Your Right to Know / Christa Westerberg

Fee recovery is key to transparency

Many states, including Wisconsin, have public records laws. But that doesn’t mean requesters always get the records they seek, or even that the laws are followed.

What provisions in a state’s laws are most associated with compliance?

The answer may surprise you. It’s not the strength of a law’s penalty provisions or whether a state has an ombudsman office to mediate records disputes (Wisconsin does not).

Instead, a 2019 [study](https://www.documentcloud.org/documents/6182080-Sticks-and-Compliance-Cuillier.html#document/p1) by University of Arizona journalism professor David Cullier found a significant correlation between compliance and laws that “mandate judges to impose attorney fees” to requesters deemed to have been wrongly denied access to records.

That’s why a recent Wisconsin court of appeals [decision](https://www.wicourts.gov/ca/opinion/DisplayDocument.pdf?content=pdf&seqNo=384895), in a case known as Meinecke v. Thyes, is good news. It held that if a court orders the release of records—even if it’s only some of the records—the requester has “prevailed” in substantial part and is thus entitled to attorney fees. While Wisconsin’s open records law has a mandatory fee-shifting provision, this case for the first time established that getting an order for records was sufficient to trigger it.

At issue was a village trustee’s request for five categories of records from the village she served. A circuit court found the village had unlawfully withheld some of the records and ordered them released, but then denied the trustee’s request for attorney fees because the trustee did not obtain access to all the records she sought and that village officials did not act with “wanton disregard” for the law, among other considerations.

That ruling was appealed, with the Wisconsin Freedom of Information Council, Wisconsin Newspaper Association and Wisconsin Broadcasters Association filing a “friend of the court” [brief](https://acefiling.wicourts.gov/document/eFiled/2020AP000338/272757) in favor of the trustee. (My law firm authored the brief.)

The appeals court ruled that the trustee was entitled to fee recovery, citing the open records law’s statement that “all persons are entitled to the greatest possible information regarding the affairs of government” and its direction that the law be liberally construed in favor of public access.

Laws that allow requesters to recover attorneys fees have always been important to ensuring access to information. For example, they allow people who could not otherwise afford an attorney to hire one on a contingent-fee basis to bring an open records case.

The Wisconsin Supreme Court is also considering a different attorney fees [case](https://wscca.wicourts.gov/appealHistory.xsl?caseNo=2019AP000096&cacheId=F275DEA558D9A484CA7EE5F1D6255D06&recordCount=1&offset=0&linkOnlyToForm=false&sortDirection=DESC) this term. It will decide whether requesters can get attorney fees when an agency voluntarily produces records after a suit is filed, if the initial denial was unlawful.

The Wisconsin Freedom of Information Council joined with four other organizations in filing a “friend-of-the-court” [brief](https://acefiling.wicourts.gov/document/eFiled/2019AP000096/369241) urging a “yes” answer to this question.

A stronger fee recovery standard means a government that is less willing to test the limits of its ability to withhold records. As Cullier pointed out, “Certainly, agencies might not worry about a $1,000 fine or other slap on the wrist, but it appears they pay attention to paying tens if not hundreds of thousands of dollars to a successful plaintiff’s attorney, not to mention the bad publicity that would create for the agency.”

The court of appeals decision that getting a court order directing the release of records should entitle a requester to fees is a welcome clarification to Wisconsin’s records law.

*Your Right to Know is a monthly column distributed by the* [*Wisconsin Freedom of Information Council*](http://www.wisfoic.org/) *(wisfoic.org), a group dedicated to open government. Christa Westerberg, an attorney at Pines Bach law firm in Madison, is the group’s vice president.*

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