STATE OF WISCONSIN IN SUPREME COURT

PETITION REQUESTING INFORMATION PURSUANT TO SCR 40.12

AND 12-

PETITION TO CREATE SCR 30.03 AND TO REPEAL SCR 40.12, REQUIRING THE BOARD OF BAR EXAMINERS TO ABIDE BY THE STATE OPEN RECORDS AND OPEN MEETINGS LAWS

INTRODUCTION

Petitioner Steven Levine hereby petitions the Supreme Court of Wisconsin pursuant to SCR 40.12 to order the Board of Bar Examiners (BBE) to (1) provide him with the names and addresses (email addresses, if available; street and city addresses if email addresses unavailable) of those persons who sat for the July 2011 Wisconsin bar exam and to (2) repeal SCR 40.12 and create SCR 30.03, as follows: "Except as explicitly set forth in SCR Chapters 30, 31, or 40, the Board of Bar Examiners shall abide by and be subject to the Wisconsin Open Records Law (Wis. Stats. §§ 19.31-19.39, as it may be amended, added to, or renumbered) and the Wisconsin Open Meetings Law (Wis. Stats. §§ 19.81-19.98, as it may be amended, added to, or renumbered) and to all remedies provided by those laws."

BACKGROUND

In August 2011 petitioner Steven Levine requested the BBE to provide him with the names and addresses (email addresses if available, otherwise street and city addresses) of those persons who sat for the July 2011 Wisconsin bar exam. Petitioner explained in his request that he wished to survey those persons concerning their evaluation of the bar exam as well as any suggestions they might have for improvement

of the exam and bar admission process. (The names might also be used to form an advocacy group to advocate for change in the bar admission process.) In a letter dated September 30, 2011 (attached to this petition), the BBE Director responded that the BBE had considered petitioner's request at its meeting of September 23, 2011, and that "[f]ollowing a discussion of the matter, and upon motion duly made and seconded, the Board declined to release that information to you as it is considered confidential under SCR 40.12."

SCR 40.12 provides:

> Confidentiality. The application files of an applicant and all examination materials are confidential. The supreme court or the board may authorize the release of confidential information to other persons or agencies.

SCR 40.12 specifically authorizes the BBE or this court to release the information requested by petitioner "to other persons." Petitioner hereby requests the court to (1) direct the BBE to provide petitioner with the requested information pursuant to SCR 40.12 and thereafter to (2) repeal SCR 40.12 and create SCR 30.03 as follows: "Except as explicitly set forth in SCR Chapters 30, 31, or 40, the Board of Bar Examiners shall abide by and be subject to the Wisconsin Open Records Law (Wis. Stats. §§ 19.31-19.39, as it may be amended, added to, or renumbered) and the Wisconsin Open Meetings Law (Wis. Stats. §§ 19.81-19.98, as it may be amended, added to, or renumbered) and to all remedies provided by those laws."

MEMORANDUM AND ARGUMENT

I. The court should direct the BBE to provide petitioner with the names and addresses of those persons who sat for the July 2011 Wisconsin bar exam. This information is not personal nor does it invade anyone's privacy. It simply consists

of names and addresses. The information is requested for a legitimate purpose: to survey bar applicants who sat for the July 2011 bar exam to gain their evaluations of the exam and of the entire bar admission process. The names and addresses may also be used to form an advocacy group to advocate changes in the Wisconsin bar admission process. In a state where arrest records are "open records" available to the public (*Newspapers, Inc. v. Breier*, 89 Wis. 2d 417, 279 N.W.2d 179 (1979)), certainly the names and addresses of bar exam applicants are also "open records."

Petitioner's reasons for requesting the names and addresses of those persons who sat for the July 2011 bar exam are legitimate and reasonable. The BBE's refusal to provide that information provided no reasons for its denial, except to state that the information requested "is considered confidential." This is no reason at all. It does not state the reasons why the BBE declined to release this information to petitioner, despite the fact that SCR 40.12 allows such release. The court should order the BBE to provide petitioner with the requested information.[1]

II. The court should require the BBE to abide by the state's open records and open meetings laws. Petitioner requests that that the court abolish SCR 40.12 and adopt a new SCR 30.03 to read as follows: "Except as explicitly set forth in SCR Chapters 30, 31, or 40, the Board of Bar Examiners shall abide by and be subject to the Wisconsin Open Records Law (Wis. Stats. §§ 19.31-19.39, as it may be amended, added to, or renumbered) and the Wisconsin Open Meetings Law (Wis. Stats. §§ 19.81-19.98, as it may be amended, added to, or renumbered) and to all remedies provided by those laws." Under proposed SCR 30.03, requests for all

[1] The BBE stated that it was denying petitioner's request under SCR 40.12, but that rule applies only to "the application files" of a bar admission applicant. Petitioner did not request the contents of any file – only the names and addresses of those persons who sat for the July 2011 bar exam.

BBE records – including information contained in applicants' files – would be subject to the state's open records law, including the exceptions contained therein.

It is important for the court to repeal SCR 40.12 and replace it with a new SCR 30.03, requiring the BBE to abide by the state's open records and open meetings laws. The purpose of the state's open records law is to inform the public concerning the actions of governmental officers and employees. *Bldg. & Constr. Trades Council v. Waunakee Cmty. Sch. Dist.*, 221 Wis. 2d 575, 582, 585 N.W.2d 726, 729 (Wis. App. 1998). The law acts as a basic pillar of our democratic form of government by providing public oversight of government. *E.g., Schill v. Wisconsin Rapids School Dist.*, 2010 WI 86, ¶ 2, 327 Wis.2d 572, 580, 786 N.W.2d 177; *Linzmeyer v. Forcey*, 2002 WI 84, ¶ 15, 254 Wis. 2d 306, 646 N.W.2d 811; *Nichols v. Bennett*, 199 Wis. 2d 268, 273, 544 N.W.2d 428, 430 (1996). The public policy of the state, as expressed in the open records law is to provide the broadest practical access to government affairs. *Hempel v. City of Baraboo*, 2005 WI 120, ¶ 28, 284 Wis. 2d 162, 699 N.W. 2d 991.

Section 19.31 provides:

> **"Declaration of policy.** 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, ss. 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."

Section 19.32(1) applies the open records law to any "… board, commission, committee, council, department or public body corporate and politic created by constitution, law, ordinance, rule or order;" The BBE is such a board. There is no reason why the purposes of the open records law so eloquently expressed in the appellate court opinions cited above should not also apply to the BBE. Public oversight of the BBE is no less important than public oversight of any other state board or agency.

Under current SCR 40.12, if an interested person wishes to see a record of the BBE, that person must first request that information from the BBE, then seek that information from the supreme court if the BBE denies the request – a burdensome, time-consuming process. Under SCR 40.12 the information can be denied for any reason or for no reason at all. The rule contains no standards – the essence of arbitrariness. Presumably, the record requested may be granted or denied depending on whether the BBE or the court believes that the reason the record has been requested is for a worthy purpose.

In contrast, under the open records law, a requester of a record need not state any reason for his or her request. It is not up to government officials – nor should it be – to judge the reasons for the request. The policy of the state expressed in the open records law is that citizens are entitled to "the greatest possible information regarding the affairs of government and the official acts of those officers and employees who represent them." Providing such information is declared to be an "essential function" of government, and there is "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." Wis. Stat. § 19.31.

Records must be provided "as soon as practicable and without delay." Wis. Stat. § 19.35(4)(a).

With respect to providing the public with governmental records, SCR 40.12 and Wis. Stats. §§ 19.31-19.39 are like night and day. SCR 40.12 creates a presumption of denial of access in a burdensome, time-consuming, arbitrary process. Wis. Stats. §§ 19.31-19.39 create a presumption of access in a practical, expeditious process. The court should apply the open records law to the BBE. By adopting petitioner's proposed SCR 30.03, the court will also be making clear that the open records law applies to BBE records other than applicants' files or examination materials.

The nature and duties of the BBE are not essentially or drastically different from other state boards and agencies as to justify an exemption from the state open records and open meetings laws which cover those agencies. The Wisconsin Department of Safety and Professional Services (DSPS, formerly the Department of Regulation and Licensing) regulates every regulated profession in Wisconsin except lawyers. In that respect, its functions are identical to the BBE's. The DSPS is subject to the open records and open meetings laws. There is no justification for treating the BBE any differently. If the DSPS can function well under the open records and open meetings laws, so can the BBE. Ironically, the current director of the BBE was formerly employed by the Department of Regulation and Licensing, where she was required to comply with the open records and open meetings laws. There is no reason why the BBE cannot operate well under those laws, given that all state agencies, including the DSPS, are subject to those laws and operate quite well under them.

There are no good reasons for the Supreme Court not to subject the BBE to the Wisconsin open records and open meetings laws. It would be hypocritical for the court to praise the open records and open meetings laws when the court decides cases dealing with all other state boards and agencies, but to exempt the BBE from compliance with those laws. And it would be arrogant – amounting to a statement that the public may need the protection of those laws with respect to all other state agencies, but not with respect to the BBE: Justices and a board which regulates lawyers can be trusted to act appropriately without the need for the open records or open meetings laws; all other agencies cannot be so trusted. To exempt the BBE from the open records and open meetings laws would constitute a statement that the Supreme Court and the BBE are above the law followed by all other state agencies – a poor example for the public by its supreme court, which is supposed to even-handedly administer the law.

The lack of application of the state open records and open meetings laws regarding public access to BBE records and meetings leaves the public at the mercy of arbitrary action by the BBE. The need for Supreme Court review in each case places an unreasonable and unnecessary burden on the public. The public should have no less rights of access to BBE records and meetings than to the records and meetings of any other state agency. The Supreme Court should adopt proposed SCR 30.03 to cover all BBE records – not only those presently covered by SCR 40.12. As an equal and coordinate branch of government, the Supreme Court of Wisconsin has a responsibility to the public to require its BBE to operate in a manner consistent with the public's right to know, as set forth in Wis. Stats. §§ 19.81-19.98 and 19.31-19.39 – unless such operation would be contrary to the interests of justice.

III. The same arguments in favor of applying the open records law to the BBE also are relevant to applying the open meetings law to the BBE. At present, the BBE usually posts agendas of its meetings on its website – but such posting is at the sole discretion of the BBE, and there have been problems. For example, the agenda of the July 2011 meeting was posted *after* the meeting was held. The open meetings law also contains protections for the public other than notices of agency meetings – such as protections regarding "email meetings," meetings by "formally constituted subunit[s]" of an agency (Wis. Stat. § 19.82(1)), and access by the media. For full protection of the public, the court should explicitly subject the BBE to the requirements of both the open records and open meetings laws.[2]

Respectfully submitted,

/s/ Steven Levine

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[2] In Board of Bar Examiners rule CLE 14.01, the BBE asserts:

"As an agency of the Supreme Court, the Board is not subject to Subchapter V of Chapter 19 of the Wisconsin Statutes, relating to open meetings of governmental bodies. However, the Board posts the dates, locations and agendas of its meetings in its Internet web site and invites the public to attend its meetings. Members of the public are not allowed to attend meetings or parts of meetings that involve confidential matters. Examples of confidential matters include (i) individuals' applications for admission to the Wisconsin bar, (ii) hearings on admission applications and (iii) bar examination questions."

Petitioner disagrees with the BBE's assertion that it is not subject to the Open Meetings Law. Please see Wis. Stats. § 19.82(1), which applies that law to "a state or local agency, board, commission, committee, council, department or public body corporate and politic created by constitution, statute, ordinance, rule or order;" The BBE is such a "board." To end any confusion in this regard, the Court in this rulemaking proceeding may and should explicitly subject the BBE to the Open Meetings Law, as set forth in petitioner's proposed SCR 30.03.