought ever more accountability from public officials. Formal attempts to codify a much stronger open records law began in 1977. There were strident and vociferous forces both for and against such a law, and there was considerable give and take between the two sides to reach a compromise that could be enacted.

For example, the law's balancing test originally would have applied to 17 different types of records, and lawmakers offered up 55 amendments to the bill, of which 18 were adopted.

The point is, what the law would cover — both procedurally and substantively — was scrutinized carefully and repeatedly over a period of five years. It is simply inconceivable that the legislature did not use the precise terms it meant to use, and the terms they chose departed from the overwhelming use elsewhere in the statutes of the term of "party" and "prevailing party" to describe litigants in adjudicated court decisions and judgments.

This is not the first decision in which the conservatives on the state's high court have taken dead aim at government transparency. In fact, it is becoming a signature of theirs. While they have made great decisions in other constitutional and policy arenas, their failure to see the importance of open government is an extraordinary and damning failure.

In one case, the conservative majority ruled that police did not have to turn over police training tapes and that the public had no right to know just what techniques police and prosecutors consider appropriate to use. A democratic and civil society certainly demands such transparency, for without transparency anything goes. A society blind to the techniques of law enforcement can see only the specter of a police state before it.

In a second case, the high court decided that then Milwaukee County sheriff David Clarke did not have to turn over records pertaining to immigration hold requests, specifically federal forms asking local jails to hold some prisoners for an additional 48 hours when they were suspected of immigration violations. Critics of the decision argued that those prisoners were in state and not federal custody — thus subject to the state's open records laws — and they argued that the public has a right to know who was being detained, whether they were properly or improperly being detained, and whether they were being ultimately released.

In the end, the conservative court surrendered state prisoners to the rules of federal jurisdiction, odd for a conservative court and one that prompted critics to call into question whether the court had political motives.

Such was the case in another decision in which the conservative majority allowed officials to withhold the names of those who had voted midway through a three-week union election after the union requested them because, according to the court, union officials might have used those records to pressure those who had not yet voted.

In a 5-2 decision, the conservatives on the high court effectively rewrote the open records statute because it allowed the motivations, or potential motivations, of requesters to be considered in an open records request, contrary to the plain language of the law, namely, that an open record is open to anyone and for any reason.

In this decision, the majority simply decided to strike the statutory provision that "no request ... may be refused because the person making the request is unwilling ... to state the purpose of the request."

That's called extreme judicial activism, and it is hard to square with conservatism.

Either that, or they inserted into the law a new exception governing union elections. But both of those modifications are legislative responsibilities, not the role of the court. It's hard not to believe the decision wasn't guided by a partisan dislike of unions rather than by a clear reading of the law.

Here again, though, the prevailing view of the importance of open government laws comes into play. Obviously, as Thomas Jefferson warned us, the courts are benched with people, humans, and that means they are no more or less political than anybody else. Jefferson, writing in 1820, put it this way: "Our judges are as honest as other men and not more so. They have with others the same passions for party, for power, and the privilege of their corps."

By the same token, we don't believe our state justices are any more partisan than anyone else. That is, they are honest people who try hard to balance constitutional principle with personal political impulse. They likely try harder the more important the issue at hand is.

That they consider open government a lower echelon principle likely increases the temptation to partisanship because they don't view any fundamental principles to be at stake. But they are badly mistaken.

These are indeed sad and dark days in Wisconsin.