

# Gary Grass

ATTORNEY AT LAW

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## PRESS RELEASE

**Release Date: May 6, 2020**

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### **Judge issues temporary order to prohibit destruction of records in Arena.**

(DODGEVILLE, WI) May 6 — Iowa County Circuit Court Judge Margaret Koehler issued a temporary order today to stop the destruction of public records in the form of text messages, following the filing of a civil complaint against the village of Arena.

Former Village Clerk Taylor Scott filed the complaint against the village and its records custodians one day after the Arena Village Board voted 5-1 to declare that text messages henceforth were “not subject to maintenance as a public record.” In her order today, Judge Koehler found that, to the contrary, state law “appears to provide that text messages are records.”

The same ordinance also changed the formula for calculating fees for the custodian to locate public records. The ordinance states that “‘actual cost’ means the total cost of personnel, including wages, fringe benefits and all other benefits and overhead related to the search of records.” According to the Complaint, this goes beyond what state law allows the village to charge.

Gary Grass, the attorney representing Scott, said while the lawsuit challenges both aspects of the ordinance, only the portion concerning text messages was covered by the Court’s order. “There will be plenty of time to litigate the whole ordinance in due course,” said Grass, “but we needed to act quickly on the text messages, because without the order, they could be destroyed, and we would have no way to get them back.”

Scott said that during his time working for the village in 2019, it was common practice for elected officials to communicate about government business via text message, and then delete the text messages.

The court issued the order after a short hearing at which only Scott was represented. This process is reserved for matters in which court action must be taken quickly to be effective. The order lasts only until the court can conduct further proceedings with both sides present.

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FILED  
05-06-2020  
Circuit Court, Iowa Co  
Lia N. Leahy, Clerk  
2020CV000050

STATE OF WISCONSIN

CIRCUIT COURT

IOWA COUNTY

TAYLOR SCOTT,  
333 Christina Street,  
Arena, Wisconsin, 53503

**SUMMONS**

Plaintiff,

-vs-

Case No. \_\_\_\_\_

VILLAGE OF ARENA, DANEAN  
NAEGER, in her capacity as the  
Clerk/Treasurer of the Village of Arena,  
TRUSTEES, BUILDING INSPECTOR,  
FIRE CHIEF, VILLAGE ATTORNEY and  
OTHER OFFICIALS of the Village of Arena,  
345 West Street, Arena, Wisconsin, 53503

Classification Codes:  
30701 Declaratory Judgment  
30704 Restraining Order  
30953 Writ of Prohibition

Defendants.

THE STATE OF WISCONSIN,  
To each person named above as a Defendant:

You are hereby notified that the Plaintiffs named above have filed a lawsuit or other legal action against you. The complaint, which is attached, states the nature and basis of the legal action.

Within twenty (20) days of receiving this summons, you must respond with a written answer, as that term is used in chapter 802 of the Wisconsin Statutes, to the complaint. The court may reject or disregard an answer that does not follow the requirements of the statutes. The answer must be sent or delivered to the court, whose address is 901 North 9<sup>th</sup> Street, Room 104. Milwaukee, WI 53233-1425, and to Gary Grass, Plaintiff's attorney, whose address is 2457 W. Juneau Ave., Milwaukee, WI 53233. You may have an attorney help or represent you.

If you do not provide a proper answer within twenty (20) days, the court may grant judgment against you for the award of money or other legal action requested in the complaint, and you may lose your right to object to anything that is or may be incorrect in the complaint. A judgment may be enforced as provided by law. A judgment awarding money may become

a lien against any real estate you own now or in the future, and may also be enforced by garnishment or seizure of property.

Dated this 6<sup>th</sup> day of May, 2020,

s/Gary Grass

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GARY GRASS,  
Attorney for Plaintiff

GARY GRASS  
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Milwaukee, WI 53233  
(414) 455-8087  
pholidote@gmail.com

STATE OF WISCONSIN

CIRCUIT COURT

IOWA COUNTY

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TAYLOR SCOTT,  
333 Christina Street,  
Arena, Wisconsin, 53503

Plaintiff,

-vs-

Case No. \_\_\_\_\_

VILLAGE OF ARENA, DANEAN  
NAEGER, in her capacity as the  
Clerk/Treasurer of the Village of Arena,  
TRUSTEES, BUILDING INSPECTOR,  
FIRE CHIEF, VILLAGE ATTORNEY and  
OTHER OFFICIALS of the Village of Arena,  
345 West Street, Arena, Wisconsin, 53503

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Defendants.

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### COMPLAINT

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Now comes the Plaintiff, Taylor Scott, by and through his counsel Gary Grass, and as and for his complaint against the Defendants, states as follows:

1. This is an action for declaratory judgment, injunctive relief, and prohibitory writ pursuant to sections 806.04, 813.02, and chapter 783, to prevent a village ordinance from going into effect that would violate public records laws, and to prevent village officials from destroying public records pursuant to that ordinance.

2. Plaintiff is a resident of the State of Wisconsin.

3. The Village of Arena is a village in Iowa County, Wisconsin, subject to state statutes 19.21 and 19.31-39, requiring village officers to maintain and provide public access to records of official village business.

4. All other defendants are village officials named in their official capacity as “authorities” or “custodians” responsible for public records under sections 19.32(1) and 19.33.

5. On May 5, 2020, at roughly 8 p.m., the Village Board voted 5-1 to enact “Ordinance 2020-0506,” which purports to change Chapter 2.70 of the Arena Village Code (“Public Records”) in the following ways, *inter alia*:

- a) Inserting a provision into section 2.70.010 (“Definitions”) stating that “‘actual cost’ means the total cost of personnel including wages, fringe benefits, and all other overhead related to the time spent in search of records.” At the board meeting at which the provision passed, it was explained that this total “is how we get to the fee schedule” for record requests.
- b) Inserting a provision providing that “Text messaging is not subject to maintenance as a public record.”

6. Section 19.35(3)(c) of the state statutes permits a public record location fee to include only the “actual, *necessary* and *direct* cost of location” (emphasis added) and only if the cost exceeds \$50.00 (fifty dollars). It does not allow inclusion of indirect costs such as “overhead” or unnecessary costs such as perquisites.

7. Village officers have in the recent past used text messaging as a means of discussing pending government business, then deleted the texts. On information and belief, they continue to follow this practice.

8. Texts are records pursuant to state statute 19.32(2). The state public records board requires electronic communications among elected officials related to government business generally to be preserved for at least six months past the official’s term in office.

9. Unless enjoined from doing so, the Village may imminently promulgate the new ordinance pursuant to state statute 61.32 and Village Code section 2.10.160, and proceed to destroy texts regarding their official public business.

10. Promulgation of the ordinance at issue would also chill requests for public records.

11. Equitable relief is appropriate because Plaintiff has no adequate remedy at law. In particular, statute 19.21 provides that suits over destruction of village records may

only be pled in the name of the village, which in this case has through its board declared its support for destroying records that are supposed to be protected by the statute.

WHEREFORE, Plaintiff requests that this honorable court grant the following relief:

- A. An immediate, *ex parte* order to the Village of Arena and all its records custodians temporarily prohibiting the destruction of text messages concerning village business unless otherwise permitted by state law until this matter can be fully heard;
- B. An immediate, *ex parte* order to the Village and its clerk, temporarily prohibiting promulgation of Arena Village Ordinance 2020-0506 until this matter can be fully heard;
- C. Declaratory judgment that the portions of Arena Village Ordinance 2020-0506 herein complained of are null and void, insofar as they conflict with state statute;
- D. An order or writ, permanently enjoining or prohibiting the Village and its records custodians from giving practical effect to the portions of Arena Village Ordinance 2020-0506 herein complained of, and requiring that the Village adhere instead to state public records law, ss. 19.21-39;
- E. Costs and reasonable attorney fees to Plaintiff; and
- F. Such other relief as deemed appropriate by the court.

Respectfully submitted this 6<sup>th</sup> day of May, 2020,

s/Gary Grass

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GARY GRASS,  
Attorney for Plaintiff

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Milwaukee, WI 53233  
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**FILED**  
**05-06-2020**  
**Circuit Court, Iowa Co**  
**Lia N. Leahy, Clerk**  
**2020CV000050**

**DATE SIGNED: May 6, 2020**

Electronically signed by Hon. Margaret M. Koehler  
Circuit Court Judge

STATE OF WISCONSIN

CIRCUIT COURT

IOWA COUNTY

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TAYLOR SCOTT,

Plaintiff,

-vs-

Case No.20-cv-50

VILLAGE OF ARENA, et al.,

Hon. Margaret Koehler

Defendants.

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### ORDER FOR TEMPORARY INJUNCTION

This matter having come before the court for an *ex parte* hearing on May 6, 2020, and the Court having considered the Complaint and the representations of the Plaintiff, the court makes the following findings:

On May 5, 2020, the Village of Arena passed "Ordinance 2020-0506," which purports to change Chapter 2.70 of the Arena Village Code by asserting that "Text messaging is not subject to maintenance as a public record."

Section 19.32(2) of the Wisconsin Statutes appears to provide that text messages are records.

Venue is proper because Arena is located in Iowa County.

An order is necessary to preserve the status quo. Plaintiff represents that village officials have conducted village business by text in the past and deleted those texts. Without an order nothing would prevent this from happening again.

Plaintiff is likely to suffer irreparable harm if an injunction is not issued, and has no other adequate remedy at law. Plaintiff has informed the court that he has pending records requests seeking text messages from village officials. If texts he seeks are destroyed, he will not be able to recover them by legal action.

Based on these findings and all other findings made on the record, the court issues the following Order pursuant to section 813.02(1)(a), that:

**Defendants are hereby enjoined from deleting any text messages** related to Village of Arena business under the purported force of Arena Ordinance 2020-0506 having declared text messages being not subject to maintenance as a public record.



This order shall continue in force pending further proceedings before this court.

Teste:

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Hon. Margaret Koehler

ORDINANCE NO. 2020-0506

**AN ORDINANCE TO AMEND SECTION 2.70 OF THE MUNICIPAL CODE OF  
THE VILLAGE OF ARENA, IOWA COUNTY, WISCONSIN,  
RELATING TO PUBLIC RECORDS**

THE VILLAGE BOARD OF THE VILLAGE OF ARENA, IOWA COUNTY, WISCONSIN, DO ORDAIN AS FOLLOWS:

Section 1: Section 2.70 of the Municipal Code of the Village of Arena shall be and hereby is amended to read as follows:

**2.70.010 Definitions.**

“Actual cost” means the total cost of personnel including wages, fringe benefits and all other benefits and overhead related to the time spent in search of records.

“Authority” means any of the following village entities having custody of a village record: an office, elected official, agency, board, commission, committee, department or public body corporate and politic created by constitution, law, ordinance, rule or order; or a formally constituted subunit of the foregoing.

“Custodian” means that officer, department head, division head, or employee of the village designated under AMC [2.70.030](#) or otherwise responsible by law to keep and preserve any village records or file, deposit or keep such records in his or her office, or is lawfully in possession or entitled to possession of such public records and who is required by this section to respond to requests for access to such records.

“Record” means any material on which written, drawn, printed, spoken, visual or electromagnetic information is recorded or preserved, regardless of physical form or characteristics, which has been created or is being kept by an authority. “Record” includes, but is not limited to, handwritten, typed or printed pages, maps, charts, photographs, films, recordings, tapes (including computer tapes), and computer printouts. “Record” does not include drafts, notes, preliminary computations and like materials prepared for the originator’s personal use or prepared by the originator in the name of a person for whom the originator is working; materials which are purely the personal property of the custodian and have no relation to his or her office; materials to which access is limited by copyright, patent or bequest; and published materials in the possession of an authority other than a public library which are available for sale, or which are available for inspection at a public library. **The data in an e-mail may constitute a public record and is subject to maintenance as a public record. Text Messaging is not subject to maintenance as a public record**

“Village” shall mean the village and its administrative subunits. [Prior code § 2-9-1].

**2.70.020 Duty to maintain records.**

(a) Except as provided under AMC 2.70.070, each officer and employee of the village shall safely keep and preserve all records received from his or her predecessor or other persons and required by law to be filed, deposited or kept in his or her office or which are in the lawful possession or control of the officer or employee or his or her deputies, or to the possession or control of which he or she or they may be lawfully entitled as such officers or employees.

(b) Upon the expiration of an officer's term of office or an employee's term of employment, or whenever the office or position of employment becomes vacant, each such officer or employee shall deliver to his or her successor all records then in his or her custody and the successor shall receipt therefor to the officer or employee, who shall file said receipt with the village clerk. If a vacancy occurs before a successor is selected or qualifies, such records shall be delivered to and receipted for by the clerk, on behalf of the successor, to be delivered to such successor upon the latter's receipt. [Prior code § 2-9-2].

**2.70.030 Legal custodian(s).**

(a) Each elected official is the legal custodian of his or her records and the records of his or her office, but the official may designate an employee of his or her staff to act as the legal custodian.

(b) Unless provided in subsection (c) of this section, the clerk or the clerk's designee shall act as legal custodian for the village board and for any committees, commissions, boards, or other authorities created by ordinance or resolution of the village board. The following offices or authorities shall have as a legal custodian of records the individual so named:

<b>Authority</b>	<b>Designated Legal Custodian</b>
General records (including board records and financial records)	Clerk
Building inspector's office	Building inspector
Fire department	Fire chief
Police department	Clerk-Police Chief

<b>Authority</b>	<b>Designated Legal Custodian</b>
Village attorney's office	Village attorney

(c) For every authority not specified in subsections (a) and (b) of this section, the authority's chief administrative officer is the legal custodian for the authority, but the officer may designate an employee of his or her staff to act as the legal custodian.

(d) Each legal custodian shall name a person to act as legal custodian in his or her absence or the absence of his or her designee, and each legal custodian shall send notice of the designated deputy to the clerk.

(e) The legal custodian shall have full legal power to render decisions and to carry out the duties of an authority under Chapter 19, Subchapter 11, Wis. Stats., and this chapter. The designation of a legal custodian does not affect the powers and duties of an authority under this section. [Prior code § 2-9-3].

**2.70.040 Public access to records.**

(a) Except as provided in AMC 2.70.060, any person has a right to inspect a record and to make or receive a copy of any record as provided in Section 19.35(1), Wis. Stats.

(b) Records will be available for inspection and copying during all regular office hours.

(c) If regular office hours are not maintained at the location where records are kept, the records will be available for inspection and copying upon at least 48 hours' advance notice of intent to inspect or copy.

(d) A requester shall be permitted to use facilities comparable to those available to village employees to inspect, copy or abstract a record.

(e) The legal custodian may require supervision during inspection or may impose other reasonable restrictions on the manner of access to an original record if the record is irreplaceable or easily damaged. No original public records of the village shall be removed from the possession of the legal custodian.

(f) A requester shall be charged a fee to defray the cost of locating and copying records ~~as follows~~ in an amount established by resolution. Charges for records are based on the following:

- (1) ~~The cost of photocopying shall be \$0.50 per page, excluding accident reports. Said cost has been calculated not to exceed the actual, necessary and direct cost of reproduction. The cost of~~

~~vehicle accident reports shall be \$1.00 per page.~~ E-mailing Records: When practicable, records may be e-mailed to the requestor. In order to ensure the integrity of Village records, any e-mailed document shall be converted to a secure format prior to sending the document to anyone outside of the Village government. There shall not be any reproduction charge for e-mailing records, however, such records may still be subject to payment of a location fee as established. E-mails are often sent to multiple recipients. A requestor will be provided with one copy of such an e-mail and all responses to that e-mail. Unless a requestor specifically requests otherwise, they will not be provided with multiple copies of such an e-mail showing receipt by each of the designated e-mail recipients.

(2) If the form of a written record does not permit copying, the actual and necessary cost of photographing and photographic processing shall be charged.

(3) The actual full cost of providing a copy of other records not in printed form on paper, such as films, computer printouts and audio or video-tapes, shall be charged.

(4) If mailing or shipping is necessary, the actual cost thereof shall also be charged.

(5) There shall be no charge for locating a record unless the actual cost therefor exceeds \$50.00, in which case the actual cost shall be determined by the legal custodian and billed to the requester. The village will determine the cost of locating a record by using the hourly rate **established by resolution** of ~~\$20.00 per hour~~ for employees involved in attempting to locate the record.

(6) The legal custodian shall estimate the cost of all applicable fees and may require a cash deposit adequate to assure payment, if such estimate exceeds \$5.00.

(7) Elected and appointed officials of the village shall not be required to pay for public records they may reasonably require for the proper performance of their official duties.

(8) The legal custodian may provide copies of a record without charge or at a reduced charge where he or she determines that waiver or reduction of the fee is in the public interest.

(g) Pursuant to Section [19.34](#), Wis. Stats., and the guidelines therein listed, each authority shall adopt, prominently display and make available for inspection and copying at its offices, for the guidance of the public, a notice containing a description of its organization and the established times and places at which, the legal custodian from whom, and the methods whereby the public may obtain information and access to records in its custody, make requests for records, or obtain copies of records, and the costs thereof. Each authority shall also prominently display at its offices, for the guidance of the public, a copy of

AMC [2.70.040](#) through [2.70.060](#). This subsection does not apply to members of the village board. [Prior code § 2-9-4].

(h) Before any custodian may deny access to any records or portion thereof, the custodian must consult with the Village Attorney. Such consultation shall occur as soon as practicable after the custodian has assembled and reviewed the requested record. In any response to requested, the custodian shall include a statement that he or she has consulted the Village Attorney regarding the denial of access to any records.

Adopted by a vote of 5 for and 1 against at a board meeting of the Village Board held this 5<sup>th</sup> day of May 2020.

**VILLAGE OF ARENA**

  
\_\_\_\_\_  
Kate Reimann, Village President

ATTEST:

  
\_\_\_\_\_  
DaNean Naeger, Village Clerk/Treasurer

Date adopted: 5-5-2020  
Date recorded: 5-6-2020  
Date published: 5-6-2020  
Effective date: 5-7-2020

