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WISCONSIN OPEN RECORDS LAW AFTER WIREDATA: STILL VIABLE TO PROTECT PUBLIC ACCESS TO INFORMATION?

[I]t is declared to be the public policy of this state that all persons are entitled to the greatest possible information regarding the affairs of government and the official acts of those officers and employees who represent them. . . . The denial of public access generally is contrary to the public interest, and only in an exceptional case may access be denied.¹

I. INTRODUCTION

With increasing frequency, municipalities are outsourcing their record-keeping functions to private companies.² This provides municipalities with the benefit of efficient data storage.³ However, most private companies store and organize the data in copyrighted formats on programs that they have created or have purchased a license to use.⁴ This leads to an inherent tension between open records law and copyright protections. Wisconsin records custodians are required to maintain records in a format that is accessible to the public.⁵ In addition, Wisconsin open records law states that records custodians are not required to create a new record to satisfy records requests seeking data in a format that does not currently exist.⁶ However, if the municipality only maintains the record in a copyrighted format, which citizens cannot access without paying exorbitant licensing fees, how will citizens acquire meaningful

1. WIS. STAT. § 19.31 (2007–2008).

2. *See, e.g.*, *WIREDATA, INC. v. VILL. OF SUSSEX*, 2008 WI 69, ¶ 7, 310 Wis. 2d 397, 751 N.W.2d 736.

3. For example,

[The technologies for maintaining] public information have distinct attributes of value for users. At the core is raw content. This is the basic message or data, with nothing added to help users find, retrieve, keep, or browse for particular pieces of information. . . . Most products have at least some “chunking” and “tagging” value added. . . . With digital computer technologies, chunking and tagging value includes things like record and file boundaries, paragraph breaks, and computer readable tags that can be accessed from elsewhere.

Henry H. Perritt, Jr., *Sources of Rights to Access Public Information*, 4 WM. & MARY BILL RTS. J. 179, 180 (1995).

4. *See, e.g.*, *WIREDATA, INC. v. VILL. OF SUSSEX*, 2007 WI App 22, ¶¶ 6, 22, 26, 298 Wis. 2d 743, 729 N.W.2d 757.

5. WIS. ADMIN. CODE ADM § 12.05(1) (2002).

6. WIS. STAT. § 19.35(1)(L) (2007–2008).

access to government records?

In *WIREData, Inc. v. Village of Sussex*,⁷ the Wisconsin Supreme Court dodged the issue of whether, and to what extent, a municipality is required to satisfy an open records request for data the municipality maintains in a copyrighted format, when that is the only format in which the record exists or has ever existed.⁸ In this case, WIREData submitted records requests to three municipalities asking for data in an “electronic/digital” format.⁹ Subsequently, WIREData clarified the request, stating that it would like the information in the copyrighted format or a similar database format.¹⁰ However, WIREData submitted this request to the record-holder, not the municipality.¹¹ The records custodian provided WIREData with the information in a PDF file, which did not permit manipulation or analysis of the data.¹² However, because the *initial* records request only asked for the records in an “electronic/digital” format, the Wisconsin Supreme Court declined to address the copyright issue posed by the clarified records request.¹³

Copyrighted computer software used by municipalities to organize data adds the benefits of increased functionality and other features, such as an electronic search capability and an ability to easily manipulate the data.¹⁴ Many times, the computer database in which municipalities maintain their records is the only “record” that exists.¹⁵ For example, property assessors can now input information directly into software, without being required to create individual, physical “property cards” for each parcel of land.¹⁶ Therefore, the

7. 2008 WI 69, 310 Wis. 2d 397, 751 N.W.2d 736.

8. *Assessment Techs. of WI, LLC v. WIREData, Inc.*, 350 F.3d 640, 645 (7th Cir. 2003).

9. *WIREData*, 2008 WI 69, ¶¶ 6, 7.

10. *Id.*, ¶ 8.

11. *Id.*

12. *See id.* A PDF is

different from [an] electronic file in its native format, such as a word processing document, database, or spreadsheet. The files in native formats are dynamic, and behave the way they do in the active business environment, which may be significant to understanding their function and content. They also contain non-apparent information . . . and functions (such as the mathematical formulas that determine the relationship of cells in a spreadsheet or records in a database).

Kenneth J. Withers, *Electronically Stored Information: The December 2006 Amendments to the Federal Rules of Civil Procedure*, 4 N.W. J. TECH. & INTELL. PROP. 171, 188 (2006).

13. *WIREData*, 2008 WI 69, ¶ 93.

14. *See* Perritt, *supra* note 3, at 180.

15. *See* Jordan M. Blanke, *Assessment Technologies of WI, LLC v. WIREData, Inc.: Seventh Circuit Decision Reinforces the Noncopyrightability of Facts in a Database*, 20 SANTA CLARA COMPUTER & HIGH TECH. L.J. 755, 756 (2004).

16. *See id.*

actual record becomes nearly inseparable from the copyrighted format.¹⁷

The law is clear that the raw data contained in copyrighted databases cannot be copyrighted.¹⁸ However, the municipalities' public "record" as it exists consists of the data in an organized format, which the owner or creator of the computer program has copyrighted.¹⁹ The municipality accesses the data in its copyrighted format, as it has paid licensing fees for the use of the software.²⁰ As the Wisconsin Court of Appeals explained, the municipalities have obtained a "value-added benefit of this computerization" using public funds.²¹ Should the public be required to pay to obtain this public information in a useable format?

Wisconsin open records law does not require the creation of a new record to satisfy copyright requests for data in a particular format.²² However, does the law require a municipality to transfer the copyrighted data into a noncopyrighted format? Or does that constitute the creation of a "new record"? If a transfer of data between programs is not possible, must municipalities perform the laborious task of creating a new database to organize the information in a noncopyrighted format? Or must the municipality write software that will transfer the data from one program to another? In *WIREData*, the Wisconsin Supreme Court left these questions unanswered. Thus, uncertainty reigns: does open records law or copyright law trump?

This Comment attempts to answer that question. Part II provides background on *WIREData* Corporation, the real property records maintained by the municipalities at issue, and Wisconsin open records law. Part III provides a broad overview of the facts in *WIREData*, detailing the records requests that were submitted, and the municipalities' and records custodians' responses. Part IV presents a related federal court decision of the Seventh Circuit Court of Appeals, *Assessment Technologies of WI, LLC v. WIREData*,

17. *See id.*

18. *Id.* at 755–56.

19. *See id.* at 756–57.

20. *WIREData, Inc. v. Vill. of Sussex*, 2007 WI App 22, ¶¶ 6, 22, 26, 298 Wis. 2d 743, 729 N.W.2d 757.

21. *Id.*, ¶ 66. In *State ex rel. Margolius v. City of Cleveland*, the Ohio Supreme Court explained a municipality's requirement under open records law:

Consider two sets of identical public records kept on paper—one set organized in a file cabinet, and another kept as a random set of papers stacked on the floor. Certainly we would not permit an agency to discharge its responsibility by providing access to the random set while precluding the disclosure of the organized set, even though both sets are 'readable' as required by the statute.

584 N.E.2d 665, 669 (Ohio 1992).

22. WIS. STAT. § 19.35(1)(L) (2007–2008).

Inc.,²³ and explains its impact on the *WIREData* case in state court. Part V explains the deficiencies of the PDF file that the municipalities provided to WIREData, and how a PDF differs from the database the municipalities used to access records. Part VI presents the progression of litigation in *WIREData*, and describes the way the circuit courts, the court of appeals, and the Wisconsin Supreme Court ruled in this case. This Part also explains how the courts interpreted Wisconsin open records law and the rationales for their holdings. Part VII underscores how the supreme court was able to evade addressing the tension between open records law and copyright protections, leaving the essential question unanswered. Part VIII describes how current Wisconsin open records laws mandated the production of the information. Finally, Part IX proposes an amendment to the Wisconsin Statutes that would allow municipalities to produce the records in a format that is “substantially as usable” as the original.

II. BACKGROUND

A. *WIREData Corporation*

WIREData Corporation is a wholly owned subsidiary of MetroMLS, Inc.²⁴ WIREData provides real property information to realtors, including the age of a property, name of the owner, number of bedrooms and bathrooms, number of acres, and square footage of the building, along with many more categories of data.²⁵ WIREData compiles information from municipalities in southeastern Wisconsin and organizes it into a database.²⁶ The database, PropertyLink, allows users to obtain information about both residential and commercial properties using a query function that searches across more than sixty different categories of information.²⁷

23. 350 F.3d 640 (7th Cir. 2003).

24. WIREData Corporation, <http://www.wiredata.com/home.php> (last visited July 8, 2010).

25. *Assessment Techs.*, 350 F.3d at 642.

26. WIREData Corporation, *supra* note 24. According to Peter Shuttleworth, president of WIREData,

Each year, WIREData requests electronic digital copies of the property record cards from each municipality . . . wherein the property record card information is maintained in a computerized database format. As a wholly owned subsidiary of Multiple Listing Service, Inc., WIREData reviews, cleans up and corrects this data, combines this data with other property information and makes this information available to various Real Estate Brokers and Sales people who use it for a variety of purposes including comparing and verifying real estate tax assessment data and preparing comparable market analysis for similar properties.

Affidavit of Peter Shuttleworth in Support of Plaintiff’s Motion for Summary Judgment at para. 2, *WIREData, Inc. v. Vill. of Sussex*, 2008 WI 69, 310 Wis. 2d 397, 751 N.W.2d 736 (Nos. 01-CV-198_B1, 01-CV-000216).

27. WIREData Corporation, *supra* note 24; WIREData Corporation, PropertyLink,

B. Municipalities' Real Property Records

WIREData submitted open records requests to three municipalities: the Village of Sussex, the Village of Thiensville, and the City of Port Washington.²⁸ The municipalities obtained real property records from their assessors to use them for tax purposes.²⁹ Traditionally, the municipalities' assessors obtained this information and recorded it directly onto individual "property record cards" for each property.³⁰ However, with advances in technology, it is now more convenient for assessors to bring a laptop computer with them to the property and to enter the information directly into the computer database used to store the records.³¹ Consequently, often no original paper record exists, and the record arguably becomes *indistinguishable* from the database.³²

Municipalities use highly specialized software programs to organize the data.³³ Instead of devoting resources to developing software, municipalities often purchase licenses to use existing property records software.³⁴ In addition, many municipalities contract with independent contractor-assessors to complete property assessments and record them in an organized computer database.³⁵ The Village of Sussex and the Village of Thiensville contracted with independent contractor assessor Michael L. Grota (Grota) of Grota Appraisals, LLC (Grota LLC) to perform their property tax assessments.³⁶ The City of Port Washington contracted with Ernest Matthies of Matthies Assessments (Matthies) to complete its assessments.³⁷

Assessment Technologies, Inc., (Assessment Technologies) also owned by Grota, created a program called Market Drive, which is used to arrange the real property data.³⁸ The assessors input the information into a Microsoft Access database, which is run and organized by the Market Drive software.³⁹ Matthies purchased a license from Grota to use the software.⁴⁰ All three

<http://www.wiredata.com/aboutpropertylink.php> (last visited July 8, 2010).

28. WIREData, Inc. v. Vill. of Sussex, 2008 WI 69, ¶ 6, 310 Wis. 2d 397, 751 N.W.2d 736.

29. *Assessment Techs.*, 350 F.3d at 642.

30. WIREData, Inc. v. Vill. of Sussex, 2007 WI App 22, ¶ 5, 298 Wis. 2d 743, 729 N.W.2d 757.

31. *See id.*; Blanke, *supra* note 15, at 756.

32. *See* Blanke, *supra* note 15, at 756; Perritt, *supra* note 3, at 182.

33. *See, e.g., Assessment Techs.*, 350 F.3d at 642–43.

34. *See, e.g., WIREData*, 2007 WI App 22, ¶¶ 6, 22, 26.

35. *See, e.g., id.*

36. *Id.*, ¶¶ 6, 22.

37. *Id.*, ¶ 26.

38. *Id.*, ¶ 5.

39. *Id.*, ¶ 6.

40. *Id.*, ¶ 26. Market Drive organizes the property assessment information into 456 fields, which are then divided across 34 tables. Brief of Respondent WIREData, Inc. at 7, WIREData, Inc. v. Vill. of Sussex, 2008 WI 69, 310 Wis. 2d 397, 751 N.W.2d 736 (Nos. 2005AP1473, 2006AP174, 2006AP175).

municipalities involved in this case used the Market Drive software to organize their data.

The municipalities are permitted read-only access to their individual property records databases pursuant to the licensing agreement with Grota LLC.⁴¹ Because of Wisconsin open records laws, this information may be accessed by submitting an open records request to the government entity that possesses the records.⁴²

C. Wisconsin Open Records Law

1. Purpose

The central tenet of open records law is the availability of public access to information to ensure transparency in government.⁴³ The public policy rationale behind Wisconsin open records law is clearly enshrined in Wisconsin Statutes section 19.31:

In recognition of the fact that a representative government is dependent upon an informed electorate, it is declared to be the public policy of this state that all persons are entitled to the greatest possible information regarding the affairs of government and the official acts of those officers and employees who represent them. Further, providing persons with such information is declared to be an essential function of a representative government and an integral part of the routine duties of officers and employees whose responsibility it is to provide such information. To that end, [sections] 19.32 to 19.37 shall be construed in every instance with a presumption of complete public access, consistent with the conduct of governmental business. The denial of public access generally is contrary to the public interest, and *only in an exceptional case may access be denied*.⁴⁴

2. History

Wisconsin's open records statute was originally enacted in 1917.⁴⁵

41. *WIREData*, 2007 WI App 22, ¶¶ 6, 22.

42. Wisconsin Statutes section 19.35(1)(a) provides, "Except as otherwise provided by law, any requester has a right to inspect any record."

43. See Leanne Holcomb & James Isaac, Comment, *Wisconsin's Public-Records Law: Preserving the Presumption of Complete Public Access in the Age of Electronic Records*, 2008 WIS. L. REV. 515, 570 ("[A] citizen's access to public records should be free so that it encourages the public's participation in government.").

44. WIS. STAT. § 19.31 (2007–2008) (emphasis added).

45. WIS. STAT. § 18.01 (1917). Wisconsin Statutes section 18.01 "was enacted by the adoption of a revisor's bill." *Int'l Union, United Auto., Aircraft & Agric. Implement Workers, Local 180 v. Gooding*, 251 Wis. 362, 366, 29 N.W.2d 730, 733 (1947). Section 18.01(1)–(2), Custody and delivery of official property and records, read as follows:

According to the revisor's notes, the legislation "is believed to give expression to the general implied right of the public to consult public records."⁴⁶ Many states amended their open records laws during the late 1970s and early 1980s in response to the amendment of the federal Freedom of Information Act.⁴⁷ In 1981, the Wisconsin legislature passed Act 335, which codified the definition of "record."⁴⁸ This revision of the open records laws was undertaken to account for changes in technology.⁴⁹ The Act defined "record" as follows:

"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), computer printouts and optical disks.⁵⁰

The new definition emphasized that when determining what constitutes a record, the focus of the analysis is the *content* of the record, not the medium in which it is contained.⁵¹

3. Procedure for Submitting an Open Records Request

Wisconsin open records law ensures citizens a right to "inspect, copy or

(1) Each and every officer of the state, or of any county, town, city, village, school district, or other municipality or district, is the legal custodian of and shall safely keep and preserve all property and things received from his predecessor or other persons and required by law to be filed, deposited, or kept in his office, or which are in the lawful possession or control of himself or his deputies, or to the possession or control of which he or they may be lawfully entitled, as such officers.

(2) Except as expressly provided otherwise, any person may with proper care, during office hours and subject to such orders or regulations as the custodian thereof may prescribe, examine or copy any of the property or things mentioned in subsection (1).

WIS. STAT. § 18.01.

46. *Int'l Union, United Auto., Aircraft & Agric. Implement Workers*, 251 Wis. at 372.

47. Holcomb & Isaac, *supra* note 43, at 523. The federal Freedom of Information Act, codified at 5 U.S.C. § 552, was amended in 1974 by the enactment of Public Law Number 93-502. Freedom of Information Act, Pub. L. No. 93-502, § 552, 88 Stat. 1561, 1561-65 (1974) (codified at 5 U.S.C. § 522 (2006)). The amendments "summarize[d three years of] investigative and legislative efforts to strengthen and improve the operation of the Act." STAFF OF H.R. COMM. ON GOV'T OPERATIONS & S. COMM. ON THE JUDICIARY, 94TH CONG., FREEDOM OF INFORMATION ACT AND AMENDMENTS OF 1974 (P.L. 93-502), at ix (Joint Comm. Print 1975).

48. Holcomb & Isaac, *supra* note 43, at 524.

49. *See id.*

50. Act of May 6, 1982, ch. 335, § 14, 1981 Wis. Sess. Laws 1385, 1387 (codified as amended at WIS. STAT. § 19.32(2) (2007-2008)).

51. *See* Holcomb & Isaac, *supra* note 43, at 524.

receive copies of records.”⁵² By law, records “[m]ust be created or kept in connection with [the] official purpose or function of [an] agency.”⁵³ Subject to exceptions, “any requester has a right to inspect any record.”⁵⁴ A records request need not be in writing, and the records requester need not identify herself, nor state the purpose for which the record is being sought, subject to certain exceptions.⁵⁵ A records request must only be “reasonabl[y] limit[ed] as to subject matter or length of time.”⁵⁶

Once a records request is submitted, the authority must “as soon as practicable and without delay, either fill the request or notify the requester of the authority’s determination to deny the request . . . and the reasons therefor.”⁵⁷ There is no statutorily mandated time frame in which an authority is required to respond.⁵⁸ However, the Wisconsin Department of Justice has indicated that a period of ten working days “is generally a reasonable time for . . . responding to a simple request for a limited number of easily identifiable records.”⁵⁹ If an authority cannot fulfill a request within that time, the Department of Justice indicates that the authority should notify the requester that it is engaged in preparing a response.⁶⁰

4. Enforcement and Penalties

There are two ways to enforce one’s right to copy and to inspect public records.⁶¹ A person may bring an action for mandamus, requesting the court to order the release of the records, or she may submit a written request to the

52. WIS. STAT. § 19.35(1)(a) (2007–2008).

53. WIS. DEP’T OF JUSTICE, PUBLIC RECORDS LAW: WIS. STAT. §§ 19.31–19.39: COMPLIANCE OUTLINE 3 (2008), http://www.doj.state.wi.us/dls/OMPR/PRCO/2008_Pub_Rec_Outline.pdf [hereinafter WIS. DEP’T OF JUSTICE].

54. WIS. STAT. § 19.35(1)(a) (emphasis added). Section 19.36(2)–(13) lists statutory exemptions from open records law requirements. In addition, Wisconsin courts have carved out common law exemptions from disclosure, such as access to district attorney prosecution files, *State ex rel. Richards v. Foust*, 165 Wis. 2d 429, 436, 477 N.W.2d 608, 611 (1991), and documents consisting of attorney work product, *Seifert v. Sch. Dist. of Sheboygan Falls*, 2007 WI App 207, ¶ 28, 305 Wis. 2d 582, 740 N.W.2d 177. The Wisconsin Public Records Compliance Outline provides a more detailed list of common law exemptions to open records law requirements. *See* WIS. DEP’T OF JUSTICE, *supra* note 53, at 27.

55. WIS. STAT. § 19.35(1)(h)–(i). A requester may be required to identify herself when the requested information is a health or student record; certain statutes limit public records access to specifically defined individuals. WIS. DEP’T OF JUSTICE, *supra* note 53, at 12. In addition, one may not commence a mandamus action under section 19.37 for the production of records until a records request has been submitted in writing. WIS. STAT. § 19.35(1)(h).

56. WIS. STAT. § 19.35(1)(h).

57. *Id.* § 19.35(4)(a).

58. WIS. DEP’T OF JUSTICE, *supra* note 53, at 14.

59. *Id.*

60. *Id.*

61. WIS. STAT. § 19.37(1) (2007–2008).

district attorney in the county holding the record, asking him to bring a mandamus action seeking the release of the records.⁶² There is no mandatory period of time a requester must wait before commencing an action.⁶³ Further, a requester need not give a municipality prior notice—sections 893.80 and 893.82, which require notice before commencing an action against governmental bodies or officers, do not apply to open records requests.⁶⁴

Because of Wisconsin's strong public policy favoring access to government records,⁶⁵ the law permits any challenger, successful in whole or in part, to recover attorney fees, damages, and actual costs from the authority that wrongfully denied a request.⁶⁶ Furthermore, a court may award punitive damages if it finds that a records custodian "arbitrarily and capriciously denied or delayed response to a request or charged excessive fees," and a court may require the authority to pay a penalty of not more than \$1,000 to the county in which the action is brought.⁶⁷

III. WIREDATA'S OPEN RECORDS REQUESTS

In April 2001, WIREDATA submitted written open records requests for property assessment records to three municipalities: Sussex, Thiensville, and Port Washington.⁶⁸

A. *The Village of Sussex*

WIREDATA requested "an electronic/digital copy" of the real estate records "used by the Assessor . . . in determining the proper assessments for each parcel."⁶⁹ Sussex referred WIREDATA to Grotta, who referred WIREDATA to Andrew Pelkey (Pelkey), the owner of the consulting firm that had programmed Grotta LLC's computer program.⁷⁰ WIREDATA subsequently revised or "enhanced" its request, asking for a "particular computerized format, which included fixed length, pipe delimited, or comma-quote outputs."⁷¹ However, WIREDATA never sent its enhanced request to the

62. *Id.* § 19.37(1)(a)–(b).

63. Wisconsin Statutes section 19.37(1m) limits the amount of time before which a committed or incarcerated person's right to bring an action expires; however, it does not establish a mandatory waiting period before which a person can bring an action.

64. WIS. STAT. § 19.37(1n).

65. *Id.* § 19.31.

66. *Id.* § 19.37(2)(a).

67. *Id.* § 19.37(3)–(4).

68. *WIREDATA, Inc. v. Vill. of Sussex*, 2008 WI 69, ¶ 6, 310 Wis. 2d 397, 751 N.W.2d 736.

69. *WIREDATA, Inc. v. Vill. of Sussex*, 2007 WI App 22, ¶ 23, 298 Wis. 2d 743, 729 N.W.2d 757.

70. *Id.*, ¶ 7.

71. *WIREDATA*, 2008 WI 69, ¶ 8 n.6. A comma-quote output file, or comma-delimited text file, is a "text file that almost all spreadsheet applications on any operating system can read." MATTHEW MACDONALD, EXCEL 2007: THE MISSING MANUAL 42 (2007). Delimited text files organize data from spreadsheets and tables into text files by separating individual columns and rows of data using

Village of Sussex; it merely informed Pelkey of its specific needs.⁷²

Pelkey stated that he would not copy the records databases for WIREdata because “the design and format of the databases [are] . . . trade secret[s] and [are] the intellectual property of Assessment Technologies of WI, L.L.C.”⁷³ Pelkey said that “he believed it would be very difficult to export data from the Market Drive software to a usable Microsoft Word format . . . [and] that providing the information in any format would be very time consuming.”⁷⁴ Moreover, Pelkey stated that if WIREdata wanted a copy of the data in the Market Drive software format, the estimated cost would be over \$6,600, which included a programming and exporting fee.⁷⁵ In addition, if WIREdata wished to share the information with a third party, it would be required to charge its customers a fee for viewing the information in the Market Drive format.⁷⁶ Unwilling to pay licensing fees for public information, WIREdata filed a mandamus action against the Village of Sussex, seeking the release of the property records.⁷⁷

B. The Village of Thiensville

The Village of Thiensville also contracted with Grota LLC to create and maintain its property assessment records.⁷⁸ In April 2001, WIREdata sent the village a written open records request for “an electronic/digital copy of the detailed real estate property records (showing the specific characteristics of each parcel and the improvements thereupon) used by the Assessor for [the] municipality.”⁷⁹ In response, Thiensville referred WIREdata to Grota, who again indicated that WIREdata would be required to pay licensing fees for the database, and would have to pay additional fees if it intended to share the data with others.⁸⁰ WIREdata filed a mandamus action against the Village of Thiensville, Grota LLC, and Michael Grota, seeking a court-ordered release

commas or “pipes” to mark breaks in the packages of information. *See id.* at 722. A comma-delimited file “means the information has commas separating each cell.” *Id.* Similarly, a pipe-delimited text file is a “delimited text file that uses the pipe symbol (|) as the delimiter.” STEPHEN R. WESTMAN, CREATING DATABASE-BACKED LIBRARY WEB PAGES: USING OPEN SOURCE TOOLS 251 (2006). Comma-delimited or pipe-delimited text files are widely used and supported by many programs. In fact, “most programs that export data to text use delimited text files.” MACDONALD, *supra*, at 722.

72. *WIREdata*, 2007 WI App 22, ¶ 10; *WIREdata*, 2008 WI 69, ¶ 8.

73. *WIREdata*, 2008 WI 69, ¶ 14.

74. *WIREdata*, 2007 WI App 22, ¶ 9.

75. *Id.*, ¶ 11.

76. *Id.*

77. *Id.*, ¶ 16.

78. *Id.*, ¶ 22.

79. *Id.*, ¶ 23.

80. *Id.*, ¶ 11.

of the property records.⁸¹

C. City of Port Washington

Unlike Sussex and Thiensville, Port Washington contracted with Matthies to perform its property assessments.⁸² Aware that Port Washington had contracted with an assessor, WIREdata informed the city that it would be sending Matthies its records request, and requested that Port Washington provide it with an estimate of the cost of reproducing the records.⁸³ Port Washington confirmed that it was appropriate for WIREdata to address its request to Matthies, but indicated that WIREdata should discuss fees and costs with Matthies.⁸⁴

WIREdata sent its records request to Matthies and specified that it needed

detailed property information or assessor information such as square footage, age, number of bedrooms, number of baths, property class, etc. . . . [and] the number of parcels, a current record layout, . . . code list for each field, and a copy of the property record card [Matthies was] currently using.⁸⁵

WIREdata also sent the City of Port Washington a formal, written records request, but did not specify that it wanted the information in an electronic or digital format.⁸⁶ Soon after, Matthies informed WIREdata that it had contracted with Assessment Technologies, Inc. for the use of the Market Drive software to organize property information.⁸⁷ Matthies claimed that its licensing agreement prevented it from satisfying WIREdata's requests: "[T]he use of Market Drive is for the use of the licensee only and does not allow our firm to distribute copies of this program or its documentation to others."⁸⁸ After receiving this response, WIREdata filed a mandamus action against both the City of Port Washington and Matthies.⁸⁹

IV. THE SEVENTH CIRCUIT WEIGHS IN ON THE COPYRIGHT ISSUE:
*ASSESSMENT TECHNOLOGIES OF WI, LLC V. WIREDATA, INC.*⁹⁰

Seeking vindication of its copyright, Assessment Technologies brought an action against WIREdata for copyright infringement pursuant to 17 U.S.C.

81. *Id.*, ¶ 24.

82. *Id.*, ¶ 26.

83. *Id.*, ¶ 27.

84. *Id.*, ¶ 28.

85. *Id.*

86. *Id.*, ¶ 29.

87. *Id.*

88. *Id.* (quoting Matthies's letter to WIREdata) (internal quotation marks omitted).

89. *Id.*, ¶ 30.

90. 350 F.3d 640 (7th Cir. 2003).

§ 502, and for theft of trade secrets in violation of Wisconsin Statutes section 134.90.⁹¹ At the district court level, Assessment Technologies was successful on the copyright claim.⁹² The court granted Assessment Technologies an injunction prohibiting WIREdata “from infringing on [Assessment Technologies’] copyright in the digital data compilation.”⁹³ However, the court dismissed the trade secret claim as moot because of its decision to grant the injunction on the copyright claim.⁹⁴

Although successful in district court,⁹⁵ Assessment Technologies lost handily before the Seventh Circuit Court of Appeals.⁹⁶ A three-judge panel consisting of Judges Posner, Wood, and Evans dismissed Assessment Technologies’ copyright claim in a strongly worded opinion written by Judge Posner.⁹⁷ In the first sentence of the opinion, Judge Posner bluntly stated, “This case is about the attempt of a copyright owner to use copyright law to block access to data that not only are neither copyrightable nor copyrighted, but were not created or obtained by the copyright owner.”⁹⁸ He continued, “It would be appalling if such an attempt could succeed.”⁹⁹

The court confirmed that a person cannot copyright facts in the public domain by placing them in a database.¹⁰⁰ It compared Assessment Technologies’ software to a database like Westlaw.¹⁰¹ Westlaw possesses a copyright because its “compilation of federal judicial opinions . . . involves discretionary judgments regarding selection and arrangement.”¹⁰² However, because “the opinions themselves are in the public domain . . . Westlaw cannot prevent its licensees from copying the opinions themselves as distinct from the aspects of the database that are copyrighted.”¹⁰³

Furthermore, the court asserted that despite Assessment Technologies’ copyright in the Market Drive software program, there were multiple ways WIREdata could obtain the property assessment data without infringing on

91. *Assessment Techs. of WI, L.L.C. v. WIREdata, Inc.*, No. 01-C-789, slip op. at 1 (E.D. Wis. Dec. 23, 2002) (order granting preliminary injunction).

92. *Id.* at 17.

93. *Id.*

94. *Id.* at 6, 17. The court stated in its analysis, “As a preliminary matter, in its trial brief, the plaintiff notes that granting an injunction on the copyright infringement claim will moot the need for an injunction on the misappropriation of trade secrets claim.” *Id.* at 6.

95. *Assessment Techs.*, 350 F.3d at 642.

96. *Id.* at 647–48.

97. *Id.* at 641.

98. *Id.*

99. *Id.* at 642.

100. *Id.* at 643.

101. *Id.* at 644.

102. *Id.*

103. *Id.*

Assessment Technologies' copyright.¹⁰⁴ The court laid out four specific ways that WIREdata could be permitted to access the real property data:

(1) the municipalities [could] use Market Drive to extract the data and place it in an electronic file; (2) they [could] use Microsoft Access to create an electronic file of the data; (3) they [could] allow programmers furnished by WIREdata to use their computers to extract the data from their database—this is really just an alternative to WIREdata's paying the municipalities' cost of extraction, which the open-records law requires; and (4) they [could] copy the database file and give it to WIREdata to extract the data from.¹⁰⁵

The court emphasized that WIREdata was not attempting to access the proprietary formulas in the Market Drive software, which dictated the organization and the layout of the database—it was attempting to access the *information*.¹⁰⁶ Assessment Technologies' endeavor to protect its software was effectively denying the public access to information that undeniably was not Assessment Technologies' to withhold.¹⁰⁷ The court warned, "To try by contract or otherwise to prevent the municipalities from revealing *their own* data, especially when, as we have seen, the complete data are *unavailable anywhere else*, might constitute copyright misuse."¹⁰⁸

The court did not address Wisconsin open records law, but did mention that there existed the possibility that "the licenses interpreted as [Assessment Technologies] would have [the court] interpret them—as barring municipalities from disclosing noncopyrighted data—would violate the state's open-records law."¹⁰⁹ The court did "not conceal [its] profound skepticism concerning [Assessment Technologies'] interpretation" of the license it granted the municipalities to use the Market Drive software because "it[s] interpretation] would forbid municipalities . . . [from sharing] the data in their tax-assessment databases with each other even for the purpose of comparing or coordinating their assessment methods, though all the data they would be exchanging would be data that their assessors had collected and inputted into the databases."¹¹⁰

V. A PDF COPY IS INSUFFICIENT

After the Seventh Circuit decision, and over three and one-half years after

104. *Id.* at 647.

105. *Id.* at 647–48.

106. *See id.* at 643.

107. *Id.* at 646–47.

108. *Id.* (second emphasis added).

109. *Id.* at 647.

110. *Id.*

WIREDATA's initial records requests, Assessment Technologies provided WIREDATA with PDF copies of the property records for each municipality.¹¹¹ However, because the data was contained in unalterable PDF files, it lacked the enhanced functionality and manipulability of data that is stored in a database.¹¹²

A PDF, or portable document file, is "essentially a photocopy of an electronic document viewed as a picture on a computer screen."¹¹³ WIREDATA's enhanced records request sought property records information in an electronic output, which was "fixed length, pipe delimited, or comma-quote."¹¹⁴ These file formats are commonly used to organize information in a database.¹¹⁵ Data is often stored in pipe-delimited and comma-quote output file formats to facilitate the transfer between programs of information stored in tables or spreadsheets.¹¹⁶ Assessment Technologies did not provide the information in any of these commonly used formats.¹¹⁷ Therefore, WIREDATA was not able to use the data.¹¹⁸ WIREDATA sought the information in an electronically manipulatable format because it desired to do "normal testing of data to confirm its accuracy."¹¹⁹ Peter Shuttleworth, president of WIREDATA, described the rationale behind the needed format in his affidavit:

A "PDF" is a document produced by "Acrobat" which is a program written and distributed by Adobe Systems Incorporated. "PDF" is a Portable Document Format which basically is an electronic picture of a document. It differs from other computer files in that it does not allow for direct input into a word-processing, spreadsheet or database program. Effectively it allows the recipient to read but not input, change or utilize the information. While it is both electronic and digital, it is not exportable into another program and thus does not meet the criteria of being "... electronic output ..." (i.e., fixed length, comma-quote, pipe

111. *WIREDATA, Inc. v. Vill. of Sussex*, 2008 WI 69, ¶ 25, 310 Wis. 2d 397, 751 N.W.2d 736.

112. *See WIREDATA, Inc. v. Vill. of Sussex*, 2007 WI App 22, ¶ 66, 298 Wis. 2d 743, 729 N.W.2d 757.

113. *Id.*, ¶ 65.

114. *WIREDATA*, 2008 WI 69, ¶ 8 n.6. For an explanation of pipe-delimited and comma-quote output files, see *supra* note 71.

115. *See J. TARIN TOWERS, MACROMEDIA DREAMWEAVER MX 2004 FOR WINDOWS AND MACINTOSH 330* (2005); WILLIAM C. WALTON, *DESIGNING GROUNDWATER MODELS WITH WINDOWS 17-18* (1995).

116. *See WALTON, supra* note 115, at 17-18.

117. *WIREDATA*, 2008 WI 69, ¶ 25.

118. *See Brief of Respondent WIREDATA, Inc., supra* note 40, at 62.

119. *Id.* at 61.

delimited).”¹²⁰

The PDF copy was essentially unusable.¹²¹ To comprehend or use the data in any meaningful way—that is, to compare the records from various plots of land—it is essential to “hav[e] the data in a manipulatable electronic mode.”¹²²

VI. THE STATE COURT DECISIONS

A. Circuit Court

1. Waukesha County

The Waukesha County Circuit Court held that Sussex had violated Wisconsin open records law by providing WIREdata with only a PDF file of the records, instead of a manipulatable database file.¹²³ The court emphasized that “WIREdata’s request was in the form the open records law required,” and Sussex failed to comply with the request.¹²⁴

2. Ozaukee County

In contrast, the Ozaukee County Circuit Court held that WIREdata’s records request was satisfied by the provision of PDF files containing the records and imposed costs on WIREdata.¹²⁵ The court reasoned that WIREdata’s initial records request did not satisfy open records requirements because it was not “reasonable in its scope.”¹²⁶ Further, it held that WIREdata had improperly directed its enhanced records request to Pelkey, instead of to the municipality itself.¹²⁷ As a result, the municipality had satisfied the records request it had received because the PDF file was “an electronic/digital copy” of the records.¹²⁸ Therefore, the Circuit Court of Ozaukee County granted summary judgment for Matthies, Port Washington, and Thiensville.¹²⁹

B. The Court of Appeals

Both the Village of Sussex and WIREdata appealed, and the respective Waukesha and Ozaukee County Circuit Court actions were consolidated.¹³⁰ The court of appeals affirmed the part of the Waukesha County Circuit

120. Affidavit of Peter Shuttleworth, *supra* note 26, at para. 5.

121. See Brief of Respondent WIREdata, Inc., *supra* note 40, at 63.

122. *Id.* (emphasis omitted).

123. WIREdata, Inc. v. Vill. of Sussex, 2007 WI App 22, ¶ 21, 298 Wis. 2d 743, 729 N.W.2d 757.

124. *Id.*

125. *Id.*, ¶ 30.

126. *Id.*, ¶ 25.

127. *Id.*

128. *Id.*

129. *Id.*, ¶ 30.

130. *Id.*, ¶ 3.

Court's decision holding that the PDF failed to satisfy what is required under open records law.¹³¹ In addition, the court reversed the Ozaukee County Circuit Court's holding that WIREdata's open records requests were insufficient, and that in any case, the PDF satisfied them.¹³² After examining Wisconsin's black letter open records law and a survey of precedent interpreting it, the court of appeals determined that the municipalities had "read their obligations under the open records law too narrowly."¹³³ There were three main reasons for the court's decision.

First, the court emphasized that its ruling was consistent with the "underlying purpose" of Wisconsin open records law, enshrined in Wisconsin Statutes section 19.31.¹³⁴ The public policy of the state of Wisconsin, codified in the statute, is to promote public access to "the greatest possible information regarding the affairs of government."¹³⁵

Second, the court stated that WIREdata's requests were permissible according to the text of the statute. The court stated that "[t]he term 'record' is broadly drawn."¹³⁶ Wisconsin Statutes section 19.32(2) defines a record as

any material on which . . . 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), computer printouts and optical disks.¹³⁷

The court recognized that under Wisconsin Statutes section 19.36(4), "[a] computer program is not subject to examination or copying."¹³⁸ However, the court emphasized that because under section 19.36(4), "the material used as *input* for a computer program or the material *produced* as a product of the computer program is subject to the right of examination and copying," WIREdata should be allowed access to the property records databases.¹³⁹ According to the court, the property records databases were the "material" created by the Market Drive computer program.¹⁴⁰ Thus, the text of the statute necessitated that WIREdata have access to the database to "examin[e]

131. *Id.*

132. *Id.*

133. *Id.*, ¶ 59.

134. *See id.*, ¶¶ 34–39.

135. WIS. STAT. § 19.31 (2007–2008).

136. *WIREdata*, 2007 WI App 22, ¶ 60.

137. WIS. STAT. § 19.32(2) (2007–2008) (emphasis added).

138. *WIREdata*, 2007 WI App 22, ¶ 35 (citing WIS. STAT. § 19.36(4) (2003–2004)).

139. *Id.* (emphasis added).

140. *Id.*, ¶ 63.

and copy[]” the information.¹⁴¹ The court stated that WIREdata should be permitted to “use tools, in the Market Drive program itself or otherwise, to extract and copy the data . . . from the Microsoft Access database and place it in a separate electronic file.”¹⁴²

Third, the court declared that because the databases were created and maintained “at public expense,” it would be improper to deny the public the “value-added benefit of th[e] computerization.”¹⁴³ The organized catalogue of information was a public record, just “as if it were written on paper property cards and organized and stored in a file cabinet.”¹⁴⁴ WIREdata was seeking information collected “not by Assessment Technologies and the Market Drive program, but by the tax assessors on their visits to the properties or from other sources.”¹⁴⁵

Finally, the court held that its decision in *State ex rel. Milwaukee Police Association v. Jones*¹⁴⁶ necessitated its holding.¹⁴⁷ In *Jones*, the court held that an analog copy of a 911 recording was insufficient to satisfy a records request for a digital audio tape (DAT) recording of the call.¹⁴⁸ “[I]nput” or “material produced” by a computer program is subject to examination under Wisconsin Statutes section 19.36(4); the court explained that because the requested digital recording was the product of a computer program, it must be produced.¹⁴⁹ City of Milwaukee Police Chief Arthur Jones claimed that an analog copy of the tape satisfied the open records request.¹⁵⁰ However, the Milwaukee Police Association (MPA) maintained that “the analog copy could not be analyzed to gain the information that . . . was central to MPA’s concern.”¹⁵¹ Because the City of Milwaukee uses a computer system to monitor and record 911 calls, the digital audiotape is the product of a computer program, which is subject to examination and copying.¹⁵² The court stated, “Clearly and unambiguously, the statute allows for exactly what the MPA has requested.”¹⁵³ The court interpreted the statute on its face, and gave effect to the “clear and unambiguous . . . ‘intention of the legislature by giving

141. *Id.*; WIS. STAT. § 19.36(4).

142. *WIREdata*, 2007 WI App 22, ¶ 64.

143. *Id.*, ¶ 66.

144. *Id.*, ¶ 64.

145. *Id.*

146. 2000 WI App 146, 237 Wis. 2d 840, 615 N.W.2d 190.

147. *WIREdata*, 2007 WI App 22, ¶ 63.

148. *Jones*, 2000 WI App 146, ¶ 3.

149. *Id.*, ¶ 17 (emphasis omitted).

150. *Id.*, ¶ 6.

151. *Id.*, ¶ 13.

152. *Id.*, ¶¶ 17–18.

153. *Id.*, ¶ 17.

the language its ordinary meaning.”¹⁵⁴

The court of appeals’ opinion in *WIREData* unambiguously held that the PDF file was insufficient to satisfy open records law.¹⁵⁵ The municipalities did not access the property records in a PDF format; rather, they viewed the data in a Microsoft Access database, “which runs off of the Market Drive software.”¹⁵⁶ Because the language of the statute specifically allows for access to the “material produced as a product of the computer program” for “examination and copying,” *WIREData*’s request for the records in a database format was not outside the permissible scope of open records requests.¹⁵⁷

The court recommended that municipalities address open records compliance in their contracts with independent contractors, possibly through the use of “indemnification and hold harmless clauses.”¹⁵⁸ However, the court cautioned that contract provisions that limit a municipality’s ability to comply with open records requests *are against public policy, and will not be upheld*.¹⁵⁹

The court further emphasized that “[a]s technology advances and computer systems are refined, it would be sadly ironic if courts could disable Wisconsin’s open records law by limiting its reach.”¹⁶⁰ Therefore, the court interpreted section 19.36(4) in line with Wisconsin’s declared public policy that the open records laws be “construed in every instance with a presumption of complete public access.”¹⁶¹

C. The Supreme Court Decision

The supreme court reversed in part and affirmed in part the decision of the court of appeals.¹⁶² Specifically, it disagreed with the following holdings of the court of appeals:

[T]hat the three municipalities denied the open records requests of *WIREData* and, thus, violated the open records law; that the PDFs were insufficient to comply with such open records requests; that the open records law requires

154. *Id.*

155. *WIREData, Inc. v. Vill. of Sussex*, 2007 WI App 22, ¶ 59, 298 Wis. 2d 743, 729 N.W.2d 757.

156. *Id.*, ¶ 65.

157. *Id.*

158. *Id.*, ¶ 49 n.4.

159. *Id.*

160. *Id.*, ¶ 66 (quoting *State ex rel. Milwaukee Police Ass’n v. Jones*, 2000 WI App 146, ¶ 19, 237 Wis. 2d 840, 615 N.W.2d 190).

161. *See* WIS. STAT. § 19.31 (2007–2008); *State ex rel. Richards v. Foust*, 165 Wis. 2d 429, 433, 477 N.W.2d 608, 609 (1991) (“There is a presumption that the public has the right to inspect public records unless an exception is found.”) (citing *Hathaway v. Green Bay Sch. Dist.*, 116 Wis. 2d 388, 392, 342 N.W.2d 682, 684 (1984)).

162. *WIREData, Inc. v. Vill. of Sussex*, 2008 WI 69, ¶ 5, 310 Wis. 2d 397, 751 N.W.2d 736.

access to the computerized database; [and] that the “enhanced” demands did not require the creation of new records.¹⁶³

The supreme court dismissed these holdings in no less than three sentences.¹⁶⁴ It stated:

The PDF files satisfied the open records requests of WIREdata, *as its initial requests were worded*. Our holdings in the present case are based on WIREdata’s initial requests because the enhanced requests were not properly submitted to the relevant authorities. Accordingly, we need not address whether the municipalities’ responses satisfied WIREdata’s purported “enhanced requests” because WIREdata’s communications with Pelkey and with the independent contractor assessors did not constitute appropriate enhanced requests to authorities.¹⁶⁵

Because the PDF files were “electronic/digital” files, and met the specifications of the initial request, the court rationalized that it did not matter that the files “did not have all of the characteristics that WIREdata wished.”¹⁶⁶

VII. THE SUPREME COURT DODGED THE ISSUE

The supreme court avoided the central issue. It declined to address WIREdata’s enhanced records request to avoid the conflict between open records access and copyright law.¹⁶⁷ Thus, the question still remains unanswered: had WIREdata’s “enhanced” records request been sufficient, would the court have required the municipalities to furnish the property data in the copyrighted Market Drive software format? The court will inevitably be forced to address this issue in the near future, and it should decide the issue consistent with the public policy of the state, enshrined in Wisconsin Statutes section 19.31.¹⁶⁸ “This statement of public policy . . . is one of the strongest declarations of policy to be found in the Wisconsin statutes.”¹⁶⁹

VIII. EXISTING OPEN RECORDS LAWS MANDATED THE FULFILLMENT OF WIREDATA’S OPEN RECORDS REQUESTS

The municipalities could have fulfilled WIREdata’s requests without

163. *Id.*

164. *Id.*, ¶ 93.

165. *Id.* (emphasis added).

166. *Id.*, ¶ 96.

167. *Id.*, ¶ 93.

168. WIS. STAT. § 19.31 (2007–2008).

169. Zellner v. Cedarburg Sch. Dist., 2007 WI 53, ¶ 49, 300 Wis. 2d 290, 731 N.W.2d 240 (citing Munroe v. Braatz, 201 Wis. 2d 442, 449, 549 N.W.2d 451, 454 (Ct. App. 1996)).

contravening existing Wisconsin open records laws. First, the Microsoft Access database in which the property records were stored was “output” of a computer program (the Market Drive software), not a computer program itself.¹⁷⁰ Second, open records law mandates the extraction of information from a public record to prevent disclosure of confidential information;¹⁷¹ by analogy, the municipalities were required to extract the property records from the Market Drive software.¹⁷² Third, open records law requires records to be provided in a format that is “substantially as good” as the original.¹⁷³ Finally, the Wisconsin Administrative Code mandates that records custodians maintain records that are accessible.¹⁷⁴

A. The Microsoft Access Database Used to Store the Information Is Not a “Program” Within the Meaning of Wisconsin Statutes Section 19.36

A computer program is exempt from the definition of record in Wisconsin Statutes section 19.36: “A computer program, as defined in [section] 16.971(4)(c), is not subject to examination or copying under [section] 19.35(1), but the material used as input for a computer program or the material produced as a product of the computer program is subject to the right of examination and copying.”¹⁷⁵ A computer program is defined as “the processes for the treatment and verbalization of data.”¹⁷⁶

Assessment Technologies uses a Microsoft Access database to store the property records information.¹⁷⁷ The Market Drive program is essentially the tool that dictates how the assessment records are organized within the database.¹⁷⁸

“WIREdata would *not* be receiving a copy of the source code or object code which instructs the program to run—that is the Market Drive software. Instead, a copy of the Access database would provide only the factual assessment data, an output of a computer program”¹⁷⁹

B. Wisconsin Open Records Law Already Contemplates Extraction of Data to Satisfy Records Requests

While open records laws do not require the authority to create a new

170. Brief of Respondent WIREdata, Inc., *supra* note 40, at 67–68.

171. WIS. STAT. § 19.36(6) (2007–2008).

172. Brief of Respondent WIREdata, Inc., *supra* note 40, at 71.

173. *See* WIS. DEP’T OF JUSTICE, *supra* note 53, at 53.

174. WIS. ADMIN. CODE ADM § 12.05(1) (2002).

175. WIS. STAT. § 19.36(4).

176. WIS. STAT. § 16.971(4)(c) (2007–2008).

177. *WIREdata, Inc. v. Vill. of Sussex*, 2007 WI App 22, ¶ 64, 298 Wis. 2d 743, 729 N.W.2d 757.

178. *See Assessment Techs. of WI, LLC v. WIREdata, Inc.*, 350 F.3d 640, 642–43 (7th Cir. 2003).

179. Brief of Respondent WIREdata, Inc., *supra* note 40, at 67–68 (emphasis added).

record to satisfy an open records request, open records laws do contemplate the extraction of data from the original source.¹⁸⁰ To protect confidentiality of certain information, open records laws require records custodians to redact records before releasing them to a records requester. For example, Wisconsin Statutes section 19.36(6) states,

If a record contains information that is subject to disclosure under [section] 19.35(1)(a) or (am) and information that is not subject to such disclosure, the authority having custody of the record shall provide the information that is subject to disclosure and delete the information that is not subject to disclosure from the record before release.¹⁸¹

Extraction of information from the original record is already permitted under open records laws.¹⁸² By analogy, the extraction of the data from the Market Drive program would not require the creation of a new record.¹⁸³ Assessment Technologies' own expert, Pelkey, testified that there were four ways that he could have easily exported the data from the Market Drive program and the Microsoft Access database into an easily usable electronic format:¹⁸⁴

- 1) Use Windows Explorer to copy. Total time 2–5 minutes.
- 2) Export data using an existing property record card report. Total time of 1–2 hours.
- 3) Use the export function in Microsoft Access. Total time 4 minutes.
- 4) Export only the requested tables and the data within them. Total time 40–60 minutes.
- 5) Use the backup function in Market Drive. Total time 15–30 minutes.¹⁸⁵

Any of these methods would only cost \$100–\$200 each, given Pelkey's hourly compensation rate.¹⁸⁶

C. Open Records Must Be Provided in a Format that Is "Substantially As Good" As the Original

Wisconsin Statutes sections 19.35(1)(b), (c), and (d) essentially mandate

180. WIS. STAT. §§ 19.35(1)(L), 19.36(6) (2007–2008); Brief of Respondent WIREdata, *supra* note 40, at 71.

181. WIS. STAT. § 19.36(6).

182. *Id.*

183. Brief of Respondent WIREdata, Inc., *supra* note 40, at 69–71.

184. *Id.* at 7.

185. *Id.* at 11 (internal citations omitted).

186. *Id.* at 12.

that paper copies be “substantially as readable,” audio tapes be “substantially as audible,” and video tapes be “substantially as good” as the original copies used by the municipalities themselves.¹⁸⁷ According to the Wisconsin Open Records Compliance Outline prepared by the Wisconsin Department of Justice Office of the Attorney General, “[b]y analogy, providing a copy of an electronic document that is ‘substantially as good’ as the original is a sufficient response where the requester does not specifically request access in the original format.”¹⁸⁸

In this case, the PDF copy is not “substantially as good” as the original.¹⁸⁹ The reason the municipalities view the information in a database is to allow for the comparison of data between and among properties—a database is an efficient method of data storage.¹⁹⁰ The municipalities do not retain the property records in a very large and unorganized PDF file,¹⁹¹ which would force them to scroll through huge quantities of information to reach the data they are seeking. Additionally, the PDF file does not allow a search of the contents using the control and function keys on a computer. Put simply, a PDF does not permit a user to interact with data.

D. The Wisconsin Administrative Code Requires Records Custodians to Maintain “Accessible” Records

Chapter Twelve of the Wisconsin Administrative Code sets forth standards and requirements for records custodians relative to electronic records management.¹⁹² In that section of the Code, there are a number of provisions that are intended to ensure that records are available to the public.¹⁹³ Section 12.05 states that “[s]tate and local agencies . . . [must] [m]aintain electronic public records that are accessible.”¹⁹⁴ Public records are not readily accessible if municipalities contract away their rights to share the information with the public. Imposing restrictions such as the payment of exorbitant licensing fees for the use of the software or a restriction on sharing the information with others absent the payment of an additional royalty, violates records custodians’ duty under the Code.¹⁹⁵ Furthermore, records custodians are required to maintain records in “information systems that can

187. WIS. STAT. § 19.35(b)–(d) (2007–2008).

188. WIS. DEP’T OF JUSTICE, *supra* note 53, at 53.

189. PDF documents are essentially mere photocopies of what appears on a computer screen, and do not permit one to manipulate data for the purposes of comparison. *See supra* Part V.

190. Affidavit of Peter Shuttleworth, *supra* note 26, at paras. 3–4.

191. WIREdata, Inc. v. Vill. of Sussex, 2007 WI App 22, ¶ 65, 298 Wis. 2d 743, 729 N.W.2d 757.

192. WIS. ADMIN. CODE ADM ch. 12 (2002).

193. *E.g.*, WIS. ADMIN. CODE ADM § 12.02.

194. *Id.* § 12.05(1).

195. *See id.* § 12.05(1); WIS. DEP’T OF JUSTICE, *supra* note 53, at 57–60.

export records that require retention to other systems without loss of meaning.¹⁹⁶ However, the municipalities contracted to use the Market Drive software without making a provision for the transfer of information into a non-copyrightable format to satisfy open records requests.¹⁹⁷ In the transfer from a Microsoft Access database into a PDF, there was a significant “loss of meaning.”¹⁹⁸

When the real estate assessors originally input the data into their laptops, the Market Drive program organized the information into a Microsoft Access database.¹⁹⁹ The information was logically grouped into categories according to property type and other features.²⁰⁰ However, WIREdata was provided with an unorganized listing of information.²⁰¹ The data in the PDF file could not be used to compare data across categories and could not be manipulated.²⁰² Arguably, if the municipality is paying licensing fees for read-only access to its databases of information, at the very least, the public should be allowed read-only access to the files in the same format. Current open records law requires compliance with WIREdata’s requests.

IX. SUGGESTIONS FOR THE FUTURE

There is a “central tension between . . . state [open] records laws on the one hand, and intellectual property law on the other.”²⁰³ This conflict has confronted other jurisdictions across the country,²⁰⁴ and the Wisconsin

196. WIS. ADMIN. CODE ADM § 12.05(11).

197. See *WIREdata, Inc. v. Vill. of Sussex*, 2007 WI App 22, ¶¶ 6, 20, 26, 298 Wis. 2d 743, 729 N.W.2d 757.

198. WIS. ADMIN. CODE ADM § 12.05(11).

199. *Assessment Techs. of WI, LLC v. WIREdata, Inc.*, 350 F.3d 640, 642–43 (7th Cir. 2003).

200. *Id.*

201. See Affidavit of Peter Shuttleworth, *supra* note 26, at paras. 3–4.

202. *Id.*

203. Perritt, *supra* note 3, at 179.

204. As Holcomb and Isaac point out, states across the country have amended their statutes to “reflect the change in storage methods of government records and entitle citizens to access in the same format in which the government agency stores information.” See Holcomb & Isaac, *supra* note 43, at 559–60; e.g., ARK. CODE ANN. § 25-19-105(d)(2)(B) (2002 & Supp. 2007) (“A citizen may request a copy of a public record in any medium in which the record is readily available or in any format to which it is readily convertible with the custodian’s existing software.”); CAL. GOV’T CODE § 6253.9(a)(1)–(2) (West Supp. 2008) (“The agency shall make the information available in any electronic format in which it holds the information.”); CONN. GEN. STAT. § 1-211(a) (2007) (“Any public agency which maintains public records in a computer storage system shall provide, to any person making a request . . . a copy of any nonexempt data contained in such records . . . on paper, disk, tape or any other electronic storage device or medium requested by the person, if the agency can reasonably make such copy or have such copy made.”); IND. CODE § 5-14-3-3(d) (2008) (“[A] public agency that maintains or contracts for the maintenance of public records in an electronic data storage system shall make reasonable efforts to provide to a person making a request a copy of all disclosable data contained in the records on paper, disk, tape, drum, or any other method of electronic retrieval if the medium requested is compatible with the agency’s data storage system.”);

Supreme Court will inevitably have to address it again. In keeping with the declared public policy of the state,²⁰⁵ and the paramount importance of a transparent government, the court should protect citizens' access to information about their government. The court should not be permitted to interpret open records laws in a way that effectively nullifies citizens' right to access. By interpreting open records laws to permit the production of a record without regard to the requested format, citizen access to records will be deterred. The *usability* of the information in a particular format must be considered.

A. Proposed Amendment

I propose an amendment to the Wisconsin Statutes that would mandate a "substantially as usable" standard for satisfying open records requests for electronic records. As discussed earlier, similar standards already exist for other media.²⁰⁶ Print copies of records must be "substantially as readable," audio tapes must be "substantially as audible," and videotapes must be "substantially as good" as the original copies.²⁰⁷ The Wisconsin Open Records Compliance Outline, produced by the Office of the Attorney General, suggests that from the supreme court's decision in *WIREData*, one can infer that a substantially as good standard applies to electronic records.²⁰⁸

However, a substantially as good standard did not ensure citizen access and remedy the problem at issue in *WIREData*.²⁰⁹ Contrary to the suggestion in Wisconsin's compliance outline, the "provision of records in PDF format [*did not*] satisf[y] [*WIREData's*] requests for records in 'electronic, digital' format."²¹⁰ It may have satisfied the letter of the law, but not its spirit. "A picture of a paper copy—even when on an electronic media like a diskette—is just as unresponsive as paper itself."²¹¹ PDF copies are only substantially as

IOWA CODE § 22.3A(2) (2008) ("A government body shall not acquire any electronic data processing system for the storage, manipulation, or retrieval of public records that would impair the government body's ability to permit the examination of a public record and the copying of a public record in either written or electronic form. If it is necessary to separate a public record from data processing software in order to permit the examination or copying of the public record, the government body shall bear the cost of separation of the public record from the data processing software. The electronic public record shall be made available in a format useable with commonly available data processing or data base management software.); N.J. STAT. ANN. § 47:1A-5(d) (West 2008); ("A custodian shall permit access to a government record and provide a copy thereof in the medium requested if the public agency maintains the record in that medium.").

205. WIS. STAT. § 19.31 (2007–2008).

206. *Id.* § 19.35(b)–(d).

207. *Id.*

208. WIS. DEP'T OF JUSTICE, *supra* note 53, at 53.

209. *WIREData, Inc. v. Vill. of Sussex*, 2008 WI 69, ¶ 110, 310 Wis. 2d 397, 751 N.W.2d 736.

210. WIS. DEP'T OF JUSTICE, *supra* note 53, at 53 (citing *WIREData*, 2008 WI 69, ¶¶ 97–98).

211. Brief of Respondent *WIREData, Inc.*, *supra* note 40, at 62.

good as paper copies of records.²¹² As many commentators who have written on the subject have noted, it is clear that paper copies of records will not suffice in an electronic era.²¹³ If Wisconsin's open records laws are to have any substance, they should be interpreted to require that citizens receive records in a format that is substantially as *usable* as the original.

1. Statutory Text

The amended statutes might read as follows (new text in bold):

WIS. STAT. § 19.35(1)(e): Except as otherwise provided by law, any requester has a right to receive from an authority having custody of a record which is not in a readily comprehensible form a copy of the information contained in the record ~~assembled and reduced to written form on paper in~~ **a format substantially as usable as the original.**

In addition to amending the text of the statutes, Wisconsin courts should interpret open records laws with a presumption that a requester is entitled to a record in the form ordinarily maintained by the municipality. In the context of federal open records requests under the Freedom of Information Act,²¹⁴ the Code of Federal Regulations “instructs agencies to provide information in a format that is used in ‘business as usual.’”²¹⁵ By analogy, courts should require Wisconsin record-keeping authorities to furnish the public record in the form normally maintained by the municipality.

Similarly, in the context of civil litigation, the Federal Rules of Civil Procedure mandate that in discovery, “[a] party must produce documents as they are kept in the usual course of business.”²¹⁶ “Federal courts have consistently held that the electronic form of a document contains essential characteristics rendering a paper printout of electronic records inadequate.”²¹⁷ If open records laws are to have any “teeth,” the regulations must be revised to ensure usable access to records that enables one to understand the information contained therein.

By proposing this amendment, I do not wish to downplay the importance of copyright or the function it serves in our society. Copyright plays an essential

212. *WIREData*, 2008 WI 69, ¶ 110.

213. See Holcomb & Isaac, *supra* note 43, at 559 (“Paper format of large documents provides little clarity about government actions when compared to an electronic format with search capability.”).

214. 5 U.S.C. § 552 (2006).

215. Robert Ratish, Comment, *Democracy's Backlog: The Electronic Freedom of Information Act Ten Years Later*, 34 RUTGERS COMPUTER & TECH. L.J. 211, 227 (2007) (quoting 32 C.F.R. § 286.4(g)(2) (2006)).

216. FED. R. CIV. P. 34(b)(2)(E)(i).

217. Holcomb & Isaac, *supra* note 43, at 555.

role in stimulating innovation and promoting and encouraging investment.²¹⁸ However, copyright must yield to the more important countervailing interest in preserving citizens' ability to access information about their government.²¹⁹

Municipalities may privately contract for record-keeping services; however, we must hold municipalities responsible—lest we forget that the Wisconsin Statutes specifically indicate that an important *function and purpose* of the government is to provide citizens with information.²²⁰ Thus, municipalities must not submit to contracts that hijack their rights to their own data—information—which belong, in a sense, to the very public that paid for the licensing fees on the contract. Records custodians must not be permitted to contract around their duties under open records laws.

X. CONCLUSION

The government must be brought back to its essential function; we must not forget that the government exists to serve the people. “Our society is built on the concept of an open government. Yet this case presents a prolonged litigious situation which is just the opposite of the prompt concise response which is embodied in the Open Records laws.”²²¹ Given the significance of the public access at stake, the legislature must act.

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218. John A. Kidwell, *Open Records Laws and Copyright*, 1989 WIS. L. REV. 1021, 1023. A full discussion of the merits of copyright in society is outside the scope of this Comment.

219. *Id.* (“The copyright monopoly encourages the creation (authoring) and then the distribution (publishing) of information. Its purpose is not to protect any natural right of authors, but rather to generate a public benefit. The reward should not exceed that necessary to stimulate the necessary investment in either authority or publishing.”).

220. WIS. STAT. § 19.31 (2007–2008).

221. Brief of Respondent WIREdata, Inc., *supra* note 40, at 86.

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