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Chair Wanggaard, Vice-Chair James, and Honorable Members of the Senate Committee on Judiciary and Public Safety:

The American Civil Liberties Union of Wisconsin appreciates the opportunity to provide written testimony in support of Senate Bill 194.

Government openness and transparency are cornerstones of a healthy democracy. We can only hold our government accountable—and ensure that it is working on behalf of the people—when its actions are transparent and reviewable by those it serves. Wisconsin's open records law, as enacted by this legislature, recognizes as much, stating, in part, "[t]he denial of public access generally is contrary to the public interest, and only in an exceptional case may access be denied." Wis. Stat. § 19.31.

The ACLU of Wisconsin supports SB-194, which will help ensure transparency and public access across all levels of government. This access is crucial for many interests, including for medical and social science researchers who use public records to study trends and propose policy change; parents who need access to information to hold their schools accountable; journalists who uncover essential information to keep the public informed; and taxpayers who are entitled to know how their tax dollars are being spent. Transparency is also critically important for preventing corruption, waste, fraud, and abuse. Review of public action is only possible if there is free and complete access to government records, policies, and communications.

Like many other states, Wisconsin has long recognized the importance of open access to government records and ensured that individuals and organizations would have recourse if a governmental entity refused to provide those records. The legislature has protected this access by granting Wisconsinites access to court review of any refusals of requests and by explicitly creating a fee-shifting structure so that individuals seeking records are not burdened by significant legal expenses to enforce their rights to access.

More simply put, the legislature has already recognized that if an agency unlawfully denies a record request, the agency must pay the requestor's legal fees if they sue and win access to the records. In doing so, the legislature has recognized that no one should have to go to court and pay thousands of dollars in legal fees to obtain public records they are entitled to under the law.

The fee-shifting provision is not a punishment for a government agency, but rather a consideration of who ought to bear the cost of the government's refusal to release records. Nevertheless, it cannot be denied that the prospect of paying legal fees because of its non-compliance creates an incentive for governmental entities to fully and timely comply with the law by releasing public records, as the legislature has mandated they must. The threat of litigation and the fee-shifting provision are the only leverage that individual Wisconsinites have to demand compliance with the law. This means that without the fee-shifting provision, only those who can afford it are guaranteed access to public records.

Despite the legislature's clear intent to shift the costs of enforcing compliance to the governmental actor who made that enforcement necessary, the Wisconsin Supreme Court significantly narrowed the scope of the fee-shifting provision in Wisconsin's open records law in *Friends of Frame Park, U.A. v. City of Waukesha*, 976 N.W.2d 263 (Wis. 2022). In that case, the Court held that the specific language used in the statute requires that the fee-shifting provision can only be applied if the enforcement action proceeds all the way to a court judgment. In other words, if a government actor releases the records requested at any time during the court proceeding, it entirely exempts itself from the fee-shifting provision in the statute.

Before that ruling, Wisconsin courts had repeatedly held that the fee-shifting provision should apply in cases that did not proceed all the way to judgment if the lawsuit achieved at least some of the party's desired results by causing a voluntary change in the defendant's conduct. *See, e.g., WTMJ, Inc. v. Sullivan*, 204 Wis. 2d 452, 555 N.W.2d 140 (Ct. App. 1996); *Eau Claire Press Co. v. Gordon*, 176 Wis. 2d 154, 499 N.W.2d 918 (Ct. App. 1993); *State ex rel. Eau Claire Leader-Telegram v. Barrett*, 148 Wis. 2d 769, 436 N.W.2d 885 (Ct. App. 1989); *Racine Educ. Ass'n v. Bd. of Educ. for Racine Unified Sch. Dist*., 145 Wis. 2d 518, 427 N.W.2d 414 (Ct. App. 1988); *State ex rel. Vaughan v. Faust*, 143 Wis. 2d 868, 422 N.W.2d 898 (Ct. App. 1988); *Racine Educ. Ass'n v. Bd. of Educ. for Racine Unified Sch. Dist*., 129 Wis. 2d 319, 328, 385 N.W.2d 510 (Ct. App. 1986). Or, in other words, courts had previously recognized that if the government actor was only "voluntarily" releasing documents because of the lawsuit filed against them, they should still have to pay the requestor's legal fees.

The result of the Supreme Court's ruling in the *Friends of Frame Park* case is the creation perverse incentives for governmental actors to entirely refuse compliance with the open records law at any time they wish. This is true because if anyone objects, the only recourse that person has is to spend hundreds of dollars on filing fees and potentially thousands of dollars on attorney fees to file a mandamus action, at which time the government actor could *then* release the records with no obligation to reimburse the requestor's costs.

Many requestors will just give up, and the few who continue to court will be effectively charged for access. One judge recognized that this empowers government actors to "strategically freez[e] out the public's access to records." *See Friends of Frame Park, U.A. v. City of Waukesha*, 976 N.W.2d 263, 295 (Wis. 2022) (Karofsky, J., dissenting). Even worse than just waiting until a case is filed, the government actor could choose to delay even further, force the case to be set for a hearing or trial, drop the records on the requestor's desk halfway through the hearing, and still be exempt from the fee-shifting provision since they technically released records before the court's order was issued. All of this can, and does, result in months of delays and exorbitant costs for Wisconsinites to simply get access to materials to which they are entitled under the law.

By restoring the fee-shifting provision of the Wisconsin open records law to its pre-2022 application, the legislature will make significant strides in guaranteeing the transparency of our government and protecting every individual who seeks those records. The ACLU of Wisconsin strongly urges committee members to support SB-194.