

Municipal Law Newsletter

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Applicability of the “Competitive and Bargaining Reasons” Exception to Wisconsin’s Public Records Law

In a recent case, *Friends of Frame Park, U.A. v. City of Waukesha*, 2019AP96, the Wisconsin Court of Appeals examined the applicability of the Open Meetings Law exception in Wis. Stat. § 19.85(1)(e) for “competitive or bargaining reasons” to Wisconsin’s Public Records Law.

This case stems from the City of Waukesha’s plan to build and operate a baseball stadium in Frame Park. The Friends of Frame Park (“Friends”), made up of citizens, property owners, and taxpayers, organized to track how the stadium used taxpayer funds due to concerns that the City would contract with private entities to run the stadium and the baseball team.

In October 2017, Friends made a public records request to the City for any letters of intent, memoranda of understanding, or lease agreements between Big Top Baseball and the City. The City denied the request citing “competitive or bargaining reasons,” and provided two justifications for nondisclosure: 1) competitive harm due to another entity competing for a baseball team and 2) the need for common council review prior to disclosure to negotiate favorable terms.

In December 2017, Friends filed suit for the release of the records and for attorney’s fees. The next day, the common council met, and one day later, the City attorney emailed to Friends a draft contract between Big Top Baseball and the City. Because the City voluntarily released the record, the only issue for the appellate court was whether Friends was entitled to attorney’s fees.

Wisconsin’s Public Records Law allows a requester to sue for the release of records when requested records are withheld or delayed, after a written request for disclosure is made. If the requester “substantially prevails,” the court will award reasonable attorney’s fees and other actual costs related to accessing the record. When records are released after a suit is pending, as in this case, the only issue remaining is the question of attorney’s fees. In previous cases, courts have looked to whether the suit was a cause in-fact of the record’s release to determine whether a requester “substantially prevailed.”

In this case, the records were not released due to the Friends’ filing suit, but rather because the City claimed the public records exception was no longer applicable. The Court held that when a public record is released while a suit is pending and that release is due to a public records exception no longer being applicable, the key consideration is whether the exception was properly invoked in the initial denial, rather than whether the suit caused the release.

The Court found that the City’s reliance on the “competitive or bargaining reasons” exception in Wis. Stat. § 19.85(1)(e) was unwarranted and led

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Get the Lead Out, the Sequel New DNR Private Lead Service Line Replacement Program and Updates on PSC Financial Assistance Programs

Municipalities and water utilities should start getting ready to get the lead out in 2021. The Wisconsin Department of Natural Resources (DNR) is back offering a new Private Lead Service Line (LSL) Replacement Program, with full principal forgiveness, to assist municipalities in replacing private LSLs. And the Public Service Commission of Wisconsin (PSC) has issued new guidance that streamlines the application process for a PSC approved financial assistance program for utilities to provide ratepayer funded financing for the removal of private LSLs.

DNR Private Lead Service Line Replacement Program

The new DNR Program builds on the success of the prior 2-year DNR Private LSL replacement program by offering at least 63 million dollars of new funding for eligible municipalities to replace private LSLs. A municipality is eligible for funding if its water utility reported to the PSC any private LSLs, galvanized pipes downstream of current or former lead lines, or “unknown may contain lead.” The funding is strictly principal forgiveness, meaning that municipalities will not have to conduct any bonding or retain bond counsel to take advantage of the DNR Program.

The DNR Program may be used for costs associated with replacing LSLs at residential properties, including multi-family and buildings containing both residential and commercial occupants, Pre-K-12 schools, licensed/certified daycare centers, and other qualifying non-residential properties. Eligible costs include construction costs, up to \$5,000 for engineering and administrative support for municipalities with fewer than 3,300 residents, and up to \$5,000 for costs related to developing a mandatory replacement ordinance for all communities.

Unlike a PSC-approved financial assistance program, to qualify for funding a municipality does not have to require all residents to replace their lead service lines. The municipality also does not need its utility to have a PSC-approved financial assistance program for the municipality to qualify for DNR funding.

A municipality has two options for construction contracting to replace private LSLs. First, the municipality may bid a contract to complete all Program-funded replacements. This option will require compliance with Davis-Bacon and a solicitation of Disadvantaged Business Enterprises. Second, the municipality may develop a list of pre-qualified contractors with whom homeowners can contract directly.

There are limitations to eligibility: Funds may not be used to replace any public infrastructure, but all upstream public LSLs or lead pipes must be replaced at the same

time. Regular Safe Drinking Water Loan Program funding may be used for public replacements. Funds are awarded to the municipality, not the water utility or directly to the homeowner. Funds may also not be used to replace any interior plumbing or fixtures.

The DNR is already accepting applications for funding for the 2021 construction season. To take full advantage of funding for the entire 2021 construction season, the DNR should receive applications no later than February 2021. And all applications for any part of the 2021 construction season must be received no later than June 30, 2021. While the DNR does not know how many years funding will be available, awarded funds may not be carried over into the following year and the municipality must reapply each year. Thus, while there is no benefit to overestimating the number of private LSLs that the municipality can replace in 2021, the municipality should be generous in its estimation and avoid underestimating its costs. Costs the municipality incurs that exceed its awarded funding will receive first priority for the 2022 Program year awards—but the municipality must carry the costs until that time.

More information is available on the DNR’s website, including a recording and slide show handout from the DNR’s September 2, 2020, workshop: <https://dnr.wisconsin.gov/aid/documents/EIF/privateLSLreplacementFundingProgram.html>.

Updates to PSC Financial Assistance Program Applications

The PSC has created a new category of docket, Application Filing Requirements or AFRs. In docket 5-AFR-1600, PSC staff have proposed revised application requirements for private lead service line replacement financial assistance programs. The revised requirements renew focus on the financial aspects of the program and limit the level of detail on the actual construction work that will be done under the program. For example, the PSC is not requiring any environmental or archeological information.

The application requirements indicate the PSC approval only applies to financial assistance provided by the utility—not assistance provided by the municipality. Municipal assistance—including through the DNR Program—should not be addressed in the utility’s application.

While not addressed in the application requirements, recent PSC decisions have clarified two other issues. First, the Commission is not requiring utilities to require replacement of galvanized service lines in addition to service lines made out of lead. Second, the Commission

has prohibited utilities from including a priority list for assistance, indicating that such a list could result in discrimination between customers within the same class. PSC staff has indicated that if a utility faces a budget shortfall due to higher-than expected requests for financial assistance, the utility must request a waiver or reconsideration of its approved program from the PSC.

While the draft Commission Order still requires Commission approval, the proposed application requirements are a big step towards reducing the burden on utilities to apply for approval of a financial assistance program. However, the PSC approved program still relies on rate-payer funding for private LSL replacement financial assistance. Since the DNR Program provides for funding for the full cost of private LSL replacement without any additional cost to residents or ratepayers, it is likely that few utilities will seek to implement a new PSC-approved program while DNR funding remains available.

— Jared Walker Smith

Applicability of the "Competitive and Bargaining Reasons"

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to an unreasonable delay in the record's release. Consequently, even though the lawsuit was not an actual cause of the release, Friends "substantially prevailed" and was entitled to some portion of its attorney's fees.

Municipalities wishing to invoke the "competitive or bargaining reasons" exception when responding to public records requests should be sure to adhere to the following general principles identified by the Court:

- The exception can be invoked to prevent disclosure of a negotiation strategy or other insider information that is not available to one party in a negotiation.
- The exception cannot be invoked merely because a private entity desires confidentiality; because the public will later have the opportunity to provide input; or to prevent competition where the other side remains free to negotiate with potential competitors.
- For public policy reasons, the exception should generally not be used to prevent competition among governmental entities, as this could harm both consumers and those citizens interested in the workings of their government.

This case should remind municipalities that the mere fact of a closed meeting does not justify a blanket nondisclosure of all meeting documents. Rather, there must be a specific showing as to why "competitive or bargaining reasons" require nondisclosure.

— Eric Hagen

Michael May Joins Boardman Clark



Michael P. May, formerly the City Attorney for Madison, Wisconsin, has joined Boardman & Clark as Senior Counsel. May started with the firm on October 1.

Mike brings over 4 decades of legal experience, including 16 years as the chief legal office for Wisconsin's second largest city. As Madison City Attorney, he ran an office with 16 attorneys and 10 support staff, and managed complex legal issues at the highest levels of city government. Mike's inside experience and legal expertise will be a great addition to the Municipal Law Group at Boardman & Clark.

Mike's experience ranges from A (Administrative Appeals) to Z (Zoning). He can assist local units of government on alcohol licensing, appellate review, civil rights, contracts (including public bidding), constitutional law, elections, government structure, intergovernmental agreements, open meetings and public records, police and fire, public works and utilities, tax disputes, and zoning. He brings a wealth of knowledge on dealing with politically charged issues while under public scrutiny.

May is a native of Madison, where he attended high school, undergrad and law school, earning scholastic honors along the way. He has been active in the State Bar of Wisconsin, including service on the Boards of the Government Lawyers Division and of the Administrative and Local Government Law Section.

We welcome Mike to the Boardman & Clark team!



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