BY THE COURT:

DATE SIGNED: July 15, 2022

Electronically signed by Judge Valerie Bailey-Rihn
Circuit Court Judge

STATE OF WISCONSIN DANE COUNTY CIRCUIT COURT
BRANCH 3

AMERICAN OVERSIGHT,

Plaintiff,

vs. Case No. 21-CV-2521

ROBIN VOS,

Defendant.

DECISION AND ORDER

INTRODUCTION

In this public records case, Wisconsin State Assembly Speaker Robin Vos ("Vos") did not respond to four records requests for six months. After the Court ordered Vos to respond, he finally did so. It took him one day. On another occasion, Vos responded to a request for records "from November 3, 2020, through the date the search is conducted" by producing 1,400 pages of unwanted records from August 2020, but none from the requested period. American Oversight now seeks summary judgment on the undisputed evidence that Vos has not only untimely delayed responses to records requests, but that his responses have also failed to include countless records, either willfully or because of neglectful office-wide practices which might have caused the loss of

records.

The Wisconsin public records law does more than protect the public's rights to the "greatest possible information regarding the affairs of government." Wis. Stat. § 19.31. The law also requires our government respond to records requests "as soon as practicable and without delay…" Wis. Stat. § 19.35(4)(a). Courts "must give effect to the legislature's choice." *State ex rel. Kaul v. Prehn,* 2022 WI 50, ¶26, __ Wis. 2d __, __ N.W.2d __ (quoted source omitted). In doing so, I conclude that Vos violated the public records statutes in three ways: First, Vos provides no reason and no evidence to explain why a response delayed for six months was "as soon as practicable." Second, Vos failed to respond to the request for records "from November 3, 2020" by instead producing records from an unasked-for time period. Third, based on the undisputed evidence of Vos' ineffectual records practices, I can draw no reasonable inference except that Vos did not search for records in the first instance.

Accordingly, American Oversight is entitled to judgment that Vos has violated the public records law. However, American Oversight fails to demonstrate "arbitrary and capricious" conduct deserving punitive damages. American Oversight's motion for summary judgment is therefore granted in part and denied in part. Within twenty days, Vos shall search for and produce to American Oversight records responsive to each of the requests attached to the Complaint. Additionally, Vos shall pay statutory fees plus American Oversight's costs and reasonable attorney fees, in an amount to be determined.

I. BACKGROUND

A. American Oversight's Records Requests.

This is one of several cases American Oversight has filed seeking enforcement of public records requests sent to Vos. This case involves only those records requests sent between May 1,

2021, and July 15, 2021, plus some "follow-up requests," in each of which American Oversight requested records related to the assembly's investigation into the 2020 election.

American Oversight requested four categories of information from Vos. Cmplt. ¶¶29-35, 42-44; *See* Cmplt. Table 1, dkt. 2:13. Broadly speaking, these were:

1. A May 28, 2021, request for "Organizing Materials," in which American Oversight sought, among other records:

    a. Copies of "any contract … or other written agreement between the Wisconsin State Assembly (or members thereof) and parties investigating the November 2020 election …" and;

    b. Copies of "any formal or informal guidance, directives, memoranda, or other policy and procedure documents issued to entities investigating the November 2020 election…" and;

    c. Copies of resumes, bids, proposals, cost estimates, invoices, and the like, also relating to the investigation. Cmplt. Exh. 1, dkt. 2:17-21.

2. A May 28, 2021, request for "Investigation Communications," in which American Oversight sought, among other records: "All electronic communications … sent or received by [Vos] … regarding the legislature's investigation of the 2020 election." Cmplt. Exh. 2, dkt. 2:22-26.

3. A May 28, 2021, request for "External Communications," sent or received after November 3, 2020, in which American Oversight sought: "All records reflecting communications … between (A) Robin Vos … and (B) any of the [twenty-eight individuals listed below, individually described by name and email address.]" Cmplt. Exh. 3, dkt. 2:27-32 (emphasis omitted).

4. A July 15, 2021, request for additional communications, in which American Oversight sought, among other records: communications sent or received by Vos related to the Arizona state government, former United States President Donald Trump, and any "[c]ommunications regarding the Assembly's decision not to pursue a large-scale investigation or review of elections in Wisconsin." Cmplt. Exh. 6, dkt. 2:43-48.

American Oversight followed up its "Organizing Materials" and "Investigation Communications" requests with three additional requests in each matter. Cmplt. Exhs. 4-5, 7-10. These six "follow-up requests" were sent between July 15 and September 15, 2021. *Id.*

B. Vos' Partial Responses.

Vos had little personal involvement in responding to these requests, which for the most part were handled by Vos' custodian, Steven Fawcett ("Fawcett"). This fact is perhaps best illustrated by Vos' deposition response that American Oversight should "ask Mr. Fawcett," repeated six times and, still referring to Fawcett, to "ask Steve" repeated another sixteen times. Westerberg Aff. Exh. A, Vos Depo., dkt. 138. In fact, Vos testified to "have no idea what the process is that's utilized [to preserve responsive records]." *Id*. dkt. 138:78. I therefore recognize at the outset the distinction between what the evidence shows Vos did or did not do, and what the evidence shows Vos' custodian, Fawcett, did or did not do. This distinction is useful for understanding the factual background of this case, but it is not useful for understanding Vos' ultimate responsibilities under the public records law: "The designation of a legal custodian does not affect the powers and duties of an authority under this subchapter." Wis. Stat. § 19.33(7). Accordingly, this decision generally refers to Vos even for the actions of his custodian.

Vos responded to each request, but sometimes delayed his response, at times for months and at times until after ordered to do so. American Oversight supplies no direct evidence that Vos withheld records from these responses. Instead, American Oversight produces circumstantial evidence that Vos' practices resulted in withholding, either willfully or as the practically certain result of an ineffectual system.

For example, Vos sometimes waited weeks before telling his staff that he had received a records request. Westerberg Aff. Exh. G, dkt. 88 (Fawcett's August 26, 2021 email informing Vos' office about a request received thirteen days prior); Colombo Aff. ¶¶6-8 (other emails showing delays of approximately one week.). To explain why these delays demonstrate dysfunction, one

need only turn to the Wisconsin Attorney General's interpretation of the public records law.[1] The 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." Wis. 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 July 13, 2022. Here, Vos sometimes did not even inform staff of the existence of a request for ten working days. As a result, Vos admits that responsive records could have been deleted after Vos received a request, but before Vos told his employees about that request. Westerberg Aff. Exh. A, Vos Dep., dkt. 138:77-79. Vos' later production of deleted-then-recovered emails suggests that this did occur. *See* AO Br., dkt. 136:17 (table summarizing recovered emails.).

As another example of Vos' ineffectual system, any search for records was performed by staff members on an individual basis, some of whom bore responsibility for searching Vos' own files. Westerberg Aff. Exh. B, Fawcett Dep. I, dkt. 139:36. This is concerning because Vos' custodian, Fawcett, did not know whether those staff were trained on the public records law. *Id.* at 38. Some staff were given instruction in the form of a "brief presentation … on sort of the general—really the DOJ guide to open records and our Assembly Policy Manual and just generally how to conduct open records in an office." *Id.* at 37. The delegation of responsibility to untrained

[1] Reference to the Attorney General is useful in this context because:

> "The legislature has expressly charged the state attorney general with interpreting the open meetings and public records statutes … Thus the interpretation advanced by the attorney general is of particular importance here."

State v. Beaver Dam Area Dev. Corp., 2008 WI 90, ¶37, 312 Wis. 2d 84, 752 N.W.2d 295; *See also Schill v. Wisconsin Rapids Sch. Dist.*, 2010 WI 86, ¶¶106-116, 327 Wis. 2d 572, 786 N.W.2d 177 ("The opinions and writings of the attorney general have special significance in interpreting the Public Records Law…")

and unsupervised individuals meant that Vos could not say whether any individual had complied with these requests. Westerberg Aff. Exh. B, Fawcett Dep. I, dkt. 137:69. Predictably, when an individual employee left the office, confusion about the former employee's records reigned. Westerberg Feb. 2, 2022, Aff. Exh. A, Answer to Interrogatory No. 5, dkt. 67:2-5 (Vos failed to search for records from recently-departed employee Joe Handrick.). From this and similar evidence, American Oversight infers that Vos must have failed to produce responsive records.

Putting aside, for now, the methodology of his search, Vos responded to American Oversight's May 28, 2021 requests on July 23 and 28, 2021. Colombo Aff. ¶¶9-10. By then, American Oversight had already sent its July 15, 2021 request for additional communications, as well as its first set of follow-up requests. Vos responded to these on September 7-8, 2021. Colombo Aff. ¶13. Vos did not respond to the remaining four follow-up requests, sent August 13 and September 15, 2021 until March 11, 2022, when the Court ordered him to do so. Order (Mar. 11, 2022), dkt. 103:1-2.

C. The Court Order Commanding Vos to Respond.

On March 11, 2022, one day after oral arguments on American Oversight's motion to compel discovery, I issued a written order commanding Vos to produce responsive records which Vos had deleted, or "produce an expert to explain why recovery is impossible…" Order (Mar. 11, 2022), dkt. 103:1.[2] I further ordered Vos to "[r]espond to [American Oversight's] four outstanding

[2] In his response to the motion for summary judgment, Vos frames the issue of deleted documents strictly as "not germane to this mandamus action" and "largely irrelevant." Vos Resp. Br., dkt. 177:5. It is true that legislators may delete records in the absence of a records request. Wis. Stat. § 16.61(2)(b)1.

However, this misses the point of this case because American Oversight does not seek lawfully-deleted records. As the Court stated at the conclusion of oral arguments prior to its ruling: "Either these records exist or they don't. As I said all along, if they were deleted or destroyed after an open records request was made, I think that's relevant and I think the Court needs to hear that." *See* Tr. of Mar. 10, 2022 Hr'g, dkt. 105:18-20.

records requests that are at issue in this case, Exhibits 7, 8, 9, and 10 to the Complaint." *Id.* at 2. That same day, March 11, 2022, Vos responded to American Oversight's requests. Colombo Aff. ¶15 and Exhs. H-J (emails containing Vos' responses.).

On April 29, 2022, American Oversight brought this motion for summary judgment. Dkt. 135-173. Vos opposes the motion. Dkt. 177. Having been fully briefed, and in consideration of the evidence and arguments of record, I now issue this written decision.

II. STANDARD OF REVIEW

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). "A factual issue is genuine 'if the evidence is such that a reasonable jury could return a verdict for the nonmoving party.'" *Baxter v. DNR,* 165 Wis. 2d 298, 312, 477 N.W.2d 658 (Ct. App. 1991) (quoting *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 247-48 (1986)).

To evaluate whether summary judgment is appropriate, a court first "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.*

III. DISCUSSION

A. The Pleadings State a Claim.

The first step of the summary judgment procedure is to examine the pleadings to determine whether claims have been stated. *Tews,* 2010 WI 137, ¶41. The Complaint alleges Vos "withheld

records…" Cmplt. ¶58. It therefore states a claim for violations of Wis. Stat. § 19.35(4), [3] which requires an authority to, "as soon as practicable and without delay, either fill the request or notify the requester [why the request will not be filled]…" Vos denies having withheld records. Answer ¶¶58-60.

B. American Oversight Makes a Prima Facie Case That Robin Vos Delayed Responding to Requests, But Not That Robin Vos Withheld Records.

The second step of the summary judgment procedure is to determine whether the movant makes a prima facie case that it is entitled to judgment as a matter of law. *Tews,* 2010 WI 137, ¶41. American Oversight makes three, distinct prima facie cases of a violation of the public records law: (1) Vos failed to respond to a request as soon as practicable and without delay, (2) Vos failed to provide any response to the May 28, 2021, request for "external communications," attached as Exhibit 3 to the Complaint ("the External Communications Request") and (3) Vos failed, by use of ineffectual records practices, to produce responsive records to any of the requests.

1. American Oversight makes a prima facie case that Vos did not respond as soon as practicable and without delay.

American Oversight's first prima facie case is that Vos did not respond to records requests "as soon as practicable and without delay." As evidence, American Oversight supplies the affidavit of its attorney, Sarah Colombo, who avers to have not received any response to four records requests for six months. Colombo Aff. ¶¶9-15. This evidence supports a prima facie case that Vos did not respond as soon as was practicable.

2. American Oversight makes a prima facie case that Vos did not respond

[3] Wis. Stat. § 19.35(4)(a) reads, in full:

> Each authority, upon request for any record, shall, as soon as practicable and without delay, either fill the request or notify the requester of the authority's determination to deny the request in whole or in part and the reasons therefor.

to the External Communications Request.

American Oversight's second prima facie case is that Vos has never responded to the External Communications Request, in which American Oversight sought records from the time period beginning November 3, 2020, through the date of the search. Cmplt. Ex. 3, dkt. 2:27. As evidence, American Oversight's attorney Sarah Colombo avers:

> I have reviewed each of the 1,414 pages provided at the link [provided in response to the request[4]]. In reviewing the production, I was unable to locate any document reflecting correspondence dated on or after November 3, 2020. Instead, the produced records consist of correspondence, court filings, and other documents from, at the latest, August 2020

Colombo Aff. ¶11, dkt. 145:3. This evidence supports a prima facie case that Vos did not respond to the External Communications Request.

3. American Oversight makes a prima facie case that Vos failed to search for and/or produce responsive records.

American Oversight's third prima facie case is that Vos could not have responded to any of its requests because he did not search for responsive records in the first place. As evidence, American Oversight supplies the deposition of Vos (Westerberg Aff. Exh. A, dkt. 138), the deposition of Vos' records custodian Steve Fawcett (Exhs. B-C, dkt. 139-140), the deposition of Vos' policy analyst Jacob Wolf (Exh. D, dkt. 141), interrogatory answers (Exhs. E-G, dkt. 142-144), and other evidence American Oversight characterizes as showing that Vos' ineffectual records practices resulted in the withholding or deletion of records. This evidence supports a prima facie case that Vos failed to search for and/or produce responsive records.

C. Vos Fails to Show Any Genuine Issue of Material Fact.

[4] Vos' response is contained in the Colombo Aff. Exh. G, dkt. 152. Exhibit G contains a July, 2021 email chain between the assembly and American Oversight in which the assembly provided a link it described as "the records provided by Speaker Vos' office in regards to your request – WI-REP-21-0752 [the request for communications beginning Nov. 3, 2020]."

The third step of summary judgment procedure is to examine the proof of the non-moving party to determine whether there are any genuine issues of material fact. *Tews,* 2010 WI 137, ¶41. I turn to the proof Vos supplies in response to each of American Oversight's three prima facie cases.

1. Vos does not dispute that he failed to respond as soon as practicable and without delay.

Vos produces no evidence explaining why a six-month delay in responding to a public records request satisfies the requirement that an authority respond "as soon as practicable and without delay…" Wis. Stat. § 19.35(4)(a). Vos also does not explain any competing, reasonable inference for the timeliness of his response. *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."). Further, Vos' response one day after the Court's oral ruling and the same day of the written order commanding him to respond strongly suggests that responding to these particular responses did not involve extraordinary impracticality. Accordingly, the Court must conclude that there are no genuine issues of material fact that Vos delayed a response to American Oversight, who is entitled to judgment as a matter of law.

2. Vos does not dispute that he failed to respond to the External Communications Request.

Vos produces no evidence explaining why the production of 1,400 pages of records from an unwanted time period is responsive to a request for records from a discrete, clearly-defined, and entirely different time period. Vos also does not explain any competing, reasonable inference for why these unwanted records were responsive to the External Communications Request. Vos instead responds by labeling this "a new issue," one that it is "entirely off-base," but he does not

explain the meaning of those labels. Vos Resp. Br., dkt. 177:17. If Vos' argument here is that American Oversight has not sought these records until the present motion, then Vos contradicts this point by conceding that the Complaint alleges Vos "improperly withheld records responsive to American Oversight's requests attached hereto as [the External Communications Request]." Vos Resp. Br., dkt. 177:17.

3. Vos does not dispute that he failed to search for and/or produce responsive records.

Vos produces no evidence disputing whether his office practices resulted in a failure to produce records. The sole evidence Vos does produce in this matter is the affidavit of Jeff Ylvisaker ("Ylvisaker"), the director of the Wisconsin Legislative Technology Services Bureau. Ylvisaker does not aver to have any personal knowledge of what records Vos produced, or how, when, or who produced them. Accordingly, Ylvisaker offers no testimony relevant to this summary judgment motion: courts do not ask "whether irrelevant facts are in dispute but rather whether material facts are in dispute." *Hilkert v. Zimmer*, 90 Wis. 2d 340, 342, 280 N.W.2d 116 (1979).

Vos also does not explain any competing, reasonable inference for whether his ineffectual office practices resulted in withheld records. Instead, he argues that an inference that records were not produced "is not relevant to this action and the facts do not support such a finding much less an inference." Vos Resp. Br., dkt. 177:4. Vos does not explain which facts, in particular, he means. He further asserts that "inferences do not carry a burden on summary judgment." Vos Resp. Br., dkt. 177:5. Both of these assertions go unsupported by any citation to authority,[5] and I reject the novel proposition that summary judgment may not be sustained by logical inferences. It is well-

[5] For his second assertion, that "inferences do not carry a burden on summary judgment," Vos does cite *Burbank Grease Servs., LLC v. Sokolowski*, 2006 WI 103, ¶40, 294 Wis. 2d 274, 717 N.W.2d 781, although nothing in this case suggests that summary judgment may not be granted upon an inference.

settled that "[c]ircumstantial evidence is not necessarily better or worse than direct evidence. Either type of evidence can prove a fact." WIS JI-CIVIL 230 (collecting cases). Although it is true that "[o]n a motion for summary judgment, the court is required to draw all reasonable inferences in favor of the non-moving party," it is not true that an unreasonable inference, or the absence of any logical inference, would also defeat summary judgment. *See e.g. Strasser v. Transtech Mobile Fleet Serv., Inc.,* 2000 WI 87, ¶56, 236 Wis. 2d 435, 613 N.W.2d 142. In other words, "summary judgment should not be granted if reasonable, but differing, inferences can be drawn from the undisputed facts." *Tews,* 2010 WI 138, ¶42 (quoted source omitted).

In this case, Vos supplies no evidence and no reasonable, but differing, inferences. Vos actually refuses to do so—referring to evidence of the evidence of his ineffectual office practices, he states without elaboration that because "these 'facts' are largely irrelevant, [Vos] will not respond to them in detail." Vos Resp. Br., dkt. 177:6. Litigants frequently do not choose to forego responding to a motion for summary judgment because under Wisconsin's rules of civil procedure, "the party opposing summary judgment … must set forth, by affidavit or other statutory means, specific facts showing that a genuine issue of fact exists." *Bauer v. Murphy,* 191 Wis. 2d 517, 527 n. 6, 530 N.W.2d 1 (Ct. App. 1995) (citing *Grams v. Boss,* 97 Wis. 2d 332, 339, 294 N.W.2d 473 (1980)). Further, while courts are not bound to accept the inferences either party draws from undisputed evidence, courts also "do not step out of our neutral role to develop or construct arguments for parties; it is up to them to make their case." *Serv. Emps. Int'l Union. Loc. 1 v. Vos,* 2020 WI 67, ¶24, 393 Wis. 2d 38, 946 N.W.2d 35.

In sum, Wis. Stat. § 19.35(1)(a) provides that "any requestor has a right to inspect any record." The only reasonable inference to draw from these undisputed facts, and the only inference presented by either party in this case, is that Vos denied American Oversight that right by never

properly searching for requested records. It is conceivable that a different jurisdiction might limit such a right by foreclosing inquiry into the adequacy of a search for records, that is, to accept an authority at its word that responsive records have in fact been produced, as Vos urges this Court to do. Our legislature has chosen a different policy, one which declares that the public records law "shall be construed in every instance with a presumption of complete public access, consistent with the conduct of government business." Wis. Stat. § 19.31. This "is one of the strongest declarations of policy to be found in the Wisconsin statutes." *Zellner v. Cedarburg Sch. Dist.*, 2007 WI 53, ¶49, 300 Wis. 2d 390, 731 N.W.2d 240. Courts must give effect to the legislature's choices. *State ex rel. Kaul v. Prehn*, 2022 WI 50, ¶¶25, 26, __ Wis. 2d __, __ N.W.2d __ (citing *State ex rel. Kalal v. Cir. Ct. for Dane Cnty.*, 2004 WI 58, ¶44, 271 Wis. 2d 633, 681 N.W.2d 110; *State v. Yakich*, 2022 WI 8, ¶24, 400 Wis. 2d 549, 970 N.W.2d 12)). The effect of Wis. Stat. §§ 19.31 and 19.35 is that a requestor's rights will not be protected when, after an unreasonable delay, an authority directs its unknown, unqualified, or unsupervised agents to search for records. Because that is what the evidence in this case shows, and because Vos does not dispute that evidence, summary judgment must be granted.

4. Vos' remaining arguments.

Although Vos does not submit any evidence from which the Court could find a genuine issue of material fact, Vos advances two additional arguments for why summary judgment should not be granted. The Court discusses, and rejects, these arguments in turn.

Vos first relies on Ylvisaker's testimony that "it is not possible to determine the date an email was deleted." Ylvisaker Aff. ¶10, dkt. 178. In other words:

> An email dated July 15, 2021 that was produced to [American Oversight] in discovery from the deleted archives could have been deleted on July 16, 2021 or July 17, 2021 or in December 2021 or in January 2022 or in March 2022.

Id. ¶11.

If this case was about record retention policies, Ylvisaker's testimony and knowledge of deleted records would be important because absent a records request, legislators need not preserve records. Wis. Stat. § 16.61(2)(b)1 ("'Public records' does not include: … Records and correspondence of any member of the legislature."). Unable to prove the date on which Vos deleted records, American Oversight would also be unable to distinguish lawful deletion from a violation of unlawful deletion. *See* Wis. Stat. § 19.35(5) (prohibiting destruction "after the receipt of a request…"). But this case is not about record retention policies and American Oversight does not seek an order commanding Vos to retain records. *See State ex rel. Gehl v. Connors,* 2007 WI App 238, ¶13, 306 Wis. 2d 247, 742 N.W.2d 530 ("failure to keep sought-after records may not be attacked under the public records."). This case is about whether Vos produced records he created or kept at the time the request was made, regardless of how that set of records came to be, and whether such records are still available in paper or other format.

Vos next argues that American Oversight "asks the Court to declare that Speaker Vos violated the Public Record Law, a remedy not available under Wis. Stat. § 19.37." Vos Resp. Br., dkt. 177:8. For this reason, Vos concludes that "[t]here is simply no basis" for American Oversight's motion, but confusingly, Vos also agrees that a court "may compel a response to a request that has not been replied to." *Id.* dkt. 177:10-11. The basis for this motion is that Vos "withheld records responsive to American Oversight's Requests." American Oversight Br., dkt. 136:22. The motion does not seek any "declaration," except insofar as a declaration is the ordinary predicate to relief in the American judicial system. *Marbury v. Madison,* 5 U.S. (1 Cranch) 137, 177 (1803) ("It is emphatically the province and duty of the judicial department to say what the

law is. Those who apply the rule to particular cases, must of necessity expound and interpret that rule.")

Finally, Vos argues that the action is moot because the Court's March 11, 2022, order already granted American Oversight the relief it seeks. Vos Resp. Br., dkt. 177:13. "An issue is moot when its resolution will have no practical effect on the underlying controversy." *PRN Associates LLC v. DOA,* 2009 WI 53, ¶25, 317 Wis. 2d 656, 766 N.W.2d 559. This is a motion for summary judgment, in which one party attempts to show that it is entitled to judgment as a matter of law. Wis. Stat. § 802.08. One of the judgments American Oversight seeks is fees, costs, and other remedies under Wis. Stat. § 19.37. Another is an order commanding Vos to respond to records requests. Resolution of these issues would have a practical effect, and the motion is therefore not moot.

In conclusion, after careful application of the summary judgment methodology, American Oversight has shown there are no genuine issues of material fact that Vos violated the public records law in at least three ways. First, Vos unreasonably delayed responding to a request for six months. Second, Vos failed to respond to the request for records "beginning November 3, 2020" by producing records from an earlier, unasked for time period. Third, Vos did not search for records responsive to any of American Oversight's requests.

D. Remedies.

1. American Oversight has prevailed because it has obtained a judicially sanctioned change in the parties' legal relationship.

Having concluded that Vos violated the public records law, I next turn to the remedy for those violations. The first remedy for a violation of the public records law is for reasonable attorney fees, costs, and damages of not less than $100:

> [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). These fees are mandatory. *Meinecke v. Thyes,* 2021 WI App 58, ¶10, 399 Wis. 2d 1, 963 N.W.2d 816. And although "mandatory fees may impose a 'severe' penalty … the legislature has decided that this is worth the benefit of openness." *Id.* ¶15 (quoted source omitted).

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, U.A. v. City of Waukesha,* 2022 WI 57, ¶14, __Wis. 2d__, __N.W.2d__. In *Frame Park,* the Wisconsin Supreme Court answered this question by distinguishing two competing theories for what it means to prevail. Under the first theory, what the court called 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 (quoting *Buckhannon Bd. & Care Home, Inc. v. W. Va. Dep't of Health and Hum. Res.,* 532 U.S. 598, 601 (2001)). 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." *Id. Frame Park* rejected this theory, holding that it ultimately "do[es] not track the meaning of the words the legislature used." *Id.* ¶2. Under the second theory, *Frame Park* posited 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. Thus, *Frame Park* holds 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.* ¶24.[6]

[6] Neither *Buckhannon* nor *Frame Park* offer a comprehensive definition of "judicially sanctioned change," but a court

In this case, American Oversight obtained a judicially sanctioned change in the parties' legal relationship when it obtained the March 11, 2022, court order commanding Vos to, among other things, "[r]espond to [American Oversight's] four outstanding open records requests that are at issue in this case…" Order (Mar. 11, 2022), dkt. 103. This order, too, is a judicially sanctioned change in the parties' relationship. Accordingly, the Court "shall award" remedies under Wis. Stat. § 19.37(2).

2. Punitive damages.

The second remedy for a violation of the public records law is punitive damages:

> If a court finds that an authority or legal custodian under s. 19.33 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). To be entitled to punitive damages, "[p]laintiffs must allege the underlying cause of action, request and prove actual damages, and request punitive damages based on the conduct that caused the actual damages." *Cap. Times Co. v. Doyle*, 2011 WI App 137, ¶7, 337 Wis. 2d 544, 807 N.W.2d 666 (quotations and citations omitted).

American Oversight argues that Vos' records responses are "so inadequate to the task of retaining and producing records as required by law that it was practically designed to fail." AO Br., dkt. 136:40. That is, they assert that Vos' policies "make[] it 'substantially certain' that records would be deleted, as it was in *Scheffler*." *Id.* (citing *Scheffler v. Cnty. of Dunn*, No. 08-cv-622-bbc,

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order is clearly one type. *Buckhannon*, 532 U.S. at 604 ("enforceable judgments on the merits … create the material alteration of the legal relationship of the parties necessary to permit an award of attorney's fees.") (quotations and citations omitted).

Federal courts have since frequently interpreted the phrase. One clear expression is that a judicially sanctioned change in the relationship is one "directing the parties to act or else face the court's enforcement." *Aaron-Brush v. Att'y Gen. State of Alabama*, 678 Fed. Appx. 792, 796 (11th Cir. 2017).

2009 WL 3241876 (W.D. Wis. Sep. 29, 2009) (unpub.)).

Scheffler was a public records case about a camera system at the Dunn County Jail which automatically erased old footage after "20 to 40 days," unless the footage could be first be copied to a DVD. *Scheffler,* 2009 WL 3241876, *1. Twenty-six days after he was imprisoned therein, Scheffler returned to the jail to make an oral request for footage from the jail's camera. *Id.* The jailor, despite believing that footage was saved only for thirty days, did nothing for over a month. By the time he finally searched for Scheffler's requested records, now about two months since it had been recorded, the footage had been destroyed. *Id.* *3. Dunn County admitted that this conduct violated the public records law but sought summary judgment on the limited issue of whether the conduct was arbitrary and capricious. Judge Crabb denied the request:

> Instead of searching for and saving the footage, [the jailor] made the irrational choice to wait past the 30–day deadline so that he could speak with [the jail administrator] about the request. A reasonable jury could find that [the jailor's] choice was not an inadvertent act, such as trying to record the footage to a DVD and mistakenly pushing the erase button instead of the record button. …
>
> Therefore, a reasonable jury could find that defendant's destruction of the footage was arbitrary and capricious, entitling plaintiff to punitive damages.

Id. *6.

This case is unlike *Scheffler* because American Oversight does even not demonstrate the threshold issue that Vos has actually deleted records. Even though American Oversight has shown that Vos did not produce records "as soon as practicable," it does not follow, absent some additional evidence, that any records have been deliberately destroyed in the same way that the Dunn County jailor made certain to destroy old footage. The facts of this case are better compared to *Eau Claire Press Co. v. Gordon,* 176 Wis. 2d 154, 163, 499 N.W.2d 918 (Ct. App. 1993) or *State ex rel. Young v. Shaw,* 165 Wis. 2d 276, 294, 477 N.W.2d 340 (Ct. App. 1991) both cases in

which authorities relied on flawed legal theories to refuse to produce records. In sum, "that [Vos] was wrong does not justify punitive damages." *Shaw*, 165 Wis. 2d at 294. Here, the records could still exist and be produced if they were properly searched for by the Respondent.

ORDER

Based on the foregoing, the Court grants in part and denies in part American Oversight's motion for summary judgment.

1. American Oversight's motion for summary judgment is granted in part:

    a. Robin Vos is commanded to respond, within twenty days of the date of this order, to each of the records requests attached to the Complaint.[7]

    b. American Oversight prevailed against Robin Vos when it obtained a court order on March 11, 2022, commanding Robin Vos to respond to American Oversight's requests, and prevailed again when it obtained this court order.

    c. Robin Vos shall pay reasonable attorney fees, damages of not less than $100, and other actual costs to American Oversight under Wis. Stat. § 19.37(2).

2. American Oversight's motion for summary judgment is denied in part:

    a. American Oversight fails to show that it is entitled to a judgment for punitive damages as a matter of law.

3. The hearing previously scheduled in this matter for July 21, 2022, at 10:00 a.m. will continue on the calendar as a status conference.

This is NOT a final order for purposes of appeal. Wis. Stat. § 808.03(1).

[7] Although the Court will not order Vos to search in any particular way, to minimize the possibility of further litigation, Vos is strongly encouraged to follow the Wisconsin Attorney General's "Suggested Four-Step Approach" for compliance with the public records law.

See https://www.doj.state.wi.us/sites/default/files/office-open-government/Resources/PRL-GUIDE.pdf.