



To: Members, Wisconsin State Assembly
From: Tom Larson, WRA Director of Regulatory & Legislative Affairs
Date: April 9, 2010
Re: AB 638/SB 426 -- Open records legislation

The Wisconsin REALTORS® Association (WRA) strongly supports AB 638/SB 426, legislation intended to address two open records issues related to obtaining land information records, which were highlighted in the recent Wisconsin Supreme Court case WIREData, Inc. v. Village of Sussex, et al. Specifically, AB 638/SB 426 was introduced to achieve the following two goals:

- (1) clarify what contractors hired by municipalities can charge for producing land information records (property taxes, zoning, etc.) requested by the public, and
- (2) clarify the format in which the municipalities must provide the land information records.

Goal #1 – Clarify what contractors hired by municipalities can charge for producing the land information records requested by the public

Background

Wisconsin's open records laws contains a major deficiency, which effectively can be and is used to make records inaccessible. This is a result of a logical gap which allows a contractor (who is maintaining public records for an authority) to make a profit and set a prohibitively exorbitant price on the obtaining the record.

Specifically, this loophole results from the interrelationship between the two following provisions:

1. When an authority has custody of a record, it can only charge the actual cost of reproducing the record
 - a. Wis. Stat. § 19.35 (3) (a) states "An authority may impose a fee upon the requester of a copy of a record which may not exceed the actual, necessary and direct cost of reproduction and transcription of the record, unless a fee is otherwise specifically established or authorized to be established by law"
2. The law also states that when a public record is in the hands of a contractor, it must be produced. Specifically Wis. Stat. § 19.36 (3) states "Subject to sub. (12), each authority shall make available for inspection and copying under s. 19.35 (1) any

record produced or collected under a contract entered into by the authority with a person other than an authority to the same extent as if the record were maintained by the authority. This subsection does not apply to the inspection or copying of a record under s. 19.35 (1) (am).ö

The problem occurs in that nothing limits the contractor to only charge the actual cost of reproducing the record. The recently decided WIREData case makes it clear that the governmental unit is responsible to force the contractor to produce the record, but nothing limits the contractor to what it charges the governmental unit for producing the record. Experience in the assessment records situation shows how the contractor can price the record high, but since that is the amount actually paid by the government unit, it become the direct cost of the reproduction öeven though there are significant profits built in for the benefit of the contractor.

Solution

To remove this loophole, AB 638/SB 426 applies the same standards to contractors that currently apply to local units of government, as found in Wis. Stat. § 19.35 (3) (a) (above).

Goal #2 -- Clarify the format in which the municipalities must provide the land information records

Background

Under Wis. Stat. § 19.36(4), the material produced by or stored on a computer program may be examined and copied. However, the law does not specify the format (e.g., paper, electronic) in which this material can be copied. Accordingly, if someone asks for a public record to be copied in an electronic format, Wisconsin's open records law does not require the request to be honored, even if the electronic format requested is the same electronic format in which the public record is currently stored.

The ability to obtain public records in an electronic format is important for members of the public who want to use this data for research, analysis, or other lawful purposes without incurring the time and cost necessary to reproduce it manually from a hard copy into an electronic format. Moreover, the costs incurred by a keeper of a public record to reproduce the record in the same electronic format in which the record is currently stored would be minimal and fully reimbursed by the person requesting the record.

Solution

To address this problem, AB 638/SB 426 requires all land information records to be reproduced in the same format as currently maintained by the keeper of such records, if requested by a member of the public. [Note -- Several state agencies raised concerns that requiring all records to be copied/produced in an electronic format could allow recipients of these electronic records to gain access to confidential information. Accordingly, this scope of this provision was narrowed to relate only to local land information records.]

If you have questions, please feel free to contact us at (608) 241-2047.