

SUPREME COURT
STATE OF WISCONSIN

Appeal Nos.: 2005AP1473; 2006AP174; 2006AP175

WIREDATA, Inc.,
Plaintiff-Respondent
v.
Village of Sussex, and
Village of Sussex Custodian
Defendants-Co-Appellants-Cross Petitioners
GROTA Appraisals, LLC, Michael L. Grota, and Assessment
Technologies of WI, LLC,
Defendants-Appellants-Petitioners

WIREDATA, Inc.,
Plaintiff-Appellant,
v.
Village Of Thiensville, Defendant-Respondent,
GROTA Appraisals, LLC, Michael L. Grota, And Assessment
Technologies Of WI, LLC,
Defendants-Respondents-Petitioners

WIREDATA, Inc.,
Plaintiff-Appellant,
v.
City Of Port Washington
Defendant-Respondent-Cross Petitioner,
Matthies Assessments, Inc.,
Defendant-Respondent,
American Family Insurance Company,
Intervenor.

BRIEF OF DEFENDANTS-APPELLANTS-PETITIONERS

**APPEAL FROM WAUKESHA COUNTY CIRCUIT COURT, THE
HONORABLE MARK S. GEMPELER, PRESIDING, CASE NO.
2001CV001403, AND APPEAL FROM OZAUKEE COUNTY CIRCUIT
COURT, THE HONORABLE THOMAS R. WOLFGRAM, PRESIDING,
CIRCUIT COURT CASE NOS. 2001CV000198 AND 2001CV00216**

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**STATEMENT OF ISSUES PRESENTED FOR REVIEW, THE METHOD OR
MANNER OF RAISING THE ISSUES IN THE COURT OF APPEALS
AND HOW THE COURT OF APPEALS DECIDED THE ISSUES.**

1. Did the municipalities deny WIREdata's request prior to WIREdata filing the mandamus action? It is undisputed that the request was never actually explicitly denied prior to filing suit. Grota Appraisals argued in both the trial court on summary judgment and in the Court of Appeals that no actual denial ever took place, and that in any event, the municipalities were attempting to comply with the requests. The Court of Appeals concluded that the municipalities impliedly denied WIREdata's requests.

2. Was WIREdata's request insufficient as a matter of law? Grota Appraisals argued in both the trial court on summary judgment and in the Court of Appeals that the requests were insufficient as a matter of law because they did not have a reasonable temporal limitation or a reasonable subject matter limitation, as required by statute. The Court of Appeals instead concluded that the appropriate measure of the sufficiency of the request is not judged by the actual request itself.

3. Are third party consultants, like Mr. Andrew Pelkey or Impact Consultants, proper recipients of an open records request? Grota Appraisals argued in both the trial court on summary judgment and the Court of Appeals that third party consultants are not a proper recipient of an open records request, because they are neither an authority nor a custodian. Mr. Pelkey and Impact Consultants were instead an unrelated third party vis-à-vis the municipalities, the appropriate recipients. The Court of Appeals concluded impliedly that Mr. Pelkey, as a third party implied agent, is an appropriate recipient of an open records request, and a respondent thereto.

4. Did the Court of Appeals have a sufficient factual basis to conclude that defendants had not fulfilled WIREdata's open records request once a PDF file¹ was produced? The Court of Appeals ignored WIREdata's admissions and other undisputed evidence that WIREdata did in fact receive electronic/digital copies of the requested data. Grota Appraisals argued in both the

¹ PDF stands for "portable document format," a standard electronic digital document format developed by Adobe Systems, and PDF files are read using a program called "Adobe Acrobat." PDF is widely used for delivering electronic documents. This Court distributes its opinions in two electronic formats, PDF and HTML (hyper-text markup language, typically read by internet browsers such as Microsoft Internet Explorer). See, e.g., <http://www.wicourts.gov/supreme/sctoday.jsp>.

trial court on summary judgment and in the Court of Appeals that a PDF copy of the 2001 database was sufficient to comply with WIREdata's requests. Instead, the Court of Appeals ruled that the municipalities must provide WIREdata with access to a computer database so that it may examine and copy the property assessment information it sought, despite its conclusion that PDF files are indisputably electronic/digital files.

5. Would a new record have to be created to fulfill WIREdata's request? Grota Appraisals argued in both the trial court on summary judgment and in the Court of Appeals that a new record would have to be created to fulfill WIREdata's request, so responding to WIREdata's request would be beyond the scope of duty of any respondent thereto. The Court of Appeals impliedly concluded that a new record would not have to be created.

6. Is the fee that would have been charged to WIREdata the actual fee? Grota Appraisals argued in both the trial court on summary judgment and in the Court of Appeals that the computer programming fees that Assessment Technologies' contractor would have charged, would have to be paid by a respondent. The Court of Appeals impliedly concluded that even stating

that a request would be granted, but charging too high of a fee (in the requester's opinion), constitutes a implied denial of a request allowing a mandamus action to be filed.

STATEMENT ON ORAL ARGUMENT AND PUBLICATION

Defendants-Appellants-Petitioners request oral argument because, although this brief fully meets the issues, oral argument could possibly materially clarify issues for this Court.

Publication of this Court's opinion is authorized because this case meets one or more of the criteria of Wis.Stat. § 809.23(1)(a)(1).

STATEMENT OF THE CASE

This appeal arises from a Court of Appeals decision that decided a split between decisions in the Waukesha County Circuit Court and the Ozaukee County Circuit Court. On nearly identical facts, the Waukesha County Circuit granted summary judgment to WIREdata, while the Ozaukee County Circuit Court granted summary judgment to all defendants. WIREdata, Inc. v. Village of Sussex et al., 2007 WI APP 22 (Wis. Ct. App. 2007). The genesis of the three related open records actions that were consolidated by the Court of Appeals were requests made on April 20, 2001 by WIREdata under Wisconsin Open Records Law, Wis.Stat. §§ 19.31 – 19.37 to the Village of Thiensville, the Village of Sussex and the City of Port Washington. *Id.* at ¶¶ 7, 23. The request was:

This is to formally request 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 your municipality in determining the proper assessments for each parcel within the [municipality].
(55:22; 23; 32; 58-59)

Each of those municipalities had contracted with private assessors to perform their assessments. The Village of Sussex and the Village of Thiensville had both hired Grota Appraisals to perform assessments, and the Village of Port Washington hired Matthies

Assessments. Grota Appraisals and Matthies Assessments, along with approximately 80 other assessment firms in Wisconsin, license Market Drive™ software from a software company called Assessment Technologies of WI, LLC to assist in performing their assessments.

Each of the three municipalities then undertook a separate response process, as described below.

Upon receiving WIREdata's request, the Village of Sussex referred the matter to their counsel, Attorney John Macy of Arenz, Molter, Macy & Riffle, S.C. for response.

Preemptively, prior to any response from Sussex, and merely four days after their April 24, 2001 request to Sussex, counsel for WIREdata wrote Attorney Macy threatening that "if the request is denied in whole or in part . . . we will be seeking immediate relief via a mandamus action...." (55:33-36)

Attorney Macy in turn forwarded the matter to Grota Appraisals for their input. Grota Appraisals in turn forwarded the matter to Mr. Pelkey, owner of Impact Consultants, a private computer programming firm that Assessment Technologies contracted with to write MarketDrive™ software (the software licensed by both Grota Appraisals and Matthies Assessments).

On May 4, 2001, Mr. Pelkey informed the Village of Sussex of his opinion that it would be very difficult

to export data from the MarketDrive™ software to a Microsoft Word format. Mr. Pelkey further informed the village that it would be very time consuming to do so, and that the end result would be unusable.² (55:37)

Between May 4, 2001 and May 21, 2001, Mr. Tom Curtis of WIREdata contacted Impact Consultants directly to discuss the data requirements of WIREdata. Mr. Curtis wrote to Mr. Pelkey requesting selected fields regarding each property within a municipality, in a specified order. (55:38-39).

WIREdata wrote the following to Impact Consultants:

Selected fields requested from Market Drive software. Any type of electronic output and media is acceptable (i.e., fixed length, comma-quote, pipe delimited). ***We would need a data layout, if the fields are not in the order below.***

Taxkey
County
Municipality
Town, Village or City Indicator
Property Prefix
Property Street Number
Property Street Direction
Property Street Name
Property Unit Number
Zip Code
Owner Name
Owner Address
Owner City...
Property Class

² At trial in Federal Court, Mr. Pelkey's opinion regarding the difficulty of data exportation was incorrect. In fact, an experienced programmer was able to convert the data from the Market Drive™ (Version 2000) software into a readable format more quickly than Mr. Pelkey had believed.

Acres
Zoning
Land Use
Building Type
Number of Stories
Story code (Example: 1, 1+attic)
Number of Units
Building Square Feet
Basement Type (Full, partial, etc.)
Attic (Yes/No/Type: Finished/etc.)
Pool (Yes/No/Type: Inground/etc.)...
Garage Type (# stalls, attached,
detached, etc.)...
(emphasis added).

Understandably, none of the municipalities had the data in the tailored format as WIREdata had requested.

Impact Consultants then responded to WIREdata directly, again bypassing all of the municipalities and all of the assessors. Impact Consultants stated that it could export the data for each municipality into a format that would give WIREdata "a complete picture of what each property looks like." However, Impact Consultants would have to do some computer programming and verification to determine that the output was acceptable. Mr. Pelkey's stated cost for Impact Consultants to do this programming was \$6600.³

³ Other branches of government, including this Court, routinely provide value-added services to the public for data extraction and manipulation tasks. For instance, access to CCAP is provided for free to the public via the internet, but is single query based and ordinarily generates only results on the single query. See <http://wcca.wicourts.gov/index.xsl>. Access to the full database that the CCAP web site queries; however, is provided at the rate of \$5,000.00 per year, or \$500 monthly, on a subscription basis. See

Impact Consultants would also charge \$0.50 per parcel for this service (the Village of Sussex had approximately 2500+ parcels at the time, the Village of Thiensville approximately 1,200, and the City of Port Washington approximately 4,000). (55:40-43)

Between May 22 and May 29, 2001, more communications ensued between Attorney Macy and Impact Consultants, and Attorney Macy and Grota Appraisals, as they attempted to work through technical and legal questions surrounding the village's response to WIREdata's request. (55:44-49)

Ultimately, on May 29, 2001, counsel for the Village of Sussex wrote to counsel for WIREdata regarding the status of the village's response to WIREdata's request. Village of Sussex, 2007 WI APP 22 at ¶ 15. In this correspondence, the Village of Sussex informed WIREdata that "every effort is being made to promptly respond to your request" and that its investigation was ongoing. (55:56-57). Specifically, the Village of Sussex related to WIREdata that Grota had "concerns as to the technical aspects of their request." (55:56-57)

Further, the Village opined that there were really two issues involved with WIREdata's request: the first was a public records request, and the second was a

http://wcca.wicourts.gov/download/SOAP_Agreement_Dec06.pdf.

private business transaction involving computer programming that would allow existing data to be "organized in a comprehensible form" with regard to providing WIREdata with the data it really wanted. *Id.*

Even though the municipalities were still working on a response, on May 30, and June 8, 2001, WIREdata filed the Village of Thiensville along with the City of Port Washington Complaint, and the Village of Sussex Complaint, respectively.

On June 12, 2001, Grota Appraisals wrote to the Village of Sussex and notified the Village that "Grota Appraisals could export digital information on a time and material basis if requested to do so.... The Village should notify WIREdata of records availability.... Should WIREdata choose to order copies of assessment information they should contact Grota Appraisals." However, neither the Village of Sussex nor Grota Appraisals ever received a response from WIREdata: unknown to them, the present lawsuits had already been commenced. (55:52)

Between June 12, and June 20, 2001, Grota Appraisals diligently attempted on its own to export data to a comprehensible format. On June 20, 2001, Grota Appraisals informed the Village that it could provide data to WIREdata for an estimated cost of \$3,132. This estimate was based on a trial run that Grota Appraisals did to process the data into a text

format. Grotta Appraisals estimated that it would take 2 minutes per parcel, so 5,370 minutes to process the 2,685 individual parcels that the Village of Sussex had on the assessment roll. (55:53-54)

On June 25, 2001, the Sussex Village Administrator attempted to inform Attorney Deutch that "the records you have requested are available from the Assessor" and that the costs approximated \$3,132, but that if the "actual necessary, and direct cost is less than this estimate, we will refund the difference." No further response was ever received, excepting the pleadings in this lawsuit. (55:56-57)

In the meantime, the Village of Thiensville had turned the request over to their counsel, Houseman & Feind, who, on June 4, 2001, informed counsel for WIREdata that the Village of Thiensville was:

still evaluating the capability of the [MarketDrive™ software] used by our assessor. Once we are fully informed as to the specific capabilities of the program, we will be in a better position to properly evaluate your open records request. As we continue to evaluate your request, we ask that you postpone any filing of a writ of mandamus.
(85:29)

Regarding the City of Port Washington, On May 4, the City Treasurer sent WIREdata a letter stating, "You certainly may obtain information from Matthies Assessments. Please direct your request directly to Matthies; please also direct your questions regarding

their charges for these services directly to them.” Matthies was contacted by WIREdata, and Mathies then contacted a Grota Appraisals employee. The Grota Appraisals employee reminded Matthies of the limitations of the Market Drive™ software user license.

Following these responses by each municipality, and in response to the filing of the mandamus actions, Assessment Technologies sued WIREdata in Federal Court seeking an injunction to prevent infringement of Assessment Technologies’ copyrights in the Market Drive™ software and its federally registered database structure.

Although the District Court granted Assessment Technologies’ request for an injunction, the 7th Circuit reversed. *See Assessment Techs. of WI, LLC v. WIREdata, Inc.*, 350 F.3d 640 (7th Cir. 2003).

Notably, the 7th Circuit did not address any of the issues that this Court faces now. Instead, the 7th Circuit was presented with *only* federal copyright issues and its decision specifically held that WIREdata could be provided its data, under certain circumstances, without violating federal copyright law but that the method selected for doing so was at the discretion of “the municipality to decide in light of applicable trade-secret, open-records, and contract laws.” *See Id. at 647.* The methods that the 7th Circuit suggested were:

(1) the municipalities use Market Drive to extract the data and place it in an electronic file; (2) they use Microsoft Access to create an electronic file of the data; (3) they 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; (4) they copy the database file and give it to WIREdata to extract the data from.

The decision of the 7th Circuit made no analysis of applicable trade-secret, open records, or contract laws. In other words, the 7th Circuit never decided whether its four chosen alternatives for data disclosure would be acceptable in light of the applicable trade-secret, open-records, or contract laws.

Following the 7th Circuit decision, WIREdata promptly received in an electronic and digital form, PDF files containing all of the data that Grota Appraisals had in its possession. Village of Sussex, 2007 WI APP 22 at ¶¶ 20, 25.

All parties filed summary judgment motions in their respective courts, Ozaukee County and Waukesha County.

In Waukesha County, the trial court granted WIREdata's motion for summary judgment, with the exception of a request for punitive damages. The court determined that there could be multiple authorities

under open records law and Sussex, Grota Appraisals, Assessment Technologies and Michael Grota were authorities. The court held that WIREdata's request was in the form the open records law required and did not require the creation of a new record. The court found that the defendants did not provide a proper response to the valid open records request. The court concluded that the PDF was not in compliance with either the open records law or the 7th Circuit decision. Village of Sussex, 2007 WI APP 22 at ¶ 21.

In Ozaukee County, the trial court reached the opposite - and correct - conclusion. Thiensville, WIREdata, Grota Appraisals, Assessment Technologies and Michael Grota filed motions for summary judgment that were substantially similar to those filed in the Sussex case. The court granted summary judgment in favor of Thiensville, Grota Appraisals, Assessment Technologies and Michael Grota and imposed costs on WIREdata. In its oral ruling, the court first rejected the notion that the Sussex court's decision had any preclusive effect on the cases before it. The court next determined that Thiensville was an authority; it had simply delegated the responsibility for maintaining the records to a different custodian. However, the court then found that WIREdata's initial request failed to satisfy the open records law requirement that it be reasonable in its scope and that the subsequent enhanced request from

WIREDdata was improperly directed to Pelkey. The court further determined that the PDF was in “electronic digital format,” which was what WIREDdata had requested. Village of Sussex, 2007 WI APP 22 at ¶ 25.

The Court of Appeals concluded that (1) the municipalities are the appropriate authorities and must be held responsible for the open records law violations;⁴ (2) WIREDdata submitted a valid open records request, which the municipalities improperly denied; (3) the PDF failed to comply with the open records law; (4) the open records law demands access to the computer database; (5) WIREDdata is entitled to actual, reasonable and customary fees and costs; and (6) that the independent contractor assessors are not responsible for WIREDdata’s reasonable costs and attorney fees. Village of Sussex, 2007 WI APP 22 at ¶ 3.

⁴ This holding is the subject of the Village of Sussex’s cross-petition.

ARGUMENT

A. WIREdata's Requests Were Never Denied as The Municipalities Were Diligently Working on Responses

The municipalities and their independent contractors here should have been given ample time to respond to a complex request, and reasonable latitude in the form that the municipalities chose for compliance.

As a prerequisite to determine if *any* mandamus action in this case was proper, the Court must conclude that WIREdata's requests were actually denied or unreasonably delayed. *See* Wis.Stat. § 19.37(1) ("If an authority withholds a record or a part of a record or delays granting access to a record or part of a record after a written request for disclosure is made, the requester may [institute a mandamus action.]")

"Each authority, upon request for any record, shall, as soon as practicable and without delay, either fill the request or notify the requester of the authority's determination to deny the request in whole or in part and the reasons therefor." WIS. STAT. § 19.35(4)(a).

Thus, the statute provides no concrete timeframe for response, instead allowing municipalities a "practicable" amount of time for a response.

When confronted with the complex technological and

legal tasks that the requests in this case presented, the municipalities each acted appropriately and promptly in an attempt to respond to the ambiguous requests. Counsel for the Village of Sussex even emphasized:

Again, I expect that we will be providing you with the final response to your request in the very near future. Regrettably, this issue arises right during Board of Review procedures which necessarily [require] a significant amount of the Assessor's time. Nevertheless, we will continue to treat this matter with the highest priority.

Village of Sussex, 2007 WI APP 22 at ¶ 15.

The evidence shows that the municipalities were attempting to formulate a response that would best suit WIREdata's needs.

For instance, Counsel for the Village of Sussex informed WIREdata that "every effort is being made to promptly respond to your request" and that its investigation was ongoing. (55:56-57), and that there were computer related technical concerns that the village was dealing with. (55:56-57).

The Village of Thiensville turned the request over to their counsel, Houseman & Feind, who, on June 4, 2001, informed counsel for WIREdata that the Village of Thiensville was:

still evaluating the capability of the [MarketDrive™ software] used by our assessor. Once we are fully informed as to the specific capabilities of the program, we will

be in a better position to properly
evaluate your open records request.
As we continue to evaluate your
request, we ask that you postpone any
filing of a writ of mandamus.
(85:29)

Instead of focusing on what a “practicable” amount of time meant, the Court of Appeals instead created new law in concluding that “[i]f an authority withholds a record or delays granting access, the requester may *immediately* bring an action for mandamus seeking release of the record.” Village of Sussex, 2007 WI APP 22 at ¶ 53 (emphasis in original.)

What is “practicable” obviously differs with each different request. A request for a simple photocopy of meeting minutes would clearly require a faster response than the present case of first impression. There is no evidence in the record of any of the municipalities or the assessors, or even Mr. Pelkey for that matter, dealing with a request of the type presented here. The municipalities were entitled to sort through the various legal and technical issues, and indeed the evidence shows that they were performing this task.

Concededly, WTMJ, Inc. v. Sullivan, 204 Wis. 2d 452, 457, 555 N.W.2d 140 (Ct. App. 1996) holds that “compliance at some unidentified time in the future is not authorized by the open records law.” *Id.* at 458. However, WTMJ did not deal with how much time an authority had to formulate a response to an open records response. Indeed, in WTMJ, the authorities’

response was made the day after the initial request, with the records only being produced after “[o]nce the criminal investigation [into Jeffrey Dahmer’s alleged assailants] is completed...” *Id.* The issue in WTMJ thus dealt with the authorities agreeing to comply with the request, but at some unidentified time in the future.

The distinction between WTMJ and this case is that in this case, the facts show that the municipalities and their independent contractors may not have possessed the technological or legal aptitude required to respond to WIREdata’s complex requests. For instance, in this case, although trained computer experts, including the independent computer programmer and the requester themselves could deal with the technological aspects of responding to the requests, the municipalities and their contract assessors probably did not possess that aptitude. The municipalities were attempting to ascertain the true extent of WIREdata’s requests and check into the legal and technological complexities involved. This is certainly an attempt to act in a “practicable” period of time.

The solution to what defines a “practicable” amount of time must therefore vary from case to case. The facts of this case, due to the complexity of interpreting the request, the municipalities’ conceded

lack of computer skills, and the required analysis of the rights licensed under Assessment Technologies' software license, all demonstrate that a "practicable" period of time in this case is longer than an ordinary or mundane open records request.

Under the strictures of the Court of Appeals' decision in this case, municipalities are given an undefined, but in any event very little amount of time in which to formulate responses to open records requests. This decision does not factor in the complexity nor the novelty of the requests here. Instead, municipalities are faced with ticking time bombs, the expiry of which would remain unknown.

After the Court of Appeals determined that the undefined time of "several weeks" was too long for the municipalities to respond, it compounded its error by determining that communications with Mr. Pelkey also constituted a denial of WIREdata's requests. Village of Sussex, 2007 WI APP 22 at ¶¶ 55, 56. If these communications are considered, the communications between WIREdata and Impact Consultants occurred at between May 4, 2001 and May 21, 2001. Suit was filed on May 30, 2001 in the Village of Thiensville case. Therefore, any authority had as few as nine (9) days to evaluate and respond to WIREdata's enhanced request. Therefore, it was unreasonable to respond to such a lengthy and comprehensive request in this short period

of time, and the mandamus actions themselves were premature, as there had been no unreasonable delay in responding to the requests. Wis.Stat. § 19.37(1).

Mr. Pelkey's communications cannot be deemed an authority withholding or delaying access to any record. The Court of Appeals recognized that Grota Appraisals, Assessment Technologies and Michael Grota were not statutory authorities responsible for open records compliance. Indeed, Mr. Pelkey is not a proper recipient of an open records request, and was not authorized by any authority to act on their behalf, as will be explained below in relation to Mr. Pelkey's status as an agent of the municipalities.

The Court of Appeals found that the municipalities are the authorities. Yet no correspondence from either the municipalities or their contractors is appropriately construed as an affirmative denial.⁵ The communications with Mr. Pelkey are reflective of a private business transaction to perform computer programming services, and should not be considered as an open-records response on behalf of any authority. If the communications with Mr. Pelkey *are* considered to comprise an open records response, the communications can only be considered a grant of WIREdata's request, or intent to grant WIREdata's request.

⁵ The parties do not dispute that a request may be subsequently enhanced. The parties do dispute that an enhanced request can be directed to a third-party.

In that case, if communications with Mr. Pelkey are considered responses on behalf of authorities, this whole dispute would resolve into a question of whether the amount Impact Consultants would charge would be reasonable – mandamus would not be proper in this circumstance. Wis.Stat. § 19.37(1). Instead, Wis.Stat. § 19.35(3)(a) would be implicated (“[a]n 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...”.) In that case, the only issue that should have faced the courts would have been a dispute regarding the proposed private-party fee structure, not a mandamus action compelling release of the data. Wis.Stat. § 19.37(1) does not authorize a mandamus action for an alleged violation of Wis.Stat. § 19.35(3)(a).

An action for mandamus required a denial or unreasonable delay, neither of which took place in this case. For this reason, this Court must reverse the Court of Appeals.

B. WIREdata's Requests Were Insufficient as a Matter of Law

WIREdata and the Court of Appeals never defined what exact time or subject matter limitations are embodied in WIREdata's request. WIREdata's request was

insufficient as a matter of law because the request had absolutely ***no limitation as to length of time or subject matter*** represented by the records request. “[A] request for a record without a reasonable limitation as to subject matter or length of time represented by the record does not constitute a sufficient request.” Wis.Stat. § 19.35 (1)(h).

It is simply unacceptable to ask for records without a time limitation. *See, e.g., Schopper v. Gehring*, 210 Wis. 2d 208, 213 (Wis. Ct. App., 1997) (to require a custodian of a record to engage in the copying 180 hours of tape and the creation of a log to identify the time and the order in which the transmissions were received represent a burden far beyond that which may reasonably be required of a custodian of a public record.)

WIREDdata never disputed that WIREDdata itself did not even know what time frame is represented by its request:

12 Q. So you don't know what years that [your
open records] request
13 applies to; correct?
14 A. Correct.

(R55:69)

In Schopper, a request seeking a transcription of three hours of 911 phone calls was held overbroad. *See Schopper*, 210 Wis. 2d at 213. In this case, WIREDdata now interprets their own request as requiring the

assessor to turn over basically everything it had going back in time as far as it had data. Unquestionably, the WIREdata request is far more overbroad than the inappropriate request in Schopper.

Additionally, Schopper does not place the burden on an open records request recipient to seek clarification of an insufficient request. Certainly the burden to clarify an insufficient request cannot fall on a third-party, Impact Consultants. The burden to frame a sufficient request is statutory, and rests squarely with the requester. Wis.Stat. § 19.35 (1)(h). A denial (although there was none here) of an insufficient request cannot form the basis for a mandamus action.

The Court of Appeals rejected all challenges to the sufficiency of the requests, holding that they were tardy. Village of Sussex, 2007 WI APP 22 at ¶ 50. Although the evidence shows that efforts were being made to provide everything the respondents presently had, it makes sense that no further sufficiency challenges were raised prior to the mandamus action. Those sufficiency challenges would have been in a written denial. Wis.Stat. § 19.35 (4)(b). Because there was never a denial, of course there were no pre-litigation sufficiency challenges; the parties were trying to accommodate WIREdata's requests, not deny them.

Because there is absolutely no reasonable temporal or subject matter limitations stated by the request, the Court of Appeals's holding concluding otherwise must be reversed.

C. Mr. Pelkey Is Not An Agent of Any Municipality and Is Not an Appropriate Recipient of an Open Records Request

The Court of Appeals decision goes so far as to hold that even unknown third parties engaged in unknown business-to-business communications can bind appropriate open records respondents.⁶ Indeed, at least the Village of Thiensville in the present case did not even know who Mr. Pelkey was, let alone know what he was saying, or how his statements would bind the Village.

This holding is inconsistent with legions of authority regarding the law of agency. The Court of Appeals identified absolutely no facts on which to base its implied conclusion that Mr. Pelkey was an agent acting on behalf of the municipalities.

⁶ "We also note that WIREdata could have reasonably construed its communications with Pelkey and both of the assessors as denials of its requests. The municipalities decry any responsibility for the effects of these communications. However, for purposes of the open records law, their actions must be attributed to the municipalities. They were all acting at the behest of the respective municipalities." Village of Sussex, 2007 WI APP 22 at ¶ 55.

Mr. Pelkey is an individual who owns Impact Consultants, Inc. Impact Consultants, Inc. is a private computer programming firm that Assessment Technologies of WI, LLC, a private software development firm, contracted with to program the Market Drive™ software. There is no dispute that Pelkey and Impact are not in contractual privity with any municipality. The Court of Appeals failed to mention any facts to support its implied conclusion that Mr. Pelkey was acting as anyone's agent, and never presented any legal analysis of how Mr. Pelkey could be acting as anyone's agent.

In Snider v. Northern States Power Co., 81 Wis. 2d 224, 232 (1977), this Court stated that the most important single factor in determining whether someone is an independent contractor is the degree of control retained over the details of the work. There is no evidence concerning the degree of control any municipality retained over the details of Impact Consultants' work that is before the Court. Indeed there was none. Therefore, the Court of Appeals never could have appropriately concluded that Mr. Pelkey was anyone's agent.

WIREDATA's communications with Assessment Technologies were merely a proposed private business transaction. Impact Consultants communicated to WIREDATA directly, bypassing any of the municipalities.

Impact Consultants cannot be determined to be an agent. As such, all communications with Impact Consultants are outside the purview of open records law because WIREdata does not, and cannot, contend that Mr. Pelkey or Impact Consultants is either an authority or a custodian.

In order to find that Impact Consultants was an agent of any municipality would require the municipalities' "manifestations of consent to such third person that such agent shall act as his agent...." Risdon, Inc. v. Miller Distributing Co., 29 Wis.2d 418, 425, 139 N.W.2d 12, 15 (1966); *see also* Vandervest v. Kauffman Pizza, Inc., 60 Wis. 2d 230, 245 (Wis., 1973) ("[A]pparent agency and authority cannot rest solely upon the statements made to third parties by [Impact Consultants] but are dependent upon the [municipalities'] manifestation of consent.") There is no evidence that any municipality had granted Impact Consultants the authority to act on its behalf. The Court of Appeals certainly pointed to none.

Because Impact Consultants is not an agent of any municipality, it is improper to consider communications with Impact Consultants and Mr. Pelkey as open records responses.

**D. A PDF Version is An Electronic/Digital Copy,
and the Request Has Indisputably Been
Complied with**

The Court of Appeals first ruled that “WIREDdata, or the municipalities themselves, may use tools, in the Market Drive program itself or otherwise, to extract and copy the data WIREDdata desires from the Microsoft Access database and place it in a separate electronic file.” Village of Sussex, 2007 WI APP 22 at ¶ 64. This holding is directly contrary to Wis.Stat. § 19.35 (1)(L), which “does not require an authority to create a new record by extracting information from existing records and compiling the information in a new format.”

Yet Market Drive *was* used to extract and copy the data into a PDF file in excess of open records requirements, and the Court of Appeals still held that the extraction step did not fulfill the open records law.

According to WIREDdata - a PDF format is not an electronic format, in response to their original request, nor is it “any type of electronic output” in response to what they call their enhanced request. The Court of Appeals inexplicably agreed that a PDF file is not an acceptable electronic format.

WIREDdata has not even attempted to argue around their admissions:

- 1 Q. Have you received an electronic digital copy?
- 2 A. Yes.
- 3 Q. So when you asked for an
- 4 electronic digital copy,
- you were in fact expecting
- something else?

5 A. Yes.
6 Q. So why did you ask for an
7 electronic digital copy
8 if you were, in fact, expecting
9 something else?
10 A. I was expecting it in a different
 format.
 Q. You were expecting it in a
 different format than
 what you actually asked for?
 (R55:66)

The Court of Appeals found that the PDF was not in compliance with either the open records law or the 7th Circuit decision. The 7th Circuit did not have jurisdiction to decide the application of Wisconsin's Open Records Law. The question in front of the 7th Circuit was if production of the database would violate copyright law.

Furthermore, the issue in State ex rel. Milwaukee Police Ass'n v. Jones, 2000 WI App 146, ¶19, 237 Wis. 2d 840, 615 N.W.2d 190 was an entirely different one. In Jones, there was a qualitative difference between analog and digital audio recordings of a 911 telephone call. See Id. at ¶ 14 (describing differences between analog and digital noise and waveform enhancement). The same cannot be said here. Whether WIREdata receives a PDF or a Microsoft Access database file, the assessed values and the factors used to determine the assessment remain the same. The data is the *exact same data*.

The distinction that the court of appeals drew in Jones between analog and digital, and the risk of

quality degradation between analog and digital, is simply not present here. In this case, what was requested and what was provided were both digital. Reliance on Jones is clear legal error in this case.

Although Wisconsin Open Records law mandates that it is “the public policy of this state that all persons are entitled to the greatest possible information regarding the affairs of government,” Wis.Stat. § 19.31, this policy has been followed in this case. Once WIREdata received the data, it had all of the information in the possession of the assessors, in an electronic format, regardless which electronic format was provided. Wisconsin policy favoring disclosure had been fulfilled. WIREdata’s remaining complaint then is that the format of the data was not optimal for its needs, not that the data itself had been shielded from production.

For this reason, the Court of Appeals must be reversed to the extent that it held that the PDF files did not comply with the open records requests here.

E. Compliance With WIREdata’s Request and the Court of Appeals Decision Would Require Generation of a New Record.

WIREdata has received the data, apparently just not in a computer format that it likes. It has

received the data in an electronic form, yet this was not good enough for the Court of Appeals.

WIREDATA's request, compliance with the 7th Circuit's opinion in Assessment Technologies, and compliance with Village of Sussex would require avoidance of copyright infringement by:

To summarize, there are at least four possible methods by which WIREDATA can obtain the data it is seeking without infringing AT's copyright; which one is selected is for the municipality to decide in light of applicable trade-secret, open-records, and contract laws. The methods are: (1) the municipalities use Market Drive to extract the data and place it in an electronic file; (2) they use Microsoft Access to create an electronic file of the data; (3) they 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; (4) they copy the database file and give it to WIREDATA to extract the data from.

Assessment Technologies, 350 F.3d at 647-48.

Indeed, the extraction functions referenced by the 7th Circuit are directly contrary to Wis.Stat. § 19.35 (1)(L), which "does not require an authority to create a new record by extracting information from existing records and compiling the information in a new format."

Nonetheless, the municipalities *exceeded* their

open records requirements to follow the 7th Circuit's ruling, and used Market Drive to extract the data and place it in an electronic file. This is directly in concert with option (1) outlined above.

So either the data must be given to WIREdata in the exact format as it existed in accordance with the Court of Appeals ruling, rearranged according to WIREdata's specifications (beyond the scope of open records requirements), or simply rearranged (again beyond the scope of open records requirements, but exactly what WIREdata was provided with in the PDF).

Despite seeming to allow data extraction, the Court of Appeals still opined that "the language of the law itself and the public policy underpinning the open records law require ... access to the source material—the material as it is both inputted and stored in the database, **regardless of its physical form or characteristics.**") Village of Sussex, 2007 WI APP 22 at ¶ 63 (emphasis added).

Even so, The Court of Appeals' ruling that WIREdata must have access to the Market Drive™ database exactly as it exists in the database is contrary to even the 7th Circuit's decision:

So AT has a valid copyright; and if WIREdata said to itself, "Market Drive is a nifty way of sorting real estate data and **we want the municipalities to give us their data in the form in which it is organized in the database, that is, sorted into**

AT's 456 fields grouped into its 34 tables," and the municipalities obliged, they would be infringing AT's copyright because they are not licensed to make copies of Market Drive for distribution to others; and WIREdata would be a contributory infringer (subject to a qualification concerning the fair-use defense...)

Assessment Techs. of WI, LLC v. WIREdata, Inc., 350 F.3d 640, 643 (7th Cir. 2003)

This is not merely removing confidential entries from an otherwise non-confidential database, Wis.Stat. § 19.36(6), it is creating an entirely new database tailored to WIREdata's specifications. Nobody can be required to perform this cost-saving function for WIREdata.

F. The Fee That Would Have Been Charged to WIREdata is the Actual Fee

Wis.Stat. § 19.35 (3) provides that 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.

Although this simplistic cost provision is easily applied in some circumstances, for instance when simple photocopying is involved, the same simplistic cost provision results in costs not so easily pinpointed as the methods for compliance increase in complexity from photocopying. As increased computer system resources

and expertise are required to even evaluate, much less provide responsive documents to the complex requests, so to do the costs become harder to define.

The parties to this case were fully prepared to cater to WIREDATA's needs and to create a custom export computer programming subroutine so that WIREDATA could receive the data in the format that Mr. Curtis discussed with Impact Consultants. Grota Appraisals informed the Village that it could provide data to WIREDATA for an estimated cost of \$3,132. This estimate was based on a trial run that Grota Appraisals did to process the data into a text format. Grota Appraisals estimated that it would take 2 minutes per parcel, so 5,370 minutes to process the 2,685 individual parcels that the Village of Sussex had on the assessment roll.

What Impact Consultants was going to charge - \$6,600 for custom programming work was, as the Village of Sussex had stated, essentially a business transaction that was outside of any open records response:

There is some question in my mind based upon the conversations that I have had, however, of whether providing that information in a form would really give you what you want. I mention this not because I think it impacts upon the legal issues, but because it may impact upon the practical matter, particularly if I am correct that there is an independent issue that is essentially a business transaction that may take place. . . . The Village of Sussex is not involved and will not

become involved in any aspect of this issue that might involve a business transaction or private interests of the parties....

(55:51)

Grota Appraisals informed the Village that it could provide data to WIREdata for an estimated cost of \$3,132. This is how Grota Appraisals felt it must respond and this was the actual estimated cost. Wis.Stat. § 19.35 (3) ("An authority (The Village) may impose a fee upon the requester (WIREdata) of a copy of a record which may not exceed the actual, necessary and direct cost of reproduction.")

Because the requests were going to be accommodated, it cannot be said that excess fees beyond the private programmers would have been charged.⁷

⁷ Neighboring states, such as the State of Michigan, sensibly incorporate "operating expenses" into their "reasonable fee" charged for receiving access to digital records such as those present in this case. *See* MCL § 15.442 (defining "operating expenses" as the "public body's direct cost of creating, compiling, storing, maintaining, processing, upgrading, or enhancing information or data in a form available for enhanced access, including the cost of computer hardware and software, system development, employee time, and the actual cost of supplying the information or record in the form requested by the purchaser.") *See also*, Ind. Code Ann. §§ 5-14-3-3.5, 5-14-3-8 ("A public agency may charge any reasonable fee agreed on in the contract under section 3.5 of this chapter for providing enhanced access to public records.")


CONCLUSION

This case was not and is not about keeping the public informed, in furtherance of valid open records objectives. This point is exemplified by WIREdata's rejection of the property record files in PDF format.

WIREdata, and indeed the public, is not being precluded from accessing information regarding the affairs of the government. Instead, WIREdata's motivation is to increase their profit margin by shifting burdensome data extraction and manipulation tasks to the communities or their independent contractors.

The Court of Appeals must be reversed as to its holdings that: (1) WIREdata submitted a valid open records request, which the municipalities improperly denied; (2) the PDF failed to comply with the open records law; (3) the open records law demands access to the computer database; (4) WIREdata is entitled to actual, reasonable and customary fees and costs.


Respectfully submitted: Date: June 21, 2007

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FORM AND LENGTH CERTIFICATION

I certify that this brief conforms to the rules contained in Wis. Stat. § (Rule) 809.19(8)(b) and (c) for a brief produced using monospaced font: The length of this brief is 7742 words inclusive of footnotes, and 36 pages. The font is Monospac821 BT, used on Microsoft Word 2003, 13 point.

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CERTIFICATE OF SERVICE

I hereby certify that three copies of Grota Appraisal, LLC. Michael L. Grota and Assessment Technologies of WI, LLC's Defendants-Appellants-Petitioners' Brief of Defendants-Appellants-Petitioners has been served on the following attorneys by US Mail as follows:

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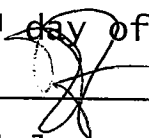
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Daniel R. Johnson

**SUPREME COURT
STATE OF WISCONSIN**

Appeal Nos.: 2005AP1473; 2006AP174; 2006AP175

WIREDATA, Inc.,

Plaintiff-Respondent

v.

Village of Sussex, and

Village of Sussex Custodian

Defendants-Co-Appellants-Cross Petitioners

**Grota Appraisals, LLC, Michael L. Grota, and Assessment
Technologies of WI, LLC,**

Defendants-Appellants-Petitioners

WIREDATA, Inc.,

Plaintiff-Appellant,

v.

Village Of Thiensville, Defendant-Respondent,

**Grota Appraisals, LLC, Michael L. Grota, And Assessment
Technologies Of WI, LLC,**

Defendants-Respondents-Petitioners

WIREDATA, Inc.,

Plaintiff-Appellant,

v.

City Of Port Washington

Defendant-Respondent-Cross Petitioner,

Matthies Assessments, Inc.,

Defendant-Respondent,

American Family Insurance Company,

Intervenor.

APPENDIX OF DEFENDANTS-APPELLANTS-PETITIONERS

**APPEAL FROM WAUKESHA COUNTY CIRCUIT COURT, THE
HONORABLE MARK S. GEMPELER, PRESIDING, CASE NO.
2001CV001403, AND APPEAL FROM OZAUKEE COUNTY CIRCUIT
COURT, THE HONORABLE THOMAS R. WOLFGRAM, PRESIDING,
CIRCUIT COURT CASE NOS. 2001CV000198 AND 2001CV00216**

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Technologies of WI, LLC**

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- R76:1-4 Letter dated 5-10-05 and Order Re: Motions for Summary Judgment and Writ of Mandamus, signed by the Court 5-20-05, and filed by Emily Canedo SA35-SA37
- R73:1-40 Transcript of 4-27-05 Motion Hearing filed 4-29-05 by Ct. Reporter, Thomas Racinowski SA38-SA77
- R65:1-33 Response to Village of Sussex's Motion For Summary Judgment with attached Exhibit A and Response Brief in Opposition to WireData's Motion for Summary Judgment with attached Exhibits A through D filed 11-30-04 filed by Daniel Johnson SA78-SA110
- R85:1-70 Grota Appraisals, LLC, Michael L. Grota, Assessment Technologies of WI, LLC's Notice of Motion and Motion for Summary Judgment with Exhibits - Exhibit E SA111

**COURT OF APPEALS
DECISION
DATED AND FILED**

January 3, 2007

Cornelia G. Clark
Clerk of Court of Appeals

NOTICE

This opinion is subject to further editing. If published, the official version will appear in the bound volume of the Official Reports.

A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals. See WIS. STAT. § 808.10 and RULE 809.62.

**Appeal Nos. 2005AP1473
2006AP174
2006AP175**

**Cir. Ct. Nos. 2001CV1403
2001CV198
2001CV216**

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT II**

**No. 2005AP1473
WIREDATA, INC.,**

PLAINTIFF-RESPONDENT,

v.

VILLAGE OF SUSSEX AND VILLAGE OF SUSSEX CUSTODIAN,

DEFENDANTS-CO-APPELLANTS,

**GROTA APPRAISALS, LLC, MICHAEL L. GROTA AND ASSESSMENT
TECHNOLOGIES OF WI, LLC,**

DEFENDANTS-APPELLANTS.

**No. 2006AP174
WIREDATA, INC.,**

PLAINTIFF-APPELLANT,

v.

**VILLAGE OF THIENSVILLE, GROTA APPRAISALS, LLC, MICHAEL L.
GROTA, AND ASSESSMENT TECHNOLOGIES OF WI, LLC,**

DEFENDANTS-RESPONDENTS.

**NO. 2006AP175
WIREDATA, INC.,**

PLAINTIFF-APPELLANT,

V.

CITY OF PORT WASHINGTON AND MATTHIES ASSESSMENTS, INC.,

DEFENDANTS-RESPONDENTS.

**AMERICAN FAMILY INSURANCE COMPANY,
INTERVENOR.**

APPEAL from an order of the circuit court for Waukesha County:
MARK GEMPELER, Judge. *Affirmed in part; reversed in part and cause
remanded with directions.*

APPEAL from an order of the circuit court for Ozaukee County:
THOMAS R. WOLFGRAM, Judge. *Affirmed in part; reversed in part and causes
remanded with directions.*

Before Brown, Nettesheim and Anderson, JJ.

¶1 ANDERSON, J. Nearly six years ago, WIREDATA, Inc. filed open
records requests with the three municipalities before us in this appeal. WIREDATA

sought the property assessment records in the format created and maintained by the municipalities' independent contractor assessors in a computer database. We hold that the open records law allows WIREdata the opportunity to access that database in order to examine and copy the property assessment records. Therefore, the municipalities committed open records law violations when they denied WIREdata such access and instead provided it with a "PDF," or portable document file.

¶2 WIREdata urges this court to hold both the municipalities and their independent contractor assessors responsible for failing to properly respond to its open records request. We hold that the open records law contemplates holding the municipalities, but not their independent contractors, responsible for the open records law violations. The municipalities are the statutory authorities obligated to uphold the letter and spirit of the open records law and they cannot evade their duties by shifting the creation and maintenance of their assessment records to their independent contractors. We also reject all challenges to the sufficiency of the open records requests and the existence of the denials of those requests.

¶3 Accordingly, in the Village of Sussex case, we affirm the circuit court's order to the extent that it holds that (1) Sussex is an authority and must be held responsible for the open records law violations; (2) WIREdata submitted a valid open records request, which Sussex improperly denied; (3) the PDF failed to comply with the open records law; (4) the open records law demands access to the computer database; and (5) WIREdata is entitled to actual, reasonable and customary fees and costs. We reverse that order to the extent it holds the Sussex independent contractor assessor responsible for WIREdata's reasonable costs and attorney fees and remand for proceedings to determine the appropriate costs and

fees. In the Village of Thiensville and City of Port Washington cases, we affirm the court's order to the extent that it holds that Thiensville and Port Washington are authorities under the open records law. We reverse the court's order to the extent that it holds WIREdata's open records requests were insufficient and that the PDF satisfied its requests in any event. We remand for the court to determine appropriate costs and fees for Thiensville's and Port Washington's open records violations.

BACKGROUND

¶4 We begin with a recitation of the facts surrounding the open records requests and subsequent litigation involving each municipality. For the sake of clarity, we will set forth such facts for each municipality separately, but we will refer back to our discussions of the other cases where appropriate.

Village of Sussex

¶5 Sussex contracted with Grota Appraisals, LLC, which is owned by Michael L. Grota, to conduct its property assessments from January 1, 2000, to December 31, 2004. Typically, prior to the advent of computers, assessors would visit the properties and make handwritten notations about the properties on paper cards called "property record cards." Technological advancements now allow Grota Appraisals appraisers to input the raw property appraisal data from the property record cards into a computer program called Market Drive.

¶6 Assessment Technologies of WI, LLC, which is also owned by Michael Grota, developed and copyrighted Market Drive and licenses the software to property appraisers such as Grota Appraisals. The software program, in

conjunction with a Microsoft database program (Microsoft Access), collates and arranges the collected information in a multitude of tables and reports for various categories of properties. Grota Appraisals has sublicensed to Sussex certain read-only capabilities of Market Drive software. As a result, Sussex has the ability to print whatever tables and reports that the Market Drive software is configured to assemble.

¶7 On April 20, 2001, WIREdata sent registered letters to the Sussex village assessor and village clerk, custodian of records, which stated:

This is to formally request an electronic/digital copy of the detailed real estate property records (showing the specific characteristics of each parcel and the improvements thereupon) used and/or maintained by the Assessor in determining the proper assessments for each parcel within the Village of Sussex.

WIREdata, a wholly owned subsidiary of Multiple Listing Service, Inc., sought to obtain data regarding specific properties in Sussex, and the other municipalities, for purposes of making the information available to real estate brokers. Sussex directed WIREdata to Grota Appraisals. Grota Appraisals in turn forwarded the matter to Andrew Pelkey. Pelkey owns Impact Consultants, Inc., the private computer programming firm that Assessment Technologies contracted with to program the Market Drive software.

¶8 On April 24, 2001, WIREdata sent a letter to Sussex's counsel in which it offered Wisconsin's open records law as the legal basis for the request and for the potential mandamus action should Sussex deny its request. On or around May 4, Pelkey contacted WIREdata to arrange the transfer of the requested

information. WIREdata's vice president, Thomas Curtis, averred that at the time it was his understanding that Pelkey "was going to help [WIREdata] get the data."

¶9 In a letter dated May 4, Pelkey informed Sussex's counsel that he believed it would be very difficult to export data from the Market Drive software to a usable Microsoft Word format. Pelkey stated that providing the information in any format would be very time consuming. Pelkey also wrote that the raw data used by Market Drive cannot be copied because of the copyright.

¶10 Curtis sent Pelkey an email in which he wrote, "Selected fields requested from Market Drive software. Any type of electronic output and media is acceptable (i.e., fixed length, comma-quote, pipe delimited). We would need a data layout, if the fields are not in the order below." A data layout specifies the order of the categories of information.

¶11 Pelkey sent an email to Curtis outlining the cost and terms of producing the records of the municipalities using the Market Drive software. According to Pelkey, WIREdata would need to pay a \$6600 one-time fee to program, test and export the data; a \$.50 per parcel charge over and above the \$6600 programming fee; and a \$.15 per parcel annual update fee. Pelkey concluded his email with the following:

[T]he costs quoted here assume that you are not reselling the data in mass to another source. This data is meant for you and your subscribers to view. If you want to "add value" to any part of this data and distribute it in mass to another company, you will need to charge your customer for our fee in addition to your fees for your added value.

¶12 On May 21, WIREdata's counsel wrote a letter to Sussex's counsel in which he declared Pelkey's response "unacceptable." He claimed that the

assessor was asking for far more than the actual and necessary costs for copying the data. In support, he cited “the attempt to restrict my client’s use of the data once it is transferred.”

¶13 On May 22, Sussex’s counsel sent a letter to Michael Grota asking him to explain how the costs and fees set forth in Pelkey’s email could be “justified as the ‘actual, necessary and direct costs’ of producing these public records.” Sussex’s counsel cautioned Grota that WIREdata was prepared to file a mandamus action and that if Grota could not justify the costs under the open records law, he may make recommendations to Sussex that differed from the position taken in Pelkey’s letter.

¶14 Pelkey responded in a May 25 letter. Pelkey explained that while the Market Drive software used by Grota Appraisals does have the ability to export a property record card to a text file, each property would have to be exported one at a time. As a result, exporting all the properties “would be very labor intensive and would be done on a time and material basis.” Pelkey informed Sussex’s counsel that Assessment Technologies granted Grota Appraisals the authority to give Sussex a copy of the Market Drive database for internal use only. Sussex did not have the authority to distribute the database. Pelkey told Sussex’s counsel that WIREdata’s request was not an “open records request since Assessment Technologies is [a] private company, not a municipal government. As such, this request has nothing to do with [Sussex].”

¶15 On May 29, Sussex’s counsel wrote WIREdata’s counsel to advise him “of the status of this matter, and to assure [him] that every effort [was] being made to promptly respond to [WIREdata’s] request.” He emphasized, however,

that “Sussex is not involved and will not become involved in any aspect of this issue that might involve a business transaction or private interests of the parties, as [Sussex’s] interest is only in ensuring that the public records laws are followed with regard to the public records request.” Counsel stated his belief that the programming that could be done to allow the data to be organized in a comprehensible format was outside the scope of the open records law. He concluded his letter by stating:

Again, I expect that we will be providing you with the final response to your request in the very near future. Regrettably, this issue arises right during Board of Review procedures which necessarily [require] a significant amount of the Assessor’s time. Nevertheless, we will continue to treat this matter with the highest priority.

¶16 On June 8, WIREdata filed a mandamus action against Sussex, Grotta Appraisals and Michael Grotta. WIREdata later amended its complaint, adding Assessment Technologies. In August, Assessment Technologies filed suit in federal court seeking an injunction prohibiting WIREdata from infringing upon its copyrights in the Market Drive software and the resulting digital database compilations.

¶17 In December 2002, the United States District Court for the Eastern District of Wisconsin determined that Assessment Technologies owned the copyright and was protected as to “Market Drive and its derivative works.” Thus, the court reasoned, Assessment Technologies “gets to decide whether or not a derivative work, such as requested by [WIREdata], will be produced.” The Seventh Circuit reversed. *See Assessment Techs. of WI, LLC v. WIREdata, Inc.*, 350 F.3d 640, 648 (7th Cir. 2003).

¶18 The Seventh Circuit held that the process of extracting the raw data WIREdata sought from the Market Drive database did not violate copyright law. *Id.* at 644. According to the court, Assessment Technologies did not create the database it was seeking to sequester from WIREdata. *Id.* at 646. It created only an empty database, a bin that the tax assessors hired by the municipalities filled with the data. *Id.* It created the compartments in the bin and the instructions for sorting the data to those compartments, but those were its only innovations and they were protected by copyright law. *Id.* The court explained that Assessment Technologies had no ownership or other legal interest in the data the tax assessors collected, which the court emphasized were in the public domain, and therefore no legal ground for making the acquisition of that data more costly for WIREdata. *Id.* at 645. The court wrote that Assessment Technologies “is trying to use its copyright to sequester uncopyrightable data, presumably in the hope of extracting a license fee from WIREdata.” *Id.*

¶19 The court stated that WIREdata did not want the data compilation as structured by Market Drive, which was intended for tax assessments. *Id.* at 643. Rather, the court taught, WIREdata wanted the raw data, data created not by Assessment Technologies but by tax assessors, data that are in the public domain. *Id.* at 644. Once WIREdata extracted the data, it would sort them in accordance with its own needs, which have to do with providing the information about properties that is useful to real estate brokers as opposed to taxing authorities. *Id.* at 643.

¶20 In summarizing its holding, the court offered four methods by which WIREdata could extract the data: (1) the municipalities use Market Drive to extract the data and place it in an electronic file, (2) the municipalities use

Microsoft Access to create an electronic file, (3) the municipalities allow programmers furnished by WIREdata to use their computers to extract the data from their database, and (4) the municipalities copy the database file and give it to WIREdata to extract the data from. *Id.* at 647-48. At some point after the release of the decision, Michael Grota sent WIREdata Sussex's property record information in an electronic and digital form, a PDF.

¶21 Following the decision, all of the parties filed motions for summary judgment. The trial court granted WIREdata's motion for summary judgment, with the exception of a request for punitive damages. The court determined that there could be multiple authorities under open records law and Sussex, Grota Appraisals, Assessment Technologies and Michael Grota were authorities. The court held that WIREdata's request was in the form the open records law required and did not require the creation of a new record. The court found that the defendants did not provide a proper response to the valid open records request. The court concluded that the PDF was not in compliance with either the open records law or the Seventh Circuit decision.

Village of Thiensville

¶22 In October 1999, Thiensville entered into a "Contract for Maintenance of Assessment Records" with Grota Appraisals. The contract commenced on January 1, 2000, and terminated on December 31, 2001. A computer loaded with the Market Drive software is stored at the Thiensville Village Hall. The computer is limited in its capabilities, as it is a "read only" terminal and only allows for the printing of hard copy assessment reports.

¶23 On April 20, 2001, WIREdata sent Thiensville a formal written open records request for:

[A]n 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 your municipality in determining the proper assessments for each parcel within the Village of Thiensville.

On April 24, WIREdata's counsel sent a letter to Thiensville's counsel in which it offered Wisconsin's open records law as the legal basis for the request and for the potential mandamus action should Thiensville deny its request. Thiensville forwarded the matter to Grota Appraisals and informed WIREdata it had done so.

¶24 On May 30, following the communications between WIREdata and Pelkey referenced in our recitation of the facts of the Sussex case, WIREdata filed an open records action against Thiensville, Grota Appraisals and Michael Grota. WIREdata later filed an amended complaint in which it named Assessment Technologies as well.

¶25 In 2004, following the Seventh Circuit's decision, Pelkey also sent WIREdata a PDF version of Thiensville's property records. Thiensville, WIREdata and Grota Appraisals, Assessment Technologies and Michael Grota filed motions for summary judgment that were substantially similar to those filed in the Sussex case. The court granted summary judgment in favor of Thiensville and Grota Appraisals, Assessment Technologies and Michael Grota and imposed costs on WIREdata. In its oral ruling, the court first rejected the notion that the Sussex court's decision had any preclusive effect on the cases before it. The court next determined that Thiensville was an authority; it had simply delegated the

responsibility for maintaining the records to a different custodian. However, the court then found that WIREdata's initial request failed to satisfy the open records law requirement that it be reasonable in its scope and that the subsequent enhanced request from WIREdata was improperly directed to Pelkey. The court further determined that the PDF was in "electronic digital format," which was what WIREdata had requested.

City of Port Washington

¶26 In November 2000, Port Washington contracted with Matthies Assessments to conduct the official assessments on its behalf for 2001. Prior to the contract, Matthies Assessments had entered into a license and purchase agreement with Assessment Technologies for the use of the Market Drive software.

¶27 On April 25, 2001, WIREdata sent a letter to Port Washington's treasurer regarding a recent conversation about Port Washington's property information. WIREdata indicated that it would be sending a request letter to Port Washington's assessor, Matthies Assessments. WIREdata specified that it was interested in acquiring the detailed property information such as square footage, age, number of bedrooms, number of baths, and property class and the sales data such as the sale date, sale price, transfer fee and type of transfer. WIREdata asked Port Washington to include the number of parcels, a current record layout, a copy of the property record card it was currently using and ten data sheets, selected at random. WIREdata concluded the letter by asking the treasurer to contact it to discuss the estimated cost to reproduce the data and the type of media the data would come in.

¶28 On May 4, the treasurer sent WIREdata a letter stating, “You certainly may obtain information from Matthies Assessments. Please direct your request directly to Matthies; please also direct your questions regarding their charges for these services directly to them.” The treasurer also signed a release approving Matthies Assessments’ release to WIREdata of its detailed property information. On May 9, WIREdata sent a letter to Ernest Matthies of Matthies Assessments. WIREdata wrote:

WIREdata Corporation is requesting the detailed property information or assessor information such as square footage, age, number of bedrooms, number of baths, property class, etc. Please include the number of parcels, a current record layout, 10 printed data sheets, selected at random, code list for each field, and a copy of the property record card you are currently using.

¶29 On May 22, 2001, Ernest Matthies responded to the May 9 letter. He wrote that he assumed WIREdata was “requesting a copy of the assessment data base used to store assessment data for the City of Port Washington.” He informed WIREdata that he had just completed the process of placing Port Washington on Market Drive. Matthies indicated that he had spoken with Robert Grota, a principal at Assessment Technologies, who informed him that Matthies Assessments’ license and purchase agreement with Assessment Technologies precluded it from complying with WIREdata’s request. “This contract specifies that the 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.’ According to Mr. Grota, this means that I do not have the right to provide your firm with a copy of the Port Washington database.” He then directed WIREdata to Robert Grota for an explanation of the licensing agreements.

¶30 On June 12, 2001, WIREdata filed an open records action against Port Washington and Matthies Assessments. WIREdata later filed an amended complaint, naming Assessment Technologies as a party. Following the federal district court decision in the copyright case, the circuit court began addressing the Port Washington and Thiensville cases together. In response to the Seventh Circuit's decision, Pelkey sent WIREdata a PDF version of Port Washington's property records. The parties then each filed motions for summary judgment. As in the Thiensville case, the court granted Matthies Assessments' and Port Washington's motions for summary judgments, denied WIREdata's motion and imposed costs against WIREdata.

STANDARD OF REVIEW

¶31 We review a summary judgment de novo, employing the same methodology as the trial court. *Green Spring Farms v. Kersten*, 136 Wis. 2d 304, 315, 401 N.W.2d 816 (1987). It is a well-known methodology which need not be repeated here. *See State Bank of La Crosse v. Elsen*, 128 Wis. 2d 508, 511-12, 383 N.W.2d 916 (Ct. App. 1986). Generally, we will affirm the circuit court's decision granting summary judgment if the record demonstrates that there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law. *Germanotta v. National Indem. Co.*, 119 Wis. 2d 293, 296, 349 N.W.2d 733 (Ct. App. 1984). Additionally, the interpretation of a statute and its application to undisputed facts are questions of law that we review independently. *Garcia v. Mazda Motor of Am., Inc.*, 2004 WI 93, ¶7, 273 Wis. 2d 612, 682 N.W.2d 365.

DISCUSSION

¶32 The parties each raise several issues for our review: (1) whether both the municipalities and their independent contractor assessors are the responsible statutory authorities under the open records law; (2) whether WIREdata's requests contained reasonable limitations as to the subject matter and length of time of the sought-after records; (3) whether the municipalities denied WIREdata's open records requests; (4) whether the municipalities complied with the open records law by providing the PDF to WIREdata; and (5) whether the imposition of costs and attorney's fees on Michael Grota, Grota Appraisals and Assessment Technologies was appropriate.

¶33 We will first set forth the black letter Wisconsin open records law. We will then address each of the above arguments, discussing each municipality individually where necessary.

Open Records Law

¶34 The underlying purpose of Wisconsin's open records law is declared in WIS. STAT. § 19.31 (2003-04):¹

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

¹ All references to the Wisconsin Statutes are to the 2003-04 version unless otherwise noted.

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.

¶35 In furtherance of that policy, WIS. STAT. § 19.35 provides a requester with the procedure to exercise the right to inspect a public record and/or to make or receive a copy of a public record maintained by an authority. “‘Authority’ means any of the following having custody of a record: a state or local office, elected official, agency, board, commission, committee, council, department or public body corporate and politic created by constitution, law, ordinance, rule or order” WIS. STAT. § 19.32(1). An elected official is the legal custodian of his or her records and the records of his or her office. WIS. STAT. § 19.33(1).

“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. “Record” does not include ... materials to which access is limited by copyright [or] patent.

Sec. 19.32(2). A computer program is not subject to examination or copying, 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. WIS. STAT. § 19.36(4).

¶36 Pursuant to the open records law, a request directed at an authority is sufficient if it reasonably describes the requested record or the information requested. WIS. STAT. § 19.35(1)(h). The law does not require a request to contain any “magic words” nor does it prohibit the use of any words. *ECO, Inc. v. City of Elkhorn*, 2002 WI App 302, ¶23, 259 Wis. 2d 276, 655 N.W.2d 510. However, “a request for a record without a reasonable limitation as to subject matter or length of time represented by the record does not constitute a sufficient request.” Sec. 19.35(1)(h). In addition, § 19.35(1)(L) relieves authorities of the responsibility of “creat[ing] a new record by extracting information from existing records and compiling the information in a new format.”

¶37 Each authority, upon request for any record, 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 in whole or in part and the reasons therefor.” WIS. STAT. § 19.35(4)(a). When an authority denies a written request, it shall provide the requester with a written statement of the reasons for denying the written request. Sec. 19.35(4)(b). Thus, the authority’s statutory choices are two: comply or deny. *WTMJ, Inc. v. Sullivan*, 204 Wis. 2d 452, 457, 555 N.W.2d 140 (Ct. App. 1996). “[C]ompliance at some unidentified time in the future is not authorized by the open records law.” *Id.* at 458.

¶38 Further, under WIS. STAT. § 19.35, once a custodian decides to withhold a document, the custodian must state specific reasons for the refusal to disclose the document. *Osborn v. Board of Regents of Univ. of Wis. Sys.*, 2002 WI 83, ¶16, 254 Wis. 2d 266, 647 N.W.2d 158; *Newspapers, Inc. v. Breier*, 89 Wis. 2d 417, 427, 279 N.W.2d 179 (1979). Thereafter, a court will not consider reasons for withholding the document that were not asserted by the custodian.

Newspapers, 89 Wis. 2d at 427. *See also Oshkosh Nw. Co. v. Oshkosh Library Bd.*, 125 Wis. 2d 480, 484, 373 N.W.2d 459 (Ct. App. 1985) (“Where inspection is denied, it is the custodian, not the attorney representing the governmental body after a mandamus action is commenced, who must give specific and sufficient reasons for denying inspection.”).

¶39 If an authority withholds a record or delays granting access to a record after a written request is made, a requester may immediately bring a mandamus action asking a court to order release of the record. WIS. STAT. § 19.37(1); *WTMJ*, 204 Wis. 2d at 461. If the requester prevails or substantially prevails in the action, the court shall award reasonable attorney fees, damages of not less than \$100, and other actual costs to the requester. Sec. 19.37(2).

Statutory Authorities

Municipalities

¶40 The municipalities claim that they are not the responsible authorities under the open records law and therefore they are not the proper subjects of the mandamus actions. The statutory definition of “authority” includes public bodies corporate and politic. *See* WIS. STAT. § 19.32(1). Sussex, Thiensville and Port Washington each qualify as a public body corporate and politic. They contend, however, that they are exempted from the statutory definition of “authority” because their contract assessors create and have custody of the sought-after records. *See* § 19.32(1) (“‘Authority’ means any of the following having *custody* of a record” (Emphasis added.)).

¶41 In *Journal/Sentinel, Inc. v. School Bd. of the Sch. Dist. of Shorewood*, 186 Wis. 2d 443, 521 N.W.2d 165 (Ct. App. 1994), the issue was whether a “memorandum of understanding” prepared by a school board’s attorneys reciting the settlement terms of a lawsuit between the school board and a former school superintendent was a public record of the board and thus subject to inspection by a newspaper. *Id.* at 445, 452. Despite the fact that the memorandum had been drafted by and was in the custody of a private law firm, we held that the school board *was* an authority under the statute, but that the private law firm *was not* an authority. *Id.* at 452.

¶42 We explained that the question really resolved to whether a public body could avoid the public access demanded by the open records law by delegating both the record’s creation and custody to a contractor. *Id.* at 452-53. We stated, “Posing this question provides its answer: it may not.” *Id.* at 453. We reasoned that the contractors’ records provisions of the open records law establish an exception to the general rule that a public body need only provide information which it has either created and/or has in its custody. *Id.* “[E]ach 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.*” WIS. STAT. § 19.36(3) (emphasis added).

¶43 *Journal/Sentinel* teaches that pursuant to WIS. STAT. § 19.36, public bodies cannot evade their responsibilities under the open records law by shifting a record’s creation or custody to an independent contractor. Indeed, as the open records case law suggests, that is the precise type of evil the contractors’ records exception is designed to overcome. *Machoitka v. Village of West Salem*, 2000 WI

App 43, ¶8, 233 Wis. 2d 106, 607 N.W.2d 319. Accordingly, simply because Sussex, Thiensville and Port Washington have contracted out the collection and maintenance of the assessment information does not mean that they have relieved themselves of their responsibilities under the open records laws. The municipalities are the responsible authorities under the open records laws.

¶44 The municipalities contend that *Machotka* and *Building and Construction Trades Council of South Central Wisconsin v. Waunakee Community School District*, 221 Wis. 2d 575, 585 N.W.2d 726 (Ct. App. 1998), control and absolve them of responsibility for any open records law violations. We disagree. In those two cases, the requesters sought records that fell outside of the contractual obligations between the authorities and their contractors. See *Building & Constr. Trades Council*, 221 Wis. 2d at 580-81 (contractors' records exception did not apply to payroll records of subcontractors that did not themselves have a contract with an authority); *Machotka*, 233 Wis. 2d 106, ¶9 (contractors' records exception did not apply where the sought-after records were not part of the contractual relationship between the authority and the independent contractor, but rather were part of separate and private undertakings of the independent contractor). Here, however, the municipalities contracted with the independent contractor assessors for the collection and maintenance of the property records WIREdata seeks.

Independent Contractor Assessors

¶45 Having determined that the municipalities are authorities, we turn to the status of the independent contractor assessors. The amicus briefs submitted in this case consider whether a single record can have multiple authorities or, more

specifically, whether the municipalities and their independent contractor assessors can be held jointly responsible as authorities for the violations in this case. WIREdata and the municipalities contend that the independent contractor assessors, as local public officials and as custodians of the assessment records, are also authorities. Even assuming the statute allows for multiple authorities and the assessors are the custodians of the records, we cannot find any support either in case law or the statute for the position that the assessors bear responsibility for open records obligations.²

¶46 First, we are not aware of any case in which an individual, whether a public official or private citizen, or a private corporation has been held responsible for an open records violation. Simply put, the responsibility for upholding the letter and spirit of the open records law travels to the governmental or quasi-governmental entity enumerated in WIS. STAT. § 19.32(1).

¶47 The municipalities direct our attention to cases where they claim that an entity, other than the governmental body, was held responsible under the public records law because it was a custodian of the sought-after records. However, *Journal/Sentinel* informs us that simply because a private contractor maintains and has custody of the sought-after records does not mean that it is an authority under the statute. See *Journal/Sentinel*, 186 Wis. 2d at 452. Further, in each of

² The municipalities and WIREdata point out that both independent contractor assessors confessed to being “authorities” under the statute in their answers to WIREdata’s complaints and that Michael Grota conceded that he believes he is an authority. The municipalities and WIREdata assert that we must hold the assessors to their admissions. The municipalities and WIREdata read too much into the admissions. The assessors may have accepted the label “authority” to describe their official capacity as contract assessors for the municipalities, but they have steadfastly denied having any responsibility under the open records law.

the cases the municipalities cite, the custodian was a subset of a governmental entity, or was itself a type of organization, that fell within a category listed in WIS. STAT. § 19.32(1). See *Woznicki v. Erickson*, 202 Wis. 2d 178, 184, 549 N.W.2d 699 (1996) (holding that the district attorney, a “state or local office” with custody of teacher’s personnel file, was an authority under § 19.32(1)); *Grebner v. Schiebel*, 2001 WI App 17, ¶¶1-3, 240 Wis. 2d 551, 624 N.W.2d 892 (concluding that the Polk county clerk with custody of voting records could determine how to satisfy an open records request); *Osborn*, 254 Wis. 2d at 271 (assuming that the Board of Regents of the University of Wisconsin System, which had custody of the records of its applicants, bore open records law responsibility); *Cavey v. Walrath*, 229 Wis. 2d 105, 116, 598 N.W.2d 240 (Ct. App. 1999) (holding that the Legal Aid Society, which received more than fifty percent of its funds from Milwaukee county and provided health and safety services to the county, was an authority because it satisfied the criteria in § 19.32(1) for nonprofit organizations).

¶48 Here, even assuming that the independent contractors do have custody of the records, they do not fit within any of the categories of entities listed in the definition of authority. Contrary to WIREdata’s and the municipalities’ assertions, the independent contract assessors are not “local public officials” who qualify as authorities under WIS. STAT. § 19.32(1). The definition of authority includes “a state or local office” having custody of a record. Sec. 19.32(1). WISCONSIN STAT. § 19.42(7w) defines “local public office” and excludes from that definition any position filled by an independent contractor. The contracts between the municipalities and their respective assessors each show that the municipalities designated the assessors as independent contractors hired to fill an

appointed statutory position.³ The independent contractor assessors cannot be held responsible as authorities under the open records law for the violations in these cases.

¶49 The statute's penalty provision further supports our construction of the open records law. WISCONSIN STAT. § 19.37(2) provides that

the court shall award reasonable attorney fees, damages of not less than \$100, and other actual costs to the requester if the requester prevails Costs and fees shall be paid by the authority affected or the unit of government of which it is a part, or by the unit of government by which the legal custodian under s. 19.33 is employed and may not become a personal liability of any public official.

The statute speaks in terms of the governmental entity, not a private citizen or corporation or even an individual public official, shouldering the responsibility of paying the actual costs and damages and attorney fees of the prevailing requester. Accordingly, we reverse that portion of the judgment proclaiming Grot

³ The contract between Matthies Assessments and Port Washington states, "The Assessor shall be an independent contractor pursuant to [WIS. STAT.] Sec. 60.307(4)." The contracts between Grotta Appraisals and Thiensville and Grotta Appraisals and Sussex each state, "The Assessor is to be considered an Independent Contractor hired to fill an Appointed Statutory Position, and is not subject to withholding tax, insurance programs or benefits." At oral argument, the parties debated whether it was WIS. STAT. § 70.055 which authorizes governing bodies to hire "expert help" to aid in making assessments or WIS. STAT. § 60.307(4) which grants towns the right to hire independent contractor assessors that provided the municipalities with the authority to hire Matthies Assessments and Grotta Appraisals. Clarification of the specific statutory provision authorizing the hiring of the assessors would not alter our analysis. The fact remains that the contracts explicitly provided that the assessors were to be considered independent contractors.

Appraisals, Assessment Technologies and Michael Grotta as statutory authorities responsible for the open records violations.⁴

Sufficiency of WIREdata's Requests

¶50 The municipalities and their independent contractor assessors maintain that WIREdata's initial written requests failed to contain reasonable limitations as to the subject matter and length of time for the records requested. *See* WIS. STAT. § 19.35(1)(h). We need not consider the cases individually on this point. The municipalities and their assessors did not raise these objections in response to WIREdata's requests; instead, the parties first challenged the sufficiency of the requests far into the litigation. We will not consider these after-the-fact reasons for nondisclosure offered not by the custodian and/or authority of the sought after records, but by an attorney during litigation. *See Newspapers*, 89 Wis. 2d at 427; *Oshkosh*, 125 Wis. 2d at 484.

¶51 Furthermore, on the merits, the public policy underpinning the time and subject matter limitations does not apply. The purpose of the limitations is to prevent a situation where a request unreasonably burdens a records custodian, requiring the custodian to spend excessive amounts of time and resources

⁴ We recommend that in the future when municipalities outsource government services, such as property assessments, they address open records law compliance in their contracts. The municipalities should consider including indemnification and hold harmless clauses to protect themselves should an open records dispute arise. Indeed, the municipalities in this appeal have taken similar protective measures in their contracts with the assessors. Furthermore, it is possible that contractual provisions prohibiting or otherwise preventing the municipalities from providing access to records subject to the open records law may violate public policy and therefore may be open to judicial scrutiny. *See State ex rel. Journal/Sentinel, Inc. v. Pleva*, 155 Wis. 2d 704, 711, 456 N.W.2d 359 (1990) (courts will protect parties' freedom of contract as long as the terms of the contract are not contrary to public policy).

deciphering and responding to a request. *See Schopper v. Gehring*, 210 Wis. 2d 208, 213, 565 N.W.2d 187 (Ct. App. 1997) (“While this state favors the opening of public records to public scrutiny, we may not in furtherance of this policy create a system that would so burden the records custodian that the normal functioning of the office would be severely impaired.”). Here, the information contained in the computer database clearly defines the reach of WIREdata’s requests and Pelkey testified at his deposition that the information could be exported fairly easily within a short amount of time. Furthermore, we note that the requests were specific enough as to time and subject matter that Pelkey was able to offer WIREdata a quote on the costs of responding to the requests. We reject the challenges to the sufficiency of WIREdata’s requests.

Denials of WIREdata’s Requests

¶52 The municipalities and their independent contractor assessors argue that they did not deny WIREdata’s records requests prior to the filing of the mandamus actions and therefore WIREdata’s mandamus actions were premature. *See* WIS. STAT. § 19.37(1) (“If an authority withholds a record ... or delays granting access to a record ... the requester may pursue ... an action for mandamus”). We disagree.

¶53 The municipalities, as the responsible statutory authorities, had the obligation to ensure *timely* access to the affairs of government, *see WTMJ*, 204 Wis. 2d at 457-58, and each of the municipalities failed to sustain this obligation. WISCONSIN STAT. § 19.35(4) requires an authority to fill any request for records or notify the requester of the reasons for denial “as soon as practicable and without delay.” Compliance at some unidentified time in the future is not authorized by

the open records law. *WTMJ*, 204 Wis. 2d at 458. The open records law admits of only two choices for the authority: comply or deny. *Id.* at 457; § 19.35(4). If an authority withholds a record or delays granting access, the requester may *immediately* bring an action for mandamus seeking release of the record. WIS. STAT. § 19.37(1); *WTMJ*, 204 Wis. 2d at 461. Thus, a failure of an authority to promptly respond to a request constitutes a denial, authorizing the requester to pursue a mandamus action in order to compel an appropriate response.

¶54 In each case, several weeks passed between when WIREdata submitted its open records request and when it filed the mandamus action. Rather than wait for an undetermined amount of time for an appropriate municipal response, WIREdata chose to bring the mandamus action to compel that response. It was well within its rights to do so. *See* WIS. STAT. § 19.37(1); *WTMJ*, 204 Wis. 2d at 461.

¶55 We also note that WIREdata could have reasonably construed its communications with Pelkey and both of the assessors as denials of its requests. The municipalities decry any responsibility for the effects of these communications. However, for purposes of the open records law, their actions must be attributed to the municipalities. They were all acting at the behest of the respective municipalities. Further, the municipalities' arguments rest on their assumption that either the contract assessors shouldered sole responsibility, or that they shared joint responsibility with their assessors, for the open records law duties. As we have explained, where the open records law is concerned, the buck stops with the municipalities.

¶56 Sussex and Thiensville, by virtue of WIREdata's communications with Pelkey, conditioned the release of the requested records on financial terms plainly unauthorized by the open records law. Pelkey informed WIREdata that in order for it to obtain the records sought, it would have to pay a fee of \$6600, a per parcel charge, an annual update fee and copyright license fees. Open records law permits the imposition of a fee upon the requester of a copy that does not exceed the "actual, necessary and direct cost of reproduction and transcription of the record." WIS. STAT. § 19.35(3)(a). Michael Grota conceded that the fees had profit built into them.

¶57 For a requester to construe a response as a refusal to comply with the open records laws, it need not contain any magic words such as "deny" or "refuse." An offer of compliance with a request, like the one here, that is conditioned on unauthorized costs and terms constitutes a denial of that request.

¶58 Port Washington, through Matthies Assessments, flatly denied WIREdata's request. Port Washington directed WIREdata to Matthies Assessments and signed a release authorizing Matthies Assessments to provide WIREdata with the requested records. Ernest Matthies wrote to WIREdata and informed it that he had spoken with Robert Grota, a principal at Assessment Technologies, who informed him that his license and purchase agreement with Assessment Technologies, which prohibited the distribution of copies of Market Drive and its documentation, "preclude[d]" him from complying with its request. Ernest Matthies then denied WIREdata's request outright, stating, "I do not have the right to provide your firm with a copy of the Port Washington database."

Format of the Response

¶59 The municipalities and their independent contractor assessors argue that the PDF provided to WIREdata satisfied the requirements of WIREdata's open records requests. In support, they quote WIREdata's requests for "an electronic/digital copy" and direct us to WIREdata's admission that the PDF constitutes an electronic file. They read their obligations under the open records law too narrowly.

¶60 There is a presumption that the public has the right to inspect public records unless an exception is found. *State ex rel. Milwaukee Police Ass'n v. Jones*, 2000 WI App 146, ¶19, 237 Wis. 2d 840, 615 N.W.2d 190. The term "record" is broadly drawn. It includes "*any material on which ... electromagnetic information is recorded or preserved, regardless of physical form or characteristics*, which has been created or is being kept by an authority." WIS. STAT. § 19.32(2) (emphases added).

¶61 We have already considered the application of our open records law to data in digital form. In *Jones*, 237 Wis. 2d 840, ¶1, Milwaukee's police officers' association and its president filed an open records request for a copy of a 911 call. The chief of police responded by providing an analog copy of the original digital audio tape recording. *Id.*, ¶¶3, 4. The association subsequently enhanced its request, seeking a digital audio copy of the original digital recording. *Id.*, ¶4. The chief of police denied that enhanced request and a mandamus action ensued. *Id.*, ¶¶5-7.

¶62 The chief of police maintained that WIS. STAT. § 19.36(4) establishes that record requesters have no right to copies of computer programs,

but rather only may request the information which is inputted into a computer for processing. *Jones*, 237 Wis. 2d 840, ¶16. We rejected this argument, finding it contrary to the remaining language in § 19.36(4), which also permits access to the material produced as a product of the computer program. *Jones*, 237 Wis. 2d 840, ¶17. We held that the statute “[c]learly and unambiguously ... allows for exactly what [the association] has requested—access to the source ‘material’ and the opportunity for ‘examination and copying.’” *Id.* In that case, the “source material” was the digital audio tape itself.

¶63 By arguing that the PDF satisfies WIREdata’s open records requests, the municipalities are essentially fronting the same argument as the chief of police in *Jones*. They are saying that the PDF, like the analog copy in *Jones*, essentially provides WIREdata with the same information the assessors inputted into the computer program. However, as *Jones* teaches, the language of the law itself and the public policy underpinning the open records law require more. They require access to the source material—the material as it is both inputted and stored in the database, regardless of its physical form or characteristics.

¶64 Here, WIREdata seeks the data created and 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. The assessors inputted this raw data into the computer, and the Market Drive program in conjunction with Microsoft Access automatically allocated the data to hundreds of fields grouped into master categories. *See Assessment Techs.*, 350 F.3d at 642-43. This inputted data, maintained at public expense in the Microsoft Access database, is as much a part of the public record as if it were written on paper property cards and organized and stored in a file cabinet. As *Jones* tells us, the open records law

provides WIREdata with access to this material whatever its physical form or characteristics. WIREdata, or the municipalities themselves, may use tools, in the Market Drive program itself or otherwise, to extract and copy the data WIREdata desires from the Microsoft Access database and place it in a separate electronic file.

¶65 The municipalities and their independent contractor assessors comment that the PDF, essentially a photocopy of an electronic document viewed as a picture on a computer screen, is an electronic file that permits WIREdata to cut and paste the assessment information. They miss the point. The municipalities and assessors do not input the data into or maintain the assessment records in a PDF. Indeed, they created the PDF following the Seventh Circuit's decision rejecting Assessment Technologies' copyright defense. Instead, the municipalities and their assessors maintain the assessment data in a Microsoft Access database which runs off of the Market Drive software.⁵ *Jones* tells us that WIREdata may request access to this database for purposes of examination and copying of the source data.⁶

⁵ At the time of the open records requests, the data was kept in a Microsoft Access database. Now, the data is kept in either a Microsoft Access or a Microsoft SQL Server database.

⁶ In his discussion of "form-of-production" disputes, Withers writes:

(continued)

¶66 The organization and compilation of the data into the Microsoft Access database, done at public expense, allows greater ease of public access to the public assessment information. In keeping with the letter and spirit of the open records law, we will not allow the municipalities to deny WIREdata, and others who seek the information, the value-added benefit of this computerization. As we wrote in *Jones*:

As 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.... A potent open records law must remain open to technological advances so that its statutory terms remain true to the law's intent.

Most electronic document productions, until recently, mimicked paper document productions. The electronic files were "imaged," that is, converted from their native file format into a static image, usually in Tagged Image File Format ("TIFF") or Portable Document Format ("PDF"). These formats are essentially the same as photocopies of the electronic document as it would appear on a screen or in a paper printout. These images have some of the advantages of portability and cost-savings of other electronic documents, and they also have the advantages of being static artifacts—they can be Bates stamped, categorized and gathered into virtual file folders, and even readily printed out for those who insist on handling paper. But they are also different from the 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, such as metadata (embedded records of the creation and management of the document), editorial comments and changes (which may be kept in the native file format for later revision), 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 NW. J. TECH. & INTELL. PROP. 171, 188 (Spring 2006).

Jones, 237 Wis. 2d 840, ¶19.

¶67 The municipalities and their assessors assert that WIREdata's demand would require the creation of a new record, something outside the scope of the open records law. *See* WIS. STAT. § 19.35(1)(L). The demand does not require the municipalities and their assessors to create a new record.

¶68 In *George v. Record Custodian*, 169 Wis. 2d 573, 579, 485 N.W.2d 460 (Ct. App. 1992), we stated that a “nonexistent record cannot be inspected or copied” and therefore the records custodian is not required under the open records law to “collect or compile statistics or create a record for the benefit of the requester.” In contrast to *George*, WIREdata's requests do not require the municipalities and their assessors to compile or collect statistics or to explain, interpret or analyze information. As our discussion demonstrates, the municipalities and their contract assessors already have the material available in the format WIREdata seeks.

Imposition of Costs and Attorney Fees

¶69 Our holding that the responsibility for the open records law travels to the WIS. STAT. § 19.32(1) governmental or quasi-governmental entity all but answers the parties' claims regarding the imposition of costs and attorney fees. Pursuant to the plain language of the statute, Sussex, Thiensville and Port Washington as the responsible governmental authorities must pay the costs, fees and damages assessed for the open records violations. *See* WIS. STAT. § 19.37(2).

We reverse the circuit courts' orders to the extent that they require otherwise and remand for determinations of the statutory costs and fees.⁷

CONCLUSION

¶70 Sussex, Thiensville and Port Washington are statutory authorities and, as such, are responsible for the open records law violations in this case. These municipalities must provide WIREdata with access to the computer database so that it may examine and copy the property assessment information it seeks. On remand, we direct the trial court to assess against the municipalities the appropriate attorney fees and costs.⁸

⁷ Grota Appraisals, Assessment Technologies and Michael Grota also argue that WIS. STAT. § 814.04 limits available attorneys fees to \$100. Their argument is without merit. WISCONSIN STAT. § 19.37(2), which deals specifically with open records law violations, does not place a monetary cap on the amount of attorney fees available to the prevailing requester. See *State v. Gillespie*, 2005 WI App 35, ¶7, 278 Wis. 2d 630, 693 N.W.2d 320 (where two statutes relate to the same subject matter, the specific statute controls the general statute), *review denied*, 2005 WI 60, 281 Wis. 2d 115, 697 N.W.2d 473.

⁸ The Village of Sussex asks us to dismiss "the nominal 'Village of Sussex Custodian of Records.'" We deem this a nonissue as WIREdata essentially does not dispute that this is a fictional entity and we are upholding judgment against the Village of Sussex.

By the Court.—Orders affirmed in part; reversed in part and causes remanded with directions.

Recommended for publication in the official reports.

COPY

STATE OF WISCONSIN	CIRCUIT COURT CIVIL DIVISION	WAUKESHA COUNTY
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WIREdata, Inc.

Plaintiff,

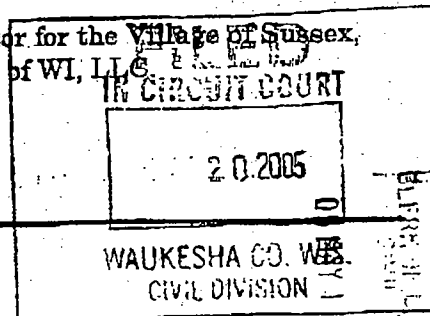
Case No. 01-CV-1403

v.

Village of Sussex,
Grota Appraisals, LLC in its capacity as Assessor for the Village of Sussex,
Michael L. Grota and Assessment Technologies of WI, LLC

Defendants.

ORDER



The defendants Michael Grota, Grota Appraisals, LLC, Assessment Technologies of WI, LLC and the Village of Sussex (the "Defendants") having moved this Court for Summary Judgment dismissing the plaintiff WIREdata Inc.'s claims against them; the plaintiff WIREdata, Inc. (the "Plaintiff") having moved this Court for Summary Judgment requiring Defendants to provide Plaintiff with the requested records and awarding Plaintiff costs, attorneys' fees and punitive damages; and the Court, having read the submissions of the parties and hearing the arguments of counsel on the record, determined as a matter of law based on there being no genuine issues of material fact, and for the reasons as stated on the record that:

1. The Village of Sussex is an appropriate party and an authority pursuant to Wisconsin Open Records Law;

2. Michael Grota, Grota Appraisals, LLC and Assessment Technologies of Wisconsin, LLC are each authorities and custodians of the records pursuant to Wisconsin Open Records Law and that the contract between the various defendants can not and does not act as any impediment to the access being requested by the Plaintiff;

3. Andrew Pelkey was a designated agent of Defendants;

4. Plaintiff's open records request was in proper form pursuant to Wis. Stat. § 19.35(1)(h) and does not require the custodian to create a new record;

5. Plaintiff's open records request was enhanced by the dialogue and correspondence between Tom Curtis and Andrew Pelkey and therefore, includes the same;

6. Defendants did not provide a proper response to Plaintiff's valid open records request;

7. The PDF provided to Plaintiff subsequent to the mandamus action being filed is not in compliance with either the open records law or the decision of the United States Court of Appeals for the Seventh Circuit in *Assessment Technologies of WI, LLC v. WIREData, Inc.*, 350 F.3d 640 (7th Cir. 2003);

8. Plaintiffs are entitled to actual, reasonable and customary attorney's fees and costs, the exact amount and apportionment of those fees and costs among the Defendants to be determined subsequent to the entry of

this order (at a date and time to be set by this court), but are not limited to \$100.00; and

9. Plaintiffs are not entitled to punitive damages.

NOW, THEREFORE, IT IS HEREBY ORDERED THAT:

1. Defendants' motions for Summary Judgment are hereby

DENIED;

2. Plaintiff's motion for Summary Judgment is hereby **GRANTED,**

except as to the award of punitive damages, which is hereby

DENIED.

3. The Writ of Mandamus as requested by the Plaintiff is hereby

issued and the Defendants shall, within 10 days, provide the

Plaintiff with all of the electronic digital "property record card"

records as requested in a "fixed length, comma quote or pipe

delimited" electronic digital format and medium.

4. Judgment is to be entered accordingly.

IT IS SO ORDERED, this 50th day of May, 2005.

/S/ MARK S GEMPELER

Honorable Mark S. Gempeler

* * * * *

CASE NO. 01-CV-1403

* * * * *

SA38

1 APPEARANCES:

2 Plaintiff appeared by ALAN H. DEUTCH and
3 EMILY C. CANEDO, Attorneys at Law, of
4 Deutch & Weiss, 7670 N. Port Washington
5 Rd., Fox Point, WI.

6 Defendant Village of Sussex appeared by
7 ERIN FAY, Attorney at Law, of Crivello,
8 Carlson & Mentkowski, 710 N. Plankinton
9 Avenue, Milwaukee, WI.

10 Defendants: Grotta Appraisals, Michael L.
11 Grotta and Assessment Technologies of
12 Wisconsin appeared by DANIEL R. JOHNSON
13 and MELISSA S. HOCKERSMITH, Attorneys at
14 Law, of Ryan, Kromholz & Manion, 3360
15 Gateway Rd., Brookfield, WI.

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23 WHEREUPON, the following proceedings were had:-
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25

1 THE COURT: WIREDdata, Inc.. versus Village
2 of Sussex, I would pronounce it Grota
3 Appraisals, L.L.C. and Michael Grota -- Is
4 that correct?

5 MR. JOHNSON: Yes, sir.

6 THE COURT: -- and Assessment
7 Technologies of Wisconsin, L.L.C. May I have
8 the appearances, please, firstly on behalf of
9 the plaintiff.

10 MR. DEUTCH: On behalf of the plaintiff,
11 Allen Deutch and Emily Canedo of Deutch &
12 Weiss.

13 THE COURT: Thank you. You are going to
14 be handling the laboring oar today for any
15 questions or argument I may require?

16 MR. DEUTCH: Yes, I am, Your Honor.

17 THE COURT: On behalf of the Village of
18 Sussex.

19 MS. FAY: Erin Fay from Crivello,
20 Carlson, Mentkowski on behalf of the Village
21 of Sussex.

22 THE COURT: Thank you, Miss Fay.

23 MR. JOHNSON: Last, on behalf of Grota
24 Appraisals, Michael L. Grota and Assessment
25 Technologies of Wisconsin, Dan Johnson and

1 Melissa Hockersmith of Ryan, Kromholz &
2 Manion.

3 THE COURT: Last, but not least,
4 Mr. Johnson, and will you be handling the
5 obligations on argument as I may require them?

6 MR. JOHNSON: Yes, sir.

7 THE COURT: Good morning to you all.
8 This matter, and we have had to endure a
9 couple of delays, one was prompted by the
10 Court simply to give me an opportunity to
11 steep myself in what has been a relatively
12 voluminous and protracted history this case
13 has had, and another date I think was not
14 available to Mr. Deutch. So, in any event, we
15 are now prepared to proceed.

16 There are cross-motions for summary
17 judgment that the parties have brought, and
18 working my way through the briefs because, and
19 this happens when we have multiple parties and
20 cross summary judgment motions, it has a
21 tendency to almost leave me blind because the
22 briefs have a tendency to be redundant. So,
23 while I have reviewed all your briefs, as I
24 found that one response or reply to another
25 was the same as a proactive brief in favor of

1 summary judgment, I pushed through that with
2 some haste, but I think I have a pretty good
3 flavor for the position of the parties and,
4 frankly, am prepared to rule on most issues
5 before the Court today.

6 Curiosity requires me to ask,
7 Mr. Johnson. This is your visual aid that you
8 brought into court. Is that correct?

9 MR. JOHNSON: Yes. My intent is to
10 display to the Court what has been provided to
11 WIREdata in the event that there is a dispute
12 regarding whether WIREdata has, in fact,
13 received any electronic and digital copies,
14 and I have with me a demonstrative exhibit
15 which could show for the Court what has been
16 provided to WIREdata at least with regard to
17 one of the municipalities, and it's basically
18 the same for all of the municipalities
19 involved.

20 THE COURT: Judge Wolfgram has the other
21 two cases?

22 MR. JOHNSON: Yes, sir.

23 THE COURT: So, really, I am only
24 concerned about Village of Sussex, right --

25 MR. DEUTCH: Correct.

1 THE COURT: -- Mr. Johnson?

2 MR. JOHNSON: Yes, sir.

3 THE COURT: All right. I don't know how
4 necessary, quite frankly, that is going to be,
5 although it is an impressive tool.

6 I have reviewed the briefs and the cites
7 and I know where the parties feel that there
8 are issues of material fact or are not.
9 Actually, because there are cross summary
10 judgment motions here this is susceptible to
11 summary disposition, the parties are at least
12 in concurrence. There is just a question of
13 who prevails here today on what.

14 I have a couple of queries to start
15 matters out, and let me just recapitulate
16 without refining as to dates the procedural
17 history of this case. This was an action
18 brought by Mr. Deutch on behalf of his clients
19 to seek compliance with an open records
20 demand, and Judge Hassin, who originally had
21 shepherded this case had at one point ruled
22 that the Village of Sussex was a proper party.
23 Miss Fay, you acknowledge that --

24 MS. FAY: Yes.

25 THE COURT: -- that is the case? This

1 case came to a halt because there was an
2 intervening action brought by, was it just
3 your clients, Mr. Johnson, or did Miss Fay and
4 Village of Sussex join in that appeal? They
5 were listed as a party --

6 MR. JOHNSON: I am --

7 THE COURT: -- in the federal action.

8 MR. JOHNSON: The federal action was
9 Assessment Technologies of Wisconsin versus
10 WIREdata, and it did not involve the
11 municipalities.

12 THE COURT: All right. That presumably
13 was an effort to shield the defendants by
14 virtue of licensing or copyright from the
15 request that was being made, and initially it
16 had success at the district court level
17 through the magistrate. I believe it was
18 Aaron Gorenstein, Magistrate Gorenstein.

19 MR. JOHNSON: Yes, sir.

20 THE COURT: Or Goodstein, excuse me, but
21 then it turned to hand the sword to the
22 plaintiffs when the Seventh Circuit reversed
23 unanimously that decision of the district
24 court; and I have reviewed, of course, the
25 decision which was authored by Judge Posner,

1 and while he does comment and leave some
2 wiggle room relative to Wisconsin's open
3 records law it does appear to be pretty
4 exacting, you would concede, Mr. Johnson.

5 MR. JOHNSON: I have also reviewed the
6 opinion and I don't believe the open records
7 issues were before this court with regard to
8 making rulings on the issues that are before
9 this Court today.

10 THE COURT: If it was dicta, it would
11 seem that Judge Posner did offer some comments
12 about open records in some pretty emphatic
13 language. At least as to the portion that
14 would implicate the open records you may
15 disagree with that, but that is my spin on
16 that. Your thoughts on my observation.

17 MR. JOHNSON: At the end of the Seventh
18 Circuit's decision there are suggested ways in
19 which Assessment Technologies could comply, or
20 I guess I should say, which the municipalities
21 could comply with the open records request.
22 It's interesting that the municipalities were
23 not parties to the federal case, and
24 Assessment Technologies is not the proper
25 authority from whom an open records request

1 could be granted. So although you do see the
2 recommended ways in which compliance can be
3 had, those are my observations.

4 THE COURT: That is the very issue before
5 me, is it not?

6 MR. JOHNSON: It's one of the issues
7 before Your Honor, and I think that the
8 threshold issue before you even reach
9 compliance with the open records request is
10 the compliance by WIREDATA with the temporal
11 and subject matter limitations that are
12 provided by Wisconsin statute. So I believe
13 that the threshold issue is whether the
14 request, itself, was in compliance with the
15 open records request.

16 THE COURT: Let's just talk about that a
17 little bit. I know there is the Pelkey
18 communicate and whether or not the Court should
19 consider that and his participation in this,
20 but as to the demand the deficiency that you
21 perceive without a temporal limitation is
22 what? Let me hear a brief synopsis of your
23 position on that.

24 MR. JOHNSON: Well, when you look at the
25 language of the request, itself, and it says,

1 I quote here now, "This is to formally request
2 an electronic, digital copy of the detailed
3 real estate property records showing the
4 specific characteristics of each parcel and
5 the improvements thereupon used by the
6 assessor for your municipality in determining
7 the proper assessments for each parcel within
8 the municipality." When you read that request
9 there is absolutely no limitation as to time.

10 THE COURT: What difference would it make
11 if there was?

12 MR. JOHNSON: If there is no limitation
13 as to time the request, itself, is
14 insufficient as a matter of law.

15 THE COURT: How would that burden your
16 client in terms of producing the records that
17 they had generated? It was as to every parcel
18 in the Village of Sussex. What difference
19 would it make if it were the last hundred
20 years, depending on how far back your records
21 go, Mr. Johnson?

22 MR. JOHNSON: There is no evidence that
23 my client has records going back to the
24 beginning of time.

25 THE COURT: All right. Well, then what

1 records do they have? How far do they go
2 back?

3 MR. JOHNSON: I do believe that they
4 probably go back to the late 90s, and that's
5 just my--that is just my guess. I don't know
6 for a fact how far back they go.

7 THE COURT: So, as a practical matter,
8 there is a time limit, isn't there?

9 MR. JOHNSON: There is a time limitation
10 as to what my client possesses, but not what
11 was requested.

12 THE COURT: And, assuming that your
13 records went back to the 40s, that's not
14 accessible to the plaintiffs if they request
15 all of them? Isn't the time implied? That is
16 what they requested, was all the records that
17 you had.

18 MR. JOHNSON: And if, in fact, the
19 request does relate all the way back to the
20 1940s, then the records, first of all, are
21 likely not to be electronic or digital.

22 THE COURT: Let's assume that they are.

23 MR. JOHNSON: Okay. Second of all, there
24 is no evidence that my client would even
25 possess those, and so --

1 THE COURT: Let's assume that they do.

2 MR. JOHNSON: Therefore, it would be my
3 client's burden to corral all these documents
4 throughout the beginning of time, and that's
5 the limitation that the statute places on the
6 requester initially is to place a request that
7 can be complied with rather readily by the
8 respondent to that request.

9 THE COURT: Isn't it undisputed that this
10 isn't going to take much more than a modicum
11 of effort for you to produce the record in a
12 format that was delineated by the Seventh
13 Circuit?

14 MR. JOHNSON: We have produced that data
15 now, the data that we possessed, and it did
16 take some effort and some cost and time
17 involved, as well.

18 THE COURT: Well, that formality has been
19 rejected, hasn't it?

20 MR. JOHNSON: No, Your Honor, it has not.

21 THE COURT: The P.D.F. hasn't?

22 MR. JOHNSON: No, Your Honor. It has not
23 been rejected.

24 THE COURT: Is that within the four means
25 that were outlined by Judge Posner?

1 MR. JOHNSON: We believe it is.

2 THE COURT: The only assertion that you
3 made, Mr. Johnson, initially was a copyright
4 one in terms of denial of the access to
5 records. Am I correct in that?

6 MR. JOHNSON: No, Your Honor. You are
7 not correct in that. First of all, the denial
8 that would have to take place had to be before
9 the incipience of these cases, meaning before
10 the filing date of this mandamus action, and
11 that is because the mandamus action is
12 predicated upon a denial of a request, and if
13 you look at the time line back in the year
14 2001 I believe that the request came in at
15 about the middle of April, 2001, and these
16 lawsuits, and I am not sure of the exact date
17 of this lawsuit but I think it was right
18 around June 11, 2001. Prior to that date
19 there had not even been a response from the
20 village or my clients in a formal denial sense
21 saying no, we are not going to give you this
22 data. If you look at the factual history
23 back --

24 THE COURT: So a lawsuit was commenced
25 before there was a denial?

1 MR. JOHNSON: Yes, sir.

2 THE COURT: Mr. Deutch, your thoughts on
3 that limited inquiry by the Court?

4 MR. DEUTCH: I presumed it might come up.
5 I have a time line here for the Court. I
6 believe our position is that, and the Osborne
7 case says as much, that you either produce the
8 records or you don't. Failure to produce
9 them, and that is the same as in the T.M.J.
10 case, is effectively a denial.

11 THE COURT: So you don't have to wait
12 around for reasons, in other words?

13 MR. DEUTCH: You don't have to. I do
14 believe that Pelkey basically says-- Pelkey's
15 communiques, and I understand the issue with
16 that, basically says no; but you don't have to
17 wait. In point of fact, we mailed our request
18 April 20th. We filed this action June 8th.
19 We have the various correspondence with Pelkey
20 in May.

21 THE COURT: Thank you, Mr. Deutch.
22 Mr. Johnson, obviously you will take
23 opposition to that spin, but was that raised
24 before Judge Hassin? Did he have an
25 opportunity to rule on that?

1 MR. JOHNSON: I don't think it ever got
2 to that stage before Judge Hassin.

3 THE COURT: So the only motion
4 proactively brought was a request for
5 dismissal by the Village of Sussex?

6 MR. JOHNSON: I do believe so.

7 THE COURT: That your understanding,
8 Mr. Deutch?

9 MR. DEUTCH: I believe that's correct,
10 Your Honor.

11 THE COURT: A denial must have been
12 issued at some time, or was this copyright
13 inferred from your action in federal court by
14 Mr. Deutch?

15 MR. JOHNSON: I am not understanding the
16 question. I'm sorry.

17 THE COURT: A formal denial must have
18 been issued by your client at some time, or
19 was that inferred by virtue of the action in
20 copyright before the federal court?

21 MR. JOHNSON: I think it may be inferred
22 by the copyright action in federal court but,
23 again, that took place all after the filing of
24 this mandamus action which, again, would mean
25 that the mandamus action was never ripe

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because a denial was never issued.

THE COURT: And you moved to quash the writ, request for the writ?

MR. JOHNSON: We responded by answering the complaint, the mandamus--in the mandamus action.

THE COURT: Did you move to quash it because of that perceived deficiency?

MR. JOHNSON: No, Your Honor, we did not.

THE COURT: How long was the case before Judge Hassin?

MR. JOHNSON: I believe that Judge Hassin had this case from 2001 until 2003.

THE COURT: Well, when was the federal action started that put a freeze on activity in this case, as I understand?

MR. JOHNSON: Based on my recollection of the procedural history of this case, the complaint in Waukesha County was filed in the middle--in the beginning to middle of June, 2001; and I believe that in August, July or August of 2001, the copyright action was commenced.

THE COURT: So about four or five months, by my arithmetic, by your dates.

1 MR. JOHNSON: I believe it was a month or
2 two following the filing of the mandamus
3 action.

4 THE COURT: I thought you said April.

5 MR. JOHNSON: That was when the request
6 was made, April.

7 THE COURT: I see. I see. All right.
8 Yes, June-- Yes, it was the date of this
9 action.

10 Mr. Deutch, anything to add on that
11 limited inquiry that I made of Mr. Johnson?

12 MR. DEUTCH: Yes, Your Honor. I believe
13 the action was started on--this action was
14 started June 6th. In November of 2001 there
15 was a hearing in federal court, and it was a
16 result of that hearing in December that the
17 parties stayed this. So this action was
18 pending for at least six months.

19 THE COURT: Before an action was taken in
20 federal court?

21 MR. DEUTCH: Before anything was done in
22 federal court to stop this. There were
23 various motions that were made in this matter,
24 including by the city and, I believe, by
25 Mr. Johnson, none of which were the motion to

1 quash that you asked about.

2 THE COURT: What motions did you bring,

3 Mr. Johnson, or didn't you bring any? You

4 disagree with Mr. Deutch in this action.

5 MR. JOHNSON: I believe my motions would

6 have been to stay the state court actions and

7 allow the federal action to proceed.

8 THE COURT: Nothing by way of summary

9 disposition?

10 MR. JOHNSON: No, Your Honor.

11 THE COURT: Mr. Deutch?

12 MR. DEUTCH: I believe that is correct.

13 THE COURT: All right. But the federal

14 action was filed prior to the November hearing

15 date, I assume, Mr. Deutch.

16 MR. DEUTCH: Yes.

17 THE COURT: You accept Mr. Johnson's --

18 MR. DEUTCH: I would agree with that. I

19 would also-- I don't know if you

20 want-- There was a letter --

21 THE COURT: Don't jump in with both feet.

22 I just want you to --

23 MR. DEUTCH: Okay, yes.

24 THE COURT: -- deal with the issue that

25 we are talking about now. Okay. All right.

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All right.

Mr. Johnson, you believe you have already complied with one of the four delineated means that were identified by the Seventh Circuit panel, and which of those four does your P.D.F. fall under?

MR. JOHNSON: Your Honor, if I could, I would just like to bring up that decision. I don't have that with me.

THE COURT: I can understand, perhaps, why.

MR. JOHNSON: I don't have that decision with me, so I don't know what the four exact --

THE COURT: Would you like to look at the printout of the one I have?

MR. JOHNSON: Yes, sir. Yes, sir. Your Honor, certainly it's Option Number 1, the municipalities use market drive to extract the data and place it in an electronic file, although I will say it's not the municipalities that have performed that function.

THE COURT: Whoever the custodian is defined as by virtue of my ruling has the

1 obligation to provide it in one of these four
2 formats. Is that correct?

3 MR. JOHNSON: Again, as predicated on the
4 threshold issue of whether the request is
5 sufficient on its face.

6 THE COURT: You need not be concerned
7 about waiving any earlier arguments when I ask
8 you the question about something down the
9 road. Was the P.D.F., that format, ever
10 accepted by plaintiff, Mr. Johnson, and was
11 the fee paid, as far as you know?

12 MR. JOHNSON: They have accepted it and,
13 no, there's not been a fee paid. That is part
14 of our remaining dispute we will have down the
15 road in this case.

16 THE COURT: And, presumably, Mr. Deutch,
17 the reason that you accepted it is because you
18 had to analyze it to see if it complied with
19 your request if you did accept it --

20 MR. DEUTCH: The word --

21 THE COURT: -- in a physical sense?

22 MR. DEUTCH: In a physical sense it was
23 sent to us. We didn't even realize it. There
24 was no notice sent to us on it. It was just
25 dropped in the mail.

1 THE COURT: Well, you must have had a
2 chance to peruse it so that you knew it didn't
3 meet with your demands.
4 MR. DEUTCH: Correct.
5 THE COURT: All right. And you are
6 square with Mr. Johnson that no fee was ever
7 paid as requested?
8 MR. DEUTCH: I don't think when we
9 received that any fee was requested.
10 THE COURT: Well, there was considerable
11 discussion about a fee and profits.
12 MR. DEUTCH: Nothing has been paid to
13 them, if that answers --
14 THE COURT: That does answer the
15 question. You pronounced, Mr. Johnson, Grota,
16 did you not?
17 MR. JOHNSON: Yes, sir.
18 THE COURT: All right. I have a couple
19 of questions, just briefly, about--there is no
20 dispute here that Grota is the assessor for
21 the Village of Sussex, Mr. Johnson?
22 MR. JOHNSON: Yes, sir.
23 THE COURT: Okay. There is no dispute?
24 MR. JOHNSON: Yes, sir.
25 THE COURT: You have answered that

1 correctly. I assume, Mr. Deutch, there is no
2 dispute?

3 MR. DEUTCH: Correct, Your Honor.

4 THE COURT: All right. If we get there
5 and if you prevail, Mr. Deutch, this issue
6 about Grotta's individual liability as opposed
7 to his alter ego company, whether it be Grotta
8 Appraisals or Assessment Technologies, both
9 are Mr. Grotta's companies, are they not,
10 Mr. Johnson?

11 MR. JOHNSON: Mr. Grotta does own both of
12 those companies.

13 THE COURT: Mr. Deutch, this issue about
14 personal liability as to Grotta versus,
15 presumably, the corporation's liability for
16 costs, attorney's fees, if we get there, is
17 that predicated upon his position as a public
18 officer? I assume that is your argument. As
19 the assessor; so, therefore, he has some
20 liability there.

21 MR. DEUTCH: It's predicated on his being
22 an independent contractor acting as the
23 assessor because a public official --

24 THE COURT: He is the assessor, isn't he?

25 MR. DEUTCH: He is the assessor, correct.

1 THE COURT: I don't think we need to go
2 any further on that issue.

3 MR. DEUTCH: If I may, Your Honor?

4 THE COURT: On something I have raised?

5 MR. DEUTCH: Yes, on the exact point.
6 There is a difference between liability to a
7 public official when he is purely a public
8 official and when he is doing it as an
9 independent contractor.

10 THE COURT: Miss Fay, you have already
11 been up to the plate on the issue of the
12 village's participation in this lawsuit or
13 presence in this lawsuit, haven't you, before
14 Judge Hassin?

15 MS. FAY: Well, yes, my colleague has
16 been, and, yes.

17 THE COURT: All right. You are speaking
18 for your client now.

19 MS. FAY: Right. We have been up a
20 couple of times on motion to dismiss.

21 THE COURT: Isn't it res judicata? Judge
22 Hassin decided you were in the case, did he
23 not?

24 MS. FAY: Well, he decided, but he
25 decided on a whole different issue. He

1 decided relative to the copyright and not to
2 the actual-- We were --
3 THE COURT: That, frankly, escaped me.
4 MS. FAY: We were dismissed once. We
5 lost on one motion to dismiss. We were
6 granted another, and now after the Seventh
7 Circuit decision it was vacated and we are
8 back in.
9 THE COURT: You agree with that,
10 Mr. Deutch; maybe not the entire time line,
11 but the bottom line?
12 MR. DEUTCH: I am sorry, Your Honor.
13 THE COURT: Go ahead.
14 MR. DEUTCH: They brought their motion, I
15 thought, on the same issues that were here.
16 They were not dismissed. Then the entire case
17 was dismissed based on a summary judgment.
18 That was then reversed. This entire case was
19 dismissed based on a copyright issue, and then
20 that--while that was pending in the Court of
21 Appeals it was reversed in the federal court.
22 So then everything opened back up here.
23 THE COURT: All right.
24 MR. DEUTCH: But the original --
25 THE COURT: That, frankly, enlightens me

1 a bit. Go ahead.

2 MR. DEUTCH: The original motion that
3 they made to be dismissed as between the
4 two--between them and the assessor, I believe,
5 was denied by Judge Hassin. I think that is
6 res judicata here.

7 THE COURT: All right. Well, while this
8 may seem fairly peremptory on the part of the
9 Court I have had the benefit of voluminous
10 briefs on these issues and I am prepared,
11 quite frankly, to rule. I don't need any
12 additional argument except on a couple of
13 matters which may be loose ends relative to
14 the cross-motions for summary judgment. We
15 can, as the dust settles on my decision, we
16 can figure out where we are going from there.

17 Firstly, I am satisfied that the village
18 is an appropriate party. I discount the
19 arguments that they make today. The issue, in
20 my estimation, while slanted today as being
21 differential and on a new basis still is not
22 palatable. As far as I am concerned, to the
23 extent that it has been ruled on by Judge
24 Hassin it is res judicata, but I am satisfied
25 that pursuant to law that while the village

1 can delegate activities in this regard they
2 can't divest themselves of responsibility
3 regarding record keeping. So, the village's
4 request for summary judgment is denied, and
5 relative to the plaintiff's request for
6 summary judgment as to the Village of Sussex
7 that is granted.

8 Further, I am satisfied that the request
9 is in exact and proper form pursuant to law,
10 and I include in that what I believe to be the
11 attributions and the dialogue that was
12 contained between-- I believe it was Curtis
13 is your client's primary client, Mr. Deutch?

14 MR. DEUTCH: Primary contact.

15 THE COURT: Yes. --and that of Pelkey,
16 who I find was a designated agent as a matter
17 of law based upon the evidence before the
18 Court, and that the request was refined by the
19 dialogue in whatever form that it occurred
20 between Pelkey and WIREdata. Further, I am
21 satisfied that the Seventh Circuit has so
22 opined and that the form of the request was
23 unambiguously made by WIREdata to include
24 matters other than that which was provided to
25 them in the P.D.F., which is not in compliance

1 with the open records law or now with the
2 decision of the Seventh Circuit.

3 The Seventh Circuit was pretty severe in
4 its language relative to defendants'
5 positions, even using the words "appalling"
6 and "absurd" in a couple of occasions.
7 Frankly, I don't know that I would use that
8 strong a language because I don't have a
9 lifetime tenure, but "disingenuous" is the
10 word that came to mind to me particularly with
11 reference to the argument that there would be
12 a creation of a new record by response to the
13 demand made by the plaintiff in this case.

14 Michael Grota is an authority and
15 custodian of the records, as far as the Court
16 is concerned, and there can be multiple
17 authorities, as here. I believe that is not
18 only supported by case law but it's strongly
19 indicated by the Seventh Circuit, and the
20 contract with clients as being an impediment
21 to access in the form that was requested by
22 WIREdata was also rejected by the Seventh
23 Circuit, as well.

24 So, accordingly, the Court is going to
25 find that there exists no genuine issue of

1 material fact, grant summary judgment in favor
2 of the plaintiff in this matter as against all
3 the defendants, as I have already done against
4 the Village of Sussex, so I should say
5 remaining defendants and deny the motion for
6 summary judgment by remaining defendants
7 represented by Mr. Johnson.

8 Now, we get to the issue of attorney's
9 fees and costs. Let me rule initially that I
10 am not satisfied that the hundred dollar
11 language under the statute places a cap on
12 attorney's fees in this matter whatsoever.
13 That's not a reasonable argument, in this
14 Court's estimation. So attorney's fees can be
15 actual, reasonable and customary, and the
16 Court would find that because there has not
17 been an appropriate response to a valid demand
18 for open records that attorney's fees and
19 costs are appropriate in this case. In what
20 amount and how they should be apportioned are
21 not matters that I am prepared to deal with
22 today, but let me go on to say that as to
23 plaintiff's request for punitive damages it's
24 a little difficult for me to come to the
25 conclusion that plaintiffs would be entitled

1 to punitive damages. Frankly, what augers
2 against that conclusion is the procedural and
3 legal history that this case has taken.
4 Defendants did prevail before a federal
5 district court and, if I can use the frivolous
6 lawsuit statute as an analogue to analysis in
7 this situation, clearly a district judge or
8 federal magistrate felt that there was some
9 arguable merit and legal merit to the
10 copyright claim and, indeed, it took an appeal
11 to the Seventh Circuit before that could be
12 straightened out. So I can't observe under
13 that analogue statute that either harassment
14 was designed by the defendants in this matter
15 or that they didn't have a good faith,
16 meritorious legal claim. So I will not allow
17 punitive damages to be an issue in this case.

18 Now, the question is how the parties wish
19 to deal with the subject of a determination,
20 and when, of attorney's fees and costs. You
21 have a final judgment from this Court, or
22 order from this Court, granting summary
23 judgment on most matters in favor of the
24 plaintiff with the exception of the punitive
25 damage aspect. It's my expectation that

1 because of the legal history of this case that
2 this is also going to end up on appellate
3 review. What we can do is one of a couple of
4 things. We can attempt to resolve the issue
5 of attorney's fees by way of hearing and costs
6 as well as their apportionment, which may be
7 an interesting issue in and of itself, as I
8 somewhat touched upon when asking questions
9 about Mr. Grotta as an individual vis-a-vis his
10 corporate entities as well as the village
11 here, and I don't know what plaintiff's
12 position is in that respect and, frankly, I am
13 not soliciting it at this point, but if the
14 parties are in unison that they want to have
15 that matter resolved by this Court before you
16 take the other issues up to District 2 and
17 beyond, should it come to that, then I have
18 some proposals as to how we proceed in that
19 respect and some directions, as well.
20 However, if you simply want to leave those on
21 the burner and resolve the issues that I have
22 ruled upon, take them up the appellate ladder
23 and see how they percolate in that system,
24 perhaps the resolution of those issues before
25 the Court of Appeals will moot or settle the

1 issue of attorney's fees and costs.

2 So, what I would like to know is how the
3 parties would like to proceed. Mr. Deutch,
4 firstly.

5 MR. DEUTCH: I would like to have the
6 legal fees issues determined at this time. At
7 this time, I don't mean today, but --

8 THE COURT: Before this Court.

9 MR. DEUTCH: -- before this Court now
10 because otherwise my feeling is if we go up
11 and then you are affirmed, which obviously we
12 would--that would be the plaintiff's position,
13 I come right back down here, I have to have
14 another hearing on attorney fees. The history
15 of this case tells me that will go up, also.
16 I think it is both judicial economy and
17 economy to our clients to have it all
18 determined now.

19 THE COURT: I can perceive the economies
20 from your client's standpoint, but I wouldn't
21 expect that the resources from the defendant's
22 standpoint would be inexhaustible but, Miss
23 Fay, your thoughts.

24 MS. FAY: I guess I am tempted to say
25 that it should be decided now and everything

1 can be up on appeal, but I am kind of
2 ambivalent to which would be the better
3 option.

4 THE COURT: Let me not sandbag you
5 because I want to throw in an additional
6 ingredient since two of you have thrown in on
7 the side of resolving the attorney's fees
8 issue. Frankly, it's my inclination, if there
9 is unanimity on that or if I have to dedicate
10 this matter to a hearing on attorney's fees
11 and costs, as requiring the parties to mediate
12 that before any hearing date will even be set.
13 Mr. Deutch, given that additional procedural
14 ingredient that I have added are you still of
15 the same mind?

16 MR. DEUTCH: Absolutely.

17 THE COURT: Miss Fay?

18 MS. FAY: Actually, I would be less
19 inclined to want to do it now if we are going
20 to have to mediate it and settle something. I
21 wouldn't want to concede any issue before I
22 would get to appeal this decision on grant of
23 summary judgment.

24 THE COURT: Well, I don't know that you
25 would be conceding any issue, but you mean

1 dealing with this issue of attorney's fees?

2 MS. FAY: I'm really torn one way or
3 another on which would be the better course.

4 THE COURT: Well, I guess I have sprung
5 this on you this morning, so maybe a few
6 minutes of repose beyond the couple minutes I
7 am affording you now would be reasonable.
8 Mr. Johnson, your thoughts.

9 MR. JOHNSON: I guess I am not clear. My
10 thoughts are again predicated on who you
11 determined is an authority and whether
12 Assessment Technologies is an authority and
13 Michael Grota is an individual or Michael
14 Grota is an assessor, and I guess I didn't
15 catch that.

16 THE COURT: Well, I found that Michael
17 Grota and his corporations are authorities and
18 custodians of records. Where the cheese
19 starts to bind on that finding is how we
20 apportion the costs that I found would be
21 reasonable to impose. Frankly, that's--it's
22 easy for me to make the utterance as to the
23 finding, but to put it in application as to
24 sanctions, if you will, is another thing.
25 Does that help you?

1 MR. JOHNSON: Yeah. I would be opposed
2 to mediating the dispute and, therefore, I
3 would like to place our appeal immediately to
4 the appeals court without that benefit of the
5 mediation.

6 THE COURT: Well, mediation is going to
7 be ordered if I am the judge on this case.
8 It's just a question of when that occurs and
9 when we determine attorney's fees. As to
10 Mr. Deutch's concern that because of the
11 procedural history of this case and varying
12 courts that if we come back at a later date to
13 determine attorney's fees we are simply going
14 to buy ourselves another appeal, your
15 reaction, Mr. Johnson.

16 MR. JOHNSON: Similarly, if the appeals
17 court reverses, which obviously I will urge,
18 then we would have wasted our time in this
19 court. So the judicial economies I don't
20 perceive.

21 THE COURT: You think it's a push?

22 MR. JOHNSON: Yes.

23 THE COURT: All right. Anything further
24 on that subject, Miss Fay, or you still would
25 like to have a moment's repose, and I use that

1 "moment" figuratively. I would give you a few
2 days to weigh in on this issue.

3 MS. FAY: I guess I'm still kind of torn
4 on the issue of-- I hate to be flapping in
5 the wind here, but I am just not sure what is
6 the best situation for the village.

7 THE COURT: I am not going to be too
8 stern about the fact that you can't make up
9 your mind to the question. Obviously, you
10 came in here expecting and hoping to prevail.
11 You did not, so I think some moment's
12 reflection in a figurative sense is
13 appropriate.

14 What I will do is set this matter for
15 status in perhaps two weeks, and I will expect
16 that the parties will in the meantime,
17 Mr. Deutch, I want you, since you have vastly
18 or from the majority standpoint prevailed, to
19 craft an order out of today's event
20 synthesizing my rulings, including that which
21 is adverse to you on the punitive damage
22 issue, and file it under the five-day rule.
23 The status date we will select first to meet
24 everybody's calendar, not that I am going to
25 expect or require a personal appearance.

1 Frankly, the parties can appear by telephone,
2 as far as I am concerned, in a telephone
3 conference. Are counsel available in the
4 early a.m. of May 11th for a telephone
5 conference, should it be necessary? Frankly,
6 I am going to require you within a week to
7 simultaneously file a written position. This
8 is mostly for Miss Fay's benefit because
9 Mr. Johnson and Mr. Deutch are pretty clear on
10 how they want to proceed and it's divergent on
11 this issue, but I may just issue a simple
12 decision one way or the other either deferring
13 the issue of attorney's fees or requiring that
14 the parties proceed to mediation before I set
15 the matter for a hearing on attorney's fees.
16 It will be that simple. If I don't get around
17 to doing that and still am in flux on that
18 issue, then at the telephone conference, the
19 date which we will set in a moment, I will
20 issue a bench decision on that question.

21 May 11th in the early a.m., and by early
22 I mean 8:00, if necessary. Mr. Deutch, are
23 you available?

24 MR. DEUTCH: I am, Your Honor.

25 THE COURT: And --

1 MR. DEUTCH: Although I presume either of
2 us could take it, since it would just be a
3 notification by the Court.
4 THE COURT: An alter ego for counsel who
5 argued today is fine.
6 MR. DEUTCH: Who has argued, or is
7 present?
8 THE COURT: Either. So long as someone
9 can speak on behalf of your client, that's
10 fine. Miss Fay?
11 MS. FAY: I am available.
12 THE COURT: I don't mean to impose 8:00,
13 but I thought it might, if you had another
14 conflict that day, it would be the best
15 available time. Mr. Johnson?
16 MR. JOHNSON: Yes, Your Honor.
17 THE COURT: All right. So if I say 8:15,
18 that's also agreeable?
19 MR. DEUTCH: Anytime in the morning.
20 THE COURT: Miss Fay?
21 MS. FAY: Yes.
22 THE COURT: Mr. Johnson?
23 MR. JOHNSON: Yes.
24 THE COURT: Will you facilitate the
25 conference call, should it be necessary,

1 Mr. Deutch?

2 MR. DEUTCH: Yes, Your Honor.

3 THE COURT: Very good. This matter will
4 be continued for status on that issue as to
5 how we are going to resolve or if we are going
6 to resolve the issue of attorney's fees by May
7 11th at 8:15. In the meantime, I will await
8 your proposed order out of today's event and
9 hold it, of course, for five days to permit
10 Mr. Johnson and Miss Fay the opportunity to
11 object as to its form.

12 Are there any questions that counsel may
13 have before we stand down on this case,
14 Mr. Deutch?

15 MR. DEUTCH: None, Your Honor.

16 THE COURT: Miss Fay?

17 MS. FAY: No, Your Honor.

18 THE COURT: Mr. Johnson?

19 MR. JOHNSON: Yeah, just one quick, Your
20 Honor. You mentioned just a minute or two ago
21 you said within one week you are going to
22 require us to file simultaneously, and then
23 the sentence was cut off.

24 THE COURT: Good point. By May 4th I
25 would like to have a letter from counsel

1 either confirming their position today that we
2 should proceed to resolve the attorney's fees
3 issues before this Court, understanding that
4 mediation will be a component of that track;
5 or that an appeal--that that should await the
6 outcome of an appeal, as you have urged
7 Mr. Johnson; and we will await to hear what
8 your position is, Miss Fay, by May 4th, as
9 well. Then by May 11th, perhaps sooner, which
10 may obviate--which will obviate the necessity
11 of a telephone conference, I will either issue
12 a terse, written decision or you will hear
13 from me on that date. Does that clarify the
14 burdens on--as far as that goes?

15 MR. JOHNSON: Yes, Your Honor.

16 THE COURT: Anything further,
17 Mr. Johnson?

18 MR. JOHNSON: No, Your Honor.

19 THE COURT: Thank you all. Please have a
20 nice day.

* * * * *

STATE OF WISCONSIN))
COUNTY OF WAUKESHA) SS.

I, Thomas A. Racinowski, Official Court Reporter for the Circuit Court, Branch 2, for the County of Waukesha, State of Wisconsin, do hereby certify that the foregoing and annexed transcript of proceedings is a true and correct copy of my original stenographic notes in regard to the above-entitled matter and of the whole thereof.

I further certify that said transcript was ordered on April 27, 2005 and completed by me this 28th day of April, 2005.

THOMAS A. RACINOWSKI, CPR, CM
Waukesha Co. Circuit Court, Br. 2

* * * * *

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IN THE STATE OF WISCONSIN - CIRCUIT COURT
WAUKESHA COUNTY

Wire Data, Inc.

Plaintiff

v.

Village of Sussex,
Grota Appraisals, LLC,
Michael L. Grota,
Assessment Technologies of WI, LLC.
Defendants.

Response to Village of Sussex's Motion
for Summary Judgment
Case No. 01CV1403

CLERK OF CIRCUIT COURT
CIVIL DIVISION
NOV 30 AM 11:01

RESPONSE TO VILLAGE OF SUSSEX MOTION FOR SUMMARY JUDGMENT

Defendants Grota Appraisals, LLC ("Grota Appraisals"), Assessment Technologies of WI, LLC ("Assessment Technologies"), and Michael L. Grota, hereby respond to the Village of Sussex's motion for summary judgment.

Defendants Grota Appraisals, LLC ("Grota Appraisals"), Assessment Technologies of WI, LLC ("Assessment Technologies"), and Michael L. Grota generally agree that the Village of Sussex, along with all other defendants, should be dismissed in accordance with the reasons stated in Defendants Grota Appraisals, LLC ("Grota Appraisals"), Assessment Technologies of WI, LLC ("Assessment Technologies"), and Michael L. Grota motion for summary judgment. However, there are some factual and legal inaccuracies in the Village's motion that this response is intended to address.

First, *Grota Appraisals* never informed the plaintiff that the records would cost the

1 plaintiff a one-time fee of \$6,600 to export, a \$0.50 per-parcel charge and an annual update
2 fee of \$0.15 per parcel. Instead, *Impact Consultants* proposed this arrangement. See, Exhibit L
3 to Grota Appraisals' Motion for Summary Judgment.

4 Second, none of Assessment Technologies of WI, LLC, Grota Appraisals, LLC, or
5 Michael L. Grota can possibly be considered an "[a]uthority." An "authority" is defined as
6 any of the following under Wis.Stat 19.32(1):

7 a state or local office, elected official, agency, board, commission,
8 committee, council, department or public body corporate and politic
9 created by constitution, law, ordinance, rule or order; a governmental
10 or quasi-governmental corporation except for the Bradley center
11 sports and entertainment corporation; a local exposition district under
12 subch. II of ch. 229; a family care district under s. 46.2895; any court of
13 law; the assembly or senate; a nonprofit corporation which receives
14 more than 50% of its funds from a county or a municipality, as defined
in s. 59.001 (3), and which provides services related to public health or
safety to the county or municipality; a nonprofit corporation operating
the Olympic ice training center under s. 42.11 (3); or a formally
constituted subunit of any of the foregoing.

15 Assessment Technologies of WI, LLC, Grota Appraisals, LLC, or Michael L. Grota are
16 none of the above. See Declaration of Michael L. Grota, attached as Exhibit A.

17 The definition of "authority" does not include private parties "under contract" with a
18 municipality, as the Village of Sussex suggests. In fact, the authority that the Village cites for
19 this proposition, Wis.Stat. § 19.36(3) makes clear that the private parties involved in these
20 cases, Grota Appraisals and Matthies Assessments are not authorities, but are instead "a
21 person other than an authority." Wis.Stat. § 19.36(3) provides that "each authority shall make
22 available for inspection and copying under s. 19.35 (1) any record produced or collected under
23 a contract entered into by the authority with a person other than an authority to the same
24 extent as if the record were maintained by the authority."

25 A "custodian" is different than an "authority." Although Grota Appraisals (but not
26 Michael L. Grota or Assessment Technologies) may be deemed a "custodian" the

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1 responsibilities of a custodian are far different than those of an "authority." Indeed, "[t]he
2 designation of a legal custodian does not affect the powers and duties of an authority under
3 this subchapter." Wis. Stat. § 19.33(7).

4 Grota Appraisals and Matthies Assessments have contracts with the true authorities,
5 the municipalities. Therefore, they are by definition "a person other than an authority."
6 Assessment Technologies and Michael L. Grota have no contractual arrangements with the
7 municipalities, under no possible stretch of the imagination can they be considered an
8 "authority."


9 It remains that all claims against Defendants Assessment Technologies of WI, LLC,
10 Grota Appraisals, LLC, and Michael L. Grota must be dismissed, regardless of what this
11 Court determines with respect to the Village of Sussex.

12
13 Respectfully submitted:

Ryan, Kromholz & Manion, S.C.

14 Date: November 29, 2004

15 By:


16 Daniel R. Johnson (State Bar No. 1033981)
17 RYAN KROMHOLZ & MANION, S.C.
18 P. O. Box 26618
19 Milwaukee, Wisconsin 53226-0618
20 Attorneys for Defendants Assessment
21 Technologies of WI, LLC, Grota Appraisals, LLC,
22 and Michael L. Grota.

23
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DECLARATION OF MICHAEL L. GROTA

Michael L. Grota, does hereby declare that:

1. I am the owner of Grota Appraisals LLC.
2. Grota Appraisals LLC has given to Wire Data electronic/digital copies of the real estate property records used for the Village of Thiensville, the Village of Sussex, and the City of Port Washington.
3. Neither Michael L. Grota, Grota Appraisals LLC, nor Assessment Technologies of WI LLC is a state or local office.
4. Neither Michael L. Grota, Grota Appraisals LLC, nor Assessment Technologies of WI LLC is an elected official.
5. Neither Michael L. Grota, Grota Appraisals LLC, nor Assessment Technologies of WI LLC is an agency.
6. Neither Michael L. Grota, Grota Appraisals LLC, nor Assessment Technologies of WI LLC is a board.
7. Neither Michael L. Grota, Grota Appraisals LLC, nor Assessment Technologies of WI LLC is a commission.
8. Neither Michael L. Grota, Grota Appraisals LLC, nor Assessment Technologies of WI LLC is a committee.
9. Neither Michael L. Grota, Grota Appraisals LLC, nor Assessment Technologies of WI LLC is a council.
10. Neither Michael L. Grota, Grota Appraisals LLC, nor Assessment Technologies of WI LLC is a department or public body corporate and politic created by constitution, law, ordinance, rule or order.
11. Neither Michael L. Grota, Grota Appraisals LLC, nor Assessment Technologies of WI LLC is a governmental or quasi-governmental corporation.



12. Neither Michael L. Grota, Grota Appraisals LLC, nor Assessment Technologies of WI LLC is the Bradley center sports and entertainment corporation.

13. Neither Michael L. Grota, Grota Appraisals LLC, nor Assessment Technologies of WI LLC is a local exposition district under subch. II of ch. 229.

14. Neither Michael L. Grota, Grota Appraisals LLC, nor Assessment Technologies of WI LLC is a family care district under s. 46.2895.

15. Neither Michael L. Grota, Grota Appraisals LLC, nor Assessment Technologies of WI LLC is a court of law.

16. Neither Michael L. Grota, Grota Appraisals LLC, nor Assessment Technologies of WI LLC is an assembly or senate.

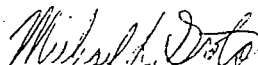
17. Neither Michael L. Grota, Grota Appraisals LLC, nor Assessment Technologies of WI LLC is a nonprofit corporation which receives more than 50% of its funds from a county or a municipality, as defined in s. 59.001 (3), and which provides services related to public health or safety to the county or municipality.

18. Neither Michael L. Grota, Grota Appraisals LLC, nor Assessment Technologies of WI LLC is a nonprofit corporation operating the Olympic ice training center under s. 42.11 (3); or a formally constituted subunit of any of the foregoing.

19. The April 20, 2001 open records requests that I have viewed never specified what type of electronic medium WireData expected.

20. I know that willful false statements and the like are punishable by fine or imprisonment, or both (18 U.S.C. 1001) and may jeopardize the validity of the application or any patent issuing thereon. All statements made of my own knowledge are true and all statements made on information and belief are believed to be true.

Dated this 18th day of November, 2004.



Michael L. Grota

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8 Attorneys for Defendants Grota Appraisals, LLC, and Michael L. Grota & Assessment Technologies, LLC.

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IN THE STATE OF WISCONSIN - CIRCUIT COURT
WAUKESHA COUNTY

Wire Data, Inc.

Plaintiff

v.

Village of Sussex,
Grota Appraisals, LLC,
Michael L. Grota,
Assessment Technologies of WI, LLC.
Defendants.

Case No. 01CV1403



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CIVIL DIVISION
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RESPONSE BRIEF IN OPPOSITION TO WIREDATA'S MOTION FOR SUMMARY
JUDGMENT

Defendants Grota Appraisals, LLC ("Grota Appraisals"), Assessment Technologies of WI, LLC ("Assessment Technologies"), and Michael L. Grota, hereby responds to WireData's motion for summary judgment. For the following reasons, WireData's motion must be denied in all respects.

The factual background and arguments stated in Assessment Technologies of WI, LLC, Grota Appraisals, LLC, and Michael L. Grota's initial motion for summary judgment are incorporated by reference, and repeated here only as necessary.

I. WIREDATA CANNOT DISPUTE THAT DEFENDANTS HAVE
FULFILLED THEIR OPEN RECORDS REQUEST

WireData contends that the defendants have not fulfilled their open records request, despite

1 the fact that WireData has received what they asked for. WireData's contention that they have not
2 received the requested data is simply false.

3 Earlier, this year, Grota Appraisals transmitted "electronic/digital copies of the real estate
4 property records used for each respective municipality," to the extent that their request can be
5 understood, to WireData. WireData admits that they received electronic digital copies of the data for
6 each municipality:

7 24 Q. Just to recap, as of this date then, you had -- Up
8 25 until today which is the 27th of July, 2004, you
9 1 now possess an electronic digital copy of the data
2 for the Village of Thiensville; correct?

3 A. That is correct.

10 4 Q. You now possess an electronic digital copy of the
5 data for Port Washington; correct?

11 6 A. That is correct.

12 7 Q. You now possess an electronic digital copy of the
8 data for Sussex; is that correct?

13 9 A. Yes, it is.

14 Deposition of Thomas Curtis, Officer of WireData, pp. 15-16, attached as Exhibit Z to
15 Defendants opening Summary Judgment Brief.

16 In direct contravention of its own sworn testimony, WireData now argues that they have not
17 received the data. WireData's internal confusion about what they actually asked for and what they
18 actually received might lead to their frivolous argument that they have not received the data in an
19 electronic format. WireData itself testified that they expected something entirely different than what
20 they actually asked for:

21 1 Q. Have you received an electronic digital copy?

22 2 A. Yes.

23 3 Q. So when you asked for an electronic digital copy,
4 you were in fact expecting something else?

24 5 A. Yes.

25 6 Q. So why did you ask for an electronic digital copy
7 if you were, in fact, expecting something else?

26 8 A. I was expecting it in a different format.

27 9 Q. You were expecting it in a different format than
28 10 what you actually asked for?

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1 Deposition of Curtis, p. 10. See Exhibit Z to Defendants opening Summary
2 Judgment Brief.

3 Comparing what WireData asked for to what they received, WireData clearly received exactly
4 what they asked for. They asked for electronic/digital copies. They received a PDF file, and
5 WireData admits that a PDF file is an electronic/digital copy.¹

6 8 Q. So a PDF file is a digital file?

7 9 A. Yes.

8 10 Q. It's also an electronic file?

9 11 A. Yes, it is.

10 Deposition of Curtis, p. 59. See Exhibit A.

11 They asked for "detailed real estate property records." WireData admits the files it has
12 received contain "detailed real estate property records."

13 12 Q. The files that you have received, they contain

14 13 detailed real estate property records; correct?

15 14 A. Yes, they do.

16 *Id.*

17 They asked for "the specific characteristics of each parcel and the improvements thereupon."
18 WireData admits that this criterion is met by the data provided.

19 21 Q. Those files, they show specific characteristics of

20 22 each parcel; correct?

21 23 A. They do.

22 24 Q. Do they show the improvements thereupon?

23 25 A. In a round about way they do.

24 *Id.*

25 WireData later specified to Impact Consultants, outside of the realm of their original open
26 records requests, that "any electronic output and media is acceptable." Defendants response meets

27 ¹ WireData spends several pages arguing that they are entitled to digital instead of analog data, equating
28 what they have received to analog data. In fact what they received was by their own admission digital, so their
arguments regarding analog vs. digital data are entirely irrelevant – they have received digital data; that is, files
of 0's and 1's that are inserted into a computer disk drive and read by the computer.

1 these criteria as well.

- 2
3 18 Q. If I provide to you a PDF file on a CD, is that an
4 19 electronic output?
5 20 A. Yes.
6 21 Q. By media you mean CD or tape; correct?
7 22 A. Correct.
8 23 Q. So a PDF file on a CD is an electronic output;
9 24 correct?
10 25 A. Correct.

11 Page: 62

- 12 1 Q. And the media then is a CD?
13 2 A. Correct.
14 3 Q. When you say any type of media, then a CD would
15 4 fulfill this request to Andy Pelkey; correct?
16 5 A. Yes.
17 6 Q. And the PDF file --
18 7 MR. DEUTCH: You need to speak up.
19 8 THE WITNESS: Yes.
20 9 MR. JOHNSON:
21 10 Q. And a PDF file would satisfy your request to
22 11 Mr. Pelkey for any type of electronic output;
23 12 correct?
24 13 A. Correct.

25 Deposition of Curtis, pp. 61-62. See Exhibit A.

26 WireData attempts to paint Michael Grota as purposefully concealing the data. This again, is
27 false. All of WireData's extravagant hyperboles regarding Mr. Grota's sole motivation, Mr. Grota's
28 beliefs, Mr. Grota's knowledge -- have absolutely no factual support. Further, these issues are entirely
irrelevant, and second Mr. Grota's motivation and beliefs are the opposite of what WireData writes.
Michael Grota is not an authority or custodian, he alone cannot be responsive to a request. It is
admitted that the data requested was provided in a manner that satisfied the request. There is no
evidence of intent to conceal.

Next, WireData argues that it cannot comprehend the data -- despite the fact that the data is
clearly visible to anyone with a computer who can read. Further, the data is capable of being

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1 manipulated. *See* Declaration of Pelkey, ¶ 19-20, attached as Exhibit B. ("In this format, if WireData
2 wishes to remove data and place it into another program, WireData can simply hit a "Select Text"
3 button, highlight the desired text, right click, hit "copy to clipboard" and then go to the destination
4 software and hit paste. In this way the data can be directly input into word processing, spreadsheet or
5 database programs.")

6 WireData now states that PDF files containing everything they asked for are not responsive to
7 their request. Their arguments that they have not been provided electronic copies of the data is
8 frivolous, as WireData's own testimony reveals. Continuation of these cases on this basis is not only
9 frivolous, but vexatious and unnecessary.

10
11 **II. NEITHER ANDREW PELKEY NOR IMPACT CONSULTANTS IS A**
12 **PROPER TARGET OF AN OPEN RECORDS REQUEST**

13 WireData argues that it "additionally clarified" its open records request by communicating
14 with Impact Consultants. By this, WireData apparently recognizes the shortcomings in its April 20,
15 2001 requests, which lacked temporal and subject matter specificity, in addition to being unduly
16 burdensome (seeking all data about every parcel, throughout time, for each municipality).

17 Although defendants agree that a request can be subsequently enhanced by communication
18 with "an authority," Impact Consultants is not an authority, so WireData's clarifications were not a
19 request under open records law. The request has to be direct to the person or entity who is an
20 authority.

21 After WireData's initial April 20, 2001 open records requests, WireData wrote the following
22 directly to Impact Consultants, bypassing the municipalities and the assessors:

23
24
25
26
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1 *Selected fields requested from Market Drive software. Any type of*
2 *electronic output and media is acceptable (i.e., fixed length, comma-quote, pipe*
3 *delimited). We would need a data layout, if the fields are not in the order*
4 *below.*

5 Taxkey
6 County
7 Municipality
8 Town, Village or City Indicator
9 Property Prefix
10 Property Street Number
11 Property Street Direction
12 Property Street Name
13 Property Unit Number
14 Zip Code
15 Owner Name
16 Owner Address
17 Owner City....
18 Property Class
19 Acres
20 Zoning
21 Land Use
22 Building Type
23 Number of Stories
24 Story code (Example: 1, 1+attic)
25 Number of Units
26 Building Square Feet
27 Basement Type (Full, partial, etc.)
28 Attic (Yes/No/Type: Finished/etc.)
 Pool (Yes/No/Type: Inground/etc.)....
 Garage Type (# stalls, attached, detached, etc.)....

(emphasis added).

Understandably, none of the municipalities had the data in this exact format, and none of the municipalities were even aware of this demand of Impact Consultants, because the municipalities never received this demand from WireData. Deposition of Curtis, pp. 45-46. See Exhibit A.

Impact Consultants then responded to WireData directly, again bypassing both the municipalities and the assessors. Impact Consultants stated that it could export the data for each municipality into a format that would give WireData "a complete picture of what each property looks like." However, Impact Consultants would have to do some computer programming and verification

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1 to determine that the output was acceptable. Mr. Pelkey's stated cost for Impact Consultants to do
2 this programming was \$6600. Impact Consultants would also charge \$0.50 per parcel for this service
3 (the Village of Sussex had approximately 2500+ parcels at the time, the Village of Thiensville
4 approximately 1,200, and the City of Port Washington approximately 4,000).²

5 First, this "additional clarification" only serves to highlight that WireData's April 20, 2001
6 request did not have *any* limitation (much less a *reasonable* limitation) as to length of time, as is required
7 by statute and did not have *any* limitation (much less a *reasonable* limitation) as to subject matter, as is
8 required by statute.

9 Second, Andrew Pelkey and Impact Consultants, Inc. are not proper subjects of an open
10 records request. They are private entities who have nothing to do with open records. They are not in
11 contractual privity with any municipality, and they are in no way an authority or custodian.

12 Andrew Pelkey is an individual who owns Impact Consultants, Inc. Impact Consultants, Inc.
13 is a private computer programming firm that Assessment Technologies of WI, LLC, a private
14 software development firm, contracted with to program the Market Drive™ software.

15 Andrew Pelkey and Impact Consultants fall outside the purview of Wisconsin Open Records
16 law because they are neither an "authority" nor a "custodian." They are private entities. As such, any
17 business proposal or arrangement that Impact Consultants was trying to work out with WireData has
18 nothing to do with open records law.

19 There is no evidence that any authority was involved with the correspondence between
20 Impact Consultants and WireData. As counsel for the Village of Sussex communicated at that time,
21 there were really two issues involved with WireData's request: the first was a public records request,
22 and the second was a private business transaction involving computer programming that would allow
23 existing data to be "organized in a comprehensible form" with regard to providing WireData with the

24
25 ² Even this amount would seem reasonable for a private programmer to accomplish specialized
26 programming. Indeed, the Wisconsin Supreme Court itself charges a \$5,000 *annual* subscription fee for annual
27 electronic access to all public records available on WCCA website, or CCAP.

28 http://wcca.wicourts.gov/download/SOAP_Agreement.doc, attached as Exhibit C.

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1 data it really wanted. *See Exhibit T* to Defendants Brief in Support of Summary Judgment.

17 Q. Your open records request does not specify that
18 you need an electronic digital copy that you can
19 use?

20 A. No, it does not.

4 Deposition of Curtis, p. 58. *See Exhibit A*.

5
6 Andrew Pelkey or Impact Consultants cannot possibly be considered an "[a]uthority." An
7 "authority" is defined as any of the following under Wis.Stat § 19.32(1):

8 a state or local office, elected official, agency, board, commission, committee,
9 council, department or public body corporate and politic created by
10 constitution, law, ordinance, rule or order; a governmental or quasi-
11 governmental corporation except for the Bradley center sports and
12 entertainment corporation; a local exposition district under subch. II of ch.
13 229; a family care district under s. 46.2895; any court of law; the assembly or
14 senate; a nonprofit corporation which receives more than 50% of its funds
15 from a county or a municipality, as defined in s. 59.001 (3), and which
16 provides services related to public health or safety to the county or
17 municipality; a nonprofit corporation operating the Olympic ice training
18 center under s. 42.11 (3); or a formally constituted subunit of any of the
19 foregoing.

15 Andrew Pelkey and Impact Consultants are none of the above. *See Declaration of Andrew*
16 *Pelkey*, attached as Exhibit B:

17 WireData's communications with Impact Consultants cannot qualify as an open records
18 request, and cannot rehabilitate WireData's improper original request.³

19
20 **III. EVEN IF WIREDATA'S COMMUNICATIONS WITH IMPACT**
21 **CONSULTANTS WAS A PROPER OPEN RECORDS REQUEST, THERE**
22 **IS NO DISPUTE THAT A NEW RECORD WOULD HAVE TO BE**
23 **CREATED TO FULFILL WIREDATA'S REQUEST**

23 ³ There is no factual basis for WireData's assertion that the defendants understood the subject matter
24 or temporal limitations of WireData's insufficient requests. Even if defendants did understand any subject
25 matter or temporal limitation within WireData's requests, WireData was still obligated to place a subject matter
26 and temporal limitation within its request. Wis.Stat. § 19.35 (1)(h). Further, there is absolutely no evidence
that WireData was seeking the "current" assessment information, as WireData suggests, or even what
"current" would have encompassed.

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1 Wis.Stat. § 19.35(1)(L) provides that the open records law "does not require an authority to
2 create a new record by extracting information from existing records and compiling the information in
3 a new format." Yet, this is exactly what WireData's demands of Impact Consultants required.

4 As WireData itself admits, it was requesting "selected fields . . . from Market Drive software.
5 Any type of electronic output and media is acceptable (i.e., fixed length, comma-quote, pipe
6 delimited). We would need a data layout, if the fields are not in the order below."

7 If Impact Consultants were to have provided the data in the format demanded by WireData,
8 notably fixed length, comma-quote, pipe delimited files in the exact order specified by WireData;
9 Impact Consultants would have had to create an entirely new file. See Declaration of Pelkey, ¶ 22,
10 Exhibit B.

11 Further, if Impact Consultants were to have provided the data in the order demanded by
12 WireData, (in the following order: Taxkey, County, Municipality, Town, Village or City Indicator,
13 Property Prefix etc.) Impact Consultants would have had to rearrange the data and create an entirely
14 new file. See Declaration of Pelkey, ¶ 23, Exhibit B.

15 No file according to WireData's demands was in any Market Drive software file.

16 Therefore, WireData's demands were in direct contravention of Wis.Stat. § 19.35(1)(L) which
17 "does not require an authority to create a new record by extracting information from existing records
18 and compiling the information in a new format."

19 Because the authorities would have had to extract information from existing records and
20 compile the information to WireData's specifications, their requests required in excess of what the
21 open records law requires. Therefore, the requests did not have to be granted.

22 An additional complication arises with WireData's request if the Court considers that
23 communications with Mr. Pelkey and Impact Consultants constituted an enhanced request. Namely,
24 the communications between WireData and Impact Consultants occurred at some time after May 4,
25 2001 but before May 21, 2001.⁴ Suit was filed on May 30, 2001 in WIREdata Inc. vs. Village of

26 ⁴ Dates from Exhibits J and K to Defendants Brief in Support of Summary Judgment.

1 Thiensville, and on June 8 and 12, 2001 in the Sussex and Port Washington cases. Therefore, any
2 authority had as few as nine (9) days to evaluate and respond to WireData's enhanced request.
3 Therefore, it was unreasonable to respond to such a lengthy and comprehensive request in this short
4 period of time, and the mandamus actions themselves were premature, as there had been no
5 unreasonable delay in responding to the requests. Wis.Stat. § 19.37(1).
6
7

8 IV. MICHAEL GROTA AND ERNEST MATTHIES ARE NOT AUTHORITIES

9 WireData appears to admit that the municipalities "are the real authority." WireData brief,
10 p.2, fn. 1. Indeed, none of Assessment Technologies of WI, LLC, Grota Appraisals, LLC, or Michael
11 L. Grota can possibly be considered an "[a]uthority." An "authority" is defined as any of the
12 following under Wis.Stat. 19.32(1):

13 a state or local office, elected official, agency, board, commission, committee,
14 council, department or public body corporate and politic created by
15 constitution, law, ordinance, rule or order; a governmental or quasi-
16 governmental corporation except for the Bradley center sports and
17 entertainment corporation; a local exposition district under subch. II of ch.
18 229; a family care district under s. 46.2895; any court of law; the assembly or
19 senate; a nonprofit corporation which receives more than 50% of its funds
20 from a county or a municipality, as defined in s. 59.001 (3), and which
21 provides services related to public health or safety to the county or
22 municipality; a nonprofit corporation operating the Olympic ice training
23 center under s. 42.11 (3); or a formally constituted subunit of any of the
24 foregoing.

25 Assessment Technologies of WI, LLC, Grota Appraisals, LLC, or Michael L. Grota are none
26 of the above. See Declaration of Michael L. Grota, attached as Exhibit D.

27 The definition of "authority" does not include private parties under contract with a
28 municipality, as the Village of Thiensville suggests. Wis.Stat. § 19.36(3) makes clear that the private
29 parties involved in these cases, Grota Appraisals and Matthies Assessments are not authorities, but
30 are instead "a person other than an authority." Wis.Stat. § 19.36(3) provides that "each authority shall
31 make available for inspection and copying under s. 19.35 (1) any record produced or collected under

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1 a contract entered into by the authority with a person other than an authority to the same
2 extent as if the record were maintained by the authority.”

3 Clearly Grota Appraisals and Matthies Assessments cannot qualify as an authority, nor can the
4 municipality abrogate its statutory duties, as a “custodian” is different than an “authority.” Although
5 Grota Appraisals (but not Michael L. Grota or Assessment Technologies) may be deemed a
6 “custodian,” the responsibilities of a custodian are far different than those of an “authority.” Indeed,
7 “[t]he designation of a legal custodian does not affect the powers and duties of an authority under this
8 subchapter.” Wis. Stat. § 19.33(7). The statute differentiates between an “authority” and a
9 “custodian”

10 Grota Appraisals and Matthies Assessments have contracts with the true authorities, the
11 municipalities. Therefore, they are by definition “a person other than an authority.” Assessment
12 Technologies and Michael L. Grota have no contractual arrangements with the municipalities, under
13 no possible stretch of the imagination can they be considered an “authority.”

14 Because none of the above are “authorities” no money damages would be available against
15 them, even if damages were appropriate, which they are not.

16
17
18 V. ATTORNEYS FEES ARE NOT AVAILABLE, ALTERNATIVELY THEY
19 ARE CAPPED AT \$100

20 First, WireData’s request for attorney’s fees is entirely premature, as they have not yet
21 prevailed in whole or in substantial part in this action. Wis.Stat. § 19.37(2) (plaintiff must prevail for
22 attorney’s fees to be appropriate). For this reason, attorney’s fees are not available, and WireData’s
23 request is not ripe.

24 Second, even if attorney’s fees are available, they are capped by statute at \$100. Wis.Stat. §
25 814.04(1)(b) (“When no money judgment is demanded and no specific property is involved, or where
26 it is not practical to ascertain the money value of the rights involved, attorney fees under par. (a) shall

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1 be fixed by the court, but shall not be less than \$ 15 nor more than \$ 100.”)

2 Third, even if attorney’s fees are available, they are not taxable to any of Grota Appraisals,
3 Assessment Technologies or Michael L. Grota because none of those parties is an “authority.”
4 Wis.Stat. § 19.37(2) (“Costs and fees shall be paid by the authority affected or the unit of government
5 of which it is a part, or by the unit of government by which the legal custodian under s. 19.33 is
6 employed and may not become a personal liability of any public official.”)

7
8
9 VI. PUNITIVE DAMAGES ARE NOT AVAILABLE

10 Wis.Stat. § 19.37(3) provides that punitive damages are available only if an authority or legal
11 custodian has arbitrarily and capriciously denied or delayed response to a request or charged excessive
12 fees. There is absolutely no evidence to support arbitrary or capricious behavior by any defendant in
13 this case.

14 First, whether any party’s behavior was arbitrary or capricious would be a factual finding that
15 is not appropriate summary judgment material.

16 Second, the actions that the parties took were not arbitrary or capricious, but instead had
17 sound grounding in complex technicalities and legal questions.

18 Third, there can be no dispute that WireData’s request prior to initiation of these cases was
19 never denied. WireData acknowledges as much – citing to Ryan Kromholz & Manion, S.C.’s June
20 2001 letter constituted a denial. However, this letter was after the lawsuits were filed – therefore
21 WireData’s suits were premature, in that WireData’s requests were not denied prior to suit.

22 No authority had actually withheld any record, or unreasonably delayed granting access to a
23 record or part of a record. Wis.Stat. § 19.37(1). WireData admits as much, arguing that Impact
24 Consultants was prepared to give WireData a data file, albeit at a price that WireData felt was too
25 high. *See* WireData brief at p. 11.

26 The Village of Sussex had been diligently inquiring of the situation and apprising WireData of

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1 its progress. Grota Appraisals had even informed Sussex that "Grota Appraisals could export digital
2 information on a time and material basis if requested to do so.... The Village should notify Wiredata
3 of records availability.... Should Wiredata choose to order copies of assessment information they
4 should contact Grota Appraisals."

5 The Village of Thiensville had responded to WireData that the Village of Thiensville was still
6 evaluating the situation and would be promptly responding more fully as soon as it could.

7 The City of Port Washington had authorized the release of the data from their assessor,
8 Matthies Assessments had informed WireData that its license with Assessment Technologies
9 precluded the release of the data. Matthies then offered printouts of the data.

10 WireData evasively cannot even establish that the requests were actually denied:

11 Q. Did you receive a denial from the Village of
12 Thiensville to that open records request?

13 A. Yes.

14 Q. When was that?

15 A. I don't remember the date.

16 Q. Who denied that request?

17 A. I believe, although I don't know this for certain,
18 that the village responded indicating we WIREdata
19 would need to go to their contract assessor to
20 receive the data.

21 Q. Is that a denial of your request?

22 MR. DEUTCH: Objection. Calls for a
23 legal conclusion. Subject to that, he can answer.

24 THE WITNESS: I did not receive the
25 data.

1 MR. JOHNSON:

2 Q. I didn't ask whether you received the data. I
3 asked whether it's a denial of your request?

4 MR. DEUTCH: Objection, asked and
5 answered.

6 THE WITNESS: I defer that to Alan.

7 MR. JOHNSON:

8 Q. Did you receive a denial to your request?

9 A. You have to rephrase the question.

10 Q. Did you receive a denial to your request?

11 A. I have to ask you to rephrase the question so that
12 I understand what you're asking me.

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13 Q. Did the Village of Thiensville deny your request?

14 A. I did not receive the data.

15 Q. Did the Village of Thiensville tell you that you

16 couldn't have the data?

17 A. I don't remember what their letter said. I didn't

18 bring it with me.

Deposition of Curtis, pp. 12-13. See Exhibit Z.

WireData admits that Impact Consultants never denied WireData the data:

12 Q. Exhibit No. 3 the letter from Andy Pelkey to

13 yourself, correct, does that indicate that he

14 won't provide you the data?

15 A. It does not.

Deposition of Curtis, p. 48. See Exhibit A.

Because no authority had actually withheld any record, or unreasonably delayed granting access to a record or part of a record, the mandamus actions were not yet ripe. A condition precedent to filing suit was never met; namely, no authority withheld or unreasonably delayed granting access to any record prior to WireData's filing suit. Wis.Stat. § 19.37 ("If an authority withholds a record or a part of a record or delays granting access to a record or part of a record after a written request for disclosure is made, the requester may pursue [mandamus].")

The municipalities and the assessors were in fact working towards granting WireData's request. Further, any delay that took place was reasonable, as the delay was as little as nine (9) days.

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1
2 VII. CONCLUSION

3 All claims against Defendants Assessment Technologies of WI, LLC, Grota
4 Appraisals, LLC, and Michael L. Grota must be dismissed.
5
6
7

8 Respectfully submitted:

Ryan, Kromholz & Manion, S.C.

9 Date: November 29, 2004

10 By: 

11 Daniel R. Johnson (State Bar No. 1033981)
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13 P. O. Box 26618
14 Milwaukee, Wisconsin 53226-0618
15 Attorneys for Defendants Assessment
16 Technologies of WI, LLC, Grota Appraisals, LLC,
17 and Michael L. Grota.
18
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20
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22
23
24
25
26

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28 P. O. Box 26618
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Facsimile: (262) 783-1211

1 STATE OF WISCONSIN
2 OZAUKEE COUNTY
3 WIREDATA, INC.,
4 Plaintiff,
5 Case No. 01-CV-198
6 VS
7 VILLAGE OF THIENSVILLE,
8 GROTA APPRAISALS, LLC,
9 MICHAEL L. GROTA, ASSESSMENT
10 TECHNOLOGIES OF WISCONSIN, LLC,
11 Defendants.
12 STATE OF WISCONSIN
13 WAUKESHA COUNTY
14 WIREDATA, INC.,
15 Plaintiff,
16 Case No. 01-CV-1403
17 VS
18 VILLAGE OF SUSSEX,
19 GROTA APPRAISALS, LLC,
20 and MICHAEL L. GROTA,
21 Defendants.
22 Deposition of:
23 Thomas Curtis
24 July 27, 2004
25 9:00 a.m.
26 Taken at:
27 Deutch & Weiss
28 7670 North Port Washington Road
29 Suite 102
30 Milwaukee, Wisconsin 53217
31 Barbara Dassow Court Reporter: 262-367-5205
32 Post Office Box 180411 Delafield, Wisconsin 53018

APPEARANCES

1 RYAN, KROMHOLZ & MANION
2 DAN JOHNSON, ESQ.
3 Post Office Box 26618
4 Milwaukee, Wisconsin 53226
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13 735 North Water Street
14 Suite 1500
15 Milwaukee, Wisconsin 53202
16 CRIVELLO, CARLSON & MENTKOWSKI
17 ERIN FAY, ESQ.
18 The Empire Building
19 710 North Plankinton Avenue
20 Milwaukee, Wisconsin 53203
21 Also present:
22 Peter Shuttleworth
23 Wiredata Corporation
24 Post Office Box 733
25 Milwaukee, Wisconsin 53201

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Mr. Johnson	110	

1 EXHIBITS
2 Exhibit:
3 No. 1 - Letter dated April 20, 2001 to
4 Village of Thiensville from
5 Thomas F. Curtis.....9
6 no. 2 - Letter dated April 20, 2001 to
7 Village of Sussex from Thomas
8 F. Curtis.....30
9 No. 3 - Letter from Andrew Pelkey with
10 attachments.....39
11 No. 4 - Letter to Andy from Tom Curtis.....45
12 No. 5 - Letter dated June 20, 2001 to
13 Village of Sussex Chris Swartz
14 from Michael L. Grota.....70
15 No. 6 - Letter dated May 9, 2001 to Ernest
16 Matthies from Dorothy Radley.....82
17 No. 7 - Letter dated June 26, 2001 to
18 Alan Deutch from Chris Swartz.....107
19 (Original exhibit attached to original transcript.
20 Copies attached to copies of transcripts.)

MARKED QUESTIONS

1 By Mr. Johnson: Page 46, Line 15



TRANSCRIPT OF PROCEEDINGS

1 THOMAS CURTIS, called for examination,
2 being first duly sworn, was examined and testified as
3 follows:

EXAMINATION

BY MR. JOHNSON:

1 Q. Good morning. What's your name?
2 A. Tom Curtis.
3 Q. What do you do for a living?
4 A. I am a CTO at Multiple Listing Service and the
5 vice president of WIREdata.
6 Q. What's CTO?
7 A. Chief Technology Officer.
8 Q. What was your position at WIREdata?
9 A. Vice president.
10 Q. What do you do in your role as vice president at
11 WIREdata?
12 A. I supervise the three employees and run the
13 company.
14 Q. Who are the three employees?
15 A. Shawn Peters, Matt Horner and Dorothy Radley.
16 Q. What do you mean run the company?
17 A. Day to day operations.
18 Q. Are you in charge of data acquisition at all?
19 A. I supervise that position, yes.

1 for the City of Port Washington?
 2 A. I don't know that either.
 3 Q. Why don't you know that?
 4 A. As I have previously stated there was a document
 5 written by me to him which you did not care to
 6 give me so I cannot tell you what I asked him for.
 7 I could look it up.
 8 MR. DEUTCH: Could you read back the
 9 last question and answer, please?
 10 (Record read aloud by the court
 11 reporter.)
 12 MR. JOHNSON: Mark this, please.
 13 (Exhibit No. 4 marked for identification
 14 by the court reporter.)
 15 MR. JOHNSON:
 16 Q. I have handed you what has been marked as Exhibit
 17 No. 4. This is the document you're referring to?
 18 A. Yes. This would have been what I would have asked
 19 him for, yes.
 20 MR. DEUTCH: You need to talk up a bit.
 21 THE WITNESS: Yes, this appears to be
 22 what I asked him for.
 23 MR. JOHNSON:
 24 Q. Is this a document that you wrote?
 25 A. Yes, it is.

1 Q. You said, "Selected fields requested from Market
 2 Drive software."
 3 A. Uh-huh.
 4 Q. Did you tell Andy which municipalities that you
 5 are looking for that data?
 6 A. Once again I believe this document is out of
 7 context.
 8 MR. DEUTCH: Which document are you
 9 talking about?
 10 THE WITNESS: This one. The Exhibit
 11 No. 4.
 12 MR. JOHNSON:
 13 Q. What do you mean out of context?
 14 A. As I have already testified, I do not know Andy
 15 Pelkey nor his relationship with Mr. Gota.
 16 Therefore, there must have been something before
 17 this indicating that I should send it to him.
 18 Q. I am sorry, send what to him?
 19 A. Sending Exhibit No. 4 to a person named Andy.
 20 Q. But does Exhibit No. 4 refer to any specific
 21 municipality?
 22 A. It does not.
 23 Q. You understand Exhibit No. 3 which I have given
 24 you before is a response to your Exhibit No. 4;
 25 correct?

1 Q. Is this directed to Andy Pelkey?
 2 A. I believe it is.
 3 Q. When you are saying Andy, you are referring to
 4 Andy Pelkey; is that correct?
 5 A. Yes.
 6 Q. Was this document ever transmitted to the Village
 7 of Sussex?
 8 A. I do not believe it was.
 9 Q. Was this document ever delivered to the City of
 10 Port Washington?
 11 A. I don't believe it was.
 12 Q. Was this document ever delivered to the Village of
 13 Thiensville?
 14 A. No, I don't believe it was.
 15 Q. Had you ever talked to Andy on the phone about any
 16 open records requests?
 17 A. I could look that up in my phone logs at work. I
 18 believe he and I did talk on the phone.
 19 MR. JOHNSON: Would you mark that
 20 question, please.
 21 Q. I'm sorry. What was your answer again?
 22 A. I believe we talked on the phone.
 23 Q. You talked on the phone. Do you know what you
 24 talked about?
 25 A. I do not remember.

1 A. I believe that is correct.
 2 Q. And neither of these documents identify any
 3 municipalities they are referring to; correct?
 4 A. Correct.
 5 Q. But you have also testified that Exhibit No. 4 was
 6 never provided to any of the municipalities
 7 directly; correct?
 8 A. That is correct.
 9 Q. You never received a response then to Exhibit
 10 No. 4 from any of the municipalities; correct?
 11 A. That is correct.
 12 Q. Exhibit No. 3 the letter from Andy Pelkey to
 13 yourself, correct, does that indicate that he
 14 won't provide you the data?
 15 A. It does not.
 16 Q. Does it indicate that he is willing to provide you
 17 the data?
 18 A. It indicates he will sell me the data.
 19 Q. I am talking about providing. I am not talking
 20 about money now. It indicates he's willing to
 21 provide you the data; correct?
 22 MR. DEUTCH: Objection, asked and
 23 answered. If he says sell, that is not the same.
 24 THE WITNESS: He will sell me the data.
 25 MR. JOHNSON:

1 in an ASCII comma-quote delimited file with a data
2 layout.
3 MR. JOHNSON:
4 Q. You don't know whether the village assessor for
5 the Village of Thiensville in fact had an ASCII
6 delimited file with that information; correct?
7 A. Can you rephrase that, please?
8 Q. You don't know whether the assessor for the
9 Village of Thiensville in fact had an ASCII pipe
10 delimited electronic file; is that correct?
11 A. I am sorry. I am not able to answer that
12 question.
13 Q. Why not?
14 A. Because I don't understand it.
15 Q. Do you know whether the Village of Thiensville has
16 -- I am sorry. What type of filing were you
17 looking for, ASCII --
18 A. Comma-quote delimited.
19 Q. ASCII comma-quote delimited. You don't know
20 whether the Village of Thiensville assessor in
21 fact possessed an ASCII comma-quote delimited
22 file; do you?
23 A. I do not.
24 Q. So if the Village of Thiensville assessor did not
25 in fact have an ASCII comma-quote delimited file,

1 Q. It's an electronic copy; correct?
2 A. It's not in a very usable format.
3 Q. I am not asking how usable it is. I am asking
4 whether it's electronic?
5 A. It was sent to me electronically.
6 Q. Is that also digitally?
7 A. Yes.
8 Q. So a PDF file is a digital file?
9 A. Yes.
10 Q. It's also an electronic file?
11 A. Yes, it is.
12 Q. The files that you have received, they contain
13 detailed real estate property records; correct?
14 A. Yes, they do.
15 Q. Just to be clear, we're talking about the Village
16 of Thiensville, the City of Port Washington and
17 the Village of Sussex; correct?
18 A. Correct.
19 Q. You have received all three; correct?
20 A. Yes, I have.
21 Q. Those files, they show specific characteristics of
22 each parcel; correct?
23 A. They do.
24 Q. Do they show the improvements thereupon?
25 A. In a round about way they do.

1 then what was the village assessor to provide to
2 you?
3 A. It could have been pipe delimited as opposed to
4 comma-quote delimited. It could have been a fixed
5 length file. It could have been an Excel
6 spreadsheet.
7 Q. But your open records request just asked for an
8 electronic digital copy; correct?
9 A. Correct.
10 Q. It doesn't specify what type of file; correct?
11 A. It does not.
12 Q. Any type of an electronic digital copy; correct?
13 A. Incorrect.
14 Q. Why incorrect?
15 A. Because we need an electronic digital copy that we
16 can use in our data base.
17 Q. Your open records request does not specify that
18 you need an electronic digital copy that you can
19 use?
20 A. No, it does not.
21 Q. You have been provided with an electronic copy,
22 correct, for the three municipalities; correct?
23 A. I have been provided one in a PDF format.
24 Q. PDF is an electronic copy; correct?
25 A. PDF is an electronic paper copy.

1 Q. They do; correct?
2 A. In a round about way.
3 Q. I am just asking --
4 A. Not directly.
5 Q. -- yes or no?
6 A. No, not directly.
7 Q. How about indirectly?
8 A. Indirectly, yes.
9 Q. Indirectly they do show the improvements on the
10 properties; correct?
11 A. Correct.
12 Q. Getting back to your correspondence with
13 Mr. Pelkey, so you asked him for an alternative
14 request I will call it, either provide the data in
15 the order as listed, tax key, county,
16 municipality, et cetera or provide me the data how
17 you have it in addition to a data layout; correct?
18 A. I believe I used the term --
19 MR. DEUTCH: Listen to the question.
20 Read the question, please.
21 (Question read aloud by the court
22 reporter.)
23 THE WITNESS: Yes.
24 MR. JOHNSON:
25 Q. When you say any type of electronic output and

1 media, what do you mean by media?
 2 A. Media is a CD, floppy disk, tape.
 3 Q. I understand. Any type of electronic output, what
 4 does that mean?
 5 A. That would be an Excel spreadsheet, an attachment
 6 to an e-mail, file written on a CD.
 7 Q. So electronic output, for instance a text file, is
 8 that a type of an electronic output?
 9 A. If it's on electronic media, yes.
 10 Q. If I provide you a CD with a file called the
 11 Village of Sussex.txt on a CD to you, is that an
 12 electronic output?
 13 A. Is it an electronic output, yes.
 14 Q. And if I provide a CD to you with a Microsoft Word
 15 document regarding the Village of Sussex, is that
 16 an electronic output?
 17 A. Yes.
 18 Q. If I provide to you a PDF file on a CD, is that an
 19 electronic output?
 20 A. Yes.
 21 Q. By media you mean CD or tape; correct?
 22 A. Correct.
 23 Q. So a PDF file on a CD is an electronic output;
 24 correct?
 25 A. Correct.

1 Q. Does the verification --
 2 A. Yes, sir.
 3 Q. -- cost you money?
 4 A. Yes.
 5 Q. What was the other one, there were three, you said
 6 verification time, programming time and what else?
 7 A. Computer time.
 8 Q. And computer time; correct?
 9 A. Yes.
 10 Q. How much does that cost you? Do you pay
 11 programmers?
 12 A. We do pay programmers.
 13 MR. DEUTCH: Objection. Allow me to get
 14 my objection in. There were two questions in
 15 there.
 16 MR. JOHNSON:
 17 Q. Let's start with the first. How much does that
 18 cost you then for the Village of Thiensville to
 19 process that data?
 20 A. We are still processing it.
 21 Q. Who is processing it?
 22 A. WIREdata.
 23 Q. Are there employees at WIREdata that are
 24 processing it?
 25 A. Yes, sir.

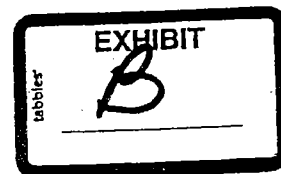
1 Q. And the media then is a CD?
 2 A. Correct.
 3 Q. When you say any type of media, then a CD would
 4 fulfill this request to Andy Pelkey; correct?
 5 A. Yes.
 6 Q. And the PDF file --
 7 MR. DEUTCH: You need to speak up.
 8 THE WITNESS: Yes.
 9 MR. JOHNSON:
 10 Q. And a PDF file would satisfy your request to
 11 Mr. Pelkey for any type of electronic output;
 12 correct?
 13 A. Correct.
 14 Q. I guess that I heard you say before that the data
 15 is not usable; is that correct?
 16 A. Which data?
 17 Q. The data that you have received regarding the
 18 three municipalities?
 19 A. It requires additional processing that is not
 20 required for any other municipality.
 21 Q. What is that additional processing?
 22 A. Programming and computer time and verification
 23 time.
 24 Q. Does that programming time cost you money?
 25 A. Yes, sir.

1 Q. Who are those employees?
 2 A. Matt Horner, Shawn Peters and Dorthy Radley.
 3 Q. Are all three of those processing Village of
 4 Sussex data?
 5 A. Yes.
 6 Q. How much do each of those three get paid on an
 7 hourly basis?
 8 A. We charge \$75 per hour for programming time. That
 9 is our rate.
 10 Q. Who do you charge?
 11 A. Whoever wants programming time pays that rate.
 12 Q. \$75 per hour for a programmer; is that correct?
 13 A. That is correct.
 14 Q. How many hours has it taken you so far with the
 15 three of those programmers to process the Village
 16 of Sussex data?
 17 A. It is not processed. It's in process.
 18 Q. How many hours total so far?
 19 A. 80.
 20 Q. 80 times 75, I will say that is roughly \$6,000; is
 21 that correct?
 22 A. That is correct so far.
 23 Q. It has not been completed yet; correct?
 24 A. Correct.
 25 Q. Who is paying WIREdata to process the Village of

DECLARATION OF ANDREW PELKEY

Andrew Pelkey, does hereby declare that:

1. I am the owner of Impact Consultants, Inc..
2. Impact Consultants, Inc. is not a state or local office.
3. Impact Consultants, Inc. is not an elected official.
4. Impact Consultants, Inc. is not an agency.
5. Impact Consultants, Inc. is not a board.
6. Impact Consultants, Inc. is not a commission.
7. Impact Consultants, Inc. is not a committee.
8. Impact Consultants, Inc. is not a council.
9. Impact Consultants, Inc. is not a department or public body corporate and politic created by constitution, law, ordinance, rule or order.
10. Impact Consultants, Inc. is not a governmental or quasi-governmental corporation.
11. Impact Consultants, Inc. is not the Bradley center sports and entertainment corporation.
12. Impact Consultants, Inc. is not a local exposition district under subch. II of ch. 229.
13. Impact Consultants, Inc. is not a family care district under s. 46.2895.
14. Impact Consultants, Inc. is not a court of law.



15. Impact Consultants, Inc. is not an assembly or senate.

16. Impact Consultants, Inc. is not a nonprofit corporation which receives more than 50% of its funds from a county or a municipality, as defined in s. 59.001 (3), and which provides services related to public health or safety to the county or municipality.

17. Impact Consultants, Inc. is not a nonprofit corporation operating the Olympic ice training center under s. 42.11 (3); or a formally constituted subunit of any of the foregoing.

18. I believe that WireData has received electronic/digital cop[ies] of the real estate property records used for the Village of Thiensville, the Village of Sussex, and the City of Port Washington in PDF format.

19. In this format, if WireData wishes to remove data and place it into another program, WireData can simply hit a "Select Text" button, highlight the desired text, right click, hit "copy to clipboard" and then go to the destination software and hit paste. In this way the data can be directly input into word processing, spreadsheet or database programs.

20. By viewing the PDF document, the data contained therein is quite simply understandable to the user who can read.

21. Market Drive software does not provide fixed length, comma-quote, pipe delimited files.

22. If Impact Consultants were to have provided the data in the format demanded by WireData, notably fixed length, comma-quote, pipe delimited files in the exact order specified by WireData; Impact Consultants would have had to create an entirely new file.

23. If Impact Consultants were to have provided the data in the order demanded by WireData, (in the following order: Taxkey, County, Municipality, Town, Village or City Indicator, Property Prefix etc.) Impact Consultants would have had to rearrange the data and create an entirely new file.

24. Market Drive software does not store data in the order below, which is the order which WireData demanded:

Taxkey
County

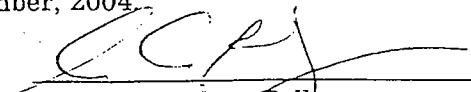
Municipality
Town, Village or City Indicator
Property Prefix
Property Street Number
Property Street Direction
Property Street Name
Property Unit Number
Zip Code
Owner Name
Owner Address
Owner City....
Property Class
Acres
Zoning
Land Use
Building Type
Number of Stories
Story code (Example: 1, 1+attic)
Number of Units
Building Square Feet
Basement Type (Full, partial, etc.)
Attic (Yes/No/Type: Finished/etc.)
Pool (Yes/No/Type: Inground/etc.)....
Garage Type (# stalls, attached, detached, etc.)....

25.If I were to have provided data in the format requested above, notably fixed length, comma-quote, pipe delimited files, I would have had to create a new file.

26.No file according to WireData's demands was in any Market Drive software file. I would have had to create a new file to meet WireData's demands.

27.I know that willful false statements and the like are punishable by fine or imprisonment, or both (18 U.S.C. 1001) and may jeopardize the validity of the application or any patent issuing thereon. All statements made of my own knowledge are true and all statements made on information and belief are believed to be true.

Dated this 19 day of November, 2004.


Andrew Pelkey

**Wisconsin Circuit Court Data
Subscription Agreement**

Director of State Courts
Consolidated Court Automation Programs
and

(Insert Subscriber Name)
(Date)

I. Purpose

This subscription agreement is made and entered into this ____ day of _____, 2003 by and between the Director of State Courts Office's Consolidated Court Automation Programs (hereinafter referred to as "CCAP") and _____ (hereinafter referred to as "Subscriber") and defines the limited access CCAP will provide to Subscriber to the Wisconsin Circuit Court Access (WCCA) website through the Simple Object Access Protocol (SOAP) interface and Web Service Definition Language (WSDL) using W3C Internet Standards. This access will allow Subscriber the ability to download WCCA data available on the WCCA Web Site (<http://wcca.wicourts.gov/index/xsl>). Subscriber must create its own applications to download the data and/or to perform queries on the data available through the SOAP interface.

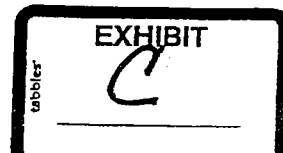
II. Limitations of WCCA and Subscriber's Responsibilities

WCCA provides public access to the records of the Wisconsin circuit courts for counties using CCAP's Case Management system. These records are open to public view under Wisconsin's Open Records law, ss. 19.31-19.39, Wis. Stats. Court records not open to public inspection by statute are not available through the SOAP interface.

WCCA is not the official Judgment and Lien Docket. The official Judgment and Lien Docket is located in each county's Clerk of Circuit Court Office.

The WCCA data available is limited by:

1. One Wisconsin county, Walworth, does not use CCAP's Case Management System, and therefore does not have data on WCCA.
2. Some counties currently use CCAP for selected case types only. Portage County has data only for Probate cases while Milwaukee County has data for all case types except Probate.
3. Counties that are on CCAP began using it at different times and made independent decisions about the "backloading" of pre-CCAP cases.



4. All the data in the CCAP website is entered in the individual counties where the case files are located.

CCAP provides no warranties as to the accuracy or timeliness of the information contained in records available on WCCA. Subscriber understands that the data downloaded from WCCA provides only a snapshot of CCAP's Case Management System as of the date of the download. The Subscriber is responsible for the accuracy and currency of the data the Subscriber subsequently releases to its clients and/or the public. The Subscriber shall inform its clients and/or the public of the limitations of this data before it is released.

The WCCA website has been created by CCAP for use by the circuit courts of Wisconsin. Subscriber acknowledges that court system use of the website will always be given priority over use under this temporary agreement.

III. Subscription Services

CCAP will provide all subscribers with access to the SOAP interface to download records in the WCCA website within ten working days of receiving the Subscriber's request and payment.

CCAP reserves the right to immediately suspend Subscriber's access to the SOAP interface due to unforeseen technical problems. Once the technical problems are resolved, CCAP will notify Subscriber of the availability of WCCA data through the SOAP interface.

CCAP reserves the right to limit the Subscriber's access to the SOAP interface to off-peak hours (between 5 p.m. to 7 a.m. Central Standard Time Monday through Friday) at CCAP's discretion. CCAP will provide the Subscriber twenty four hours written notice via e-mail that the Subscriber's access to the SOAP interface is restricted only to non-peak hours.

IV. Suspension or Termination of Annual Subscription Agreement

CCAP may suspend or terminate this subscription agreement without cause, upon twenty-one (21)-calendar days written notice to Subscriber.

V. Amendment of this Agreement

This agreement may be amended by mutual agreement of CCAP and Subscriber. It is acknowledged that this agreement is subject to both state and federal law, which are both subject to change. If either applicable state or federal laws change, this agreement will be considered immediately modified in accordance with such change, without notice or written amendment.

If one party believes that such change renders its performance under this agreement illegal, impractical, or impossible, or if the contract no longer meets the party's objectives in entering into the contract, CCAP and Subscriber agree to negotiate as to the effect of the change upon performance under this subscription agreement.

VI. Payment Provisions and Terms of Agreement

Subscriber must select either annual or one-time subscription. If no selection is made, CCAP will assume an annual subscription.

☐ Subscriber agrees to pre-pay a non-refundable \$5,000 annual subscription fee for annual electronic access to all public records available on WCCA website through the SOAP interface per the terms of this agreement. This agreement is for the period (insert mm/dd/yyyy = first day of next month) through (insert mm/dd/yyyy = last day of current month). This annual agreement shall remain in effect for twelve months or until the parties amend or terminate it under the terms and conditions set forth in Sections IV and V of this agreement.

☐ Subscriber agrees to pre-pay a non-refundable \$500 subscription fee for a one-time monthly electronic access to all public records on WCCA through the SOAP interface per the terms of this agreement. Within ten working days of CCAP's receipt of this signed agreement and subscription fee, Subscriber will be authorized access to the SOAP interface per the terms of this agreement.

☐ Subscriber is a government agency. At this time, the subscription fee is waived for government agencies for annual electronic access to all public records available on WCCA website through the SOAP interface per the terms of this agreement. This agreement is for the period (insert mm/dd/yyyy = first day of next month) through (insert mm/dd/yyyy = last day of current month). This annual agreement shall remain in effect for twelve months or until the parties amend or terminate it under the terms and conditions set forth in Sections IV and V of this agreement.

Signed subscription agreements and subscription fees must be made payable and remitted to:

Wisconsin Supreme Court
Attn: Brian Lamprech, Fiscal Officer
110 E. Main Street, Suite 430
Madison, WI 53703-3356

VII. Administration

Subscriber should contact Andrea Olson of CCAP at (608) 264-6908 or at WCCASOAP@wicourts.gov for any technical assistance or feedback involving this temporary agreement. Subscriber shall provide CCAP a primary contact person with the Subscriber's organization who will be responsible for administering this agreement (name, phone number and e-mail address).

A. John Voelker
Director of State Courts

Date

Subscriber Signature

Date

Subscriber Name (please print)

Subscriber Address

Subscriber Telephone Number

Subscriber E-Mail Address

DECLARATION OF MICHAEL L. GROTA

Michael L. Grotz, does hereby declare that:

1. I am the owner of Grotz Appraisals LLC.
2. Grotz Appraisals LLC has given to Wire Data electronic/digital copies of the real estate property records used for the Village of Thiensville, the Village of Sussex, and the City of Port Washington.
3. Neither Michael L. Grotz, Grotz Appraisals LLC, nor Assessment Technologies of WI LLC is a state or local office.
4. Neither Michael L. Grotz, Grotz Appraisals LLC, nor Assessment Technologies of WI LLC is an elected official.
5. Neither Michael L. Grotz, Grotz Appraisals LLC, nor Assessment Technologies of WI LLC is an agency.
6. Neither Michael L. Grotz, Grotz Appraisals LLC, nor Assessment Technologies of WI LLC is a board.
7. Neither Michael L. Grotz, Grotz Appraisals LLC, nor Assessment Technologies of WI LLC is a commission.
8. Neither Michael L. Grotz, Grotz Appraisals LLC, nor Assessment Technologies of WI LLC is a committee.
9. Neither Michael L. Grotz, Grotz Appraisals LLC, nor Assessment Technologies of WI LLC is a council.
10. Neither Michael L. Grotz, Grotz Appraisals LLC, nor Assessment Technologies of WI LLC is a department or public body corporate and politic created by constitution, law, ordinance, rule or order.
11. Neither Michael L. Grotz, Grotz Appraisals LLC, nor Assessment Technologies of WI LLC is a governmental or quasi-governmental corporation.



12. Neither Michael L. Grota, Grota Appraisals LLC, nor Assessment Technologies of WI LLC is the Bradley center sports and entertainment corporation.

13. Neither Michael L. Grota, Grota Appraisals LLC, nor Assessment Technologies of WI LLC is a local exposition district under subch. II of ch. 229.

14. Neither Michael L. Grota, Grota Appraisals LLC, nor Assessment Technologies of WI LLC is a family care district under s. 46.2895.

15. Neither Michael L. Grota, Grota Appraisals LLC, nor Assessment Technologies of WI LLC is a court of law.

16. Neither Michael L. Grota, Grota Appraisals LLC, nor Assessment Technologies of WI LLC is an assembly or senate.

17. Neither Michael L. Grota, Grota Appraisals LLC, nor Assessment Technologies of WI LLC is a nonprofit corporation which receives more than 50% of its funds from a county or a municipality, as defined in s. 59.001 (3), and which provides services related to public health or safety to the county or municipality.

18. Neither Michael L. Grota, Grota Appraisals LLC, nor Assessment Technologies of WI LLC is a nonprofit corporation operating the Olympic ice training center under s. 42.11 (3); or a formally constituted subunit of any of the foregoing.

19. The April 20, 2001 open records requests that I have viewed never specified what type of electronic medium WireData expected.

20. I know that willful false statements and the like are punishable by fine or imprisonment, or both (18 U.S.C. 1001) and may jeopardize the validity of the application or any patent issuing thereon. All statements made of my own knowledge are true and all statements made on information and belief are believed to be true.

Dated this 18th day of November, 2004.



Michael L. Grota

Jun 27, 2001 2:50PM (262) 377-5111

No. 1045 P. 1

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June 4, 2001

Mr. Alan H. Deutch
Deutch & Weiss
7670 N. Port Washington Rd., Ste. 102
Glendale, WI 53217

RE: Village of Thiensville Open Records Request

Dear Mr. Deutch:

Your open records request on behalf of your client, WIREDATA, has been forwarded to our office for review. To date, we are still evaluating the capability of the software application used by our assessor. Once we are fully informed as to the specific capabilities of the program, we will be in a better position to properly evaluate your open records request.

As we continue to evaluate your request, we ask that you postpone any filing of a writ of mandamus. Thank you for your cooperation in this regard.

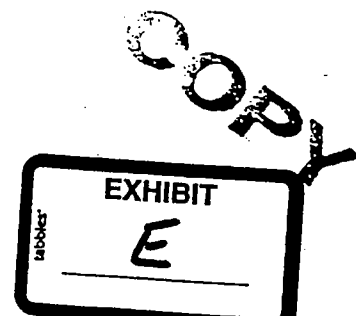
Very truly yours,

HOUSEMAN & FEIND, LLP
Attorneys for the Village of Thiensville

Steven M. Cain
Assistant Village Attorney

SMC:sl
cc: Village of Thiensville

EXHIBIT _____



SA111

**SUPREME COURT
STATE OF WISCONSIN
APPEAL NOS. 2005AP1473; 2006AP174; 2006AP175**

WIREDATA, INC.,
Plaintiff-Respondent,

v.

VILLAGE OF SUSSEX and
VILLAGE OF SUSSEX CUSTODIAN,
Defendants-Co-Appellants-Cross Petitioners,

GROTA APPRAISALS, LLC,
MICHAEL L. GROTA, and
ASSESSMENT TECHNOLOGIES OF WI, LLC,
Defendants-Appellants-Petitioners.

WIREDATA, INC.,
Plaintiff-Appellant,

v.

VILLAGE OF THIENSVILLE, *Defendant-Respondent*
GROTA APPRAISALS, LLC,
MICHAEL L. GROTA and
ASSESSMENT TECHNOLOGIES OF WI, LLC,
Defendants-Respondents-Petitioners.

WIREDATA, INC.
Plaintiff-Appellant,

v.

CITY OF PORT WASHINGTON,
Defendant-Respondent-Cross Petitioner,
MATTHIES ASSESSMENTS, INC.
Defendant-Respondent,
AMERICAN FAMILY INSURANCE COMPANY,
Intervenor.

BRIEF OF THE VILLAGE OF SUSSEX AND THE CITY
OF PORT WASHINGTON AND APPENDIX

APPEAL FROM WAUKESHA COUNTY CIRCUIT
COURT, THE HONORABLE MARK S. GEMPELER,
PRESIDING, CASE NO. 2001CV001403, AND APPEAL
FROM OZAUKEE COUNTY CIRCUIT COURT, THE
HONORABLE THOMAS R. WOLFGRAM, PRESIDING,
CIRCUIT COURT CASE NOS. 2001CV000198 AND
2001CV00216

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STATEMENT OF ISSUES

1. **Does an “authority” under the Open Records Law (Wis. Stat. § 19.32(1)) include a municipality’s statutory assessor?**

The Waukesha County Circuit Court held that there may be multiple “authorities” and that the assessor is an “authority” and thus the custodian of records responsible under the Open Records Law. The Ozaukee County Circuit Court held that the assessor is a “record custodian” and the municipalities are “authorities” who had delegated the responsibility for maintaining records to the assessors. The Court of Appeals wrongly held the assessors are not “authorities” on the grounds that the Code of Ethics for Public Officials and Employees (Wis. Stat. § 19.41 et seq.) and the penalty provisions of the Open Records Law (Wis. Stat. § 19.37(2)) exclude independent contractor assessors from the categories of entities listed in the definition of an “authority.”

2. **May municipalities direct a public records requester to the assessor who has custody of the records?**

The Waukesha County Circuit Court held that municipalities are an authority and responsible for open records obligations although the municipalities did not have the sought-after records in the form the requester wanted. (The Ozaukee County Circuit Court did not rule on this issue.) The Court of Appeals affirmed, reasoning that municipalities cannot relieve themselves of their responsibilities under the Open Records Law even when the municipalities have not denied the request for records but directed the requester to their independent contractor assessors, statutorily appointed to public office, who has custody of the sought-after assessment records in the format requested by the requester.

3. **Is a mandamus action properly commenced against municipalities under the Open Records Law pursuant to Wis. Stat. § 19.37(1) where the municipality authorized the release of the records?**

Although the municipalities did not deny the requests for records, but actually directed the requester to the proper authority (i.e., the assessors), the Waukesha County Circuit Court held the municipalities did not provide a proper response such that the mandamus action was not premature. (The Ozaukee County Circuit Court did not rule on this issue.) The Court of Appeals affirmed, reasoning that several weeks elapsed between the request, the municipality directing the requester to the assessor as the proper authority having custody of the records in the form requested, and the denial by the assessors. The Court of Appeals attributed the assessors' denials to the municipalities.

4. **Should a municipality be liable for damages including attorney's fees under the Open Records Law where it did not oppose the request for sought-after records and did not have the ability to respond to the request in electronic format as sought by the requester?**

The Waukesha County Circuit Court held the assessors responsible for the requester's reasonable costs and attorney's fees. (The Ozaukee County Circuit Court did not rule on this issue.) The Court of Appeals held that municipalities must pay the costs, fees and damages assessed for open records violations, even though the municipalities did not oppose the request, directed the requester to the assessors as the authority having custody of the records in the sought-after form, and did not initiate counterclaims and separate litigation in federal court against the requester.

STATEMENT ON ORAL ARGUMENT

The Village of Sussex and the City of Port Washington request oral argument. Oral argument would assist the court in answering the purely legal questions presented by this appeal. Moreover, oral argument would serve this Court's law-declaring role by assisting the court in clarifying whether an "authority" under the Open Records Law includes persons or entities who accept statutory appointments to local public office within the government body, and who maintain and have custody of sought-after records (to the exclusion of the municipalities). Oral argument would also serve to answer any questions as to whether such persons or entities should be held accountable under the Open Records Law to the exclusion of the municipality or whether they should be exempt from its coverage. The Court of Appeals' published decision on this issue has statewide impact on all municipalities and renders municipalities liable for all costs, including attorney's fees, due to the unilateral decisions of their independent contract assessors who dishonor Open Records Law obligations and who fail to act at the behest of the

municipalities in circumstances where the municipalities do not have possession, custody or control over sought-after records.

STATEMENT ON PUBLICATION

The Cross-Petitioners believe that publication is appropriate. A published opinion from the Supreme Court would serve to clarify the existing rule established by the Court of Appeals' published decision that exempts persons who are statutorily appointed to a local public office from complying with Open Records Law obligations when they have sole control and custody over sought-after records. The substantial and continuing public interest of the proper role between municipalities and their independent contractors in complying with Open Records Law presents policy laden issues which are of significant public interest. Wisconsin municipalities have a strong interest in and compelling need for direction regarding the application of the Open Records Law in these recurring circumstances. Further, the issues presented in this appeal involve interpretation of the Open Records Laws in the context of technological advances. Lastly, there may be reason to qualify existing precedent on some of the issues presented to this Court.

STATEMENT OF CASE

1. NATURE OF CASE

This case involves consolidated appeals stemming from related litigation arising in the Waukesha County and Ozaukee County Circuit Courts regarding similar records requests presented by WIREdata, Inc. (“WIREdata”) to several municipalities and their independent contractor assessors for electronic/digital data of real estate property records contained in the assessors’ computer database. These requests were made pursuant to Wisconsin’s Open Records Law, Wis. Stat. § 19.31-19.39.¹

The record does not contain any evidence that the municipalities purposefully sought to evade their obligations under the Open Records Law or to keep secret the sought-after information. The Waukesha County Circuit Court observed: “Nothing here persuades me that the information that you seek is being precluded from being provided by the village.” [R-Sussex 47 (4/24/03 Hearing p. 51)]² The municipalities had possession of a limited database that permitted the production of a read-only

¹ All references are to Wisconsin Statutes 2005-2006.

² References to the record are as follows: “R-Sussex” refers to the Sussex Record; “R-PW” refers to the Port Washington Record.

electronic paper-copy (i.e., “pdf”) of the sought-after information, and they offered the same, but they did not have possession of the data in the *electronic/digital* format requested by WIREdata. Only the assessors had the sought-after information in the format requested by WIREdata. [R-Sussex 8 (1st Amd. Compl. ¶ 20); 21 (Grota’s Answ. ¶ 20); 55 (Exh. Y); 62 (Grota’s Depo., Exh. A p. 21); 62 (Swartz Aff. ¶ 6); R-PW 45 (Matthies Depo., Exh. C p. 40, 65-66)]

2. STATEMENT OF FACTS

As part of their statutory power to fill local public office, Wisconsin villages and cities may appoint a corporation or independent contractor as the municipal assessor, pursuant to §§ 61.197(1)(f) and 62.09(1)(c), respectively.³ Indeed, § 70.05(1)

³ Sections 61.197(1)(f) and 62.09(1)(c) contain similar language:

A corporation or an independent contractor may be appointed as the [city/village] assessor. The corporation or independent contractor so appointed shall designate the person responsible for the assessment. The designee shall file the official oath under s. 19.01, and sign the affidavit of the assessor attached to the assessment roll under s. 70.49. No person may be designated by any corporation or independent contractor unless he or she has been granted the appropriate certification under s. 73.09. For purposes of this subsection, "independent contractor" means a person who either is under contract

requires that each taxation district have an assessor (either by election or appointment), and § 70.055 provides a means by which the governing body of a municipality may employ *additional* expert help to work *with* the assessor in completing an equitable assessment in compliance with the law. The assessor, who must be certified as qualified by the Department of Revenue, shall take and file the official oath when taking office. *See* §§ 61.197(1)(f); 61.27; 62.09(1)(c), (d) & (4)(a). (For those provisions applicable to towns, *see* Wis. Stat. §§ 60.307(4) & 60.31(1) & (3).). As part of their duties to perform all work required under Chapter 70, assessors value real property in the manner specified by the Wisconsin Property Assessment Manual. *See* § 70.32(1).⁴

Accordingly, rather than elect an assessor, the governing bodies of the municipalities in this case appointed assessors. The Village of Sussex contracted with Grota Appraisals, LLC to conduct the assessments for the Village and appointed Michael Grota as the

to furnish appraisal and assessment services or is customarily engaged in an independently established trade, business or profession in which the services are offered to the general public.

⁴ *See also* § 73.03(2a) (“The manual shall discuss and illustrate accepted assessment methods, techniques and practices with a view to more nearly uniform and more consistent assessments of property at the local level.”).

official assessor for the Village of Sussex. [R-Sussex 8 (1st Amd. Compl. ¶ 7 & Exh. D); 62 (Swartz Aff. ¶ 2)] As part of fulfilling the position of municipal assessor, Grota Appraisals must maintain its own liability and records insurance and be available at certain times for taxpayer inquiries/appointments, hold formal “open book” conferences, complete and sign the assessment roll, and furnish testimony when needed to defend valuations. [R-Sussex 8 (Exh. D, Art. III, ¶ 6 and Art. IV ¶¶ 1, 4-5, 7-8] “Michael Grota shall be designated as the person responsible for the Assessment and shall file an official oath.” [*Id.* (Art. III, ¶ 11)] Grota Appraisals has admitted that it holds the appointed position of Statutory Assessor for the Village and that it has custody of the sought-after records. [R-Sussex 8 (1st Amd. Compl. ¶¶ 3, 17, 18, 30 and Exh. D, Art. III ¶ 7); 21 (Grota’s Ans. ¶¶ 3, 17, 18, 30); see also R-Sussex 55 (Grota’s Mot. Summ. Jdt. at Exh. Q); 62 (Grota’s Depo., Exh. A p. 10)].

Likewise, the City of Port Washington contracted with Matthies Assessments, Inc. to conduct the assessments for the City. [R-PW 46 (Grams Aff. ¶ 2); 53 (Exh. H, Art. I, § 1)] The Matthies

Assessments' contract requires that the assessor maintain liability insurance (including to cover "loss of municipality's records withdrawn from municipality"). [R-PW 53 (Exh. H, Art. III ¶ 4)] The contract further requires attending Board of Review hearings, furnishing testimony, performing public relations, and maintaining office space and office hours. [*Id.* (Art. III, ¶¶ 2,3, 8, 10-11)] Matthies acknowledged that he holds the statutorily appointed local public office of assessor for the City of Port Washington, having custody of the sought-after records. [R-PW 45 (Matthies Depo., Exh. C p. 29, 40, 65-66); *see also* R-PW 53 (Exh. H); R-Sussex 55 (Exh. Y)]

The City of Port Washington and the Village of Sussex assessors, like all municipalities, gather certain information regarding each and every parcel of property located within its jurisdiction. [R-Sussex 32 (E.D.Wis. Decision p. 3)] Prior to the advent of computers, the assessors would visit each parcel of land and make handwritten notes on paper cards such as the year the house was built, the home style, the square footage, number of bathrooms, etc. [*Id.*] These paper cards are referred to as "property

record cards.” [*Id.*] One of the uses of this information is to enable the municipality to make an assessment of the property for tax purposes. [*Id.*]

With advances in technology, assessors now have a software program, called Market Drive, which stores the assessment data in a computer database. [R-Sussex 32 (E.D.Wis. Decision p. 4)] Grotta Appraisals and Matthies Assessments collected information on individual parcels of property and stored it in this database. [R-Sussex 55 (Exh. J, Q, Y); R-PW 53 (Matthies Depo., Exh. C p. 15)] This makes it easier to manipulate the data as assessments change. For example, if a home remodels and adds a bathroom, this can be easily noted in the software.

These advances in technology, however, have a trade-off. The assessor, not the municipality, has custody of the assessment records in electronic/digital format and these sought-after records are made available to the municipality only in a separate “read-only” paper format such as by “pdf.” [R-Sussex 32 (E.D.Wis. Decision p. 5); 62 (Grotta’s Depo., Exh. A p. 10, 12, 15, 36, 85); 62 (Swartz Aff. ¶ 6); R-PW 46 (Grams Aff. ¶ 3)]. There is no dispute that Grotta

Appraisals is the custodian and the sole keeper of electronic assessment information. [R-Sussex 62 (Grotta Depo., Exh. A p. 10, 12, 36, 85)]. Nor is there a dispute that Matthies is the custodian and sole keeper of the digital assessment information sought by WIREdata. [R-PW 45 (Matthies Depo., Exh. C p. 34-35, 40)] The only way the City or Village can disseminate the data to a requester is through hard-copy, paper records for each individual property. [R-Sussex 62 (Swartz Aff. ¶ 6); R-PW 46 (Grams Aff. ¶ 3)]

On April 20, 2001, WIREdata sent a letter to the Village of Sussex requesting “an electronic/digital copy of the real estate property records” for each parcel of property in the Village of Sussex. [R-Sussex 8 (1st Amd. Compl. ¶ 10)] That same day, WIREdata sent a similar request to Grotta Appraisals, LLC. [*Id.* (¶ 11)]

In like fashion, on April 25, 2001, WIREdata sent a letter to the City of Port Washington Treasurer, requesting “detailed property information for the City of Port Washington” along with an approval form to obtain the sought-after information from Matthies

Assessments. [R-PW A-App p. 154, 158] There was no mention of an “electronic/digital copy” in the original request. [*Id.*]

In the Sussex case, the Village responded by directing WIREdata to Grota Appraisals. [R-Sussex 62 (Curtis Depo., Exh. B p. 30, 36)] Grota Appraisals then directed WIREdata to the computer programmer for the Market Drive software, Andrew Pelkey. [R-Sussex 8 (1st Amd. Compl. ¶¶ 13-14); 32 (E.D.Wis. Decision p. 3-4); R-PW 128 (10/31/05 Hearing p. 24)] Andrew Pelkey worked as an independent contractor for Assessment Technologies of Wisconsin, LLC, the owner of the Market Drive software, which was licensed to Grota Appraisals. [R-Sussex 32 (E.D.Wis. Decision p. 4-5)] The contract between Assessment Technologies and Grota Appraisals specifically stated that the software could not be copied and that it was copyrighted. [*Id.* (p. 5)] Andrew Pelkey outlined the costs for extracting the data from Market Drive into the electronic/digital format that WIREdata wanted. [R-Sussex 8 (1st Amd. Compl. ¶ 14)].

Mike Grota and Grota Appraisals, not the Village, made the unilateral decision not to turn over the sought-after records in the

format requested by WIREdata. [R-Sussex 62 (Grota Depo., Exh. A p. 25, 88)] He testified that no Village official had ever told him not to release the records nor gave any reason to disallow it. [*Id.* (p. 26, 27, 88)] The Village did not oppose the production of the sought-after records. Indeed, the Village never took the position that he should not release the records, never told him not to release the records, nor gave him any reason for not releasing the records. [*Id.* (p. 26-27)] The assessor recognized these undisputed facts. After informing the Village Attorney of the limitations placed on the digital assessment information (but offering to export the material on a time and material basis), he informed the Village Clerk to advise WIREdata of the same and that “[t]his should remove the Village from the open records request.” [R-Sussex 55 (Grota’s Mot. Summ. Jdt. at Exh. Q)]

In the Port Washington matter, on May 4, 2001, the City Treasure, Mary Bley, sent a letter to WIREdata directing WIREdata to request the sought-after information from Matthies Assessments, the custodian of the records. [R-PW A-App. p. 156] Ms. Bley also

signed a release for the records that WIREdata had sent, which said in its entirety:

Dear Mary Bley:

Please indicate your approval for Matthies Assessments Incorporated to release the assessor or detailed property information for the City of City of [sic] Port Washington to WIREdata Corporation, with your signature below.

[R-PW A-App. p. 158] Ms. Bley signed on the signature line as requested and returned the release to WIREdata with a letter dated May 4th indicating that “[y]ou certainly may obtain information from Matthies Assessments.” [*Id.* (p. 156)] The May 4th letter advised WIREdata to “direct your request directly to Matthies” along with any “questions regarding their charges for these services....” [*Id.*]

On May 9, 2001, WIREdata sent its request to Matthies Assessments. [R-PW A-App p. 157] In response, Matthies Assessments offered paper printouts of the database on the basis that it was bound by its license with Assessment Technologies not to release the actual database. [R-PW A-App p. 159-160] Matthies directed WIREdata to Assessment Technologies. [*Id.*] Although Matthies understood that he filled the role of municipal assessor and that he had to comply with the Open Records Law, he did not ask

anybody at the City as to whether he should provide the sought-after information. [R-PW 45 (Matthies Depo., Exh. C p. 35, 39)] Matthies knew that the City had never refused to provide such information. [*Id.* (p. 68)].

3. PROCEDURAL POSTURE OF CASES AND DISPOSITION IN THE TRIAL COURTS

a. Wiredata v. Sussex et al.

WIREdata commenced a mandamus action against the Village of Sussex, Grota Appraisals, LLC, Michael Grota and the catch-all “Village of Sussex Custodian of Records”⁵ on June 8, 2001. [R-Sussex 2 (Compl.)]

In response to the mandamus action, Grota Appraisals filed a Motion to Dismiss with the trial court, on the basis that Assessment Technologies, the owner of the Market Drive software, was an indispensable party. [R-Sussex 4] Parallel to this, in August 2001, Assessment Technologies filed a federal lawsuit against WIREdata, to enjoin WIREdata from infringing on Assessment Technologies’ copyright for Market Drive. [R-Sussex 32 (E.D. Wis. Decision)]

⁵ There is no Village of Sussex Custodian of Records as a title or specific person.

WIREDdata amended its complaint, on September 28, 2001, this time naming the Village of Sussex, Grota Appraisals, LLC in its capacity as Assessor for the Village of Sussex, Michael L. Grota, and Assessment Technologies of WI, LLC. [R-Sussex 8]

The trial court, the Honorable Donald J. Hassin, Jr., presiding, held a motion hearing on October 8, 2001, regarding Grota Appraisal's motion to either dismiss the action for WIREDdata's not joining Assessment Technologies, or in the alternative, staying the proceeding until after the federal copyright litigation was resolved. [R-Sussex 12] At that hearing, the defendants-appellants stated that the data was available in paper form, but not electronic form. [*Id.* (p. 5, 6)] WIREDdata asserted that it only wanted the data in an electronic form. [*Id.*] The trial court stayed the state court action pending the outcome of the Federal Court decision regarding whether Assessment Technologies had a valid copyright. [*Id.* (p. 24)]

The Village of Sussex filed a Motion to Dismiss on October 9, 2001. [R-Sussex 11] At the October 8, 2001 hearing, the trial court stayed the Village's Motion to Dismiss until after the decision

was made by the federal court. [R-Sussex 12 p. 24-25] The Village filed an Amended Motion to Dismiss, to be heard after the federal issue was resolved. [R-Sussex 14]

The Federal District Court for the Eastern District of Wisconsin decided *Assessment Technologies v. WIREdata*, Case No. 01-C-789, on December 23, 2002. [R-Sussex 32] The Federal District Court held that Assessment Technologies had a valid copyright for the “‘entire text and compilation’ of the Market Drive software.” [*Id.* (p. 7)] Specifically, the Eastern District Court held that since Assessment Technologies owned the copyright for Market Drive and its derivative works, and that WIREdata was essentially requesting a derivative work, Assessment Technologies “gets to decide whether or not a derivative work...will be produced.” [*Id.* (p. 15)]

At a January 25, 2002 Motion to Dismiss hearing, the trial court denied the Village’s Motion to Dismiss on the basis that there was a factual issue as to whether the Village of Sussex, had it requested an electronic/digital copy of the same assessment records that WIREdata had asked for, would have been charged for the cost

of extracting the data. [R-Sussex 26 (1/25/02 Hearing p. 12-14)]

The court assumed that the Village would not have been charged for the extraction and, as such, the Village was a proper authority because it could have allegedly requested the formatted data from Grota Appraisals and then copied it to WIREdata. [*Id.*] In subsequent depositions, Grota contradicted that assumption by stating that, in fact, municipalities would have to pay for those same records. [R-Sussex 62 (Grota Depo., Exh. A p. 27-28, 36); 61 (Grota Depo., Exh. A p. 37)]

In response to the Eastern District Court's decision, Grota Appraisals, LLC, Assessment Technologies, Inc. and Michael Grota filed a Motion for Partial Summary Judgment on March 3, 2003. [R-Sussex 36] WIREdata filed a Motion for Leave to File a Second Amended Complaint on April 21, 2003. [R-Sussex 38]

The Circuit Court, Judge Donald Hassin presiding, held a hearing on these matters on April 24, 2003. At the hearing, Grota Appraisals, LLC, Michael Grota, and Assessment Technologies argued that because the data in the electronic/digital form WIREdata had requested was copyrighted, that data is not considered a

“record” under the Open Records Laws, specifically under sec. 19.32(2), Wis. Stats.⁶ The Village of Sussex outlined the issue as the following:

This is a public records case. It’s before the Court on mandamus. The office of village assessor for the Village of Sussex is an authority under the public records law. There’s no dispute about that. And Mr. Grota is the custodian of the records under the public records law as the custodian for that authority.

The public records request requested information in a form that is in the custody of Mr. Grota. There’s no dispute about that either. This is all right out of the plaintiff’s complaint. Mr. Grota has declined to honor a public records request, because he has stated that he is bound by a copyright, which is an exception under the statutes to the public records law. The federal court has said they’re copyrighted. I don’t know what else we’re arguing about, Judge.

[R-Sussex 47 (4/24/03 Hearing p. 8)]

At that hearing, the trial court asked WIREdata exactly what it wanted and it said that it wanted “the property record card, the public information, the information that’s not covered by copyright.”

[R-Sussex 47 (4/24/03 Hearing p. 14)] The Court responded, “the property record card.” [*Id.*] WIREdata clarified, “[i]nformation in a digital format.” [*Id.* (p. 15)] The Village explained:

There’s no dispute that the physical content of a property record card for any individual property may be printed out and provided in response to a public records request. That’s not what he [WIREdata] wants. He said he wants it in digital electronic form.

⁶ Section 19.32(2), Wis Stats. States that a “record does not include materials to which access is limited by copyright.”

[*Id.*] The trial court transcript explains exactly what WIREdata wants and the Judge's holding:

THE COURT: But you want the property record card in a form that permits its entry into your client's database more readily than it otherwise would if it were a printed piece of information.

MR. DEUTCH: That's correct.

THE COURT: You're not entitled to it in that fashion. That disk—That disk that's generated here in the fashion that you wish it to be is protected under the copyright.

[R-Sussex 47 (4/24/03 Hearing p. 16-17)]

The trial court granted summary judgment to the Village of Sussex. [R-Sussex 47 (4/24/03 Hearing p. 52)] WIREdata appealed the trial court's decision on June 12, 2003. [R-Sussex 48] Likewise, WIREdata appealed the Federal District Court's decision.

The Seventh Circuit reversed the Eastern District Court's earlier copyright decision. The Seventh Circuit Court of Appeals held that while Assessment Technologies has a valid copyright in its database compilation, it does not have the right to preclude WIREdata from the data contained within the database because that data is public information. *See Assessment Technologies of WI, LLC v. WIREdata, Inc.*, 350 F.3d 640 (7th Cir. 2003). The Seventh Circuit reasoned that Assessment Technologies "is trying to use its

copyright to sequester uncopyrightable data, presumably in the hope of extracting a license fee from WIREdata.” *Id.* at 645.

Based on the Seventh Circuit decision, WIREdata brought a motion in the state court action to reopen and vacate the order for summary judgment. [R-Sussex 50] In the motion, WIREdata asked that the trial court reopen the matter because the grant for summary judgment was based solely on the legal determination of the Federal District Court regarding Assessment Technologies’ copyright. [*Id.* (p. 6)] WIREdata also argued that the Village of Sussex was a proper party to the lawsuit. [*Id.* (p. 12)]

The parties agreed to reopen the trial court proceedings regarding the original mandamus action. [R-Sussex 53] After mediation failed, the parties took discovery. Then, on or about October 30, 2004, all the parties filed motions for summary judgment. [R-Sussex 55, 56, 57, 62] A hearing was held by the trial court, this time the Honorable Mark S. Gempeler presiding, on April 27, 2005. [R-Sussex 73 (4/27/05 Hearing)]

At that hearing, Judge Gempeler denied summary judgment to the Village of Sussex on the basis of res judicata. [R-Sussex 73

(4/27/05 Hearing p. 25)] He held that the issues had been determined by Judge Hassin in the previous Motion to Dismiss. [*Id.*] This was contradictory because the earlier Motion to Dismiss had left unresolved the issue whether the Village itself would have been charged a fee for the electronic assessment records. [R-Sussex 26 (1/25/02 Hearing p. 13-14)] Mr. Grota, the decision maker, stated in his 2004 deposition that he would charge the Village, too. [R-Sussex 62 (Grota Depo., Exh. A p. 27-28, 36); 61 (Grota Depo., Exh. A p. 37)] The trial court also held that the Village can delegate performing assessments to private contractors, such as Grota Appraisals, but that the Village cannot “divest themselves of [the] responsibility regarding record keeping.” [R-Sussex 73 (4/27/05 Hearing p. 26)] As such, the trial court denied the Village of Sussex’s motion for summary judgment and granted WIREdata’s motion for summary judgment as to the Village of Sussex. [*Id.*]

The trial court determined that Michael Grota is an authority and custodian of the records and that there may be multiple authorities. [R-Sussex 73 (4/27/05 Hearing p. 27)] Indeed, Michael Grota admitted that he is an “authority” under Wis. Stat. §19.32(1).

[R-Sussex 8 (1st Amd. Compl. ¶¶ 18, 30); 21 (Grota's Answ. ¶¶ 18, 30)] Also, the court held that there can be multiple authorities. [R-Sussex 73 (4/27/05 Hearing p. 27)] Finally, the court denied the remaining defendants' motion for summary judgment and granted WIREdata's motion for summary judgment. The trial court granted attorneys fees and costs to the plaintiff, but did not allow punitive damages. [*Id.* (p. 28-29)]

In a judgment entered on May 20, 2005, Judge Gempeler awarded WIREdata summary judgment. On June 6, 2005, Grota Appraisals, Michael Grota and Assessment Technologies filed a Notice of Appeal. On June 10, 2005, the Village of Sussex filed a Notice of Appeal.

b. WIREdata v. City of Port Washington et al.

WIREdata commenced a mandamus action against the City of Port Washington and Matthies Assessments on June 12, 2001, subsequently amending the suit to include Assessment Technologies.⁷

⁷ Around that time, WIREdata also commenced mandamus actions against the Village of Thiensville as well as Thiensville's official assessor, Grota Appraisals. Following the decision by the United States

In 2003, after the Eastern District of Wisconsin ruled that the Market Drive database was copyrighted, the defendants filed for summary judgment. [R-PW 41-45] Since the open records laws exempt documents protected by copyright, Judge Wolfgram granted the defendants' motion for summary judgment.

Shortly after the Seventh Circuit decision, Assessment Technologies sent Adobe Acrobat "pdf" copies of the database to WIREdata, on compact disc. [R-PW 73 (Grota Depo., Exh. C. p. 15, 83)] Despite having copies of the database in "pdf" in June 2004, WIREdata continued its mandamus action at the state the circuit court level. Because of the Seventh Circuit decision, the Circuit Court vacated the summary judgments granted to the defendants.

The parties filed the cross-motions for summary judgment in October 2004. In a judgment entered on December 8, 2005, the Honorable Thomas R. Wolfgram presiding, awarded summary judgment to the defendants. [R-PW 128 (10/31/05 Hearing p. 27)] On January 23, 2006, WIREdata filed a Notice of Appeal. [R-PW 116]

District Court in the parallel *Assessment Technologies* case, the Circuit Court addressed the cases together.

c. Appellate Proceedings

On January 3, 2007, the Court of Appeals, District II, issued its decision. *WIREData, Inc. v. Village of Sussex*, 2007 WI App 22, 729 N.W.2d 757. On February 2, 2007, Grota Appraisals, Michael Grota and Assessment Technologies petitioned this Court for review. On February 27, 2007, the Village of Sussex and the City of Port Washington cross-petitioned for review. On February 28, 2007, the Court of Appeals ordered its decision to be published in the official reports. On May 23, 2007, this Court granted the Petition and Cross-Petition.

ARGUMENT

I. STANDARD OF REVIEW

Summary: All issues are questions of law which this court reviews de novo.

The court of appeals reviews summary judgment motions de novo. *Blazekovic v. City of Milwaukee*, 225 Wis. 2d 837, 840, 593 N.W.2d 809 (Ct. App. 1999). For summary judgment to be granted there must be no genuine issue of material fact and the moving party must be entitled to judgment as a matter of law. *Calbow v. Midwest Sec. Ins. Co.*, 217 Wis. 2d 675, 679, 579 N.W.2d 264 (Ct. App. 1998). When confronted with cross-motions for summary judgment, the reviewing court must rule on each party's motion on an individual basis. Each motion must be denied if material factual issues exist as to the motion. *City of Edgerton v. General Cas. & Co. of Wisconsin*, 172 Wis. 2d 518, 529, 493 N.W.2d 768, 769 (Ct. App. 1992).

This case stems from a mandamus action. Generally, a circuit court's decision to grant or deny a petition for writ of mandamus will be upheld unless the court erroneously exercised its discretion. *See ex rel. Lewandowski v. Callaway*, 118 Wis. 2d 165, 171, 346

N.W.2d 457, 459-60 (1984). Where, as here, however, the issue is the application of the Open Records Law to undisputed facts, the court of appeals reviews de novo the question of law presented. *See Wisconsin State Journal v. University of Wisconsin—Platteville*, 160 Wis. 2d 31, 36, 465 N.W.2d 266, 268 (Ct. App. 1990). The application of a statute to a particular set of facts presents a question of law. *Oshkosh Northwestern Co. v. Oshkosh Library Bd.*, 125 Wis. 2d 480, 485, 373 N.W.2d 459, 462 (Ct. App. 1985).

II. AN “AUTHORITY” UNDER THE OPEN RECORDS LAW INCLUDES STATUTORILY APPOINTED INDEPENDENT CONTRACTOR ASSESSORS HOLDING LOCAL PUBLIC OFFICE.

Summary: The definition of “authority” under the Open Records Law includes a public body’s independent contractor who fills a statutory appointment to a local public office.

The Court of Appeals concluded that the independent contractor assessors in this case could not be an “authority” subject to the Open Records Law. In reaching this result, it incorrectly relied upon the Code of Ethics instead of the Open Records Law to absolve statutorily appointed assessors of such obligations. This decision creates conflict with the plain language and policy of the

Open Records Law and the statutory mechanism by which an independent contractor assessor becomes appointed and functions on behalf of a municipality. Four reasons demonstrate this error.

First, the definition of an “authority” includes several enumerations that are not necessarily limited to the body politic.

WIREData, 2007 WI App 22 ¶ 48. Section 19.32(1) contains the following definition of an “authority”:

An “authority” means *any* of the following *having custody of a record*: a state or local office, elected official, agency, board, commission, committee, council, department or public body corporate and politic created by constitution, law, ordinance, rule or order; a governmental or quasi-governmental corporation except for the Bradley center sports and entertainment corporation; a local exposition district under subch. II of ch. 229; a family care district under s. 46.2895; any court of law; the assembly or senate; a nonprofit corporation which receives more than 50% of its funds from a county or a municipality, as defined in s. 59.001 (3), and which provides services related to public health or safety to the county or municipality; a nonprofit corporation operating the Olympic ice training center under s. 42.11 (3); or a formally constituted subunit of any of the foregoing.

§ 19.32(1) (emphasis added). When interpreting statutes, courts begin with the language of the statute. *State ex rel. Kalal v. Circuit Court for Dane County*, 2004 WI 58, ¶ 45, 271 Wis. 2d 633, 681 N.W.2d 110. That language is given its common, ordinary, and accepted meaning. *Id.* Courts interpret statutory language in the

context in which it is used, in relation to the language of surrounding or closely related statutes, and in a way that avoids absurd results. *See id.*, ¶ 46. Courts also consider the purpose of the statute so far as its purpose is shown in the text and structure of the statute itself. *Id.*, ¶ 48. The meaning of a statute is also a question of law reviewed without deference. *LaCount v. General Cas. Co.*, 2006 WI 14, ¶20, 288 Wis.2d 358, 709 N.W.2d 418.

Of significance here, the plain language states that several types of persons/entities can be an “authority.” An “authority” is not limited to the public body corporate and politic in the traditional sense; its enumerations include the “local office” and agencies and boards, private entities such as certain non-profit corporations, quasi-governmental corporations, or “a formally constituted subunit of any of the foregoing.” § 19.32(1). There is no statutory limit confining an “authority” to the public body corporate and politic. Nor is there any language limiting the application of the Open Records Law to one entity alone. That few, if any, cases under the Open Records Law have involved the responsibilities of appointed statutory assessors, whether public or private, **WIREData**, 2007 WI

App 22 ¶ 46, does not mean that the application of the Open Records Law could not pertain to the independent contractor assessors in this case.

Wisconsin cities and villages are authorized to employ independent contractor assessors pursuant to § 61.197(1)(f) and 62.09(1)(c).⁸ The appointee fills a local public office as the municipality's official assessor and is responsible for the assessments. The appointee becomes the custodian of the property assessment records, and thus an authority under the Open Records Laws. Those appointees are not simply an independent contractor assessor by *name* and *title*. Rather, the statutory appointed assessor actually *functions* as a local office. They hold themselves out as a local officer by signing an oath, signing the tax role, and holding office hours. Municipalities can even obtain the assistance of additional "expert help" to aid their assessors in making equitable

⁸ Section 70.055, Wis Stats., states:

If the governing body of any town, village or city not subject to assessment by a county assessor under s. 70.99 determines that it is in the public interest to employ expert help to aid in making an assessment in order that the assessment may be equitably made in compliance with law, the governing body may employ such necessary help from persons currently certified by the department of revenue as expert appraisers...

assessments.⁹ Neither a city nor a village can act without a statutory office of assessor. *See Wis. Stat. §§ 62.09(1)(b) and 61.195.* In these circumstances, a statutory contractor assessor serves as a local office or local officer and thus falls within the definition of an “authority.”

Second, in determining whether the independent contractor assessors were an “authority,” the Court of Appeals should not have relied upon § 19.42(7w) of the Code of Ethics for Public Officials and Employees to determine whether their function as the municipal assessor qualified as a “local office.” The Legislature did not incorporate § 19.42(7w) or any of its subparts in the definition of an “authority.” When the Legislature wants to incorporate provisions from the Code of Ethics into the Open Records Law, it has expressly done so. For example, in 2003 Wisconsin Act 47, the Legislature expressly referenced § 19.42(7w) in defining “local public office” and “state public office” in the Open Records Law. *See Wis. Stat. § 19.32(1dm) & (4).* No such expressions are contained in the

⁹ “When appointed, expert help, *together with the assessor*, shall act together as an assessment board in exercising the powers and duties of the assessor..., and the concurrence of a majority of the board is necessary to determine any matter upon which they are required to act.” *Wis. Stat. § 70.055(4)* (emphasis added).

definition of an “authority” under § 19.32(1). Although the Code of Ethics is contained in the same statutory chapter pertaining to general duties of public officials, that should not be outcome dispositive. *See In Interest of Angel Lace M.*, 184 Wis.2d 492, 513, 516 N.W.2d 678 (1994) (rejecting to read §§ 48.81 (1) and 48.92 (2) of the Children’s Code in pari materia, since it led to absurd results). *See also Verdoljak v. Mosinee Paper Corp.*, 200 Wis.2d 624, 633, 547 N.W.2d 602 (1996) (the legislature’s omission of a phrase indicates an intent to alter statutory meaning; when a statute is repealed and recreated on the same subject, any change in language is presumed to be the result of the legislature’s conscious deliberation).

Instead, the Court of Appeals should have considered §§ 61.197(1)(f) and 62.09(1)(c) in determining whether a person or entity functions as an “authority.” Wisconsin Statutes §§ 61.197(1)(f) and 62.09(1)(c) govern the *selection of officers* for villages and cities, and they are a better fit in addressing this issue. “There is no rule of construction more reasonable, and none better settled, than that special provisions of a statute in regard to a

particular subject will prevail over general provisions in the same or other statutes, so far as there is a conflict.” *State v. Zawistowski*, 95 Wis.2d 250, 263, 290 N.W.2d 303 (1980). Those statutes enable Wisconsin villages and cities to appoint independent contractor assessors as local officers. When an assessor fills a statutory position under §§ 61.197(1)(f) and 62.09(1)(c), in conjunction with § 19.01 governing the oaths and bonds of public officials, this statutory scheme suits the enumerations of persons or entities that are an “authority.” *See Kalal*, 2004 WI 58, ¶ 46 (“[S]tatutory language is interpreted . . . as part of a whole; in relation to the language of surrounding or closely-related statutes.”).

This result actually comports with § 19.32(1dm), which defines “local public office.” Although § 19.32(1dm) references the Code of Ethics’ provision, its full definition confirms that the assessors fall within the definition of “local public office”:

“Local public office” has the meaning given in §. 19.42 (7w), and also includes any appointive office or position of a local governmental unit in which an individual serves as the head of a department, agency, or division of the local governmental unit, but does not include any office or position filled by a municipal employee, as defined in §. 111.70 (1) (i)

§ 19.32(1dm) (emphasis added). From this definition it is clear that what the Code of Ethics takes with one hand, the Open Records Law gives back with the other hand. In other words, even assuming the Court of Appeals correctly looked to § 17.42(7w), it failed to look at the full definition of § 17.32(1dm).

Third, when the statute defines “an authority,” it does so in relation to the person/entity *having custody* of the record, but this is largely absent in the Court of Appeals analysis. Although an “authority” has several enumerations of entities to which it applies, all have one common denominator – they must be a person or entity “having custody of a record.” § 19.32(1). *See Woznicki v. Erickson*, 202 Wis. 2d 178, 184, 549 N.W.2d 699 (1996) (the term authority, as defined by § 19.32(1), Wis. Stats., is “a ‘state or local office, elected official, agency [or] board’ who has ‘custody of a record.’”); *Osborn v. Board of Regents University of Wisconsin System*, 2002 WI 83, ¶ 42, 254 Wis. 2d 266, 282, 647 N.W.2d 158, 166 (the “authority having custody of the record shall provide the information that is subject to disclosure...”). “Custody” means “the care or control of a thing...” or the “keeping, guarding, care,

watch, inspection, preservation or security of a thing, carrying with it the idea of the thing being within the immediate personal care and control of the person to whose custody it is subjected.” **Black’s Law Dictionary 384 (6th ed.)**. “Having” is the present tense of “have,” which means “to hold in possession as property,” “own,” or “to hold, keep or retain.” **Webster’s Third New Int’l Dict. 1039 (1986)**.

The focus on the custodian having the records dominates the statutory language of the Open Records Law. By example, a “record” is defined, in part, as any material “which has been created or is *being kept* by an authority.” **Wis. Stat. § 19.32(2)** (emphasis added). As another example, § 19.35(1)(b) states that “the authority having custody of the record” may, at its option, provide a substantially readable copy of the record or permit the requester to copy the same. Other provisions applicable to an authority “having custody” further include those in § 19.35(1)(c), (d), (e) and (f) pertaining to the requester’s right to inspection, § 19.36(6) pertaining to the separation of information contained in a record, and § 19.37(1m) pertaining to the time for commencing a mandamus

action. *See also* Wis. Stat. § 19.35(6) (“No elected official is responsible for the record of any other elected official unless he or she has possession of the record of that other official.”). All these provisions emphasize that actual custody or possession of records constitutes an integral component of the definition of “authority.”

Fourth, the Court of Appeals incorrectly relied upon the penalty provisions of the Open Records Law. It determined that the penalty provisions apply only to the governmental entity and not a private citizen. **WIREDdata, 2007 WI App 22 ¶ 49.** However, the penalty provisions do not speak to one entity but several: “[c]osts and fees shall be paid by the authority affected *or* the unit of government of which it is a part, *or* by the unit of government by which the legal custodian under s. 19.33 is employed and may not become a personal liability of any public official.” § 19.37(2)(a). The disjunctive “or” signifies that the penalty provisions apply to “an authority” or “unit of government.” Stated differently, although the penalty provisions apply to a “unit of government,” they may also be triggered by “an authority.” *See In the Matter of Guardianship of F.E.H.*, 154 Wis.2d 576, 594, 453 N.W.2d 882

(1990) (“When a statute contains a list of conditions, the ‘or’ between the final subsections of the statutory list is to be read as a disjunctive.”). “One of the maxims of statutory construction is that a law should be construed so that no term is redundant of another term.” *State v. Bodoh*, 220 Wis.2d 102, 108, 582 N.W.2d 440 (Ct. App. 1998) (applying rule to disjunctive “or” where statutory criminal provision included “negligent operation or handling of a dangerous weapon”). As discussed above, an “authority” has several enumerations which include the independent contractor assessors involved in this case. These assessors were statutorily appointed to a local public office, i.e., a “unit of government.”

In this case, it is undisputed that assessors are an authority and the custodians of the records requested by WIREdata. [R-Sussex 8 (1st Amd. Compl. ¶¶ 3, 17, 18, 30 and Exh. D, Art. III ¶ 7); 21 (Grota’s Answ. ¶¶ 3, 17, 18, 30); 55 (Grota’s Mot. Summ. Jdt. at Exh. Q); 62 (Grota’s Depo., Exh. A p. 10); R-PW 45 (Matthies Depo., Exh. C p. 29, 40, 65-66); *see also* R-PW 53 (Exh. H); R-Sussex 55 (Exh. Y)].

The Court of Appeals minimized these concessions as mere “labels.” **WIREData, 2005AP1402 at n. 2.** However, these concessions evidence the assessors’ acceptance of their statutory appointment to a local public office and their *function* as a public official. That the assessors steadfastly deny responsibility under the Open Records Law does not address the issue whether they are an “authority” as a matter of law. That they believe they are merely independent contractors detached from responsibility under the Open Records Law fails to account for their status as statutory creatures appointed as a local officer for the purpose of carrying out a specific and important function in the government body.

Applying the definition of an “authority” to the assessors in this case comports with the policy underlying the Open Records Law. The Law’s “Declaration of Policy” emphasizes that the public is entitled to “the greatest possible information” regarding the affairs of government and the official acts “of those officers and employees who represent them.” **Wis. Stat. § 19.31.** The Law speaks in terms of “the routine duties of officers and employees whose responsibility it is to provide such information.” *Id.* An assessor is one of those

“officers and employees” who should be subject to providing “the greatest possible information” about the conduct of his “governmental business” *Id.* Excluding statutorily appointed officials (such as assessors) actually dims the light on open government because it holds fewer persons accountable under the Law. It also fails to accord with the presumption in favor of “complete public access” to information regarding “the official acts of [government] officers and *employees* who represent them.” § 19.31. The Court of Appeals decision leaves statutorily appointed assessors who hold the sought-after digital records free from Open Records Law obligations. If records of a public governmental body are to be open and available to the public for inspection and copying, then the Court of Appeals decision frustrates this policy by exempting those local officials who have actual custody of sought-after information.

The Court of Appeals’ decision leaves Open Records Law compliance unworkable in situations where a municipality’s appointed officers makes unilateral decisions inconsistent with the directives of the Open Records Law and inconsistent with their

obligations to the municipalities that addressed Open Records Law compliance. Addressing compliance issues in contracts with subcontractor assessors, such as by inclusion of indemnification and hold harmless provisions, is an unsatisfactory method of ensuring open records compliance where the independent contractor assumes a statutory position within the public body corporate, maintains and has exclusive custody of sought-after records and fails to honor open records obligations (even after commencement of a mandamus action). Indemnification may not be available if the municipality alone is considered the responsible party liable for noncompliance. Moreover, if statutorily appointed independent contractors are not authorities, it makes it more difficult to obtain indemnification agreements because they will not be inclined to endorse the same if the law says they are not responsible. Holding the municipalities fully liable in such circumstances neither ensures that the sought-after records will not be produced nor allows the municipalities relief for the assessors' disregard of open records compliance.

III. NO LIABILITY SHOULD ATTACH TO MUNICIPALITIES WHEN THEY CONTRACT WITH INDEPENDENT CONTRACTORS TO FILL A LOCAL PUBLIC OFFICE INVOLVING THE COLLECTION, MAINTENANCE AND CUSTODY OF CERTAIN RECORDS AND WHEN THEY DIRECT THE REQUESTER OF THOSE RECORDS TO THE INDEPENDENT CONTRACTOR WHO HAS SOLE CUSTODY OF THE RECORDS.

Summary: Although municipalities may not evade the Open Records Law by shifting responsibilities to a third party, this rule does not address those situations where the third party is an authority who has been statutorily appointed to fill the responsibilities for collecting, maintaining and having custody of the sought-after records.

The Court of Appeals incorrectly placed significant reliance on *Journal/Sentinel v. Shorewood School Bd.*, 186 Wis. 2d 443, 521 N.W.2d 165 (Ct. App. 1994). In that case, the Journal sued the members of a school board and sought access to a “memorandum of understanding” that recited the settlement terms of a defamation lawsuit a former school superintendent commenced against the district and the board. *Id.* at 445-446. The board retained the Milwaukee law firm of von Briesen and Purtell, and the law firm had possession of the sought-after memorandum. *Id.* at 446. The court held the board accountable under these circumstances.

However, that case is factually inapposite and leads to inequitable results when applied here for two reasons. First, in *Journal/Sentinel*, the school board's lawyers were a private law firm engaged as litigation counsel, whereas here the assessors were statutorily appointed local officials. The assessors, unlike the private law firm, constitute an "authority" pursuant to the Open Records laws. *Journal/Sentinel*, 186 Wis.2d at 452 (noting law firm was "a private law firm, and not itself an 'authority.'"). They were statutory agents duly appointed to a local office under §§ 61.197(1)(f) and 62.09(1)(c). As a result of this statutory appointment, they were the authority "having custody of a record." Moreover, the issue in *Journal/Sentinel* was whether a "memorandum of understanding" prepared by the school board's litigation counsel reciting the settlement terms of a lawsuit and contained in the attorneys' files was a "record." Here, the issue involves whether the independent contractor assessors are "authorities." In that case, the school board further raised the legal theory that the memorandum was not a "record" because its law firm was not an "authority," *Id.* at 452, whereas in this case the

undisputed evidence shows that the statutory assessors were authorities and there is no dispute that the sought-after digital information they seek is a record in their possession.¹⁰

Second, while it is true that *Journal/Sentinel* teaches that a governmental entity cannot evade its responsibilities under the open records law by “shifting” a record’s creation or custody to an agent, such guidance is inapplicable in this case because the municipalities never shifted any records to an agent and never opposed the production of the sought-after electronic information and in no way were the municipalities trying to divest themselves of their open records responsibilities. There is no evidence that the municipalities engaged in any conduct beyond good faith efforts at compliance. The assessors, as statutory agents duly appointed to a local office, had the obligation to collect, maintain and produce the records in the data sought by the requester; the municipalities could provide only

¹⁰ The school board claimed that the memorandum had been drafted by, and was in the custody of, its attorneys and therefore was not a record it had created or was keeping. *Id.* The court concluded that the contractors’ records exception applied because the memorandum was a document “produced during the course of [the firm]’s representation of the district, and was, in effect, the culmination of that representation.” **186 Wis. 2d at 453.** The court observed, however, that the law firm was not an “authority.” *Id.* at 452. The school board was the “authority” under the Open Records Laws. *Id.*

the “pdf” property data cards for each property. Accountability lies with the assessors, and the municipalities cooperated with the request for sought-after records by directing both the requester and the circuit courts in the mandamus actions to the entity that has the records.

The fact that a contract existed between the municipalities and assessors does not mean the municipalities could have ordered the assessors to produce the records. Nothing in the record shows the municipalities had more power than a circuit court utilizing its mandamus power. State law requires assessors to keep certain data confidential, thereby making mandamus the appropriate method to compel compliance and making the Court of Appeals decision remarkable in holding that the municipalities should somehow circumvent these limitations. *See* § 19.62-19.80 (personal information practices); § 70.35(3) (personal property tax returns confidential); § 70.47(7)(af) (confidentiality of information about income and expenses that is provided to the assessor); § 71.78 (confidentiality provisions for income and other tax returns); § 77.265 (confidentiality of real estate transfer return). Further, like

the requester, the municipalities themselves had to request and pay for the sought-after electronic information. The municipalities were not divesting themselves of responsibility but bringing to light the entity accountable for responding to the request.

Nor did the municipalities attempt to “evade” their responsibilities under the Open Records Law by using the assessors as a shield. This is most glaringly evident by the undisputed fact that the municipalities offered WIREdata the records in their custody – “read-only” PDF versions. [R-Sussex 47 (4/24/03 Hearing p. 14-17, 51); 62 (Swartz Aff. ¶ 6); R-PW 45 (Curtis Depo., Exh. B p. 16, 62); 128 (10/31/05 Hearing p. 26-27)] There is no evidence that the municipalities tried to shift their responsibilities in order to hide the sought-after data. The municipality’s data has always been available. The only issue is the electronic form of the data sought by WIREdata, not the availability of the data itself.

Because the assessors in this case were “authorities” who contracted to collect and maintain the sought-after electronic records, the “contractor’s records” exception is inapplicable. Here, the contract existed between *two authorities*, not an authority and “a

person other than an authority....” § 19.36(3). Although the assessors had contracts with the municipalities, those contracts should not absolve them from obligations under the Open Records Law where the purpose of the contract, their duties and their function were all governed by their statutory appointment as a local public official. In that capacity, the contracts provided that limited “read-only” paper copies only would be made available to the municipalities.

The contractor’s records exception is not absolute. Recognition of a municipality’s efforts at compliance with Open Records Law obligations by producing all information in its custody has been recognized in cases like *Building & Construction Trades Council of South Central Wisconsin v. Waunakee Community School District*, 221 Wis.2d 575, 585 N.W.2d 726 (Ct. App. 1998) and in *Machotka v. Village of West Salem*, 2000 WI App 43, 233 Wis. 2d 106, 607 N.W.2d 319. In *Waunakee*, an authority denied the request because it did not have the sought-after records. 221 Wis.2d at 578. The court held that the contractor’s records exception, § 19.36(3), reaches only such records as are produced or

collected under the terms of the contract between the school district and the general contractor, and those were not the records the plaintiff sought. *Id.* at 585. Likewise, in *Machotka*, the court found the Village was not required to obtain and provide sought-after records that were under a third party's control and where the Village provided all of the information in its possession. *Machotka*, 2000 WI App. at ¶ 10.

Like the municipalities in *Machotka* and in *Waunakee*, Sussex and Port Washington provided all of the information they have created and in their custody to the requester. It is undisputed that the municipalities do not have any assessment records in their possession that are in the electronic/digital format requested by WIREdata; they have only “pdf” versions and the original paper property record cards. This is not what WIREdata wants. The municipalities contracted with another authority to be the official assessor and perform assessment duties. The assessors keep their records in the electronic/digital format; however, the municipalities do not. As such, the assessors constitute the “authority” for the separate and distinct records sought in this case. The municipalities

properly complied with the Open Records Laws by offering the only records they had in their custody. The fact that WIREdata did not accept the paper property record cards does not diminish the fact that the municipalities complied with their duties. That WIREdata may suggest the municipalities could have somehow made digital copies in order to comply with the Open Records Law misses the point that the assessors provided the municipalities with read-only versions of the data so that the municipalities could not duplicate the digital information contained therein. Even if some technical way existed to circumvent the software, the municipalities are not required to create a record. § 19.35(1)(L).

IV. A MANDAMUS ACTION AGAINST THE MUNICIPALITIES IS NOT PROPERLY COMMENCED WHEN THE MUNICIPALITIES HAVE NOT DENIED THE REQUEST FOR RECORDS.

Summary: A mandamus action against a municipality is not warranted where municipalities direct a requester to the sought-after records being held by an independent contractor who has sole and exclusive custody of the sought after records.

Under the Court of Appeals' decision, Wisconsin municipalities are subject to a mandamus action even when they have neither denied nor delayed in responding to a request for

records. Section 19.37(1)(a), which allows mandamus as a remedy, states:

19.37 Enforcement and penalties.

(1) Mandamus. If *an authority* withholds a record or a part of a record or delays granting access to a record or part of a record after a written request for disclosure is made, the requester may pursue either, or both, of the alternatives under pars. (a) and (b).

(a) The requester may bring an action for mandamus asking a court to order release of the record. The court may permit the parties or their attorneys to have access to the requested record under restrictions or protective orders as the court deems appropriate.

§ 19.37(1)(a). (emphasis added).

There is no need, or reason, to issue a mandamus against several parties, some of which cannot comply with the request because those parties do not have custody of the requested record. A writ of mandamus is a command that directs one particular party to perform a particular duty in which that duty particularly applies to the party's position or office. *See Marbury v. Madison*, 5 U.S. 137, 147 (1803) (emphasis added). Indeed, there is duplicity in holding that both the municipality and the assessor can be sued jointly when the denials came from the assessors alone and those denials were not even in the proper form. Even the Sussex assessor recognized this when he advised the Village Clerk to inform WIREdata of his response and

that “[t]his should remove the Village from the open records request.” [R-Sussex 55 (Grota’s Mot. Summ. Jdt. at Exh. Q)]

That an “authority” shall either “fill” the request or notify the requester of its denial “as soon as practicable and without delay,” § 19.35(4)(a), does not mean that municipalities who direct the requester to the appropriate authority choose denial or compliance at some unidentified time in the future. In contrast to *WTMJ, Inc. v. Sullivan*, 204 Wis. 2d 452, 457, 555 N.W.2d 140 (Ct. App. 1996), where the authority advised the requester that the records “will not be made available to you at this time” and “you cannot review” the sought-after records, the municipalities made no such expressions in this case and immediately chose compliance. On April 20, 2001, WIREdata sent a letter to the Village of Sussex requesting “an electronic/digital copy of the real estate property records” for each parcel of property in the Village of Sussex. [R-Sussex 8 (1st Amd. Compl. ¶ 10)] The Village offered the paper records it had in its custody. The Village further directed WIREdata to request the separate and distinct electronic data from the proper custodian, Grota Appraisals. Thereafter, WIREdata did not communicate with

the Village but only with Grota Appraisals and agents of Grota's software program. The Village was never privy to the communications between Pelkey and WIREdata. Then, on June 12, 2001, WIREdata filed this lawsuit. The fact that WIREdata did not accept the paper records that the Village offered does not diminish the fact that the Village complied with its duties.

Yet, on such a record, to find the mandamus action properly commenced as to the municipalities, pursuant to § 19.37 and *WTMJ*, leads to the inequitable result that municipalities may be held liable even where they take all necessary steps within their authority to ensure compliance.

A mandamus action, if one is to commence under these circumstances, should be directed towards the statutorily appointed assessors as the proper custodians of the records sought by WIREdata. Mandamus applies to assessors. *State ex rel. Ward v. Assessors of Town of Delavan*, 1 Wis. 345 (1853) (holding that mandamus will lie to compel town assessors to reduce the amount of an assessment of personal property); *Neu v. Voegel*, 96 Wis. 489, 71 N.W. 880 (1897) (holding that it is the duty of an assessor to enter

valuations upon the assessment roll and the performance of such a duty may be compelled by mandamus.).

V. A MUNICIPALITY SHOULD NOT BE LIABLE FOR DAMAGES UNDER THE OPEN RECORDS LAW WHERE IT DID NOT OPPOSE THE SOUGHT-AFTER RECORDS AND DID NOT HAVE THE ABILITY TO RESPOND.

Summary: An award of damages under § 19.37(2)(a) should flow to the independent contractor assessors as the “authority affected” by the non-compliance under the Open Records Law where the municipality did not have the records and did not oppose their production.

The Court of Appeals determined that the municipalities bear the penalties for the noncompliance of their independent contractor assessors. This result is particularly harsh since the assessors should be considered “authorities” who had the sought-after records and who were acting contrary to the directives of the municipalities. It is also illogical and unfair to penalize the municipalities for the assessors’ actions (i.e., Grota’s) in pursuing counterclaims and federal court litigation in response to the mandamus action. [R-Sussex 21 (Grota’s Answ. p. 6-13); 12 (10/8/01 Hearing p. 2-3, 6-8)]

The municipalities neither directed nor controlled such litigation, yet the Court of Appeals would penalize the municipalities for all costs

and attorney's fees incurred by WIREdata in responding to the same.

Section 19.37 governs the damages awarded to a requester if the requester prevails in its mandamus action. As stated therein, “[c]osts and fees shall be paid by the authority affected....” **Wis. Stats. § 19.37(2)(a)**. The “authority affected” is the authority that had custody of the records requested and the authority that was compelled to release the records as a result of the mandamus action. *See Racine Education Association. v. Racine Bd of Ed.*, 145 Wis. 2d 518, 427 N.W.2d 414 (Ct. App. 1988) (if an agency exercises due diligence but is unable to respond timely to a records request, the plaintiff must show that a mandamus action was necessary to secure the records release to qualify for award of fees and costs.).

In the case at hand, the municipalities should not be held liable for damages stemming from open records requests where it is undisputed that they took all efforts to comply. The municipalities responded to WIREdata's request by directing WIREdata to the assessors. It is also undisputed that the municipalities could not “fill” the request for an “electronic/digital copy” of the property

assessment records because they did not have custody of those records. Only the assessors had such records and they alone refused to “fill” the request. The Seventh Circuit’s decision is clear that the assessors, not the municipalities, carried this case on for years as they litigated the proprietary and confidential nature of the method by which they electronically stored this information. *See Assessment Technologies of WI, LLC v. WIREdata, Inc.*, 350 F.3d 640, 641, 647 (7th Cir. 2003) (noting that “[t]his 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” and that Assessment Technologies “had no cause to drag the licenses before us”).

The municipalities in these cases are small communities. If the point of awarding costs and attorneys’ fees is deterrence, nothing is achieved by awarding such damages because the circumstances presented by this issue are likely to recur if the actual custodian of the records is not held accountable under the Open Records Law. The municipalities never possessed the records requested nor the

ability to respond. Liability for damages on this record is inequitable.

CONCLUSION

For these reasons, the Village of Sussex and the City of Port Washington respectfully request that this Court reverse the decision of the Court of Appeals and hold that: (a) the municipalities' independent contractor assessors, statutorily appointed to a local public office, qualify as an "authority" subject to the Open Records Law; (b) no liability should flow to the municipalities under the circumstances of this case; (c) the municipalities should not have been subjected to the mandamus action; and (d) the municipalities should not be subject to the penalty provisions of the Open Records Law under these circumstances.

Dated this 19th day of June, 2007.

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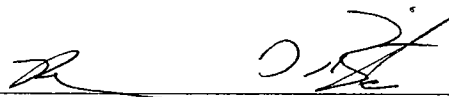
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FORM AND LENGTH CERTIFICATION

I hereby certify that this brief conforms to the rules contained in Wis. Stats. §809.19(8)(b) and (c) for a brief produced using the following font: Proportional serif font, minimum printing resolution of 200 dots per inch, 13 point body text, 11 point for quotes and footnotes, leading of minimum 2 points, and maximum of 60 characters per full line of body text. This brief contains 9383 words.

Dated this 19th day of June, 2007.

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APPENDIX

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CERTIFICATION OF APPENDIX

I hereby certify that filed with this brief, either as a separate document or as a part of this brief, is an appendix that complies with Rule 809.19(2)(a) and that contains:

- (1) a table of contents;
- (2) relevant trial court record entries;
- (3) the findings or opinion of the trial court; and
- (4) portions of the record essential to an understanding of the issues raised, including oral or written rulings or decisions showing the trial court's reasoning regarding those issues.

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**COURT OF APPEALS
DECISION
DATED AND FILED**

January 3, 2007

Cornelia G. Clark
Clerk of Court of Appeals

NOTICE

This opinion is subject to further editing. If published, the official version will appear in the bound volume of the Official Reports.

A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals. See WIS. STAT. § 808.10 and RULE 809.62.

**Appeal Nos. 2005AP1473
2006AP174
2006AP175**

**Cir. Ct. Nos. 2001CV1403
2001CV198
2001CV216**

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT II**

**No. 2005AP1473
WIREDATA, INC.,**

PLAINTIFF-RESPONDENT,

v.

VILLAGE OF SUSSEX AND VILLAGE OF SUSSEX CUSTODIAN,

DEFENDANTS-CO-APPELLANTS,

**GROTA APPRAISALS, LLC, MICHAEL L. GROTA AND ASSESSMENT
TECHNOLOGIES OF WI, LLC,**

DEFENDANTS-APPELLANTS.

**No. 2006AP174
WIREDATA, INC.,**

PLAINTIFF-APPELLANT,

v.

**VILLAGE OF THIENSVILLE, GROTA APPRAISALS, LLC, MICHAEL L.
GROTA, AND ASSESSMENT TECHNOLOGIES OF WI, LLC,**

DEFENDANTS-RESPONDENTS.

**NO. 2006AP175
WIREDATA, INC.,**

PLAINTIFF-APPELLANT,

V.

CITY OF PORT WASHINGTON AND MATTHIES ASSESSMENTS, INC.,

DEFENDANTS-RESPONDENTS.

**AMERICAN FAMILY INSURANCE COMPANY,
INTERVENOR.**

APPEAL from an order of the circuit court for Waukesha County:
MARK GEMPELER, Judge. *Affirmed in part; reversed in part and cause
remanded with directions.*

APPEAL from an order of the circuit court for Ozaukee County:
THOMAS R. WOLFGRAM, Judge. *Affirmed in part; reversed in part and causes
remanded with directions.*

Before Brown, Nettesheim and Anderson, JJ.

¶1 ANDERSON, J Nearly six years ago, WIREDATA, Inc. filed open
records requests with the three municipalities before us in this appeal. WIREDATA

sought the property assessment records in the format created and maintained by the municipalities' independent contractor assessors in a computer database. We hold that the open records law allows WIREdata the opportunity to access that database in order to examine and copy the property assessment records. Therefore, the municipalities committed open records law violations when they denied WIREdata such access and instead provided it with a "PDF," or portable document file.

¶2 WIREdata urges this court to hold both the municipalities and their independent contractor assessors responsible for failing to properly respond to its open records request. We hold that the open records law contemplates holding the municipalities, but not their independent contractors, responsible for the open records law violations. The municipalities are the statutory authorities obligated to uphold the letter and spirit of the open records law and they cannot evade their duties by shifting the creation and maintenance of their assessment records to their independent contractors. We also reject all challenges to the sufficiency of the open records requests and the existence of the denials of those requests.

¶3 Accordingly, in the Village of Sussex case, we affirm the circuit court's order to the extent that it holds that (1) Sussex is an authority and must be held responsible for the open records law violations; (2) WIREdata submitted a valid open records request, which Sussex improperly denied; (3) the PDF failed to comply with the open records law; (4) the open records law demands access to the computer database; and (5) WIREdata is entitled to actual, reasonable and customary fees and costs. We reverse that order to the extent it holds the Sussex independent contractor assessor responsible for WIREdata's reasonable costs and attorney fees and remand for proceedings to determine the appropriate costs and

fees. In the Village of Thiensville and City of Port Washington cases, we affirm the court's order to the extent that it holds that Thiensville and Port Washington are authorities under the open records law. We reverse the court's order to the extent that it holds WIREdata's open records requests were insufficient and that the PDF satisfied its requests in any event. We remand for the court to determine appropriate costs and fees for Thiensville's and Port Washington's open records violations.

BACKGROUND

¶4 We begin with a recitation of the facts surrounding the open records requests and subsequent litigation involving each municipality. For the sake of clarity, we will set forth such facts for each municipality separately, but we will refer back to our discussions of the other cases where appropriate.

Village of Sussex

¶5 Sussex contracted with Grotta Appraisals, LLC, which is owned by Michael L. Grotta, to conduct its property assessments from January 1, 2000, to December 31, 2004. Typically, prior to the advent of computers, assessors would visit the properties and make handwritten notations about the properties on paper cards called "property record cards." Technological advancements now allow Grotta Appraisals appraisers to input the raw property appraisal data from the property record cards into a computer program called Market Drive.

¶6 Assessment Technologies of WI, LLC, which is also owned by Michael Grotta, developed and copyrighted Market Drive and licenses the software to property appraisers such as Grotta Appraisals. The software program, in

conjunction with a Microsoft database program (Microsoft Access), collates and arranges the collected information in a multitude of tables and reports for various categories of properties. Grota Appraisals has sublicensed to Sussex certain read-only capabilities of Market Drive software. As a result, Sussex has the ability to print whatever tables and reports that the Market Drive software is configured to assemble.

¶7 On April 20, 2001, WIREdata sent registered letters to the Sussex village assessor and village clerk, custodian of records, which stated:

This is to formally request an electronic/digital copy of the detailed real estate property records (showing the specific characteristics of each parcel and the improvements thereupon) used and/or maintained by the Assessor in determining the proper assessments for each parcel within the Village of Sussex.

WIREdata, a wholly owned subsidiary of Multiple Listing Service, Inc., sought to obtain data regarding specific properties in Sussex, and the other municipalities, for purposes of making the information available to real estate brokers. Sussex directed WIREdata to Grota Appraisals. Grota Appraisals in turn forwarded the matter to Andrew Pelkey. Pelkey owns Impact Consultants, Inc., the private computer programming firm that Assessment Technologies contracted with to program the Market Drive software.

¶8 On April 24, 2001, WIREdata sent a letter to Sussex's counsel in which it offered Wisconsin's open records law as the legal basis for the request and for the potential mandamus action should Sussex deny its request. On or around May 4, Pelkey contacted WIREdata to arrange the transfer of the requested

information. WIREdata's vice president, Thomas Curtis, averred that at the time it was his understanding that Pelkey "was going to help [WIREdata] get the data."

¶9 In a letter dated May 4, Pelkey informed Sussex's counsel that he believed it would be very difficult to export data from the Market Drive software to a usable Microsoft Word format. Pelkey stated that providing the information in any format would be very time consuming. Pelkey also wrote that the raw data used by Market Drive cannot be copied because of the copyright.

¶10 Curtis sent Pelkey an email in which he wrote, "Selected fields requested from Market Drive software. Any type of electronic output and media is acceptable (i.e., fixed length, comma-quote, pipe delimited). We would need a data layout, if the fields are not in the order below." A data layout specifies the order of the categories of information.

¶11 Pelkey sent an email to Curtis outlining the cost and terms of producing the records of the municipalities using the Market Drive software. According to Pelkey, WIREdata would need to pay a \$6600 one-time fee to program, test and export the data; a \$.50 per parcel charge over and above the \$6600 programming fee; and a \$.15 per parcel annual update fee. Pelkey concluded his email with the following:

[T]he costs quoted here assume that you are not reselling the data in mass to another source. This data is meant for you and your subscribers to view. If you want to "add value" to any part of this data and distribute it in mass to another company, you will need to charge your customer for our fee in addition to your fees for your added value.

¶12 On May 21, WIREdata's counsel wrote a letter to Sussex's counsel in which he declared Pelkey's response "unacceptable." He claimed that the

assessor was asking for far more than the actual and necessary costs for copying the data. In support, he cited "the attempt to restrict my client's use of the data once it is transferred."

¶13 On May 22, Sussex's counsel sent a letter to Michael Grota asking him to explain how the costs and fees set forth in Pelkey's email could be "justified as the 'actual, necessary and direct costs' of producing these public records." Sussex's counsel cautioned Grota that WIREdata was prepared to file a mandamus action and that if Grota could not justify the costs under the open records law, he may make recommendations to Sussex that differed from the position taken in Pelkey's letter.

¶14 Pelkey responded in a May 25 letter. Pelkey explained that while the Market Drive software used by Grota Appraisals does have the ability to export a property record card to a text file, each property would have to be exported one at a time. As a result, exporting all the properties "would be very labor intensive and would be done on a time and material basis." Pelkey informed Sussex's counsel that Assessment Technologies granted Grota Appraisals the authority to give Sussex a copy of the Market Drive database for internal use only. Sussex did not have the authority to distribute the database. Pelkey told Sussex's counsel that WIREdata's request was not an "open records request since Assessment Technologies is [a] private company, not a municipal government. As such, this request has nothing to do with [Sussex]."

¶15 On May 29, Sussex's counsel wrote WIREdata's counsel to advise him "of the status of this matter, and to assure [him] that every effort [was] being made to promptly respond to [WIREdata's] request." He emphasized, however,

that “Sussex is not involved and will not become involved in any aspect of this issue that might involve a business transaction or private interests of the parties, as [Sussex’s] interest is only in ensuring that the public records laws are followed with regard to the public records request.” Counsel stated his belief that the programming that could be done to allow the data to be organized in a comprehensible format was outside the scope of the open records law. He concluded his letter by stating:

Again, I expect that we will be providing you with the final response to your request in the very near future. Regrettably, this issue arises right during Board of Review procedures which necessarily [require] a significant amount of the Assessor’s time. Nevertheless, we will continue to treat this matter with the highest priority.

¶16 On June 8, WIREdata filed a mandamus action against Sussex, Grota Appraisals and Michael Grota. WIREdata later amended its complaint, adding Assessment Technologies. In August, Assessment Technologies filed suit in federal court seeking an injunction prohibiting WIREdata from infringing upon its copyrights in the Market Drive software and the resulting digital database compilations.

¶17 In December 2002, the United States District Court for the Eastern District of Wisconsin determined that Assessment Technologies owned the copyright and was protected as to “Market Drive and its derivative works.” Thus, the court reasoned, Assessment Technologies “gets to decide whether or not a derivative work, such as requested by [WIREdata], will be produced.” The Seventh Circuit reversed. *See Assessment Techs. of WI, LLC v. WIREdata, Inc.*, 350 F.3d 640, 648 (7th Cir. 2003).

¶18 The Seventh Circuit held that the process of extracting the raw data WIREdata sought from the Market Drive database did not violate copyright law. *Id.* at 644. According to the court, Assessment Technologies did not create the database it was seeking to sequester from WIREdata. *Id.* at 646. It created only an empty database, a bin that the tax assessors hired by the municipalities filled with the data. *Id.* It created the compartments in the bin and the instructions for sorting the data to those compartments, but those were its only innovations and they were protected by copyright law. *Id.* The court explained that Assessment Technologies had no ownership or other legal interest in the data the tax assessors collected, which the court emphasized were in the public domain, and therefore no legal ground for making the acquisition of that data more costly for WIREdata. *Id.* at 645. The court wrote that Assessment Technologies “is trying to use its copyright to sequester uncopyrightable data, presumably in the hope of extracting a license fee from WIREdata.” *Id.*

¶19 The court stated that WIREdata did not want the data compilation as structured by Market Drive, which was intended for tax assessments. *Id.* at 643. Rather, the court taught, WIREdata wanted the raw data, data created not by Assessment Technologies but by tax assessors, data that are in the public domain. *Id.* at 644. Once WIREdata extracted the data, it would sort them in accordance with its own needs, which have to do with providing the information about properties that is useful to real estate brokers as opposed to taxing authorities. *Id.* at 643.

¶20 In summarizing its holding, the court offered four methods by which WIREdata could extract the data: (1) the municipalities use Market Drive to extract the data and place it in an electronic file, (2) the municipalities use

Microsoft Access to create an electronic file, (3) the municipalities allow programmers furnished by WIREdata to use their computers to extract the data from their database, and (4) the municipalities copy the database file and give it to WIREdata to extract the data from. *Id.* at 647-48. At some point after the release of the decision, Michael Grota sent WIREdata Sussex's property record information in an electronic and digital form, a PDF.

¶21 Following the decision, all of the parties filed motions for summary judgment. The trial court granted WIREdata's motion for summary judgment, with the exception of a request for punitive damages. The court determined that there could be multiple authorities under open records law and Sussex, Grota Appraisals, Assessment Technologies and Michael Grota were authorities. The court held that WIREdata's request was in the form the open records law required and did not require the creation of a new record. The court found that the defendants did not provide a proper response to the valid open records request. The court concluded that the PDF was not in compliance with either the open records law or the Seventh Circuit decision.

Village of Thiensville

¶22 In October 1999, Thiensville entered into a "Contract for Maintenance of Assessment Records" with Grota Appraisals. The contract commenced on January 1, 2000, and terminated on December 31, 2001. A computer loaded with the Market Drive software is stored at the Thiensville Village Hall. The computer is limited in its capabilities, as it is a "read only" terminal and only allows for the printing of hard copy assessment reports.

¶23 On April 20, 2001, WIREdata sent Thiensville a formal written open records request for:

[A]n 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 your municipality in determining the proper assessments for each parcel within the Village of Thiensville.

On April 24, WIREdata's counsel sent a letter to Thiensville's counsel in which it offered Wisconsin's open records law as the legal basis for the request and for the potential mandamus action should Thiensville deny its request. Thiensville forwarded the matter to Grota Appraisals and informed WIREdata it had done so.

¶24 On May 30, following the communications between WIREdata and Pelkey referenced in our recitation of the facts of the Sussex case, WIREdata filed an open records action against Thiensville, Grota Appraisals and Michael Grota. WIREdata later filed an amended complaint in which it named Assessment Technologies as well.

¶25 In 2004, following the Seventh Circuit's decision, Pelkey also sent WIREdata a PDF version of Thiensville's property records. Thiensville, WIREdata and Grota Appraisals, Assessment Technologies and Michael Grota filed motions for summary judgment that were substantially similar to those filed in the Sussex case. The court granted summary judgment in favor of Thiensville and Grota Appraisals, Assessment Technologies and Michael Grota and imposed costs on WIREdata. In its oral ruling, the court first rejected the notion that the Sussex court's decision had any preclusive effect on the cases before it. The court next determined that Thiensville was an authority; it had simply delegated the

responsibility for maintaining the records to a different custodian. However, the court then found that WIREdata's initial request failed to satisfy the open records law requirement that it be reasonable in its scope and that the subsequent enhanced request from WIREdata was improperly directed to Pelkey. The court further determined that the PDF was in "electronic digital format," which was what WIREdata had requested.

City of Port Washington

¶26 In November 2000, Port Washington contracted with Matthies Assessments to conduct the official assessments on its behalf for 2001. Prior to the contract, Matthies Assessments had entered into a license and purchase agreement with Assessment Technologies for the use of the Market Drive software.

¶27 On April 25, 2001, WIREdata sent a letter to Port Washington's treasurer regarding a recent conversation about Port Washington's property information. WIREdata indicated that it would be sending a request letter to Port Washington's assessor, Matthies Assessments. WIREdata specified that it was interested in acquiring the detailed property information such as square footage, age, number of bedrooms, number of baths, and property class and the sales data such as the sale date, sale price, transfer fee and type of transfer. WIREdata asked Port Washington to include the number of parcels, a current record layout, a copy of the property record card it was currently using and ten data sheets, selected at random. WIREdata concluded the letter by asking the treasurer to contact it to discuss the estimated cost to reproduce the data and the type of media the data would come in.

¶28 On May 4, the treasurer sent WIREdata a letter stating, "You certainly may obtain information from Matthies Assessments. Please direct your request directly to Matthies; please also direct your questions regarding their charges for these services directly to them." The treasurer also signed a release approving Matthies Assessments' release to WIREdata of its detailed property information. On May 9, WIREdata sent a letter to Ernest Matthies of Matthies Assessments. WIREdata wrote:

WIREdata Corporation is requesting the detailed property information or assessor information such as square footage, age, number of bedrooms, number of baths, property class, etc. Please include the number of parcels, a current record layout, 10 printed data sheets, selected at random, code list for each field, and a copy of the property record card you are currently using.

¶29 On May 22, 2001, Ernest Matthies responded to the May 9 letter. He wrote that he assumed WIREdata was "requesting a copy of the assessment data base used to store assessment data for the City of Port Washington." He informed WIREdata that he had just completed the process of placing Port Washington on Market Drive. Matthies indicated that he had spoken with Robert Grota, a principal at Assessment Technologies, who informed him that Matthies Assessments' license and purchase agreement with Assessment Technologies precluded it from complying with WIREdata's request. "This contract specifies that the 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.' According to Mr. Grota, this means that I do not have the right to provide your firm with a copy of the Port Washington database." He then directed WIREdata to Robert Grota for an explanation of the licensing agreements.

¶30 On June 12, 2001, WIREdata filed an open records action against Port Washington and Matthies Assessments. WIREdata later filed an amended complaint, naming Assessment Technologies as a party. Following the federal district court decision in the copyright case, the circuit court began addressing the Port Washington and Thiensville cases together. In response to the Seventh Circuit's decision, Pelkey sent WIREdata a PDF version of Port Washington's property records. The parties then each filed motions for summary judgment. As in the Thiensville case, the court granted Matthies Assessments' and Port Washington's motions for summary judgments, denied WIREdata's motion and imposed costs against WIREdata.

STANDARD OF REVIEW

¶31 We review a summary judgment de novo, employing the same methodology as the trial court. *Green Spring Farms v. Kersten*, 136 Wis. 2d 304, 315, 401 N.W.2d 816 (1987). It is a well-known methodology which need not be repeated here. *See State Bank of La Crosse v. Elsen*, 128 Wis. 2d 508, 511-12, 383 N.W.2d 916 (Ct. App. 1986). Generally, we will affirm the circuit court's decision granting summary judgment if the record demonstrates that there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law. *Germanotta v. National Indem. Co.*, 119 Wis. 2d 293, 296, 349 N.W.2d 733 (Ct. App. 1984). Additionally, the interpretation of a statute and its application to undisputed facts are questions of law that we review independently. *Garcia v. Mazda Motor of Am., Inc.*, 2004 WI 93, ¶7, 273 Wis. 2d 612, 682 N.W.2d 365.

DISCUSSION

¶32 The parties each raise several issues for our review: (1) whether both the municipalities and their independent contractor assessors are the responsible statutory authorities under the open records law; (2) whether WIREdata's requests contained reasonable limitations as to the subject matter and length of time of the sought-after records; (3) whether the municipalities denied WIREdata's open records requests; (4) whether the municipalities complied with the open records law by providing the PDF to WIREdata; and (5) whether the imposition of costs and attorney's fees on Michael Grota, Grota Appraisals and Assessment Technologies was appropriate.

¶33 We will first set forth the black letter Wisconsin open records law. We will then address each of the above arguments, discussing each municipality individually where necessary.

Open Records Law

¶34 The underlying purpose of Wisconsin's open records law is declared in WIS. STAT. § 19.31 (2003-04):¹

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

¹ All references to the Wisconsin Statutes are to the 2003-04 version unless otherwise noted.

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.

¶35 In furtherance of that policy, WIS. STAT. § 19.35 provides a requester with the procedure to exercise the right to inspect a public record and/or to make or receive a copy of a public record maintained by an authority. “‘Authority’ means any of the following having custody of a record: a state or local office, elected official, agency, board, commission, committee, council, department or public body corporate and politic created by constitution, law, ordinance, rule or order” WIS. STAT. § 19.32(1). An elected official is the legal custodian of his or her records and the records of his or her office. WIS. STAT. § 19.33(1).

“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. “Record” does not include ... materials to which access is limited by copyright [or] patent.

Sec. 19.32(2). A computer program is not subject to examination or copying, 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. WIS. STAT. § 19.36(4).

¶36 Pursuant to the open records law, a request directed at an authority is sufficient if it reasonably describes the requested record or the information requested. WIS. STAT. § 19.35(1)(h). The law does not require a request to contain any “magic words” nor does it prohibit the use of any words. *ECO, Inc. v. City of Elkhorn*, 2002 WI App 302, ¶23, 259 Wis. 2d 276, 655 N.W.2d 510. However, “a request for a record without a reasonable limitation as to subject matter or length of time represented by the record does not constitute a sufficient request.” Sec. 19.35(1)(h). In addition, § 19.35(1)(L) relieves authorities of the responsibility of “creat[ing] a new record by extracting information from existing records and compiling the information in a new format.”

¶37 Each authority, upon request for any record, 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 in whole or in part and the reasons therefor.” WIS. STAT. § 19.35(4)(a). When an authority denies a written request, it shall provide the requester with a written statement of the reasons for denying the written request. Sec. 19.35(4)(b). Thus, the authority’s statutory choices are two: comply or deny. *WTMJ, Inc. v. Sullivan*, 204 Wis. 2d 452, 457, 555 N.W.2d 140 (Ct. App. 1996). “[C]ompliance at some unidentified time in the future is not authorized by the open records law.” *Id.* at 458.

¶38 Further, under WIS. STAT. § 19.35, once a custodian decides to withhold a document, the custodian must state specific reasons for the refusal to disclose the document. *Osborn v. Board of Regents of Univ. of Wis. Sys.*, 2002 WI 83, ¶16, 254 Wis. 2d 266, 647 N.W.2d 158; *Newspapers, Inc. v. Breier*, 89 Wis. 2d 417, 427, 279 N.W.2d 179 (1979). Thereafter, a court will not consider reasons for withholding the document that were not asserted by the custodian.

Newspapers, 89 Wis. 2d at 427. *See also Oshkosh Nw. Co. v. Oshkosh Library Bd.*, 125 Wis. 2d 480, 484, 373 N.W.2d 459 (Ct. App. 1985) (“Where inspection is denied, it is the custodian, not the attorney representing the governmental body after a mandamus action is commenced, who must give specific and sufficient reasons for denying inspection.”).

¶39 If an authority withholds a record or delays granting access to a record after a written request is made, a requester may immediately bring a mandamus action asking a court to order release of the record. WIS. STAT. § 19.37(1); *WTMJ*, 204 Wis. 2d at 461. If the requester prevails or substantially prevails in the action, the court shall award reasonable attorney fees, damages of not less than \$100, and other actual costs to the requester. Sec. 19.37(2).

Statutory Authorities

Municipalities

¶40 The municipalities claim that they are not the responsible authorities under the open records law and therefore they are not the proper subjects of the mandamus actions. The statutory definition of “authority” includes public bodies corporate and politic. *See* WIS. STAT. § 19.32(1). Sussex, Thiensville and Port Washington each qualify as a public body corporate and politic. They contend, however, that they are exempted from the statutory definition of “authority” because their contract assessors create and have custody of the sought-after records. *See* § 19.32(1) (“‘Authority’ means any of the following having custody of a record” (Emphasis added.)).

¶41 In *Journal/Sentinel, Inc. v. School Bd. of the Sch. Dist. of Shorewood*, 186 Wis. 2d 443, 521 N.W.2d 165 (Ct. App. 1994), the issue was whether a “memorandum of understanding” prepared by a school board’s attorneys reciting the settlement terms of a lawsuit between the school board and a former school superintendent was a public record of the board and thus subject to inspection by a newspaper. *Id.* at 445, 452. Despite the fact that the memorandum had been drafted by and was in the custody of a private law firm, we held that the school board *was* an authority under the statute, but that the private law firm *was not* an authority. *Id.* at 452.

¶42 We explained that the question really resolved to whether a public body could avoid the public access demanded by the open records law by delegating both the record’s creation and custody to a contractor. *Id.* at 452-53. We stated, “Posing this question provides its answer: it may not.” *Id.* at 453. We reasoned that the contractors’ records provisions of the open records law establish an exception to the general rule that a public body need only provide information which it has either created and/or has in its custody. *Id.* “[E]ach 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.*” WIS. STAT. § 19.36(3) (emphasis added).

¶43 *Journal/Sentinel* teaches that pursuant to WIS. STAT. § 19.36, public bodies cannot evade their responsibilities under the open records law by shifting a record’s creation or custody to an independent contractor. Indeed, as the open records case law suggests, that is the precise type of evil the contractors’ records exception is designed to overcome. *Machotka v. Village of West Salem*, 2000 WI

App 43, ¶8, 233 Wis. 2d 106, 607 N.W.2d 319. Accordingly, simply because Sussex, Thiensville and Port Washington have contracted out the collection and maintenance of the assessment information does not mean that they have relieved themselves of their responsibilities under the open records laws. The municipalities are the responsible authorities under the open records laws.

¶44 The municipalities contend that *Machotka* and *Building and Construction Trades Council of South Central Wisconsin v. Waunakee Community School District*, 221 Wis. 2d 575, 585 N.W.2d 726 (Ct. App. 1998), control and absolve them of responsibility for any open records law violations. We disagree. In those two cases, the requesters sought records that fell outside of the contractual obligations between the authorities and their contractors. See *Building & Constr. Trades Council*, 221 Wis. 2d at 580-81 (contractors' records exception did not apply to payroll records of subcontractors that did not themselves have a contract with an authority); *Machotka*, 233 Wis. 2d 106, ¶9 (contractors' records exception did not apply where the sought-after records were not part of the contractual relationship between the authority and the independent contractor, but rather were part of separate and private undertakings of the independent contractor). Here, however, the municipalities contracted with the independent contractor assessors for the collection and maintenance of the property records WIREdata seeks.

Independent Contractor Assessors

¶45 Having determined that the municipalities are authorities, we turn to the status of the independent contractor assessors. The amicus briefs submitted in this case consider whether a single record can have multiple authorities or, more

specifically, whether the municipalities and their independent contractor assessors can be held jointly responsible as authorities for the violations in this case. WIREdata and the municipalities contend that the independent contractor assessors, as local public officials and as custodians of the assessment records, are also authorities. Even assuming the statute allows for multiple authorities and the assessors are the custodians of the records, we cannot find any support either in case law or the statute for the position that the assessors bear responsibility for open records obligations.²

¶46 First, we are not aware of any case in which an individual, whether a public official or private citizen, or a private corporation has been held responsible for an open records violation. Simply put, the responsibility for upholding the letter and spirit of the open records law travels to the governmental or quasi-governmental entity enumerated in WIS. STAT. § 19.32(1).

¶47 The municipalities direct our attention to cases where they claim that an entity, other than the governmental body, was held responsible under the public records law because it was a custodian of the sought-after records. However, *Journal/Sentinel* informs us that simply because a private contractor maintains and has custody of the sought-after records does not mean that it is an authority under the statute. See *Journal/Sentinel*, 186 Wis. 2d at 452. Further, in each of

² The municipalities and WIREdata point out that both independent contractor assessors confessed to being “authorities” under the statute in their answers to WIREdata’s complaints and that Michael Grota conceded that he believes he is an authority. The municipalities and WIREdata assert that we must hold the assessors to their admissions. The municipalities and WIREdata read too much into the admissions. The assessors may have accepted the label “authority” to describe their official capacity as contract assessors for the municipalities, but they have steadfastly denied having any responsibility under the open records law.

the cases the municipalities cite, the custodian was a subset of a governmental entity, or was itself a type of organization, that fell within a category listed in WIS. STAT. § 19.32(1). See *Woznicki v. Erickson*, 202 Wis. 2d 178, 184, 549 N.W.2d 699 (1996) (holding that the district attorney, a “state or local office” with custody of teacher’s personnel file, was an authority under § 19.32(1)); *Grebner v. Schiebel*, 2001 WI App 17, ¶¶1-3, 240 Wis. 2d 551, 624 N.W.2d 892 (concluding that the Polk county clerk with custody of voting records could determine how to satisfy an open records request); *Osborn*, 254 Wis. 2d at 271 (assuming that the Board of Regents of the University of Wisconsin System, which had custody of the records of its applicants, bore open records law responsibility); *Cavey v. Walrath*, 229 Wis. 2d 105, 116, 598 N.W.2d 240 (Ct. App. 1999) (holding that the Legal Aid Society, which received more than fifty percent of its funds from Milwaukee county and provided health and safety services to the county, was an authority because it satisfied the criteria in § 19.32(1) for nonprofit organizations).

¶48 Here, even assuming that the independent contractors do have custody of the records, they do not fit within any of the categories of entities listed in the definition of authority. Contrary to WIREdata’s and the municipalities’ assertions, the independent contract assessors are not “local public officials” who qualify as authorities under WIS. STAT. § 19.32(1). The definition of authority includes “a state or local office” having custody of a record. Sec. 19.32(1). WISCONSIN STAT. § 19.42(7w) defines “local public office” and excludes from that definition any position filled by an independent contractor. The contracts between the municipalities and their respective assessors each show that the municipalities designated the assessors as independent contractors hired to fill an

appointed statutory position.³ The independent contractor assessors cannot be held responsible as authorities under the open records law for the violations in these cases.

¶49 The statute's penalty provision further supports our construction of the open records law. WISCONSIN STAT. § 19.37(2) provides that

the court shall award reasonable attorney fees, damages of not less than \$100, and other actual costs to the requester if the requester prevails Costs and fees shall be paid by the authority affected or the unit of government of which it is a part, or by the unit of government by which the legal custodian under s. 19.33 is employed and may not become a personal liability of any public official.

The statute speaks in terms of the governmental entity, not a private citizen or corporation or even an individual public official, shouldering the responsibility of paying the actual costs and damages and attorney fees of the prevailing requester. Accordingly, we reverse that portion of the judgment proclaiming Grotz

³ The contract between Matthies Assessments and Port Washington states, "The Assessor shall be an independent contractor pursuant to [WIS. STAT.] Sec. 60.307(4)." The contracts between Grotz Appraisals and Thiensville and Grotz Appraisals and Sussex each state, "The Assessor is to be considered an Independent Contractor hired to fill an Appointed Statutory Position, and is not subject to withholding tax, insurance programs or benefits." At oral argument, the parties debated whether it was WIS. STAT. § 70.055 which authorizes governing bodies to hire "expert help" to aid in making assessments or WIS. STAT. § 60.307(4) which grants towns the right to hire independent contractor assessors that provided the municipalities with the authority to hire Matthies Assessments and Grotz Appraisals. Clarification of the specific statutory provision authorizing the hiring of the assessors would not alter our analysis. The fact remains that the contracts explicitly provided that the assessors were to be considered independent contractors.

Appraisals, Assessment Technologies and Michael Grota as statutory authorities responsible for the open records violations.⁴

Sufficiency of WIREdata's Requests

¶50 The municipalities and their independent contractor assessors maintain that WIREdata's initial written requests failed to contain reasonable limitations as to the subject matter and length of time for the records requested. *See* WIS. STAT. § 19.35(1)(h). We need not consider the cases individually on this point. The municipalities and their assessors did not raise these objections in response to WIREdata's requests; instead, the parties first challenged the sufficiency of the requests far into the litigation. We will not consider these after-the-fact reasons for nondisclosure offered not by the custodian and/or authority of the sought after records, but by an attorney during litigation. *See Newspapers*, 89 Wis. 2d at 427; *Oshkosh*, 125 Wis. 2d at 484.

¶51 Furthermore, on the merits, the public policy underpinning the time and subject matter limitations does not apply. The purpose of the limitations is to prevent a situation where a request unreasonably burdens a records custodian, requiring the custodian to spend excessive amounts of time and resources

⁴ We recommend that in the future when municipalities outsource government services, such as property assessments, they address open records law compliance in their contracts. The municipalities should consider including indemnification and hold harmless clauses to protect themselves should an open records dispute arise. Indeed, the municipalities in this appeal have taken similar protective measures in their contracts with the assessors. Furthermore, it is possible that contractual provisions prohibiting or otherwise preventing the municipalities from providing access to records subject to the open records law may violate public policy and therefore may be open to judicial scrutiny. *See State ex rel. Journal/Sentinel, Inc. v. Pleva*, 155 Wis. 2d 704, 711, 456 N.W.2d 359 (1990) (courts will protect parties' freedom of contract as long as the terms of the contract are not contrary to public policy).

deciphering and responding to a request. See *Schopper v. Gehring*, 210 Wis. 2d 208, 213, 565 N.W.2d 187 (Ct. App. 1997) (“While this state favors the opening of public records to public scrutiny, we may not in furtherance of this policy create a system that would so burden the records custodian that the normal functioning of the office would be severely impaired.”). Here, the information contained in the computer database clearly defines the reach of WIREdata’s requests and Pelkey testified at his deposition that the information could be exported fairly easily within a short amount of time. Furthermore, we note that the requests were specific enough as to time and subject matter that Pelkey was able to offer WIREdata a quote on the costs of responding to the requests. We reject the challenges to the sufficiency of WIREdata’s requests.

Denials of WIREdata’s Requests

¶52 The municipalities and their independent contractor assessors argue that they did not deny WIREdata’s records requests prior to the filing of the mandamus actions and therefore WIREdata’s mandamus actions were premature. See WIS. STAT. § 19.37(1) (“If an authority withholds a record ... or delays granting access to a record ... the requester may pursue ... an action for mandamus”). We disagree.

¶53 The municipalities, as the responsible statutory authorities, had the obligation to ensure *timely* access to the affairs of government, see *WTMJ*, 204 Wis. 2d at 457-58, and each of the municipalities failed to sustain this obligation. WISCONSIN STAT. § 19.35(4) requires an authority to fill any request for records or notify the requester of the reasons for denial “as soon as practicable and without delay.” Compliance at some unidentified time in the future is not authorized by

the open records law. *WTMJ*, 204 Wis. 2d at 458. The open records law admits of only two choices for the authority: comply or deny. *Id.* at 457; § 19.35(4). If an authority withholds a record or delays granting access, the requester may *immediately* bring an action for mandamus seeking release of the record. WIS. STAT. § 19.37(1); *WTMJ*, 204 Wis. 2d at 461. Thus, a failure of an authority to promptly respond to a request constitutes a denial, authorizing the requester to pursue a mandamus action in order to compel an appropriate response.

¶54 In each case, several weeks passed between when WIREdata submitted its open records request and when it filed the mandamus action. Rather than wait for an undetermined amount of time for an appropriate municipal response, WIREdata chose to bring the mandamus action to compel that response. It was well within its rights to do so. *See* WIS. STAT. § 19.37(1); *WTMJ*, 204 Wis. 2d at 461.

¶55 We also note that WIREdata could have reasonably construed its communications with Pelkey and both of the assessors as denials of its requests. The municipalities decry any responsibility for the effects of these communications. However, for purposes of the open records law, their actions must be attributed to the municipalities. They were all acting at the behest of the respective municipalities. Further, the municipalities' arguments rest on their assumption that either the contract assessors shouldered sole responsibility, or that they shared joint responsibility with their assessors, for the open records law duties. As we have explained, where the open records law is concerned, the buck stops with the municipalities.

¶56 Sussex and Thiensville, by virtue of WIREdata's communications with Pelkey, conditioned the release of the requested records on financial terms plainly unauthorized by the open records law. Pelkey informed WIREdata that in order for it to obtain the records sought, it would have to pay a fee of \$6600, a per parcel charge, an annual update fee and copyright license fees. Open records law permits the imposition of a fee upon the requester of a copy that does not exceed the "actual, necessary and direct cost of reproduction and transcription of the record." WIS. STAT. § 19.35(3)(a). Michael Grota conceded that the fees had profit built into them.

¶57 For a requester to construe a response as a refusal to comply with the open records laws, it need not contain any magic words such as "deny" or "refuse." An offer of compliance with a request, like the one here, that is conditioned on unauthorized costs and terms constitutes a denial of that request.

¶58 Port Washington, through Matthies Assessments, flatly denied WIREdata's request. Port Washington directed WIREdata to Matthies Assessments and signed a release authorizing Matthies Assessments to provide WIREdata with the requested records. Ernest Matthies wrote to WIREdata and informed it that he had spoken with Robert Grota, a principal at Assessment Technologies, who informed him that his license and purchase agreement with Assessment Technologies, which prohibited the distribution of copies of Market Drive and its documentation, "preclude[d]" him from complying with its request. Ernest Matthies then denied WIREdata's request outright, stating, "I do not have the right to provide your firm with a copy of the Port Washington database."

Format of the Response

¶59 The municipalities and their independent contractor assessors argue that the PDF provided to WIREdata satisfied the requirements of WIREdata's open records requests. In support, they quote WIREdata's requests for "an electronic/digital copy" and direct us to WIREdata's admission that the PDF constitutes an electronic file. They read their obligations under the open records law too narrowly.

¶60 There is a presumption that the public has the right to inspect public records unless an exception is found. *State ex rel. Milwaukee Police Ass'n v. Jones*, 2000 WI App 146, ¶19, 237 Wis. 2d 840, 615 N.W.2d 190. The term "record" is broadly drawn. It includes "*any material on which ... electromagnetic information is recorded or preserved, regardless of physical form or characteristics, which has been created or is being kept by an authority.*" WIS. STAT. § 19.32(2) (emphases added).

¶61 We have already considered the application of our open records law to data in digital form. In *Jones*, 237 Wis. 2d 840, ¶1, Milwaukee's police officers' association and its president filed an open records request for a copy of a 911 call. The chief of police responded by providing an analog copy of the original digital audio tape recording. *Id.*, ¶¶3, 4. The association subsequently enhanced its request, seeking a digital audio copy of the original digital recording. *Id.*, ¶4. The chief of police denied that enhanced request and a mandamus action ensued. *Id.*, ¶¶5-7.

¶62 The chief of police maintained that WIS. STAT. § 19.36(4) establishes that record requesters have no right to copies of computer programs,

but rather only may request the information which is inputted into a computer for processing. *Jones*, 237 Wis. 2d 840, ¶16. We rejected this argument, finding it contrary to the remaining language in § 19.36(4), which also permits access to the material produced as a product of the computer program. *Jones*, 237 Wis. 2d 840, ¶17. We held that the statute “[c]learly and unambiguously ... allows for exactly what [the association] has requested—access to the source ‘material’ and the opportunity for ‘examination and copying.’” *Id.* In that case, the “source material” was the digital audio tape itself.

¶63 By arguing that the PDF satisfies WIREdata’s open records requests, the municipalities are essentially fronting the same argument as the chief of police in *Jones*. They are saying that the PDF, like the analog copy in *Jones*, essentially provides WIREdata with the same information the assessors inputted into the computer program. However, as *Jones* teaches, the language of the law itself and the public policy underpinning the open records law require more. They require access to the source material—the material as it is both inputted and stored in the database, regardless of its physical form or characteristics.

¶64 Here, WIREdata seeks the data created and 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. The assessors inputted this raw data into the computer, and the Market Drive program in conjunction with Microsoft Access automatically allocated the data to hundreds of fields grouped into master categories. *See Assessment Techs.*, 350 F.3d at 642–43. This inputted data, maintained at public expense in the Microsoft Access database, is as much a part of the public record as if it were written on paper property cards and organized and stored in a file cabinet. As *Jones* tells us, the open records law

provides WIREdata with access to this material whatever its physical form or characteristics. WIREdata, or the municipalities themselves, may use tools, in the Market Drive program itself or otherwise, to extract and copy the data WIREdata desires from the Microsoft Access database and place it in a separate electronic file.

¶65 The municipalities and their independent contractor assessors comment that the PDF, essentially a photocopy of an electronic document viewed as a picture on a computer screen, is an electronic file that permits WIREdata to cut and paste the assessment information. They miss the point. The municipalities and assessors do not input the data into or maintain the assessment records in a PDF. Indeed, they created the PDF following the Seventh Circuit's decision rejecting Assessment Technologies' copyright defense. Instead, the municipalities and their assessors maintain the assessment data in a Microsoft Access database which runs off of the Market Drive software.⁵ *Jones* tells us that WIREdata may request access to this database for purposes of examination and copying of the source data.⁶

⁵ At the time of the open records requests, the data was kept in a Microsoft Access database. Now, the data is kept in either a Microsoft Access or a Microsoft SQL Server database.

⁶ In his discussion of "form-of-production" disputes, Withers writes:

(continued)

¶66 The organization and compilation of the data into the Microsoft Access database, done at public expense, allows greater ease of public access to the public assessment information. In keeping with the letter and spirit of the open records law, we will not allow the municipalities to deny WIREdata, and others who seek the information, the value-added benefit of this computerization. As we wrote in *Jones*:

As 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.... A potent open records law must remain open to technological advances so that its statutory terms remain true to the law's intent.

Most electronic document productions, until recently, mimicked paper document productions. The electronic files were "imaged," that is, converted from their native file format into a static image, usually in Tagged Image File Format ("TIFF") or Portable Document Format ("PDF"). These formats are essentially the same as photocopies of the electronic document as it would appear on a screen or in a paper printout. These images have some of the advantages of portability and cost-savings of other electronic documents, and they also have the advantages of being static artifacts—they can be Bates stamped, categorized and gathered into virtual file folders, and even readily printed out for those who insist on handling paper. But they are also different from the 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, such as metadata (embedded records of the creation and management of the document), editorial comments and changes (which may be kept in the native file format for later revision), 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 NW. J. TECH. & INTELL. PROP. 171, 188 (Spring 2006).

Jones, 237 Wis. 2d 840, ¶19.

¶67 The municipalities and their assessors assert that WIREdata's demand would require the creation of a new record, something outside the scope of the open records law. *See* WIS. STAT. § 19.35(1)(L). The demand does not require the municipalities and their assessors to create a new record.

¶68 In *George v. Record Custodian*, 169 Wis. 2d 573, 579, 485 N.W.2d 460 (Ct. App. 1992), we stated that a "nonexistent record cannot be inspected or copied" and therefore the records custodian is not required under the open records law to "collect or compile statistics or create a record for the benefit of the requester." In contrast to *George*, WIREdata's requests do not require the municipalities and their assessors to compile or collect statistics or to explain, interpret or analyze information. As our discussion demonstrates, the municipalities and their contract assessors already have the material available in the format WIREdata seeks.

Imposition of Costs and Attorney Fees

¶69 Our holding that the responsibility for the open records law travels to the WIS. STAT. § 19.32(1) governmental or quasi-governmental entity all but answers the parties' claims regarding the imposition of costs and attorney fees. Pursuant to the plain language of the statute, Sussex, Thiensville and Port Washington as the responsible governmental authorities must pay the costs, fees and damages assessed for the open records violations. *See* WIS. STAT. § 19.37(2).

We reverse the circuit courts' orders to the extent that they require otherwise and remand for determinations of the statutory costs and fees.⁷

CONCLUSION

¶70 Sussex, Thiensville and Port Washington are statutory authorities and, as such, are responsible for the open records law violations in this case. These municipalities must provide WIREdata with access to the computer database so that it may examine and copy the property assessment information it seeks. On remand, we direct the trial court to assess against the municipalities the appropriate attorney fees and costs.⁸

⁷ Grota Appraisals, Assessment Technologies and Michael Grota also argue that WIS. STAT. § 814.04 limits available attorneys fees to \$100. Their argument is without merit. WISCONSIN STAT. § 19.37(2), which deals specifically with open records law violations, does not place a monetary cap on the amount of attorney fees available to the prevailing requester. See *State v. Gillespie*, 2005 WI App 35, ¶7, 278 Wis. 2d 630, 693 N.W.2d 320 (where two statutes relate to the same subject matter, the specific statute controls the general statute), *review denied*, 2005 WI 60, 281 Wis. 2d 115, 697 N.W.2d 473.

⁸ The Village of Sussex asks us to dismiss "the nominal 'Village of Sussex Custodian of Records.'" We deem this a nonissue as WIREdata essentially does not dispute that this is a fictional entity and we are upholding judgment against the Village of Sussex.

Nos. 2005AP1473
2006AP174
2006AP175

By the Court.—Orders affirmed in part; reversed in part and causes remanded with directions.

Recommended for publication in the official reports.

COPY

STATE OF WISCONSIN	CIRCUIT COURT CIVIL DIVISION	WAUKESHA COUNTY
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WIREdata, Inc.

Plaintiff,

Case No. 01-CV-1403

v.

Village of Sussex,

Grota Appraisals, LLC in its capacity as Assessor for the Village of Sussex,
Michael L. Grota and Assessment Technologies of WI, LLC

Defendants.

ORDER

WAUKESHA CO. WIS.
CIVIL DIVISION

IN CIRCUIT COURT

20.2005

The defendants Michael Grota, Grota Appraisals, LLC, Assessment Technologies of WI, LLC and the Village of Sussex (the "Defendants") having moved this Court for Summary Judgment dismissing the plaintiff WIREdata Inc.'s claims against them; the plaintiff WIREdata, Inc. (the "Plaintiff") having moved this Court for Summary Judgment requiring Defendants to provide Plaintiff with the requested records and awarding Plaintiff costs, attorneys' fees and punitive damages; and the Court, having read the submissions of the parties and hearing the arguments of counsel on the record, determined as a matter of law based on there being no genuine issues of material fact, and for the reasons as stated on the record that:

1. The Village of Sussex is an appropriate party and an authority pursuant to Wisconsin Open Records Law;

2. Michael Grota, Grota Appraisals, LLC and Assessment Technologies of Wisconsin, LLC are each authorities and custodians of the records pursuant to Wisconsin Open Records Law and that the contract between the various defendants can not and does not act as any impediment to the access being requested by the Plaintiff;

3. Andrew Pelkey was a designated agent of Defendants;

4. Plaintiff's open records request was in proper form pursuant to Wis. Stat. § 19.35(1)(h) and does not require the custodian to create a new record;

5. Plaintiff's open records request was enhanced by the dialogue and correspondence between Tom Curtis and Andrew Pelkey and therefore, includes the same;

6. Defendants did not provide a proper response to Plaintiff's valid open records request;

7. The PDF provided to Plaintiff subsequent to the mandamus action being filed is not in compliance with either the open records law or the decision of the United States Court of Appeals for the Seventh Circuit in *Assessment Technologies of WI, LLC v. WIREdata, Inc.*, 350 F.3d 640 (7th Cir. 2003);

8. Plaintiffs are entitled to actual, reasonable and customary attorney's fees and costs, the exact amount and apportionment of those fees and costs among the Defendants to be determined subsequent to the entry of

this order (at a date and time to be set by this court), but are not limited to \$100.00; and

9. Plaintiffs are not entitled to punitive damages.

NOW, THEREFORE, IT IS HEREBY ORDERED THAT:

1. Defendants' motions for Summary Judgment are hereby **DENIED**;
2. Plaintiff's motion for Summary Judgment is hereby **GRANTED**, except as to the award of punitive damages, which is hereby **DENIED**.
3. The Writ of Mandamus as requested by the Plaintiff is hereby issued and the Defendants shall, within 10 days, provide the Plaintiff with all of the electronic digital "property record card" records as requested in a "fixed length, comma quote or pipe delimited" electronic digital format and medium.
4. Judgment is to be entered accordingly.

IT IS SO ORDERED, this 30th day of May, 2005.

/S/ MARK S GEMPELER

Honorable Mark S. Gempeler

STATE OF WISCONSIN

CIRCUIT COURT

OZAUKEE COUNTY

WIREDATA, INC.,

Plaintiff,

v.

Case No. 01-CV-216-B2

CITY OF PORT WASHINGTON and
MATTHIES ASSESSMENTS, INC.
in its capacity as the Assessor for
the City of Port Washington,

Defendants.

OZAUKEE COUNTY, WISCONSIN
FILED

DEC - 8 2005

WIREDATA, INC.,

Plaintiff,

v.

Case No. 01-CV-198-B1

VILLAGE OF THIENSVILLE,
GROTA APPRAISALS, LLC,
MICHAEL L. GROTA, and
ASSESSMENT TECHNOLOGIES OF WI, LLC,

Defendants.

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ORDER FOR JUDGMENT

The consolidated cases of WIREDATA, Inc. v. City of Port Washington, et al, Ozaukee County Case Number 01-CV-216-B2, and WIREDATA, Inc. v. Village of Thiensville, et al, Ozaukee County Case Number 01-CV-198-B1, came before the above named court, the Honorable Thomas R. Wolfgram presiding, on January 25, 2005 and on October 31, 2005 for hearing and consideration of various motions. Attorney Alan Deutch appeared on behalf of WIREDATA, Inc. Attorney Daniel Johnson appeared as counsel for Assessment Technologies and Grota Appraisals, LLC, and Michael L. Grota. Attorney Maile Beres appeared on behalf of

Matthies Assessments. Attorney Steven Cain appeared on behalf of the Village of Thiensville and Attorney Erin Fay appeared on behalf of the City of Port Washington.

At that time, among other things, the court considered motions for summary judgment for the plaintiff and defendants in this matter.

Now, after having considered all pleadings and papers on file herein and further considering the position of the parties as expressed at the hearing, and for the reasons stated in the record of October 31, 2005;

IT IS HEREBY ORDERED that the motion of the defendant, Matthies Assessments, for summary judgment dismissing the claims against it is **GRANTED** and the plaintiff's claims against it may be dismissed.

IT IS HEREBY ORDERED that the motion of the defendant, City of Port Washington, for summary judgment dismissing the claims against it is **GRANTED** and the plaintiff's claims against it may be dismissed.

IT IS HEREBY ORDERED that the motion of the defendant, Village of Thiensville, for summary judgment dismissing the claims against it is **GRANTED** and the plaintiff's claims against it may be dismissed.

IT IS HEREBY ORDERED that the joint motion of the defendants, Grotta Appraisals, LLC, Michael L. Grotta, and Assessment Technologies of WI, LLC, for summary judgment dismissing the claims against these defendants is **GRANTED** and the plaintiff's claims against these defendants may be dismissed.

IT IS HEREBY ORDERED that the motion of the plaintiff, WIREdata, Inc., for summary judgment is **DENIED**.

IT IS FURTHER ORDERED that judgment may be entered dismissing this case with prejudice and with the statutory costs and disbursements of this action.

Dated: December 8, 2005

BY THE COURT:

/s/ Tom R. Wolfgram

Thomas R. Wolfgram
Circuit Court Judge

**In the
United States Court of Appeals
For the Seventh Circuit**

No. 03-2061

ASSESSMENT TECHNOLOGIES OF WI, LLC,

Plaintiff-Appellee,

v.

WIREDATA, INC.,

Defendant-Appellant.

Appeal from the United States District Court for the
Eastern District of Wisconsin.

No. 01-C-789—Aaron E. Goodstein, *Magistrate Judge.*

ARGUED NOVEMBER 3, 2003—DECIDED NOVEMBER 25, 2003

Before POSNER, DIANE P. WOOD, and EVANS, *Circuit Judges.*

POSNER, *Circuit Judge.* 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. The owner is trying to secrete the data in its copyrighted program—a program the existence of which reduced the likelihood that the data would be retained in a form in which they would have been readily accessible. It would be appalling if such an attempt could succeed.

Assessment Technologies (AT, we'll call it) brought suit for copyright infringement and theft of trade secrets

against WIREdata, and the district court after an evidentiary hearing issued a permanent injunction on the basis of AT's copyright claim alone, without reaching the trade secret claim. A sample database in the demo version of AT's product—a version freely distributed for promotional purposes—reveals the entire structure of the database, thus making the trade secret claim incomprehensible to us. But we shall not make a formal ruling on the claim. It was not addressed either by the district court or by the parties in their submissions in this court, and conceivably if improbably it has more merit than we can find in it.

The copyright case seeks to block WIREdata from obtaining noncopyrighted data. AT claims that the data can't be extracted without infringement of its copyright. The copyright is of a compilation, and the general issue that the appeal presents is the right of the owner of such a copyright to prevent his customers (that is, the copyright licensees) from disclosing the compiled data even if the data are in the public domain.

WIREdata, owned by Multiple Listing Services, Inc., wants to obtain, for use by real estate brokers, data regarding specific properties—address, owner's name, the age of the property, its assessed valuation, the number and type of rooms, and so forth—from the southeastern Wisconsin municipalities in which the properties are located. The municipalities collect such data in order to assess the value of the properties for property-tax purposes. Ordinarily they're happy to provide the data to anyone who will pay the modest cost of copying the data onto a disk. Indeed, Wisconsin's "open records" law, Wis. Stat. §§ 19.31-39; *State ex rel. Milwaukee Police Ass'n v. Jones*, 615 N.W.2d 190, 194-96 (Wis. App. 2000), which is applicable to data in digital form, see *id.* at 195-96; Wis. Stat. § 19.32(2), requires them to furnish such data to any person who will pay the copying

cost. However, three municipalities refused WIREdata's request. They (or the contractors who do the actual tax assessment for them) are licensees of AT. The open-records law contains an exception for copyrighted materials, *id.*, and these municipalities are afraid that furnishing WIREdata the requested data would violate the copyright. WIREdata has sued them in the state courts of Wisconsin in an attempt to force them to divulge the data, and those suits are pending. Alarmed by WIREdata's suits, AT brought the present suit to stop WIREdata from making such demands of the municipalities and seeking to enforce them by litigation.

The data that WIREdata wants are collected not by AT but by tax assessors hired by the municipalities. The assessors visit the property and by talking to the owner and poking around the property itself obtain the information that we mentioned in the preceding paragraph—the age of the property, the number of rooms, and so forth. AT has developed and copyrighted a computer program, called "Market Drive," for compiling these data. The assessor types into a computer the data that he has obtained from his visit to the property or from other sources of information and then the Market Drive program, in conjunction with a Microsoft database program (Microsoft Access), automatically allocates the data to 456 fields (that is, categories of information) grouped into 34 master categories known as tables. Several types of data relating to a property, each allocated to a different field, are grouped together in a table called "Income Valuations," others in a table called "Residential Buildings," and so on. The data collected by the various assessors and inputted in the manner just described are stored in an electronic file, the database. The municipality's tax officials can use various queries in Market Drive or Market Access to view the data in the file.

WIREDATA's appeal gets off on the wrong foot, with the contention that Market Drive lacks sufficient originality to be copyrightable. Copyright law unlike patent law does not require substantial originality. *Feist Publications, Inc. v. Rural Telephone Service Co.*, 499 U.S. 340, 345-48 (1991). In fact, it requires only enough originality to enable a work to be distinguished from similar works that are in the public domain, *Bucklew v. Hawkins, Ash, Baptie & Co.*, 329 F.3d 923, 929 (7th Cir. 2003); *Alfred Bell & Co. v. Catalda Fine Arts, Inc.*, 191 F.2d 99, 102-03 (2d Cir. 1951), since without some discernible distinction it would be impossible to determine whether a subsequent work was copying a copyrighted work or a public-domain work. This modest requirement is satisfied by Market Drive because no other real estate assessment program arranges the data collected by the assessor in these 456 fields grouped into these 34 categories, and because this structure is not so obvious or inevitable as to lack the minimal originality required, *Key Publications, Inc. v. Chinatown Today Publishing Enterprises, Inc.*, 945 F.2d 509, 513-14 (2d Cir. 1991), as it would if the compilation simply listed the data in alphabetical or numerical order. *Feist Publications, Inc. v. Rural Telephone Service Co.*, *supra*, 499 U.S. at 362-64. The obvious orderings, the lexical and the numeric, have long been in the public domain, and what is in the public domain cannot be appropriated by claiming copyright. Alternatively, if there is only one way in which to express an idea—for example, alphabetical order for the names in a phone book—then form and idea merge, and in that case since an idea cannot be copyrighted the copying of the form is not an infringement. *Ets-Hokin v. Skyy Spirits, Inc.*, 225 F.3d 1068, 1082 (9th Cir. 2000); *Kregos v. Associated Press*, 937 F.2d 700, 705-07 (2d Cir. 1991). That is not the situation here.

So AT has a valid copyright; and if WIREDATA said to itself, "Market Drive is a nifty way of sorting real estate data

and we want the municipalities to give us their data in the form in which it is organized in the database, that is, sorted into AT's 456 fields grouped into its 34 tables," and the municipalities obliged, they would be infringing AT's copyright because they are not licensed to make copies of Market Drive for distribution to others; and WIREdata would be a contributory infringer (subject to a qualification concerning the fair-use defense to copyright infringement, including contributory infringement, that we discuss later). But WIREdata doesn't want the Market Drive compilation. It isn't in the business of making tax assessments, which is the business for which Market Drive is designed. It only wants the raw data, the data the assessors inputted into Market Drive. Once it gets those data it will sort them in accordance with its own needs, which have to do with providing the information about properties that is useful to real estate brokers as opposed to taxing authorities.

But how are the data to be extracted from the database without infringing the copyright? Or, what is not quite the same question, how can the data be separated from the tables and fields to which they are allocated by Market Drive? One possibility is to use tools in the Market Drive program itself to extract the data and place it in a separate electronic file; this can be done rapidly and easily with just a few keystrokes. But the municipalities may not have the program, because the inputting of the data, which did of course require its use, was done by assessors employed by firms to do this work as independent contractors of the municipalities. And if the municipalities do have the program, still their license from AT forbids them to disseminate the data collected by means of it—a restriction that may or may not be in violation of the state's open-records law, a question we come back to later. A second extraction possibility, which arises from the fact that the database is a

Microsoft file accessible by Microsoft Access, is to use Access to extract the data and place it in a new file, bypassing Market Drive. But there is again the scope of the license to be considered and also whether the method of extraction is so cumbersome that it would require more effort than the open-records law requires of the agencies subject to it. It might take a programmer a couple of days to extract the data using Microsoft Access, and the municipalities might lack the time, or for that matter the programmers, to do the extraction. But that should not be a big problem, because WIREdata can hire programmers to extract the data from the municipalities' computers at its own expense.

From the standpoint of copyright law all that matters is that the process of extracting the raw data from the database does not involve copying Market Drive, or creating, as AT mysteriously asserts, a derivative work; all that is sought is raw data, data created not by AT but by the assessors; data that are in the public domain. A derivative work is a translation or other transformation of an original work and must itself contain minimum originality for the same evidentiary reason that we noted in discussing the requirement that a copyrighted work be original. *Pickett v. Prince*, 207 F.3d 402, 405 (7th Cir. 2000); *Gracen v. Bradford Exchange*, 698 F.2d 300, 304-05 (7th Cir. 1983). A work that merely copies uncopyrighted material is wholly unoriginal and the making of such a work is therefore not an infringement of copyright. The municipalities would not be infringing Market Drive by extracting the raw data from the databases by either method that we discussed and handing those data over to WIREdata; and since there would thus be no direct infringement, neither would there be contributory infringement by WIREdata. It would be like a Westlaw licensee's copying the text of a federal judicial opinion that he found in the Westlaw opinion database and giving it to

someone else. Westlaw's compilation of federal judicial opinions is copyrighted and copyrightable because it involves discretionary judgments regarding selection and arrangement. But the opinions themselves are in the public domain (federal law forbids assertion of copyright in federal documents, 17 U.S.C. § 105), and so Westlaw cannot prevent its licensees from copying the opinions themselves as distinct from the aspects of the database that are copyrighted. See *Matthew Bender & Co. v. West Publishing Co.*, 158 F.3d 693 (2d Cir. 1998); *Matthew Bender & Co. v. West Publishing Co.*, 158 F.3d 674 (2d Cir. 1998).

AT would lose this copyright case even if the raw data were so entangled with Market Drive that they could not be extracted without making a copy of the program. The case would then be governed by *Sega Enterprises Ltd. v. Accolade, Inc.*, 977 F.2d 1510, 1520-28 (9th Cir. 1992). Sega manufactured a game console, which is a specialized computer, and copyrighted the console's operating system, including the source code. Accolade wanted to make computer games that would be compatible with Sega's console, and to that end it bought a Sega console and through reverse engineering reconstructed the source code, from which it would learn how to design its games so that they would activate the operating system. For technical reasons, Accolade had to make a copy of the source code in order to be able to obtain this information. It didn't want to sell the source code, produce a game-console operating system, or make any other use of the copyrighted code except to be able to sell a noninfringing product, namely a computer game. The court held that this "intermediate copying" of the operating system was a fair use, since the only effect of enjoining it would be to give Sega control over noninfringing products, namely Accolade's games. See also *Sony Computer Entertainment, Inc. v. Connectix Corp.*, 203 F.3d 596, 602-08 (9th Cir.

2000); *Bateman v. Mnemonics, Inc.*, 79 F.3d 1532, 1539-40 n. 18 (11th Cir. 1996); *Atari Games Corp. v. Nintendo of America, Inc.*, 975 F.2d 832, 842-44 (Fed. Cir. 1992). Similarly, if the only way WIREDdata could obtain public-domain data about properties in southeastern Wisconsin would be by copying the data in the municipalities' databases as embedded in Market Drive, so that it would be copying the compilation and not just the compiled data only because the data and the format in which they were organized could not be disentangled, it would be privileged to make such a copy, and likewise the municipalities. For the only purpose of the copying would be to extract noncopyrighted material, and not to go into competition with AT by selling copies of Market Drive. We emphasize this point lest AT try to circumvent our decision by reconfiguring Market Drive in such a way that the municipalities would find it difficult or impossible to furnish the raw data to requesters such as WIREDdata in any format other than that prescribed by Market Drive. If AT did that with that purpose it might be guilty of copyright misuse, of which more shortly.

AT argues that WIREDdata doesn't need to obtain the data in digital form because they exist in analog form, namely in the handwritten notes of the assessors, notes that all agree are not covered by the Market Drive copyright. But we were told at argument without contradiction that some assessors no longer make handwritten notes to copy into a computer at a later time. Instead they take their laptop to the site and type the information in directly. So WIREDdata could not possibly obtain all the data it wants (all of which data are in the public domain, we emphasize) from the handwritten notes. But what is more fundamental is that since AT has no ownership or other legal interest in the data collected by the assessor, it has no legal ground for making the acquisition of that data more costly for WIREDdata. AT is trying to use its

copyright to sequester uncopyrightable data, presumably in the hope of extracting a license fee from WIREdata.

We are mindful of pressures, reflected in bills that have been pending in Congress for years, Jonathan Band & Makoto Kono, "The Database Protection Debate in the 106th Congress," 62 *Ohio St. L.J.* 869 (2001), to provide legal protection to the creators of databases, as Europe has already done. Jane C. Ginsburg, "Copyright, Common Law, and Sui Generis Protection of Databases in the United States and Abroad," 66 *U. Cinc. L. Rev.* 151 (1997). (Ironically, considering who owns WIREdata, the multiple-listing services are pressing for such protection. Ron Eckstein, "The Database Debate," *Legal Times*, Jan. 24, 2000, p. 16.) The creation of massive electronic databases can be extremely costly, yet if the database is readily searchable and the data themselves are not copyrightable (and we know from *Feist* that mere data are indeed not copyrightable) the creator may find it difficult or even impossible to recoup the expense of creating the database. Legal protection of databases as such (as distinct from programs for arranging the data, like Market Drive) cannot take the form of copyright, as the Supreme Court made clear in *Feist* when it held that the copyright clause of the Constitution does not authorize Congress to create copyright in mere data. But that is neither here nor there; what needs to be emphasized in this case is that the concerns (whether or not valid, as questioned in Ginsburg, *supra*, and also J.H. Reichman & Pamela Samuelson, "Intellectual Property Rights in Data?" 50 *Vand. L. Rev.* 51 (1997), and Stephen M. Maurer & Suzanne Scotchmer, "Database Protection: Is It Broken and Should We Fix It?" 284 *Sci.* 1129 (1999)) that actuate the legislative proposals for database protection have no relevance because AT is not the collector of the data that go into the database. All the data are collected and inputted by

the assessors; it is they, not AT, that do the footwork, the heavy lifting.

AT points to the terms of its license agreements with the municipalities, which though ambiguous might be interpreted to forbid the licensees to release the raw data, even without the duplication, or revelation of any copyrighted feature, of Market Drive. But AT is not suing for breach of the terms of the agreements—it can't, since WIREdata is not a party to them. Nor is it suing for intentional interference with contract, *Frandsen v. Jensen-Sundquist Agency, Inc.*, 802 F.2d 941, 947-48 (7th Cir. 1986) (Wisconsin law); *Dorr v. Sacred Heart Hospital*, 597 N.W.2d 462, 478 (Wis. App. 1999); *Cudd v. Crownhart*, 364 N.W.2d 158, 160-61 (Wis. App. 1985), which would be the logical route for complaining about WIREdata's inviting the municipalities that are AT's licensees to violate the terms of their license. The licenses do nothing for AT in this case.

So it is irrelevant that *ProCD, Inc. v. Zeidenberg*, 86 F.3d 1447, 1453-55 (7th Cir. 1996), holds that a copyright owner can by contract limit copying beyond the right that a copyright confers. See also *Bowers v. Baystate Technologies, Inc.*, 320 F.3d 1317, 1323-26 (Fed. Cir. 2003). Like other property rights, a copyright is enforceable against persons with whom the owner has no contractual relations; so a property owner can eject a trespasser even though the trespasser had not contractually bound himself to refrain from entering the property. That is why AT is suing WIREdata for copyright infringement rather than for breach of contract. The scope of a copyright is given by federal law, but the scope of contractual protection is, at least *prima facie*, whatever the parties to the contract agreed to. The existence of contractual solutions to the problem of copying the contents of databases is one of the reasons that Professor

Ginsburg and others are skeptical about the need for legislative protection of databases. But our plaintiff did not create the database that it is seeking to sequester from WIREdata; or to be more precise, it created only an empty database, a bin that the tax assessors filled with the data. It created the compartments in the bin and the instructions for sorting the data to those compartments, but those were its only innovations and their protection by copyright law is complete. 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.

The doctrine of misuse “prevents copyright holders from leveraging their limited monopoly to allow them control of areas outside the monopoly.” *A&M Records, Inc. v. Napster, Inc.*, 239 F.3d 1004, 1026-27 (9th Cir. 2001); see *Alcatel USA, Inc. v. DGI Technologies, Inc.*, 166 F.3d 772, 792-95 (5th Cir. 1999); *Practice Management Information Corp. v. American Medical Ass’n*, 121 F.3d 516, 520-21 (1997), amended, 133 F.3d 1140 (9th Cir. 1998); *DSC Communications Corp. v. DGI Technologies, Inc.*, 81 F.3d 597, 601-02 (5th Cir. 1996); *Lasercomb America, Inc. v. Reynolds*, 911 F.2d 970, 976-79 (4th Cir. 1990). The data in the municipalities’ tax-assessment databases are beyond the scope of AT’s copyright. It is true that in *Reed-Union Corp. v. Turtle Wax, Inc.*, 77 F.3d 909, 913 (7th Cir. 1996), we left open the question whether copyright misuse, unless it rises to the level of an antitrust violation, is a defense to infringement; our earlier decision in *Saturday Evening Post Co. v. Rumbleseat Press, Inc.*, 816 F.2d 1191, 1200 (7th Cir. 1987), had intimated skepticism. No effort has been made by WIREdata to show that AT has market power merely by virtue of its having a copyright on one system for compiling valuation data for real estate tax assessment purposes. Cases such as *Lasercomb*, however, cut misuse free from antitrust,

pointing out that the cognate doctrine of patent misuse is not so limited, 911 F.3d at 977-78, though a difference is that patents tend to confer greater market power on their owners than copyrights do, since patents protect ideas and copyrights, as we have noted, do not. The argument for applying copyright misuse beyond the bounds of antitrust, besides the fact that confined to antitrust the doctrine would be redundant, is that for a copyright owner to use an infringement suit to obtain property protection, here in data, that copyright law clearly does not confer, hoping to force a settlement or even achieve an outright victory over an opponent that may lack the resources or the legal sophistication to resist effectively, is an abuse of process.

We need not run this hare to the ground; nor decide whether the licenses interpreted as AT would have us interpret them—as barring municipalities from disclosing noncopyrighted data—would violate the state’s open-records law. Cf. *Antisdel v. City of Oak Creek Police & Fire Comm’n*, 600 N.W.2d 1, 3 (Wis. App. 1999); *Gordie Boucher Lincoln-Mercury Madison, Inc. v. J & H Landfill, Inc.*, 493 N.W.2d 375, 378 (Wis. App. 1992); *State ex rel. Sun Newspapers v. Westlake Board of Education*, 601 N.E.2d 173, 175 (Ohio App. 1991); but cf. *Pierce v. St. Vrain Valley School District*, 981 P.2d 600, 605-06 (Colo. 1999). WIREdata is not a licensee of AT, and AT is not suing to enforce any contract it might have with WIREdata. It therefore had no cause to drag the licenses before us. But since it did, we shall not conceal our profound skepticism concerning AT’s interpretation. If accepted, it would forbid municipalities licensed by AT to share 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. That seems an absurd result.

To summarize, there are at least four possible methods by which WIREdata can obtain the data it is seeking without infringing AT's copyright; which one is selected is for the municipality to decide in light of applicable trade-secret, open-records, and contract laws. The methods are: (1) the municipalities use Market Drive to extract the data and place it in an electronic file; (2) they use Microsoft Access to create an electronic file of the data; (3) they 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; (4) they copy the database file and give it to WIREdata to extract the data from.

The judgment is reversed with instructions to vacate the injunction and dismiss the copyright claim.

REVERSED AND REMANDED, WITH INSTRUCTIONS.

A true Copy:

Teste:

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**UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WISCONSIN**

U.S. DIST. COURT EAST DIST. WISC. FILED DEC 23 2002 AT _____ O'CLOCK _____ M SOFRON B. NEDILSKY

ASSESSMENT TECHNOLOGIES OF WI, LLC,

Plaintiff,

v.

Case No. 01-C-789

WIRE DATA, INC.,

Defendant.

DECISION AND ORDER

Assessment Technologies of WI, LLC brings this action against Wire Data, Inc. for injunctive relief. More particularly, Assessment's first cause of action seeks to enjoin Wire Data from infringing on Assessment's copyright, pursuant to 17 U.S.C. § 502. In its second cause of action, Assessment seeks to enjoin Wire Data from appropriating its trade secrets, in violation of § 134.90 Wis. Stat. Pursuant to the consent of the parties to the full exercise of jurisdiction by a magistrate judge, this case is before this court for all proceedings, including entry of final judgment. 28 U.S.C. § 636(c); Fed. R. Civ. P. 72(c).

By way of background, this case arises from the defendant's demand for electronic or digital copies of real estate information from various municipalities pursuant to Wisconsin's open-records law. The requests were not honored, and the defendant commenced separate legal actions in state court against three municipalities and others, seeking the release of such records. Thereafter, the plaintiff commenced this federal case seeking to have this court declare that the records the defendant is attempting to obtain are protected under federal copyright law.

By way of procedural background, the plaintiff filed a motion for a preliminary injunction contemporaneously with its complaint. Due to the nature of the relief sought, this court conducted a telephonic status conference on August 21, 2002, to discuss preliminary injunction procedures. At that conference, the court also discussed case management, and set a hearing on the plaintiff's motion for a preliminary injunction.

On November 15, 2001, the court conducted a hearing on the plaintiff's motion for a preliminary injunction. At the hearing, Andrew Pelkey testified for the plaintiff, and was subject to cross examination. However, before the completion of Pelkey's cross examination, the parties entered into a stipulation, pursuant to which the court denied the plaintiff's motion for a preliminary injunction without prejudice, and set an expedited date for a court trial on the merits. The stipulation further provided that Pelkey's testimony was preserved for use at trial, subject to completion. In addition, the parties stipulated to a stand-still agreement in pending related state court cases.

In their joint statement of ultimate issues, the parties frame the issues for resolution,

1. Will providing the information requested by the defendant infringe on the copyright of the plaintiff?
2. Will providing the information requested by the defendant misappropriate trade secrets from the plaintiff?

Joint Stmt. of Ultimate Issues.

The federal court trial commenced February 4, 2002, and continued on February 5, 2002, on the merits on the plaintiff's complaint seeking injunctive relief. Following the trial, the parties submitted their respective findings of fact, conclusion of law, and supporting memorandum. The following constitutes this court's findings of fact and conclusions of law.

I. FINDINGS OF FACT

The plaintiff, Assessment Technologies ("Assessment") is a Wisconsin limited liability company located in Menomonee Falls, Wisconsin. Assessment is engaged in the business of software and licensing, and is also engaged in the business of property information acquisition and sales through its website www.assessordata.com. Assessment owns a software program called Market Drive v. 4.0. and Market Drive 2000 ("Market Drive"). On December 8, 2000, Assessment applied for a Certificate of Registration in the United States Copyright Office for the Market Drive software; the Certificate of Registration was issued and states that Andrew Pelkey authored the Market Drive software. According to the plaintiff, the Market Drive software is licensed on both an exclusive and non-exclusive basis to approximately 65 real estate appraisers.

The defendant, Wire Data, Inc. ("Wire Data"), is a Wisconsin corporation located in Milwaukee, Wisconsin. Wire Data is engaged in the business of collection and distribution of property related information. Wire Data is not in the appraisal business. It sells the information it collects to those in the housing industry, such as Multiple Listing Services.

Municipalities gather certain information regarding the parcels of property located within their jurisdiction. Typically, assessors are hired for the purpose of collecting this information. Prior to computers, the assessor would visit the specific parcel and make handwritten notations on paper cards such as the year the house was built, the home style, the square footage, number of bathrooms, number of bedrooms, etc. These paper cards, or often a manilla folder containing this information, are referred to as "property record cards." One of the uses of this information is to enable the municipality to make an assessment of the property for tax purposes.

The advent of computers has impacted the manner in which municipalities retain their property information. As pertains to this case, Assessment Technologies owns a software program, Market Drive, which facilitates the collection and use of the raw data. For example, an appraiser using the Market Drive program will input the raw data previously recorded on the property record cards directly into the program. The program is able to collate and arrange the collected information in a multitude of tables and reports, for various categories of properties.

At the trial, this was illustrated by Andrew Pelkey. During his testimony, both on direct and cross examination, Pelkey described how the Market Drive program operated, through the use of a fictitious municipality, the Town of Badger. Pelkey testified that he has worked on developing the Market Drive software program since 1996; according to him, the present version represents 99% of his work and effort. Pelkey stated that once an appraiser collects information regarding a specific parcel of property, it will then be placed into the software. The Market Drive software will then take this information and transmit it into a digital data base computer file. For the Town of Badger, its computer file (".mdb") is comprised of 34 tables that contain 456 fields of information. To input the data collected about the individual properties, the appraiser must select one of the options presented by the program. For example, there is a box in which the appraiser can only type the tax key number and another where the name of the owner is inserted. On some screens, certain choices are presented, but the appraiser is required to select one or more of the choices presented; additional categories cannot be created by the appraiser. After the appraiser places all of the requested information in the system, the municipality can generate a variety of reports from the stored data. By way of illustration, to generate a certain report to the State of Wisconsin, the user goes to the "report" screen and

clicks on the "final report" tab. The Market Drive program then collects the information from all properties in the Town of Badger and creates a final report.

The genesis of this lawsuit stems from the use of the Market Drive software by two of the appraisers licensed to use the software program by Assessment, Grotz Appraisals, LLC and Matthies Assessments, Inc. Grotz and Matthies were hired by different municipalities to perform appraisal services in regard to properties located within the municipalities. As part of the contract with these municipalities, the appraisers collect information on individual parcels of property and store it in the Market Drive software, in a manner similar to that described by Pelkey for the Town of Badger. A sublicense is given to each of the municipalities to enable them to read and print the data that has been collected on the software. According to Grotz, the municipality is given a "read only" version of the Market Drive software which contains the property information. The municipality then has the ability to print whatever tables and reports that the Market Drive software is configured to assemble. Assessment has licensed other appraisers who have entered into similar contracts with other municipalities.

Wire Data made requests of three municipalities for property information. In particular, it requested "electronic/digital copies of the real estate records used" in the respective municipalities. Wire Data made its requests under the Wisconsin Open Records Law, and alleges in its subsequent litigation against the three municipalities that the failure to provide such information is a violation of state law. The appraisers, who are co-defendants with the municipalities in the state court litigation, contend that they are precluded from providing Wire Data with the information requested, in the form it is demanded, because of Assessment's copyright. In this lawsuit, Assessment seeks to permanently enjoin Wire Data from obtaining information that it submits is subject to copyright protection.

Wire Data responds by claiming that it is only seeking property information that is within the public domain, and the fact that it has been placed in a digital format does not implicate any copyright protection. The parties agree, and the court concurs, that the "raw data" itself is not subject to copyright protection; it is public information. Raw data is the basic information that would appear on the paper property record cards. There is no dispute between the parties that Wire Data could request the paper property cards from the municipalities and make its own compilations and tables from the information contained thereon. Wire Data, however, only wants this information in an electronic or digital form.

The issue of copyright aside, and just addressing the matter of access to information, Andrew Pelkey testified that his software does have the capability to create a text file that would contain only the stored public information, but that this would be a very labor intensive endeavor. During his cross examination, Pelkey acknowledged that he may have misjudged the amount of time it would take to obtain a report, conceding that for the Town of Badger it took less than one minute to obtain an "all properties" report containing just public information. However, Pelkey indicated that the result was in an undesirable format and some information was missing. Defendant's expert Gary Edgar testified that the public information could be extracted from Market Drive data base, saved in a separate file and thereafter accessed, all without permitting the user the ability to ascertain the Market Drive schema or trade secrets.

II. 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.

A. THE COPYRIGHT

First of all, the court finds no evidence to dispute the plaintiff's contention that it is the owner of Market Drive and Andrew Pelkey is the author. Similarly, it is undisputed from the evidence submitted at trial that the United States Copyright Office issued a Certificate of Registration No. TX-5-392-632. The copyright covers the "entire text and compilation" of the Market Drive software. See, exhibit 1. Submitted with the December, 2000 application was the fictitious Town of Badger database. The plaintiff submits that a certificate of registration "shall constitute prima facie evidence of the validity of the copyright and the facts stated in the certificate," quoting 17 U.S.C. § 410(c).

At this juncture, the arguments of the parties appear to take divergent paths. The plaintiff devotes a significant portion of its brief to the concept that the digital database compilations as created by Pelkey feature original selection, coordination, and arrangement of data. That the selection, coordination and arrangement of the data into 34 tables containing 456 fields of information entails an original process, one that has been recognized by the Copyright Office. The plaintiff further argues that the defendant has failed to disprove the originality of Pelkey's process.

The defendant directs its main attention to the databases themselves, and the fact that this constitutes public information. While the defendant does take issue with the copyrightability of Market Drive, the main thrust of its position is that, even if plaintiff possesses a Registration Certificate, it is limited in nature. The defendant submits that any copyright the plaintiff may possess is limited to the materials that were actually submitted to the Copyright Office. Thus, it only covers the database for the Town of Badger, and not any of the databases for the 2001 assessments sought by Wire Data.

The dichotomy of positions adopted by the parties is discussed in the case of Feist Publications, Inc. v. Rural Telephone Service Co., Inc., 499 U.S. 340 (1991). The Market Drive software is a compilation of a database of facts, facts which are in the public domain. The Copyright Act defines a compilation as:

a work formed by the collection and assembling of preexisting materials or of data that are selected, coordinated, or arranged in such a way that the resulting work as a whole constitutes an original work of authorship.

17 U.S.C. §101. As stated by the Supreme Court in Feist, "A compilation is not copyrightable *per se*, but is copyrightable only if its facts have been 'selected, coordinated, or arranged in such a way that the resulting work as a whole constitutes an original work of authorship.'" 499 U.S. at 341. The Feist court emphasizes that the copyright protection extends only "to those components of the work that are original to the author, not to the facts themselves." Id. at 340. The Feist court made it clear that facts are not copyrightable, but compilations consisting of raw facts may be copyrightable. Id. at 345. The Court recognized that this created an "undeniable tension between these two positions," (Id.), a tension that is reflected in the present action.

Wire Data contends that the 2001 databases it seeks are neither original or creative, and the literal copying of them, much like the telephone subscriber numbers in Feist, is not entitled to copyright protection. In response, Assessment argues that the selection, coordination and arrangement of the data by Pelkey into 34 tables containing 456 fields of information, as in the Town of Badger, is certainly original.

In order to resolve the dispute between the parties, this court will first determine if Market Drive meets the test for a copyright by a compilation. The three factors to consider are selection, coordination and arrangement. As to the latter two, the plaintiff has established originality. The testimony of Andrew Pelkey is persuasive in establishing that the program he

created is unique in coordinating and arranging the data. Wire Data has been unable to show that there is anything that is either similar, or that there is only one way the data could be coordinated and arranged. The testimony of defendant's expert, Gary Edgar, that he could use certain program tools provided by Microsoft to accomplish the same ordering of the data is not persuasive. These are tools that a programmer such as Pelkey or Edgar may use, but the creativity as to the manner in which to use the tools is still the programmer's. What Pelkey has created is unlike the situation in Feist, where the Court observed that there was nothing original in the way in which Rural arranged its white pages.

The selection element is more difficult under the facts of this case. Wire Data argues that there is no originality in the selection of data. In this regard, the defendant submits that it is the assessor who selects the data and does so in accordance with the rules for assessing real property established by the State of Wisconsin and set forth in its Real Estate Assessment Manual. First of all, as pointed out by the plaintiff, no such manual was introduced into evidence, and the court is unable to take judicial notice of either the existence or content of such a document. But even if such evidence is absent from the record, Andrew Pelkey testified that, prior to creating Market Drive, he learned how assessors work and how they gather their information. In other words, Market Drive was created with an understanding of the real estate industry; Pelkey knew the type of data that would be collected and inputted into the Market Drive software. The real estate industry thus guided his "selection" of what facts would be used by his program.

Does the fact that persons other than assessors having a license from Assessment Technologies gather the identical type of data for properties negate the element of selection? Notwithstanding the fact that others gather similar data, it is the Market Drive software that

instructs the user as to which particular fact to select and onto which screen it should be placed. While this may be an aspect of the other two elements, the software, for example, instructs the appraiser to locate the tax key number and type it in a certain place. This process is repeated for each piece of data gathered by the appraiser. Parenthetically, the record is silent as to whether or not an appraiser might have collected more facts concerning a parcel than requested by the program. However, the court believes that an assessor using the Market Drive software will limit the collection of data to that requested by the program.

As stated in Feist,

“The compilation author typically chooses which facts to include, in what order to place them, and how to arrange the collected data so that they may be used effectively by readers. These choices as to selection and arrangement, so long as they are made independently by the compiler and entail a minimal degree of creativity, are sufficiently original that Congress may protect such compilations through the copyright laws.”

Feist, 499 U.S. at 348.

This court concludes that Market Drive has satisfied the degree of creativity needed to be protected by the copyright laws.

B. SCOPE OF THE COPYRIGHT

The court now turns to the defendant's argument that it characterizes as “so what.” The defendant contends that any copyright the plaintiff may possess is limited to the Town of Badger and does not encompass the 2001 data the defendant wants. In other words, if there is a copyright, it offers the plaintiff no protection. In support of its argument, the defendant states that a copyright must be “fixed in any tangible medium of expression, now known or later developed.” 17 U.S.C. § 102(a). The only tangible database that was in existence at the time

of the copyright application was the Town of Badger, and the protection cannot be extended to the 2001 databases that came into existence subsequently.

There is no dispute that the databases for the three municipalities in question are in the same format as the Town of Badger database. Their data, having been inputted into the Market Drive software, has been subjected to an identical selection, coordination and arrangement process. This means that the present version of the databases for these municipalities fit within the definition of "compilation" as that term is used in the Copyright Act. See 17 U.S.C. §101.

The defendant refers to the case of Offbeat, Inc. v. Cager, 35 U.S.P.Q.2d 1565 (E.D. La. 1995). In that case, the plaintiff obtained a copyright certificate for the Louisiana Music Directory 1992-93, which consisted of a database of over 100 categories. From this database, the plaintiff generated a mailing list of over 1,500 businesses and individuals involved in the music industry. The plaintiff claimed that the defendant copied and used the mailing list for its own purposes without authorization. The position of the defendant was that the mailing list was not registered for copyright, while the plaintiff claimed that it was a derivative work. The court found that since the mailing list was not included in the registered database, there was no infringement by the defendant. Offbeat, at 1567.

The Offbeat case is inapposite to the present situation since the plaintiff in that case obtained a copyright for an actual database pertaining to the music industry. Assessment's Certificate of Registration covers the "entire text and compilation," with the Town of Badger submitted as an example of the compilation produced by the software. The copyright was to cover all databases subject to the software. The present situation is more analogous to the facts of Kregos v. Associated Press, 937 F.2d 700 (2nd Cir. 1991). In that case, Kregos registered his form with the Copyright Office and received a copyright. The form was distributed to

newspapers and was to be used in analyzing performances of baseball pitchers scheduled to start each day's game. The Associated Press developed its own form and Kregos commenced a copyright infringement action. Of relevance to the present action, the Kregos form listed nine items of information about each pitcher's last performance, grouped into three categories. The Kregos court cited Feist Publications for guidance on whether or not the compilation was copyrightable. It observed that no form had previously listed the same nine items, and concluded that as a matter of law, it cannot be said that Kregos failed to satisfy the originality requirement. Id. at 704. The court stated, "[t]here is no prior form that is identical to his nor one from which his varies in only a trivial degree." Id. at 705.

For purposes of this case, it is important to note that new data would be inserted into the Kregos form each day. Similarly, new data is inserted into the Market Drive software for each municipality. To not apply the plaintiff's copyright to all non-Town of Badger data would eviscerate the creativity of Pelkey's work and effort. In effect, it would deter persons from creating original software programs for fear that any copyright protection would be valid only for the initial application. The plaintiff's software is designed to benefit the end user, to enable that person to supply particular data, which will in turn be coordinated and arranged by the program and placed in a .mdb file. The user is then able to generate a variety of reports from this file. Each user supplies different data, but the data is then subjected to the same selection, coordination and arrangement scheme. Market Drive is entitled to receive copyright protection for the 2001 databases in question and for subsequent databases.

C. SCOPE OF COPYRIGHT VIS-A-VIS DEFENDANT'S REQUESTS

In each of its open records requests, the defendant made the following demand,

This is to formally request an electronic/digital copy of the detailed real estate property records (showing the specific characteristics of each parcel and the improvements thereupon) used and/or maintained by the Assessor in determining the proper assessments for each parcel with the [name of municipality].

See, e.g. exhibit 14, attachment A.

At trial, and in its post trial brief, the defendant has made it clear that it is seeking the underlying or public data, which is now contained in the .mdb files of the respective municipalities. These are the files created by use of the Market Drive program by appraisers, licensed by the plaintiff and hired by the municipalities. As stated earlier, the data itself is not covered by copyright, so the issue is whether in order to disclose such data in the form requested by the defendant, it is necessary to prepare a derivative work of the copyrighted Market Drive program.

Under the Copyright Act, a "derivative work" is defined as "a work based upon one or more preexisting works, such as a translation, . . . abridgment, condensation, or any other form in which a work may be recast, transformed or adapted. A work consisting of editorial revisions, . . . or other modifications which, as a whole, represent an original work of authorship, is a 'derivative work.'" 17 U.S.C. § 101.

The defendant argues that it is only seeking non-copyright protected preexisting data which is currently stored in a .mdb file. Since the defendant only wants the public data, its production does not entail the same selection, coordination and arrangement that may have resulted in the plaintiff's copyright protection. The defendant's expert, Gary Edgar testified as to the manner in which the requested data could be exported from the Town of Badger .mdb file. He demonstrated that with the assistance of a Microsoft tool, Access, it would take him three keystrokes to obtain a new file containing the requested property information from one

of the tables. As far as the ordering of the information in the new file, Edgar stated that Access places the information in a "natural" order, one item after the next; Access orders materials in the same manner, regardless of the program being accessed. Edgar stated that he does not know if any assessor who uses Market Drive has the ability to perform the segregation of data in a similar manner.

According to Pelkey, when the assessor places the data in the 34 tables with 456 fields, it is translated into program code, and its storage is not in the order as found in the defendant's open records requests. As the program is presently written, there is no report which is able to extract all of the public data; to do this, a special text file would have to be created by the author.

In determining whether or not the extraction of the public data from the Market Drive program entails the creation of a derivative work, this court believes that there is a significant difference between the process involved in this case and the simple copying of a telephone subscriber list (Feist Publications, supra) or the copying of recipes in a cookbook (Publications International, Ltd. v. Meredith Corp., 88 F.3d 473 (7th Cir. 1996)). In those situations, the raw data was readily available for use by someone else. With Market Drive, whether the extraction encompasses just three keystrokes for each of the 34 tables in the Town of Badger, or whether more effort is involved, it is still necessary for the data, now in code, to be translated and rearranged. It takes a similar creative effort to extract the requested data from storage as it did to initially place it there. For this effort, Market Drive has received a copyright. Translating and transferring a portion of the data to a hard copy report or to another disc constitutes the creation of a derivative work.

The defendant wants an electronic/digital reproduction of a portion of the plaintiff's program. The defendant wants the plaintiff, or someone authorized to use plaintiff's program, to make a derivative work consisting of the specific characteristics of each parcel and the improvements thereon. Assessment Technologies owns the copyright and is protected as to Market Drive and its derivative works. This means that the plaintiff gets to decide whether or not a derivative work, such as requested by the defendant, will be produced.

In reaching its conclusion, the court recognizes that, unless the municipalities in question have retained the property record cards, the effect is that the defendant will be unable to obtain the raw property data. Although it was not clear from the evidence presented, the court's impression is that the assessors who use the Market Drive program work directly with that software and forego the use of property record cards. Whether or not the actual property cards still exist, however, does not matter to the defendant; the president of Wire Data, Peter Shuttleworth, testified that his company is only interested in electronically stored data.

D. INJUNCTIVE RELIEF

Assessment Technologies seeks to enjoin the defendant from infringing upon or taking advantage of plaintiff's exclusive rights to the copyrighted work. Wire Data states that all it has done is make an open records request to several municipalities, and then to institute litigation in state court when its requests were denied. Wire Data submits that at this point, it does not have the information and cannot obtain it as long as the municipalities refuse to honor its requests; therefore, it has not engaged in any act of infringement and there is nothing to enjoin. Further, the defendant contends that it would certainly be improper to enjoin a party from making future open record requests.

In its complaint, the plaintiff seeks to enjoin Wire Data, its officers, agents or anyone acting on its behalf, from "directly or indirectly misappropriating Assessment Technologies' exclusive copyrights in the copyrighted digital data compilation." In its post trial reply brief, the plaintiff urges that the defendant be "enjoined from any activity that will infringe, or lead to the infringement of Assessment Technologies' copyrights . . ." As can be seen, the plaintiff couches its request for injunctive relief in very broad terms.

Rule 65(d), Fed.R.Civ.P. provides in part that every order granting an injunction "shall be specific in terms; shall describe in reasonable detail, and not by reference to the complaint or other document, the act or acts sought to be restrained; . . ." In the opinion of the court, the plaintiff is entitled to some form of injunctive relief in order to enjoin the defendant from infringing on its copyright. An injunction is prophylactic in nature; its purpose is to prevent conduct which will result in future violations. The fact that the defendant does not currently have the digital data is of no moment since the defendant's actions clearly demonstrate its intent to obtain same.

In any event, the plaintiff must be more specific in regard to the exact form of the injunctive relief. If the only way that the defendant can possibly infringe upon the copyright is by attempting to obtain a digital compilation from municipalities, such as the ones in question, it may be that the injunction should be that specific. Therefore, the court will grant judgment for the plaintiff on the issue of the copyright, but will withhold entry until the matter of the form of the injunction that will issue is resolved. The court will require the plaintiff to submit a more detailed request that follows the requirements of Rule 65. Finally, as indicated at the outset, in light of the court's decision, it is not necessary to make a finding on the trade secrets claim.

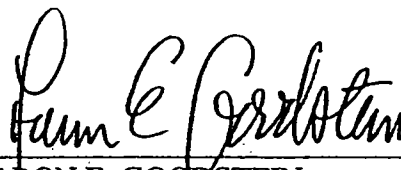
THEREFORE, IT IS ORDERED, that

1. Judgment shall be entered for the plaintiff, Assessment Technologies of WI, LLC, against the defendant, Wire Data, Inc., on the issue of the Market Drive copyright claim, and the court will enter an injunction enjoining the defendant from infringing on plaintiff's copyright in the digital data compilation.

2. The court will withhold entry of judgment and issuance of the injunction pending submission by the plaintiff of a more detailed request as to the specific form of the injunction that it wishes the court to issue. The plaintiff's submission shall be filed with the court no later than January 10, 2003; the defendant may respond no later than January 20, 2003; and the plaintiff may reply by January 27, 2003. If necessary, the court will conduct a hearing on this issue, or entertain oral argument.

3. At the appropriate time, judgment shall also be entered dismissing the plaintiff's claim for an injunction on its trade secrets in Market Drive as moot.

Dated at Milwaukee, Wisconsin, this 22nd day of December, 2002.



AARON E. GOODSTEIN
United States Magistrate Judge

**SUPREME COURT
STATE OF WISCONSIN
APPEAL NOS. 2005AP1473; 2006AP174; 2006AP175**

**WIREDATA, INC.,
Plaintiff-Respondent,**

v.

**VILLAGE OF SUSSEX and
VILLAGE OF SUSSEX CUSTODIAN
Defendants-Co-Appellants-Cross Petitioners,
GROTA APPRAISALS, LLC and
MICHAEL L. GROTA,
ASSESSMENT TECHNOLOGIES OF WI, LLC
Defendant - Appellants-Petitioners.**

**WIREDATA, INC.,
Plaintiff-Appellant,**

v.

**VILLAGE OF THIENSVILLE,
Defendant-Respondent,
GROTA APPRAISALS, LLC and
MICHAEL L. GROTA,
ASSESSMENT TECHNOLOGIES OF WI, LLC,
Defendants - Respondents - Petitioners.**

**WIREDATA, INC.,
Plaintiff-Appellant,**

v.

**CITY OF PORT WASHINGTON,
Defendant - Respondent - Cross Petitioner,
MATTHIES ASSESSMENTS, INC.,
Defendant - Respondent,
AMERICAN FAMILY INSURANCE COMPANY,
Intervenor.**

BRIEF OF RESPONDENT WIREDATA, INC.

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STATEMENT ON ORAL ARGUMENT

WIREData believes that oral argument is appropriate.

However, since the Court has already scheduled Oral Argument,

WIREData does not submit any statement concerning same.

CLARIFICATION ON CONSOLIDATION OF RECORDS

The record for the Waukesha case was paginated by the Clerk of Court for Waukesha County.

However, as to Ozaukee County, the record for these cases were divided into three separate paginations by the Clerk of Court for Ozaukee County: (1) the documents filed in WIREData v. Village of Thiensville, et al., 01-CV-198, 2001-2003; (2) the documents filed in WIREData v. City of Port Washington, et al., 01-CV-216, 2001-2003; and (3) both cases from January 2004 to December 2005. Since the record numbers for each pagination start with 1, we have referred to the appropriate record as follows:

Reference in Brief	Case Name	Trial Case No.	Record Years
R-TH	WIREData, Inc. v. Village of Thiensville, et al.	01-CV-198	2001-2003
R-PW	WIREData, Inc. v. City of Port Washington, et al.	01-CV-216	2001-2003
R-PWTH	Thiensville and Port Washington after consolidation		2004-2005
R-S	WIREData, Inc. v. Village of Sussex, et al.	01-CV-1403	2001-2005

STATEMENT OF CASE

As it relates to the portion of these cases which are being appealed, WIREdata made two open records requests in April, 2001: one to the Village of Sussex (“Sussex”) and its assessor, Michael L. Grota of Grota Appraisals, LLC; the second to the City of Port Washington (“Port Washington”) and its assessor Ernest Matthies of Matthies Assessments, Inc (“Matthies”).

Michael L. Grota is the sole owner of both Grota Appraisals, LLC and the software company Assessment Technologies of WI, LLC (“AT”). Both assessors (Grota and Matthies) use AT’s Market Drive software to run the municipal assessment databases, which are kept by the assessors in a Microsoft Access database.

WIREdata’s respective requests asked for an electronic/digital copy of the municipalities’ tax assessment records. Neither of the assessors provided the data, both claiming that it was protected by AT’s copyright. Grota would only provide the information on condition of receipt of copyright license fees and profits above the actual cost of reproduction. No other reasons were given by either

custodian at the time of the denial or by their counsel during the first three years of the current mandamus action.

Because the records were not produced, separate mandamus actions commenced against both municipalities and their assessors seeking production of the records. Grota responded with a federal copyright infringement suit against WIREdata. The state actions were stayed pending a decision in the federal case.

In 2003, the Eastern District Court originally decided in Grota's favor and defendant's summary judgment motions were granted, dismissing the state cases in both Waukesha County and Ozaukee County Circuit Courts. When the Eastern District Court's decision was reversed on appeal, the state court's dismissal orders were vacated and these actions reinstated.

In 2004, cross-motions for summary judgment were brought by the parties. In Waukesha, WIREdata's motion was granted in substantial part and Grota's and the Village's motions were denied in full.¹ However, in Ozaukee, the municipalities' motions were

¹ The only portion of WIREdata's motion which was denied was its request for punitive damages.

granted in substantial part, the assessors motions were granted in full ² and WIREdata's motion was denied in full.

As a result of appeals in both counties, the matter was determined by the Court of Appeals which found, inter alia, that the records should have been produced and that the municipalities were liable for the Plaintiff's damages, costs and attorney fees. Grota and the municipalities of Sussex and Port Washington now seek review from that determination. Review was not sought by the Village of Thiensville or the assessor Matthies.

STATEMENT OF FACTS AND PROCEDURAL BACKGROUND

Since the municipalities and Grota each present different views of the facts and highlight different facts, WIREdata needs to respond to each of these factual presentations.

OVERVIEW- GROTA

On one hand, as they tried to do in the trial court and the court of Appeals, Defendants-Appellants-petitioner Michael L. Grota, Grota Appraisals, LLC and Assessment Technologies of WI, LLC (collectively "Grota"), have a unique way of presenting their case – they completely ignore the matters admitted in their Answer to the Amended Complaint, ignore the evidence stated

² The municipalities argued that because the assessors were custodians and authorities under the open records law, the municipalities should be dismissed. Judge Wolfram held that the municipalities were authorities and could not be dismissed on those grounds.

in the affidavits and simply dream up what they would have hoped the facts would be in an attempt to confuse what is otherwise a straight-forward fact scenario. Indeed, the 7th Circuit Court of Appeals referred to Grota's position as "absurd" and "appalling", while the Waukesha trial court called it "disingenuous". Assessment Technologies of WI, LLC v. WIREdata, Inc., 350 F.3d 640, 642 and 647 (7th Cir. 2003); (R.73:30).

OVERVIEW- MUNICIPALITIES

On the other hand, the municipalities apparently have had a curious change of heart. In this court, they take the position that the records should have been produced and that it was the assessors who acted to thwart the Open Records law. This position, that the records should have been produced, is a new one for the municipalities – who did actually have copies of the records which could have been produced, but were not. In essence, they say "don't hold us responsible – we wanted the records produced". However, previously, in the Trial Court and the Court of Appeals, the municipalities attempted to echo some of Grota's arguments about why the records should not have been produced.

OVERVIEW- FACTUAL EVENTS

On one hand, the factual events of this case can be summarized in a paragraph such as follows:

A request was made for a digital copy of the municipal tax assessment records as contained in an electronic database. The municipal assessor, an independent contractor, refused the request arguing copyright infringement and requiring the requestor to pay license fees for the copy. In federal court, it was determined that there is no copyright restriction to obtaining a copy. The Wisconsin Court of Appeals determined that the records should be produced and that the municipalities were liable for the costs and attorney fees for the failure to produce the records.

Unfortunately the myriad of arguments shot-gunned and presented by Grota mandates a review of the facts in great detail. Thus, notwithstanding the aforesaid one paragraph summary, the very specific details of this matter are as follows.

I. GENERAL BACKGROUND – MATTERS WHICH APPLY TO THE RECORDS KEPT BY BOTH MUNICIPALITIES

A. THE ASSESSORS KEEP THE RECORDS IN A MICROSOFT ACCESS DATABASE.

The electronic data is kept by both assessors in a “Microsoft Access” database since at least as early as 2001. (R-S 60:2, R-App

153-154; and R-PWTH.64:21-22, 34, R-App. 443-444, 446). Grota's Market Drive software is merely the computer program that manipulates the facts by "instructing" the computer where and in what order to place the data in the Access database (i.e., the data compilation). (R-PWTH.64:21-22, 34, R-App. 443-444, 446).

Obviously, Grota has no proprietary interest in the factual assessment data which is contained within the Microsoft Access database, nor does he own Microsoft. Further, the 7th Circuit Court of Appeals held that Grota's thin copyright in the "organization" of the data compilation cannot prevent access to the assessment data, or access even to a copy of the database itself. See Assessment Technologies of WI, LLC v. WIREdata, Inc., 350 F.3d 640 (7th Cir. 2003).

Therefore, any assertion or inference that Market Drive continues to prevent access to either the Village itself or WIREdata to the requested records is untrue.

B. MICHAEL GROTA IS THE SOLE OWNER OF BOTH GROTA APPRAISALS AND ASSESSMENT TECHNOLOGIES.

As a point of clarification, Michael Grota is the sole owner and member of Grota Appraisals, LLC ("Grota Appraisals") and

Assessment Technologies of WI, LLC (“AT”). (R-S.8:3-4, R.App.103-04; R-S.21:1-2, R.App.124-25.) Therefore, any communications with Mr. Grota are with both companies. Similarly, any claimed contracts or “requests for permission” between the two companies are really Mr. Grota talking with himself.

C. THE COMPLEXITY OF THE DATABASE DOES NOT PREVENT PROVIDING A QUICK EASY COPY.

As found by the 7th Circuit Court of Appeals, the database is maintained in a Microsoft Access format and is complex in that it is a relational database consisting of 456 fields divided across 34 tables. Regardless of this complexity, the Assessor’s own expert, Pelkey, testified that there are commonly known methods which would allow the entire database to be copied in 2 to 4 minutes.

II. THE REQUEST AND THE CUSTODIANS’ DENIALS THEREOF.

Because of the slightly different factual situations between Sussex and Port Washington, this portion of the factual presentation is arranged so that each of the municipalities are separately presented and discussed.

A. THE SUSSEX REQUEST AND DENIAL THEREOF.

1. The Request.

On April 20, 2001, WIREdata made a written open records request of Sussex and its assessor Michael Grota. (R-S-8:4, R-App. 104 and R-S 21:2, R-App. 125). The original April 20th request stated in relevant part as follows:

This is to formally request an electronic/digital copy of the detailed real estate property records (showing the specific characteristics of each parcel and the improvements thereupon) used and/or maintained by the Assessor in determining the proper assessments for each parcel within the Village of Thiensville.

(Id.)

2. The Failure To Respond.

On May 4, 2001, Andrew Pelkey (acting on behalf of Grota) initiated a call to Tom Curtis of WIREdata in response to WIREdata's April 20th request.³ (R-S.8:6, R-App. 104, R-S 21:2, R-App. 125). This fact was admitted in the pleadings.⁴ During that conversation, Pelkey indicated to Curtis that he would be facilitating WIREdata's receipt of the requested records and asked what data WIREdata typically examined and utilized, with the understanding that a full copy of the entire database itself would not be provided.

³ At the same time WIREdata had made the same request to Grota as assessor for the Village of Thiensville. Pelkey was responding to both requests.

⁴ Clearly even if it was not admitted in the answer, the only possible conclusion is that Pelkey is an agent. If a citizen sends a letter to a municipality and receives a call in response, the only possible conclusion is that the caller is acting as an agent of the person to whom the letter was sent.

That same day, May 4, 2001, Curtis e-mailed his response to

Pelkey's inquiry, which stated:

Selected fields requested from Market Drive software. Any type of electronic output and media is acceptable (*i.e.*, fixed length, comma-quote, pipe delimited). We would need a data layout, if the fields are not in the same order below.

Taxkey
County
Municipality
Town, Village or City Indicator
...

(Emphasis Added). (R-S.67:33-34, R-App. 215-16).

Grota later testified that Pelkey's conversations and correspondence with Curtis were on his behalf as both assessor and as owner of AT. (R-S.69:25-26, R-App.291-92 and R-S.61:11-12. R-App.165-66).

3. The Denial.

On May 18, 2001, Pelkey e-mailed Curtis stating that the requested records "for each municipality" would be provided "for the current year (2001) assessed values" upon the following terms: a one time "cost" of \$6,600.00 for creation of a customized computer program to extract the requested records from the database, plus per parcel fees and annual license fees. (R-S.67:35, R-App. 217).

Further, he said "[i]f you want to "add value" to any part of this data and distribute it in mass to another company, you will need to charge

your customer for our fee in addition to your fees for your added value.” (Id.). Grota later confirmed in his deposition testimony that the release of the requested records was absolutely conditioned on the terms quoted by Pelkey:

- Q: Let’s back up in you answer a little bit. You said Assessment Technologies has never denied a request of a community to produce data?
- A: It’s never been asked.
- Q: Well, did you ask Assessment Technologies as part of the request that was made for open records from WIREdata?
- A: Yes, I did.
- Q: And what did Assessment Technologies respond?
- A: That related back to the Mr. Pelkey’s conversation with Mr. Curtis, that there would be a cost of producing that to WIREdata.
- Q: So that in point of fact, Assessment Technologies was saying no, unless you pay the cost; is that correct?
- A: In this specific case, yes.

(R-S.61:9, R-App.163).

Grota further confirmed that the costs and fees quoted by Pelkey were not the actual, necessary or direct cost to reproduce the records, but included profits to AT as well. (R-S. 61:10, R-App.164).

Pelkey later admitted that he had considered providing the requested records to WIREdata in a comma-quote format, as requested by Curtis, but specifically chose not to because it was not Pelkey’s preference. (R-S.67:55-57, R-App. 244-45). Besides the license fees, which are impermissible under the open records law, Pelkey later testified that creation of a customized program was not

necessary to retrieve the requested records and identified five other methods by which WIREDdata could receive the data, none of which would take more than one to two hours, total, to complete. According to Pelkey, the specific methods are as follows:

1) Use Windows Explorer to copy. Total time 2-5 minutes. (R-S.67, R-App.243).

2) Export data using an existing property record card report. Total time of 1-2 hours. (R-S. 67, R-App.240 and R-S.61, R-App.180);

3) Use the export function in Microsoft Access. Total time 4 minutes. (R-S.67, R-App.243 and R-S. 61, R-App. 185);

4) Export only the requested tables and the data within them. Total time 40-60 minutes. (R-S.67, R-App.247 and R-S. 61, R-App. 191);

and

5) Use the backup function in Market Drive. Total time 15-30 minutes. (R-S.67, R-App.252, R-S. 61, R-App. 196).

The actual cost of any one of these methods of retrieval would be no more than \$100.00 – \$200.00 if Pelkey was to do the work himself.⁵ However, Pelkey also said that anyone capable of using Market Drive is also capable of extracting the data using any of the above methods. (R-S.61:46,R-App. 200). The assessors, then, could do this themselves without Pelkey's or AT's assistance.

On May 30, 2001, WIREdata filed its mandamus action against the Village and Grota.

4. The Village of SUSSEX Supported Grota's Position.
 - a. SUSSEX was involved in the determination of whether the records would be produced.

Upon receiving a copy of Pelkey's May 18th e-mail from WIREdata's counsel, John Macy, the attorney for the Village sent a letter to Michael Grota which asked for Grota's justification as to how these costs and fees represent actual and necessary costs. (R-S.55:44-45, R.App.211-12). It also cautions that WIREdata's attorney informed Macy that WIREdata was prepared to file a mandamus action and that Macy may recommend to the Village that it adopt a different approach from Grota in this regard if Macy is not satisfied that Pelkey's response is appropriate under the open

⁵ Based on Pelkey's stated hourly rate. (R-S.61, R-App.200).

records law. (Id.) Indeed Mr. Macy's characterization of Pelkey's responses is also clear where he says : "Andrew Pelkey's correspondence, to me, reads more like an advertisement than it does like a public records response".(Macy's letter of May 22, 2001; R-S.55:44-45, R.App.211-12).

In response, Pelkey sends a letter to Macy explaining Grota's position. (R-PWTH.53; R-App.353-354). The Village was apparently satisfied with this reasoning and stated as much when it reiterated these terms in its own letters to WIREdata, dated May 29 and June 25, 2001. (R-PWTH.57, R-App. 355-56 and R-PWTH 33, R.App. - 487). Grota himself told the Village that he was the proper party to address this matter and that the Village should send all further inquiries to him directly. Since then, the Village has taken the position that this matter doesn't involve them, but has not taken any actions to provide the data to WIREdata (R-S.60:2-3, R.App.153-54).

- b. The Village of Sussex could have supplied a copy of the data because it can access the data electronically, despite their read-only version.

Pelkey stated that a copy of the Access database could be made even if Market Drive is a read-only version. (R-S.61:47-48,

R.App.201-02). This is because while the Market Drive program may be limited to “read-only”, the Access Database has no such limitation. The Village has also admitted to possessing this read-only market drive program which means they also had a full copy of the database, not merely paper copies. (R-S.60:2-3, R.App.153-154.)

Further, Grota has no legal standing to limit the Village to a read-only version of its own data:

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. (Emphasis in original.)

Assessment Technologies of WI, LLC v. WIREdata, Inc., supra, 350

F.3d at 646-47. Nor, by the same token, can Grota legally charge the Village anything for a copy of its own data (in any format – electronic or otherwise) beyond the compensation he receives as assessor.

Despite this holding, however, there is nothing in the record to indicate that the Village either asked Grota to comply with the law or attempted to do so themselves.

c. Outside Correspondence Was Solely Between Other Parties and Did Not Involve WIREdata.

WIREdata was unaware of any correspondence or communications between Mr. Pelkey, Mr. Grota and the Village of Sussex. Nor was WIREdata provided any alternate cost or fee

amount for release of the records other than what was outlined in Mr. Pelkey's May 18, 2001 e-mail.

Furthermore, Mr. Macy's May 29th letter to WIREdata's counsel did not indicate anything that WIREdata didn't already know from Mr. Pelkey's May 18th correspondence. (R-PWTH 33, R-App. 482). As WIREdata's counsel indicated in his previous letter to Mr. Macy, dated May 21, 2001, those terms were unacceptable because they did not reflect the actual, necessary or direct cost of reproduction which the open records law requires. (R-S.67:39, R.App.221). Based on the unlawful, conditional terms for release outlined in Mr. Pelkey's May 18th letter, the instant mandamus action was filed on June 8, 2001.

Finally, the Village Administrator's, Mr. Marc Swartz, letter dated June 25th, merely told WIREdata what it already knew: That the terms for release were still conditioned on unnecessary, excessive and unlawful costs and fees. (R-PWTH 33, R-App. 487).

B. THIENSVILLE REQUEST AND DENIAL

Even though Thiensville has not requested review from this court, because Grota raises matters concerning Thiensville in his brief and because

Grota is effectively appealing whether the Thiensville data need be produced, it is important to also note the following about Thiensville.

1. The request, failure to respond and effective denial are the same as with Sussex;
2. The Village of Thiensville could have produced the requested records because they also had a full copy of the database along with a read-only copy of the Market Drive Program; and
3. The municipal officials of the Village of Thiensville also knew about Pelkey's response and were copied on the various correspondences from Mr. Macey, the attorney for the Village of Sussex. (R-PWTH 33, R-App.349, 355-56).

C. THE PORT WASHINGTON REQUEST AND DENIAL.

It should be noted that unlike Thiensville and Sussex, Port Washington has its own separate assessor, Earnest Matthies of Matthies Assessments, Inc. (who is not Grota or employed by one of Grota's family of companies). Matthies uses Grota's Market Drive software to run the Port Washington assessment database.

1. The Request.

WIREData made a written open records request to Port Washington's Treasurer, Mary Bley, on April 25, 2001 for

electronic/digital copies of Port Washington's assessment data. (R-PW.17:2, 8-9, R-App.328, 334-35 and R-PW.29:2, R-App.342). On May 4, 2001 the Treasurer responded that WIREdata could obtain the requested records and asked that the request be directed to its assessor, Matthies Assessments. (R-PW.17:2, 11, R-App.328, 336 and R-PW.29:2, R-App.342). At the same time, Ms. Bley forwarded WIREdata her written consent for the records release. (R-PW.17:2, 13, R-App.328, 338 and R-PW.29:2, R-App.342). On May 9, 2001, five days after Pelkey's call to Curtis, WIREdata sent a written request to Matthies, which states in relevant part:

WIREdata Corporation is requesting the detailed property information or assessor information such as square footage, age, number of bedrooms, number of baths, property class, etc. Please include the number of parcels, a current record layout, 10 printed data sheets, selected at random, code list for each field, and a copy of the property record card you are currently using.

Please give me a call at 414-778-6154 with any questions you might have and to discuss what the estimated cost will be to reproduce the detailed property information, to determine what fields to be reproduced and what type of media the data will be reproduced on.

(R-PW.17.12, R-App.337).

2. The Denial.

On May 22, 2001, two days after Pelkey's e-mail to Curtis outlining the costs for production, Matthies informed WIREdata that their request was denied, stating in relevant part:

I have received your request for “detailed property information” in your letter dated May 9th. I assume that by detailed property information, you are requesting a copy of the assessment data base used to store assessment data for the City of Port Washington. . . .

. . .
I spoke with Robert Grota, one of the principles at Assessment Technologies regarding your request for a copy of the Port Washington database. He informed me that my license/purchase agreement with his firm precludes me from complying with your request. This contract specifies that the 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 documents to others”. According to Mr. Grota, this means that I do not have the right to provide your firm with a copy of the Port Washington database.

If you wish to pursue this matter further, I would suggest that you contact Robert Grota at Assessment Technologies directly.

p.s. Assessment data printouts of individual parcels are available upon request for a reasonable fee. Access to assessment data in this format is available to the public upon request.

(Emphasis added.) (R-PW.17:14-15. R-App.339-40).

On June 12, 2001 WIREdata filed its mandamus action against the City and Matthies.

Eventually, three and a half years after the information was requested and the lawsuit was commenced, AT and Pelkey sent WIREdata a PDF file of the Port Washington assessment records on behalf of Matthies. (R-PWTH.78:8, 17, R-App.475, 477). Matthies later confirmed his belief that this PDF file satisfied WIREdata’s request.

3. Port Washington’s Involvement in the Denial.

In response to WIREdata's request, the City Treasurer directed WIREdata to Matthies Assessments. (R-PW.17:2, 11, R-App. 328, 336 and R-PW.29:2, R-App.342). There is a clear and direct stream of communications from WIREdata to Matthies via the City of Port Washington. Since Matthies is the City's assessor, his actions on its behalf are the actions of the municipality itself. He is a Port Washington official. Furthermore, with the exception of Mary Bley's initial written statement that WIREdata was entitled to the record, Port Washington has consistently supported Matthies' position as to deny WIREdata's access to the requested records. (R-PW.17:2, 13, R-App. 328,338; R-PW.29:2, R-App. 342). Therefore Matthies denial is the denial of Port Washington.

III. THE MANDAMUS ACTION AND COPYRIGHT INFRINGEMENT SUIT.

A. THE DEFENDANTS ORIGINALLY ARGUED THAT THE DENIALS WERE JUSTIFIED TO PREVENT COPYRIGHT INFRINGEMENT.

As to Port Washington, Matthies' May 22nd letter clearly stated that the only reason for non-production was AT's copyright. (R-PW.17:15-16. R-App.339-340).

As to Sussex and Thiensville, Grota conditioned release on impermissible copyright license fees and costs, thereby effectively denying the request. (R-PWTH37.77, R-App.396). Grota's counsel later confirmed their client's position in a letter to WIREdata's counsel explaining that AT was not giving permission for Grota Appraisals to disseminate the copyrighted data compilation, belying the fact that Grota is the sole party to this exchange. (R-S.67, R-App.260-262). Further, Grota's counsel stated:

The records that your client desires can be obtained, they simply cannot be provided in the format your client requested without the infringement of Assessment Technologies of WI, LLC's copyrights and the risk of trade secret misappropriation. (Emphasis in original.)

(R.67, R-App.262).

Obviously, this communication between "AT" and "Grota Appraisals" is really Grota talking to himself.

Both municipalities directed WIREdata's requests to their assessors and supported the positions of their assessors after the denials were made. (R-PWTH.33, R-App. 345-56, 482-89).

On August 3, 2001, Grota filed a copyright infringement action against WIREdata, Inc. in the U.S. District Court for the Eastern District of Wisconsin, at which time all circuit court matters were stayed pending the outcome of the federal copyright question.

B. EASTERN DISTRICT COURT FINDS FOR GROTA.

In federal court, Grotta claimed that even if the factual assessment records were extracted from the database, such an extraction would constitute a derivative work subject to the protection and control of AT's (and more specifically Grotta's) copyright. Grotta originally prevailed in the Eastern District Court.

C. SUBSEQUENTLY, EACH WISCONSIN TRIAL COURT DISMISSES THE WIREDATA CASES BASED ON AT'S COPYRIGHT.

Based on the Eastern District decision, the defendant's filed summary judgment motions in Waukesha and Ozaukee County Circuit Courts. Specifically, Grotta argued that the Market Drive database compilation made the requested data an exception to the definition of a record under Wis. Stat. § 19.32 and that Wis. Stat. § 19.36(4) precluded access to the database or any output thereof. No other reasons were raised by the defendants to support the custodians' denials of the requests. (Id.)

In the Sussex case, the Waukesha Circuit Court granted the defendants' motions for summary judgment based on the copyright exception.

The Ozaukee Circuit Court granted summary judgment to the defendants based on issue preclusion, however, Judge Wolfgram also opined that even if issue preclusion would not apply, he would still find for the defendants based on the copyright issue alone. (R-TH.66:5-6, R-App. 324-326).

D. THE 7TH CIRCUIT COURT OF APPEALS REVERSED THE DISTRICT COURT AND HELD THAT THERE COULD BE NO INSTANCE OF COPYRIGHT INFRINGEMENT IN THIS MATTER.

In November 2003, the U.S. Court of Appeals for the 7th Circuit reversed the Eastern District's decision supporting this open records exception, holding that the material requested were facts not protected by copyright, that there could be no instance of copyright infringement in this matter and cited four possible methods by which WIREdata was entitled to receive the data. Assessment Technologies of WI, LLC v. WIREdata, Inc., 350 F.3d 640 (7th Cir. 2003).

The methods are: (1) the municipalities use Market Drive to extract the data and place it in an electronic file; (2) they use Microsoft Access to create an electronic file of the data; (3) they 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; (4) they copy the database file and give it to WIREdata to extract the data from.

Id. at 647-648.

Specifically, the court first held that AT's thin copyright could not limit access to the factual data requested because extracting unprotected facts out of a copyrighted database does not constitute a derivative work.

The court further held that even if the only way to extract the data would require WIREdata to make a copy of the copyrighted database itself, "so that it would be copying the compilation and not just the compiled data only because the data and the format in which they were organized could not be disentangled, [WIREdata] would be privileged to make such a copy . . ." (Citations omitted.) Id. at 645.

The 7th Circuit also held that AT could not use its copyright in the database compilation to justify providing paper copies instead of the digital/electronic copies requested by WIREdata:

[s]ince AT has no ownership or other legal interest in the data collected by the assessor, it has no legal ground for making the acquisition of that data more costly for WIREdata. AT is trying to use its copyright to sequester uncopyrightable data, presumably in the hope of extracting a license fee from WIREdata.

Id. Finally, the court stated that were AT "[t]o 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, it might constitute copyright misuse." (Emphasis in original.) Id. at 646-647.

It is on this basis of this decision that the circuit courts reversed their previous holdings in these open records mandamus actions.

**E. BACK TO CIRCUIT COURT - THE DEFENDANTS
RAISE NEW REASONS FOR DENYING THE
REQUESTS.**

Having lost their only previously cited exceptions to producing the records, the assessors asserted new reasons to prevent production – that the requests were insufficient as to subject and time pursuant to Wis. Stat. § 19.35(1)(h). This exception to disclosure was never asserted by the custodians at the time of the denials, or in their 2003 summary judgment motions. This issue was only first claimed by counsel in their second set of summary judgment motions filed in October, 2004.

**F. GROTA CREATES A WAY TO CLAIM HE HAS
PRODUCED THE DATA WHEN HE REALLY HAS
NOT DONE SO.**

Finally, in or around June, 2004 Grota had Pelkey convert the data to Portable Document Files (“PDF”) and sends these files to WIREdata on behalf of both Grota Appraisals and Matthies Assessments. (R-PWTH.73:5-7, R-App.475-77). After reviewing the files, WIREdata determined that the PDFs were not in the format

requested by WIREdata in 2001, did not allow for a full and accurate review of the information and therefore, did not satisfy the request. WIREdata has consistently maintained this position since the files were first received. (Id.)

ARGUMENT

I. STANDARD OF REVIEW

A. SUMMARY JUDGMENT.

Summary judgment must be entered where it can be shown that there are no genuine issues as to any material facts and that the moving party is entitled to judgment as a matter of law. Wis. Stat. § 802.08. The appellate standard of review on summary judgment is *de novo*. State ex rel. Schultz v. Wellens, 208 Wis. 2d 574, 576, 561 N.W.2d 775 (Ct. App. 1997).

The appellate court may always review questions of law *ab initio*. See Board of Regents v. Personnel Comm'n, 103 Wis. 2d. 545, 551, 309 N.W.2d 366 (Ct. App. 1981).

B. THE OPEN RECORDS LAWS MUST BE INTERPRETED BROADLY IN FAVOR OF PUBLIC DISCLOSURE.

Wisconsin courts have consistently upheld the stated intention of the legislature that the open records laws must be interpreted broadly in favor of public disclosure of information.

Wis. Stat. § 19.31 states in relevant part:

. . . 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.

Any exception cited by Grota must be very narrowly construed.

Any exceptions to the general rule of disclosure must be narrowly construed . . . Section 19.21, Stats., in light of prior cases, must be broadly construed to favor disclosure. Exceptions should be recognized for what they are, instances in derogation of the general legislative intent, and should, therefore, be narrowly construed; and unless the exception is explicit and unequivocal, it will not be held to be an exception. It would be contrary to well established principles of freedom-of-information statutes to hold that, by implication only, any type of record can be held from public inspection.

(Emphasis added.) Fox v. Bock, 149 Wis. 2d 403, 438 N.W.2d 589, 592-93 (1989); citing Hathaway v. Green Bay School Dist., 116 Wis. 2d 388, 397, 342 N.W.2d 682 (1984); See also Eco, Inc. v. City of Elkhorn, 259 Wis. 2d 276, 655 N.W.2d 510 (Ct. App. 2002). Under this analysis, WIREdata is entitled to the requested data.

II. THE MANDAMUS ACTIONS WERE PROPERLY BROUGHT AS THE REQUEST WAS EFFECTIVELY DENIED.

It appears that the current position of the municipalities is that the data should have been produced. Grota, on the other hand, claims that the Mandamus actions were not properly brought because there was never an explicit denial.

The arguments raised by Grota are against a factual backdrop of that:

1. His own expert agrees that, if they had wanted to produce copies, the records could have been copied within a very short period of time (depending on the method chosen- from 2 minutes to 2 hours)
2. The time period between the original request and the commencement of the mandamus action was about 6 weeks; and
3. The records, as requested, were never produced (albeit that an insufficient ineffective PDF copy was provided about three and one-half years later).

Accordingly, the facts clearly show that the request was never fulfilled even though it quickly could have been. Further there is no legal requirement for an explicit denial before the requestor commences litigation. Even if there were a requirement for such an

explicit written denial, the facts of this case show that there was such a denial.

A. WIS. STATS. §§ 19.31-19.37, CONTEMPLATES EITHER A GRANT OF THE REQUEST OR A DENIAL – NOTHING IN BETWEEN.

“The statute contemplates a process by which the custodian of the records either grants or denies a request for inspection. Sec. 19.35(4) (a), Stats.” Oshkosh Northwestern Company v. Oshkosh Library Bd., 125 Wis. 2d 480, 484, 373 N.W.2d 459 (Ct. App. 1985).

Further:

If the custodian gives no reasons or gives insufficient reasons for withholding a public record, a writ of mandamus compelling the production of the records must issue. Beckon v. Emery, 36 Wis. 2d 510, 518, 153 N.W.2d 501, 504 (1967)] states, ‘There is an absolute right to inspect a public document in the absence of specifically stated sufficient reasons to the contrary.’ (Emphasis in original.)

State of Wisconsin ex rel. Elizabeth Blum v. Bd. of Educ., 209 Wis. 2d 377, 385-86, 565 N.W.2d 140 (Ct. App. 1997); citing Newspapers, Inc. v. Breier, 89 Wis. 2d 417, 427, 279 N.W.2d 179, 184 (1979).

Furthermore, despite Grota’s arguments to the contrary, no “affirmative denial” need be given in order for a denial to have taken place. In WTMJ, Inc. v. Sullivan, 204 Wis. 2d 452, 555 N.W.2d 140 (Ct. App. 1996), the Wisconsin Court of Appeals held that a response by the Wisconsin Department of Corrections custodian to the open

records requestor stating that the records would be released at some unspecified time in the future, was a denial of the request because it was contrary to the policy set out in the open records law.

Specifically, the court held:

This is contrary to the policy set out in § 19.35(4) STATS., which requires that upon request an authority shall fill or deny the request “as soon as practicable and without delay.” Those are the statutory choices: comply or deny. . . . The State’s third choice, compliance at some unidentified time in the future, is not authorized by the open records law.

Id. at 457. Although the instant facts and relevant section of the open records law differ from those in WTMJ, the analysis of the facts to the statute are the same.

B. THE VARIOUS COMMUNICATIONS THAT
WIREDATA RECEIVED MADE IT CLEAR THAT THE
REQUEST WAS DENIED.

1. The Records For Sussex And Thiensville Would Not Be Produced Unless Wiredata Paid The Amount Demand And Agreed To The Terms Limiting Their Use Of The Information.

Pelkey’s response made it clear that unless WIREdata paid the tribute and agreed to limit its use of the information, the data would not be provided. (R-S. 61: 9-10, R. App. 163-64).

2. Port Washington’s Data Base Would Not Be Supplied Until Grota Gave His Permission.

Matthies send a letter which unequivocally said that he would not supply a copy of the database until Grota said it is ok to do so.

3. Even After The Mandamus Was Commenced, The Copy Of The Records Were Not Supplied.

Once the mandamus was commenced, everyone was absolutely on notice that WIREDdata had made this Open Records request and the information was not provided. There was no response which said “oh here you are”. All of the subsequent communications made it extremely clear that for alleged copyright reasons, the records (in an electronic format) would not be provided.

C. **EVEN IF THERE WAS NOT AN ACTUAL DENIAL,
THE REQUEST WAS DENIED FOR INSUFFICIENT
REASONS UNDER THE LAW.**

Grota effectively denied the request when the terms for release of the data were conditioned on the impermissible license fees and unnecessary costs detailed in Mr. Pelkey’s May 18, 2001 e-mail.

These fees are improper for 4 reasons:

1. Wis. Stat. § 19.35(3)(a) states that the cost to a copy a record “may not exceed the actual, necessary and direct cost of reproduction and transcription of the record.” (Emphasis added.) Pelkey’s license fee condition clearly exceeds the “actual costs”

prescribed in the open records statute because license fees, by definition, are not “costs”.

2. \$6,600.00 (plus thousands of dollars for per parcel fees) is not the actual costs to produce the records. Mr. Pelkey himself later testified that his calculation as to the time it would take to extract the data was wrong and that therefore the cost would actually be less than \$6,600.00 – a fact that Grota’s counsel concedes in its own brief to the Court of Appeals.

3. It was not necessary for Mr. Pelkey to create a customized program to extract the data from the database. Mr. Pelkey testified to five other methods that he could have employed at the time to do the same task, none of which would take more than approximately one to two hours time. Even if Mr. Pelkey did the work himself, despite the fact that according to him, this work could have been done by the assessors, this would only cost WIREdata, at most, between \$100.00 to \$200.00 – a far cry from \$6,600.00 plus the other fees and conditions which Grota was imposing.

4. Mr. Grota himself knew that these “costs” included profits and not just actual costs. (R-.61:9-10, R. App. 163-64.)

Finally, Mr. Grota's attorney confirmed that Mr. Grota would not grant the request, except as outlined by Mr. Pelkey:

In order to avoid copyright infringement and trade secret misappropriation by either the respective villages or your client, we urge you to reconsider the appropriate business resolution that Assessment Technologies of WI, LLC has presented to date.

(R-S.67:82, R. App. 262.) As in WTMJ, these terms for release are contrary to the public policy set out in 19.35(3)(a), which requires that the requester be charged for "the actual, necessary and direct cost of reproduction." Even if one were to assume, *arguendo*, that \$6,600.00 plus \$3,132⁶ was the actual and necessary cost, the copyright license fee requirement is clearly not authorized by the statute.

Therefore, Grota's "offer" to produce the records was correctly construed by WIREdata as effectively a denial of the records because release was conditioned on terms unauthorized by the statute.

D. GROTA'S ARGUMENTS THAT THE REQUEST WAS NOT DENIED ARE WITHOUT MERIT AS "LACK OF A RESPONSE" ALSO CONSTITUTES A DENIAL.

The most obvious evidence that WIREdata's request was denied was that it did not receive any records. While Grota states that no "affirmative denial" took place, he does not deny that the

⁶ The detailed per parcel initial fee for the Village of Sussex data.

requested records were not produced.⁷ Therefore, even according to Grota's own version of events, the Court must uphold the lower court's grant of the mandamus action because "if the custodian gives no reasons or gives insufficient reasons for withholding a public record, a writ of mandamus compelling the production must issue." (Emphasis added.) Ex rel. Elizabeth Blum v. Bd. of Educ., *supra*, 209 Wis. 2d at 385-86; citing Newspapers, Inc. v. Breier, *supra*, 89 Wis. 2d at 427.

Furthermore, Grota's argument that the PDF sent to WIREdata in 2004 fulfilled the request does not cure the fact that the request was denied in 2001. First, for reasons set forth subsequently in Section V herein, the PDF does not satisfy WIREdata's request, which includes the enhancement made by Mr. Curtis in his May 4th e-mail to Mr. Pelkey, subsequent to the original April 20th request. Second, assuming, *arguendo*, that the PDF does satisfy the request, the only reason that it was released at all was a

⁷ Although Grota states he produced the records in PDF, this was not until 3 1/2 years after the request was made and not in accord with either the original or enhanced request.

result of the mandamus action being filed.⁸ Therefore, the request was denied and the writ of mandamus should issue.

Lastly, Grota's argument that WIREdata's "rush to court" prevented further discussion, which allegedly may have resulted in its receiving the requested data short of litigation, is without merit. First, this argument completely belies the fact that Grota and his counsel were uncompromising on the terms for release of the records.

Second, the "rush to court" argument in-and-of-itself has little merit as the court in WTMJ pointed out:

The 'quickness' horse is already out of the barn. In Auchinleck, the court said: "If a municipality withholds a record or delays granting access, the requester may immediately bring a mandamus seeking release of the records." (Emphasis added.)

WTMJ v. Sullivan, *supra*, 204 Wis. 2d at 461; citing State ex rel.

Auchinleck v. Town of LaGrange, 200 Wis. 2d 585, 592-93, 547 N.W. 2d 587, 590 (1996).

For the reasons described above, the trial court and the Court of Appeals had more than enough undisputed evidence before it to find that Grota denied WIREdata's request.

III. THE OPEN RECORDS REQUESTS WERE VALID.

⁸ This also makes the question of attorney's fees still very much in play despite Grota's insistence that the 2004 PDF makes this case moot.)

The Court of Appeals held that since the objection were not made by the custodian at the time of the records request and since these alleged defects were not raised until 2 years later in the Mandamus proceedings, these objections to the Open Records request are procedurally invalid. The court also held that even if they were not procedurally invalid, these supposed objections were without merit.

A. GROTA'S CONTENTION ABOUT SUFFICIENCY OF THE REQUESTS SHOULD NOT BE CONSIDERED BY THE COURT AND ARE THEREBY DEEMED WAIVED.

1. Exceptions Pursuant To Wis. Stat. §§ 19.35(1)(H) And 19.35 (1) (L) Were Never Asserted By Grota And Only First Raised By Grota's Counsel In Its Motion For Summary Judgment, Filed With The Trial Court In October, 2004.

Grota denied the request on May 18, 2001, when it conditioned release of the records on unauthorized fees and excessive and unnecessary costs. (R-S:67:35, R.App.217.) Grota's counsel then spent the next year and a half arguing that the requested data need not be released because it infringed Mr. Grota's copyrights in the Market Drive software. When that argument failed in late 2003, Mr. Grota's counsel came up with yet two more reasons as to why the data should not be released: First, that the requests were

insufficient as to subject matter and time pursuant to Wis. Stat. §19.35(1)(h); and second, that production would create a new record pursuant to Wis. Stat. §19.35 (1)(L). The first time these reasons for denial were ever asserted was by Grota's counsel in its Motion for Summary Judgment, filed on October 29, 2004. However, since these reasons were never asserted by the custodian at the time of the denial, he cannot raise them now.

The Supreme Court of Wisconsin has clearly articulated that when the court is analyzing whether or not a record should be produced, it must determine whether the custodian's reason for denial was sufficient:

The duty of the custodian is to specify reasons for nondisclosure and the court's role is to decide whether the reasons asserted are sufficient. It is not the trial court's or this court's role to hypothesize reasons or to consider reasons for not allowing inspection which were not asserted by the custodian.

(Emphasis added.) Newspapers, Inc. v. Breier, *supra*, 89 Wis. 2d at 427; See also, Fox v. Bock, *supra*, 149 Wis. 2d at 416 and Osborn v. Bd. of Regents, 254 Wis. 2d 266, 283, 647 N.W.2d 158 (2002). It was for this reason that the Supreme Court in Osborn did not consider whether Wis. Stat. § 118.125 protected the requested documents from disclosure “because the University did not use this statute, originally, as a reason for denying access to the records.” Osborn v.

Bd. of Regents, supra, 254 Wis. 2d, 294, n.13. The Court of Appeals further expounded on this long-held position in its holding in

Oshkosh Northwestern Company v. Oshkosh Library Bd.:

The statute contemplates a process by which the custodian of the records either grants or denies a request for inspection. Sec. 19.35(4) (a), Stats. Where inspection is denied, it is the custodian, not the attorney representing the governmental body after a mandamus action is commenced, who must give specific and sufficient reasons for denying inspection." (Emphasis added.)

Oshkosh Northwestern Company v. Oshkosh Library Bd., 125 Wis. 2d 480, 484, 373, N.W.2d 459 (Ct. App. 1985).

If the custodian gives no reasons or gives insufficient reasons for withholding a public record, a writ of mandamus compelling the production of the records must issue. Beckon [v. Emery, 36 Wis. 2d 510, 518, 153 N.W.2d 501, 504 (1967)] states, 'There is an absolute right to inspect a public document in the absence of *specifically stated sufficient* reasons to the contrary.' (Emphasis in original.)

State of Wisconsin ex rel. Elizabeth Blum v. Bd. of Educ., 209 Wis. 2d 377, 385-86, 565 N.W.2d 140 (Ct. App. 1997); citing Newspapers, Inc. v. Breier, 89 Wis. 2d 417, 427, 279 N.W.2d 179, 184 (1979).

After reviewing the custodian's initial denial letter, the Blum Court stated:

We also agree with Blum that the [custodian's] post-petition response by legal counsel does not necessarily cure the insufficiencies of its original denial.

Ex. rel. Elizabeth Blum, 209 Wis. 2d at 386; citing Oshkosh Northwestern Company, supra, 125 Wis. 2d at 484.

Therefore, the Court must look at the sufficiency of Grota's denial when determining whether or not the plaintiff has the right to

inspect and copy the records, not any new arguments made by their counsel.

2. Neither Custodian Cited Wis. Stat. § 19.35(1)(h) at the time of the denial and should not be able to do so now.

As a matter of principle, a custodian should not be allowed to claim that a request has been fulfilled or that they would give paper copies, while simultaneously arguing that the request was not reasonably understood. Indeed, one must observe that they understood the Sussex request enough to set the specific price of \$3,132 as part of the fees they would be charging.

In addition to Grota's denial (via Pelkey of May 18, 2001)(R-S:67:35, R.App.217), Matthies denied the request in his May 22, 2001 letter based on AT's copyright in the Market Drive software. (R-PW.17:15-16, R-App.339-340).

Counsel had an opportunity to assert this statutory exception in its first motions for summary judgment, filed in 2003, but they did not. Instead, the sole focus of those motions was that AT's copyright made it an exception to the definition of a record pursuant to Wis. Stat. § 19.32. The basis for Judge Wolfgram's decision rested on the copyright issue alone. (R-TH:66:5-6, A-App.325-26).

It was only after Grota's copyright infringement claim failed that counsel first argued that the request should be denied pursuant to Wis. Stat. §19.35(1)(h). The defendants should not be allowed yet another "kick at the cat". Doing so would effectively allow the government to avoid disclosure by merely citing a new reason for denial every time their previous argument was found insufficient. The Court Of Appeals decision must be upheld and the mandamus action should issue.

B. THE REQUESTS WHEN EVALUATED ON THE MERITS WERE SUFFICIENT.

1. The Requests were Sufficient as to Subject Matter and Length of Time.

Wis. Stat. § 19.35(1)(h) states:

"A request under pars. (a) to (f) is deemed sufficient if it reasonably describes the requested record or the information requested. However, a request for a record without a reasonable limitation as to subject matter or length of time represented by the record does not constitute a sufficient request."

The Court of Appeals has previously held that 19.35(1)(h) does not "require a request to contain any 'magic words' nor [does it] prohibit the use of any words." ECO, Inc. v. City of Elkhorn, *supra*,

259 Wis. 2d at 292. A request is sufficient if “it reasonably describes the requested records or the information requested.” Id.

Federal court interpretation of the analogous Freedom of Information Act (“FOIA”) statutory requirement for “identifiable records” under 5 U.S.C. 552(a)(3) provides that a request is sufficient if it contains “a reasonable description enabling the Government employee to locate the requested records,” but it is “not to be used as a method of withholding records.” Bristol-Myers Co. v. F.T.C., 138 U.S. App. D.C. 22, 424 F.2d 935, 938 (D.C. Cir. 1970) (citations omitted). The Wisconsin Court of Appeals has also held that federal court decisions under FOIA are persuasive authority for the interpretation of similar language in our state open records statute. See Racine Education Assoc. v. Bd. of Education, 129 Wis.2d 319, 326, 385 N.W.2d 510, 312 (Ct. App. 1986).

Under these interpretations, and with an eye toward viewing the 19.35(1)(h) exception narrowly, WIREdata’s requests were reasonably sufficient.

- a. Both The Original and the Enhanced Requests were Sufficient, Clearly Stated and Understood.

The original WIREdata request to Grota was quite clear and said:

An electronic/digital copy of the detailed real estate property records (showing the specific characteristics of each parcel and the improvements thereupon) used and/or maintained by the assessor in determining the proper assessments for each parcel within the Village of Sussex.

(Emphasis added). (R-TH.11:12, R-App.314).

One cannot judge the reasonableness of a request outside of the facts of its submission. This request, as made to a municipal tax assessor, has clear limitations as to time and subject by virtue of the information assessors actually use to make tax assessments. Indeed, Pelkey's responding communication uses the terms "2001 database" which implicitly, if not actually, admits that the assessor knew precisely what timeframe and information WIREdata was talking about.

Contrary to the implication of Grota's counsel that records were requested going back to the beginning of time, Grota does not have or use property tax information from the 1800's to make his assessments. As the trial court pointed, this meant that Grota should have given the requestor what Grota had. When questioning Grota's assertion that the request sought data potentially going back to the 1800's, the court asked how far back did Grota have data. His

counsel responded that he believed Grota had data since about the late 1990's. (R-S.73) At that point, the court saw the argument to be a sham.

The court got to the heart of the matter – Grota should have produced what he had, since his own programmer stated it would take less than a few minutes to do so. (R-S 73:11-12). In other words, Grota's counsel was just bringing up totally irrelevant arguments.

In fact, WIREdata could not have made its request more specific because there is no one set of factors uniformly used by assessors in determining tax assessments – every municipal assessor uses slightly different factual information to make his or her own assessments.

For example, one assessor might consider the square footage of a house whereas another might not. Pelkey stated as much in his May 18th email when he explained that some fields of data in Market Drive may not be filled out by every assessor, citing “zoning” as an example. (R-PWTH37:77, R-App.396).

In addition, assessors do not necessarily gather new information each year on each parcel within a given municipality. (R-PW.17:11, R-App.336). In light of these circumstances, a request for

detailed property records that an assessor has and uses to make assessments is perfectly reasonable.

Moreover, Pelkey understood that the request was for 2001 records and confirmed this in his May 18th e-mail to WIREdata. (R-PWTH.37:77, R-App.396). He also indicated that each assessor determines for himself what fields of information to fill out in the database, out of all fields possible. (*Id.*). Therefore, WIREdata's request for records used or kept by the assessor in a specific municipal database was reasonable.

Even if one assumes, *arguendo*, that the original letter was unclear as to subject matter, Mr. Curtis's May 4th e-mail could not have made the subject matter of the request clearer. Mr. Curtis provided Mr. Pelkey with a specific list of fields of information WIREdata typically used and were looking for, short of receiving a copy of the entire database.⁹

b. The Record Does Not Support Grota's Contention.

More importantly, Mr. Grota has never expressed confusion over the requests subject matter or length of time at any

⁹ It is not WIREdata's contention, however, that Mr. Pelkey asked for this information to clarify an unclear request. Instead, Mr. Pelkey asked for the fields WIREdata typically uses because Grota was not going to provide the entire database.

point during the first three years of this case. Mr. Grota has been an assessor for many years and is well versed in the language and business of municipal property tax assessments. (R-S .67:99, R.App. 225) There is no statement by Mr. Grota in the record, or in any affidavit, which would support this new claim. In fact, the record supports just the opposite, that the subject matter and length of time of the request were never in question.

First, Mr. Pelkey's May 18th correspondence to Mr. Curtis indicated that AT was ready to give WIREdata the "current year (2001) assessed values" for each municipality shortly after the subsequently enhanced request was made. (R-S.67:35, R.App.217).

Second, Mr. Grota has always been willing to supply paper copies of the same information. Similarly, Grota contends that WIREdata has already received the requested data via the PDF provided in 2004. If there was truly confusion over the subject matter and length of time of the request, it could not be fulfilled in any format, paper or otherwise. But that is not what this case is about. The only objection Grota has ever had to granting the request is that he does not want to provide a digital/electronic copy of data in its unaltered state, in the database.

There is no confusion here as to subject matter or length of time of the request. This entire argument is merely a new defense Mr. Grota's counsel has come up with after having lost the battle over their only previously cited exception, Mr. Grota's copyright in the Market Drive software.

c. The Facts Here Are Distinguishable From Schopper.

This case is distinguishable from Schopper v. Gehring, 210 Wis. 2d 208, 565 N.W.2d 187 (Ct. App. 1997), for several reasons. First, unlike the custodian in Schopper, Grota never asked WIREdata for clarification as to subject matter or time.

In Schopper, plaintiff requested a three hour interval of 911 calls recorded by the Outagamie County Sheriff's Department on November 29, 1995. Id. at 188. Because 911 calls were recorded on sixty channels, the sheriff sent a letter to Schopper asking him to narrow or clarify the scope of his request, suggesting that he identify specific times of the transmission or identify the specific incident to which the call related. Id. at 189. Schopper never responded to this request for clarification. Id. The court held that the request was overbroad and that the sheriff did not have to respond because "[Schopper] could reasonably have limited his request but failed to do

so, and because the request placed an unreasonable burden upon the custodian in preparation of the documents necessary to fulfill the request . . .” Id. at 190. Further, the court stated:

While this state favors the opening of public records to public scrutiny, we may not in furtherance of this policy create a system that would so burden the records custodian that the normal functioning of the office would be severely impaired. (Id.)

Unlike the custodian in Schopper, at no point did Mr. Grotta ask for clarification of the request or an amendment to the request’s subject matter or length of time. The only reason previously cited by Mr. Grotta for refusing to grant WIREdata’s request, was his copyright in the Market Drive software. Defendant’s October, 2004 motion is the first time, since the requests was made four years ago, that this issue has been raised. Mr. Grotta’s willingness to provide paper copies – and his new assertion that he has provided the data only a year ago by sending it to WIREdata in a PDF format – shows that he understood the subject matter and length of time of WIREdata’s request. Furthermore, fulfilling WIREdata’s request would not pose an undue burden on Mr. Grotta.

Mr. Pelkey, has since testified that the request could in fact be satisfied in any one of five ways, none of which would take more than one to two hour of time. Mr. Pelkey further testified that anyone

capable of using Market Drive would also be capable of extracting the data using any of these five methods of retrieving the requested data.

Thus, even if Mr. Grota himself were to satisfy WIREdata's subsequently enhanced request, he could have done so using any of the methods identified by Mr. Pelkey without undue strain on the office of the assessor.

WIREdata's request, therefore, was sufficiently clear as to subject matter and length of time and providing Mr. Grota with the requested records would not overly burden the office of the assessor.

2. The Port Washington Request was Sufficient.

Similar to the request of Grota, WIREdata requested a copy of what Matthies had used to make his assessments – a copy of the Port Washington assessment database. As to the scope and length of time, WIREdata was asking for whatever was kept in the assessors' database and provided specific examples of the types of information it sought. (R-PW.17:13, R-App. 334).

Matthies formal response to WIREdata confirmed that he knew WIREdata was asking for a copy of the Port Washington assessment database and denied it based on AT's copyright in the

same. (R-PW.17:15-16, R-App.339-40). A request that was correctly understood to be asking for a copy of the assessment database is reasonable even under a narrow interpretation of Wis. Stats. Sec.19.35(1)(h).

The statute does not require that the requester include a precise limitation as to timeframe and list of fields of information requested – only that a reasonable limitation be given. Further, the analogous FOIA language has held that a request is reasonable if a custodian can locate the requested records. Bristol-Myers Co. v. F.T.C., *supra*, 424 F.2d at 938. Matthies did just that.

That the requests of both assessors were reasonable is further evidenced by the fact that neither custodian asked for clarification on this point.

3. Neither Custodian Asked for Clarification as to Subject Matter or Timeframe.

Neither custodian sought clarification of the time and subject matter of these requests when made. In fact, both custodians stated that the requests could be fulfilled, so long as it was in a different format. (R-S 21; R-App. 126). Grota's counsel confirmed this position:

The records your client desires can be obtained, they simply cannot be provided in the format your client requested without the infringement of Assessment Technologies of WI, LLC's copyrights and the risk of trade secret misappropriation.

(Emphasis in original). (R-S 67, R-App.262).

Matthies stated in deposition that the only two reasons he had for denying the request was (1) because his contract with AT prevented him from doing so and (2) because he was unsure if an electronic format was covered by the open records law. (R-PWTH.37:25-26, R-App. 371-72).

At no time after the requests were made did either custodian say they did not understand the scope of the request or ask for clarification. If the requests were truly unreasonably vague, then the custodians would not be able to fulfill the requests at all, regardless of the format. One cannot logically state that a request is unreasonably vague such that the records cannot be identified or located and then turn around and assert that – without any additional clarification – the request has been fulfilled.

The facts proving that the requests were reasonably understood should not be ignored. This entire argument is merely another attempt to avoid compliance, and liability, when their sole

original exception to disclosure – copyright infringement – has been found to be invalid.

4. Fulfilling the request would not place an unreasonable burden on the office of the assessor.

A key consideration in determining the reasonableness of a request under 19.35(1)(h) is whether the request would impose a burden that would severely impair the functioning of the office of the custodian. See Schopper v. Gehring, 210 Wis.2d 208; 565 N.W.2d 187 (Ct. App. 1997). Neither assessor have provided any evidence, affidavit or other testimony which would prove that WIREdata's request would be a burden on their offices. In fact, their testimony proves otherwise.

Pelkey testified that copying the database would only take a few minutes of time – even if, *arguendo*, the database did contained factual assessment data going back to “time immemorial”. Moreover, both assessors directed WIREdata to AT and Pelkey to obtain the requested information. (R-PWTH.33, R-App. 345-56, 482-89).

Further, both assessors testified that they believe Pelkey has already fulfilled the requests for them by supplying the PDF. (R-PWTH.73:8, 17, R-App. 477). Since Pelkey, and not anyone from the assessors' offices, would be making the copies, it could not be a burden that

would severely impair the custodians' offices. Any possible burden on the custodian's office is minimal since they are not doing the work.

Finally, even if the assessors were to do the work of copying themselves, Pelkey testified that it could be done with minimal time and effort on their parts. (R-PWTH.37:69, R-App.389). Matthies testified that he routinely backs up the database by copying it to a removable drive, a process that could just as easily be done onto a diskette or CD - Rom. (R-PWTH.37:20-21, R-App.367-68).

Thus, the statute does not require the requestor to provide an actual date, specific number of records or specific fields of information to the custodian or authority because such a requirement would be too restrictive. It merely requires that the request reasonably identify the records sought. A broad interpretation of the statute must take into consideration who the recipient is and what actions they took to indicate whether or not they actually did understand the request. If, as here, the actions of the custodians and their counsel indicate that the custodians understood what was being requested, this should evidence the reasonableness of the request. Wis. Stat. §19.35(1)(h), like the

analogous FOIA statute, should not be interpreted rigidly to be used as a blanket prohibition to accessing records.

This is particularly true when, as here, the request does not place an undue burden on the office of the custodian and the custodians claim that the requests – without further clarification as to time and scope – could have been fulfilled.

IV. BOTH THE MUNICIPALITIES AND ASSESSORS PUT PELKEY INTO THE POSITION OF BEING THEIR AGENT AND THE INFORMATION GIVEN HIM CONSTITUTED AN ENHANCED REQUEST.

A. ANDREW PELKEY WAS ACTING AS AN AGENT FOR THE ASSESSORS AND THE MUNICIPALITIES.

1. Admissions In The Pleadings And Undisputed Deposition Testimony Show Pelkey To Be An Agent.

a. Grota admitted Pelkey was his agent in his Answers to the Complaint.

WIREDATA's First Amended Complaint alleged:

13. After several discussions between counsel in connection with another pending records request involving Technologies and Appraisals, on or about May 4th, 2001 Plaintiff was contacted by Andrew Pelkey, an agent of Appraisals, to arrange the transfer of the information requested by the Plaintiff.

(Emphasis added). (R-TH.11:4, R-App. 313).

Grota's response was unambiguous:

13. Admit.

(R-TH.14:2, R-App. 322).

Grota's admission in his answer that Pelkey was his agent runs counter to the assertions in each of the defendants' briefs and in the arguments to the trial court and Court of Appeals.

- b. Grota admitted Pelkey was his agent in deposition.

During his deposition testimony, Grota confirmed that Pelkey had acted on his behalf, not only as assessor, but also as owner of AT:

Q: I'm asking each and every thing he told WIREdata.
A: I'm not sure I had a conversation with WIREdata.
Q: Did you give any communications to WIREdata as to your reasons for not producing the records?
A: Myself? Or Grota Appraisals, or Assessment Technologies? Who are we talking about?
Q: Any of the entities that you own, or control?
A: I believe a contractor may have had dialogue with WIREdata on behalf of Assessment Technologies.
Q: Okay. And who is that contractor?
A: Andy Pelkey.

(R-S 67, R-App.228-229).

Q: And as the assessor did you take any actions to fulfill that request?
A: Again that related back to Andy Pelkey's conversation with Mr. Curtis.

(R-PWTH.37:11, R-App.362).

This testimony proves that Pelkey spoke for both Grota the assessor and Grota the software license owner. No affidavits or other evidence was presented to contradict this testimony. These admissions, then, must stand as undisputed fact.

2. Pelkey Was Acting As Agent For Grota Under The Principle Of Apparent Authority.

In addition to Grota's admissions, Pelkey is an agent of Grota Appraisals and AT under the theory of apparent authority.

A principal may be held liable for the acts of one who reasonably appears to a third person, through acts by the principal or acts by the agent if the principal has knowledge of those acts and acquiesced to them, to be authorized to act as an agent for the principal. We have previously recognized that liability may attach under the doctrine of apparent authority.

Pamperin v. Trinity Memorial Hospital, et al., 144 Wis. 2d 188, 203, 423 N.W. 2d 848 (1988)(citation omitted). Three elements must be present for liability to exist:

(1) Acts by the agent or principal justifying belief in the agency; (2) knowledge thereof by the party sought to be held; and (3) reliance thereon by the plaintiff, consistent with ordinary care and prudence.

Id.

Each of these elements are present in the instant case. Pelkey's call to WIREdata and the subsequent communications resulting therefrom, in response to WIREdata's various requests was a sufficient act to justify WIREdata's belief in the agency. Again, Grota admitted that Pelkey initiated these communications on his behalf and spoke for Grota as assessor and owner of the Market Drive copyright. (R-S 67, R-App.228-229) (R-PWTH.37:11, R-App.362).

Grota further testified that he knew about the discussions between Pelkey and WIREdata. (R-S 67, R-App.229) . In addition, both Grota and Pelkey testified that Grota determined the \$0.50 per parcel license fee, which Pelkey merely passed onto WIREdata as part of the larger terms for release of the data. (R-S 264, R-App. 271).

Grota's counsel's confirmed that Pelkey was acting on behalf of AT when it stated:

In order to avoid copyright infringement and trade secret misappropriation by either the respective villages or your client, we urge you to reconsider the appropriate business resolutions that Assessment Technologies of WI, LLC has presented to date.

(R-PWTH.55, R-App. 432-34).

The only "business resolution" that was presented to WIREdata was Pelkey's May 18th correspondence outlining excessive and unlawful fees and costs as terms for the records' release.

Finally, on several occasions, Pelkey responded directly to communications sent to Grota by the municipalities on these very matters, though unbeknown to WIREdata at the time. (R-S.55:44-45, R.App.211-12).

WIREdata had no reason to believe that Pelkey was not Grota's agent nor that Pelkey acted without Grota or the

municipality's knowledge and consent. Once contacted by Pelkey, it was reasonable and prudent for WIREdata to continue communications directly with him for release of the records.

Pelkey is an agent of Grota, both as assessor and as owner of AT, under the doctrine of apparent authority because: (1) Pelkey's own actions justified WIREdata's belief that he was acting as Pelkey's agent; (2) Grota confirmed in the pleadings, in his deposition statements and elsewhere that Pelkey was acting on his behalf in his capacity as assessor and as owner of AT; and (3) WIREdata relied on his representations consistent with ordinary care and prudence.

3. Pelkey was Matthies' Agent.

Actions taken by Pelkey and AT were also on behalf of Matthies. Again, Pelkey contacted WIREdata on May 4, 2001 regarding the requests. WIREdata sent a similar request to Matthies on May 9, 2001. (R-PW.17:13, R-App. 328). On May 18, 2001 Pelkey informs WIREdata of the excessive fees and costs that Grota and AT required to retrieve the records. Four days later, on May 22, WIREdata receives Matthies response denying the request due to AT's copyright, pursuant to a discussion he had with AT. (R-

PW.17:15-16, R-App. 328-29). Matthies further informs WIREdata that it should contact AT directly to retrieve the records. (R-PW 17, R-App.339). Grota testified that Pelkey fulfilled the Port Washington request. (R-PWTH.78:8, R-App.477). Again, no affidavits were filed to contradict these deposition statements, therefore they are undisputed fact.

To the extent that Matthies directed WIREdata to go to AT to fulfill the request, whose terms had already been presented to WIREdata by Pelkey, Matthies was acquiescing to whatever requirements AT – through any of its agents, Pelkey, Robert Grota, etc. – demanded as its terms for release of Port Washington’s assessment data.

4. Pelkey was the Municipalities’ Agent.

Both Matthies and Grota are clearly authorized to act on behalf of the respective municipalities’ vis-à-vis public access to assessment data, not only because their contracts with the municipalities say so, but because the actions and statements of each of the defendants evidence the same. (R-PWTH.53:37-41, R-App.407-11) In short, the assessors are agents of the municipalities.

When, as here, the assessors relinquish responsibility for fulfilling the requests to a third party, the municipality is liable for that parties' actions to the same extent as the assessors themselves. Under Wis. Stat. § 19.37(2), the municipal authority is liable for the actions or inaction of its assessors. This should be no different if the assessor relies on the actions of a third party agent in fulfillment of its duties under the open records law.

In addition, it appears that both Sussex and Thiensville knew Pelkey was involved in responding to the requests. Several letters between Pelkey and corporation counsel for the Village of Sussex went back and forth explaining Grota's position on these open records requests. (R-PWTH.33:37, 44-47, R-App. 350, 353-56). The same correspondence from Sussex' Corporation Counsel indicates he was in discussions with representatives of Thiensville regarding the same. For example he indicates that the response given " reads more like an advertisement than it does like a public records response". (Macy's letter of May 22, 2001; R-PWTH. 33, R-App. 351).

Indeed, this very correspondence shows that the municipalities were skeptical about the legal position, but that they would go along with it.

B. A HOLDING THAT PELKEY WAS NOT AN
AGENT WOULD PRODUCE ILLOGICAL
RESULTS.

The practical implications of holding Pelkey was not an agent would require a requester to hold all communications regarding a request with the authority – even when the authority has specifically told the requester to talk to someone else (the custodian); even when the custodian admits in court pleadings that the agent was acting on his behalf in his capacity as custodian of the record; and even when the authorities and custodians themselves state that they could not even grant the request if they wanted to without the agent doing it for them.

That holding is just not the way the world works. Such a requirement would hamper access to records by unnecessarily raising the level of difficulty in obtaining them. Moreover, the holding is too narrow a construction of the open records law to be in line with the legislative mandate that presumes openness of records and that only in an exceptional case may access be denied.

Pelkey was acting as an agent for Grota as assessor and owner of AT and, therefore, communications to Pelkey were made as if to the assessors and municipalities themselves.

IV. THE PDF FILES SENT IN 2004 DO NOT SATISFY THE REQUESTS.

The Court of Appeals clearly held that the PDFs were a sham attempt to be able to claim that the Assessor had satisfied the request. The court carefully analyzed that a PDF is essentially a photocopy of an electronic document that does not permit the recipient the same ability to read and comprehend the information as it would have with a digital copy of the original database.

A. SINCE PELKEY WAS AN AGENT OF THE ASSESSORS, THE PDFS DO NOT SATISFY THE REQUESTS.

As shown in the previous section, Pelkey was an agent of both the custodians or municipalities and that, therefore, communications to Pelkey enhanced the requests by WIREdata and should be included as part of the request pursuant to State of Wisconsin ex rel. Milwaukee Police Association v. Jones, 237 Wis. 2d 840, 615 N.W.2d 190 (Ct. App. 2000). Under these circumstances a PDF would not satisfy WIREdata's request.

A request may be subsequently enhanced when the requester provides additional information to the authority or custodian regarding the request itself. See MPA v. Jones, *supra*, 237 Wis. 2d at 847-48. Moreover, the court in Jones held that a requester can

receive a specific type of format (in that case digital versus analog) when the requested format is superior to perform a proper analysis of the data. Id. at 852.

Here, WIREdata's original requests were enhanced through its communications to Pelkey, acting as agent of Grotta. Specifically, WIREdata's May 4th e-mail from Curtis to Pelkey stated in relevant part:

Any type of electronic output and media is acceptable (i.e., fixed length, comma-quote, pipe delimited). We would need a data layout, if the fields are not in the order below.

(R-PWTH.37:81, R-App.400). (See also, R-PWTH.77, R-App.469).

A PDF is not the same as a comma-quote file and Pelkey understood this distinction. (R-PWTH. 64, R-App.455). Pelkey testified that he considered supplying WIREdata with a comma-quote file in May 2001, but decided against it because it was not his preference. (R-PWTH.37:47-48, R-App.378-79).

Further, Peter Shuttleworth's affidavit attests to (1) what a PDF is; (2) why it does not fulfill the request; (3) why it would not allow for normal testing of data to confirm its accuracy. (R-PWTH.38:2-4, R-App.401-404). Grotta has not supplied any testimony in opposition to this affidavit.

1. Comma-Quote And Similar Formats Are Superior To A PDF In Order To Perform A Comprehensive Review Of The Data.

WIREdata is entitled to receive the information as it was requested because data in a comma-quote format – or a copy of the Microsoft Access database itself – is superior to a PDF (which is merely a picture of a paper copy on diskette) because of its ability to allow for meaningful examination of the voluminous data.

Again, a PDF is merely a picture of a paper copy on diskette. The very reason PDFs are generally used is to allow users to view a document without allowing them to use, change, alter, or electronically analyze it or electronically verify accuracy of it in any way. A picture of a paper copy – even when on an electronic media like a diskette – is just as unresponsive as paper itself.¹⁰

The open records law does not allow Grota to require a more expensive method of retrieval of the records than what was requested because it is not his programmer's preferred format or because Grota wanted to make it more difficult for the requestor to access the

¹⁰ Further, the 7th Circuit held that AT could not use its copyright in the database to insist that WIREdata accept paper copies, thereby making the acquisition of the data more expensive for WIREdata. See Assessment Technologies v. WIREdata, *supra*, 350 F.3d at 645. Similarly, because a PDF is a picture of a paper copy on diskette, and therefore just as difficult to utilize the data therein, the same analysis used by the 7th Circuit would apply here too.

requested data. Indeed, Pelkey admits knowing about the problems encountered when dealing with a PDF. (R-S.67:55-57, R-App. 244-45).

Because of the volume of information (concerning approximately 2,500 parcels) having the data in a manipulatable¹¹ electronic mode is essential to understand the data in a meaningful way, that is, in relation to each other as a list of comparables. (R-S. 59,R-App.149-152). Whether or not an individual can read the information on the page, one page at a time, is irrelevant. Rather, it is the ability to view all of it (comparing and contrasting one property with another) which is necessary to both comprehend the data as well as evaluate its accuracy. This is the very reason the assessors keep this data in a Microsoft Access database and not in PDFs or paper files. (R-PWTH.39:1, R-App.405; R-PWTH.62:13, 19-20, R-App.436-38).

Thus, a PDF is inferior to a comma-quote or similar file because it does not readily allow for standard database analysis routines to comprehend and verify the data. Similarly, the court in MPA v. Jones recognized the importance of making such a distinction. (See also 75 Atty. Gen. Op. 133 (1986).) Such is the case here. WIREdata has always maintained that it would accept either a copy of the database

¹¹ It should be noted that the data in the Access Data Base – as kept by the Assessors – is already in a manipulatable state.

or an extraction of data alone, so long as it is in a comma-quote or similar format.

2. The assessors do not keep the data in PDF files themselves.

While the assessors and municipalities have each attested to the accuracy and convenience of keeping assessment records electronically, they do not keep them in a PDF. (R-PWTH.39:1, R-App.405; R-PWTH.62:13, 19-20, R-App:436-38). Instead, the assessors keep the assessment data in a Microsoft Access database which runs off Grota's Market Drive software. Grota, Matthies and the municipalities continue to argue that WIREdata is not entitled to the records in the same format the custodian keep them in. Nor, according to them, is WIREdata entitled to the raw data extracted out of the Microsoft Access database (the comma-quote or similar format). Instead, Grota's position is that WIREdata should be required to accept a format that it doesn't keep, that is more difficult to comprehensively review and that was not requested by WIREdata.

For the reasons set forth above, the custodians should be required to produce the records as requested – in a comma-quote or similar format or a copy of the Microsoft Access database.

B. EVEN IF THE COURT LOOKS ONLY TO THE ORIGINAL REQUEST, PDF SHOULD NOT BE ALLOWED TO SATISFY THE REQUEST.

Were the Court's review to focus only on the original request for an electronic/digital copy of the records, it should find that WIREdata is entitled to receive the records in the same format as is kept by the assessors, or a substantially similar extract thereof, and not a PDF.

In addition to the reasons cited in previous subsection, a PDF, while an electronic format, is not a proper response to WIREdata's request for the simple reason that the assessors should not be allowed to make the acquisition of the data more expensive for the requester by insisting on providing a format that the custodians do not keep.

The open records law states that requester be required to pay only an amount that "may not exceed the actual, necessary and direct cost of reproduction . . .". Wis. Stat. § 19.35(3). It is anathema to the legislative intent behind the statute for the custodian to require receipt in a format the custodian doesn't keep – particularly when (1) the "actual cost" to reproduce the records in that format is more expensive than reproducing the record in the same format kept by the custodian; (2) there is no legal reason to prevent receipt of the record

in the same format kept by the custodian; and (3) there is no practical reason to prevent receipt of the same.

1. The actual cost to reproduce a PDF is more expensive than to make a copy of the Microsoft Access database.

The testimony of both Grota and Pelkey prove that a PDF will be more expensive than either a comma-quote format or a copy of the database. Pelkey testified that copying the database (even with 2,500 files therein) would only take as little as two to four minutes of time total to complete. At Pelkey's rate of \$100.00 per hour, it would cost only a few dollars. . Further, the assessors could make a back-up copy themselves at very little cost. On the other hand, Grota testified that he believed the cost of producing a PDF would be several thousand dollars.

2. There is no legal reason why a copy of the Access database should not be produced.

There is no legal reason or copyright reason why the custodians should not be allowed to produce a copy of the database. Despite Grota's claims otherwise, the 7th Circuit held that there could be no instance of copyright infringement of the Market Drive software database compilation. The Court stated that even if the only way to extract the data would require WIREDATA to make a copy of the

copyrighted compilation itself “so that it would be copying the compilation and not just the compiled data only because the data and the format in which they were organized could not be disentangled, [WIREDdata] would be privileged to make such a copy . . .”.

Assessment Technologies of WI, LLC v. WIREDdata, Inc., *supra*, 350 F.3d at 645.

Nor does Grota have a property interest that would allow him to control how the factual data therein is received. This is why the 7th Circuit held that Grota could not insist on paper copies. *Id.* It was for these reasons that the 7th Circuit specifically held that one of the four methods by which WIREDdata could receive the data was a copy of the database. *Id.* at 647-48.

Nor is there any reason under the open records law why a copy of the database should not be provided. A Microsoft Access database is not a computer program under Wis. Stat. § 19.36, (defined under s. Wis. Stat. 16.971(4)(c) as “the processes for the treatment and verbalization of data”). WIREDdata 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, which is allowable under Wis. Stat. § 19.36(4).

3. There is no practical reason why a copy of the Access database should not be reproduced.

Again, Pelkey testified that a copy of the Microsoft Access database could easily be copied, even by the assessors. (R-PWTH.37:53-54 and 69, R.App.382-83 and 393). Beyond going through the process that Pelkey described in his deposition (which would take no more than a few minutes), the assessors could simply make a back-up copy of the Access database onto a diskette. Matthies testified that he backs up the Port Washington database weekly. (R-PWTH.37:20-21, R.App.367-368). Therefore, producing a PDF would put more of a strain on the office of the assessor than merely doing what it already routinely does.

In short, WIREdata should not have to accept a format that the assessors don't keep themselves, that makes the data therein substantially more difficult to comprehensively understand, and for which the actual cost of reproduction is more expensive. If WIREdata's more specific request for a comma-quote extract of the records within the database is not allowed, then the custodians should

provide the records in the same electronic format that they keep themselves.

V. NO NEW RECORD NEED BE CREATED TO FULFILL WIREDATA'S REQUEST.

Grota's argument regarding this matter is a perfect example of how they have consistently twisted and misstated the facts and the law to make yet another absurd argument.

A. COPYING DOES NOT CREATE A NEW RECORD.

First, WIREData is not now, nor has it ever, required that the fields specified in Mr. Curtis' May 4th e-mail to Mr. Pelkey ever be in any specific order. (R-S.67:33-34, R.App. 215-16). WIREData originally asked for what Grota had – a copy of the database. Then, when Pelkey said they would not produce the entire database, and asked Curtis what fields he was interested in, Curtis responded listing those fields. Recognizing that Pelkey would need to identify what fields he was sending, Curtis stated: "We would need a data layout, if the fields are not in the order below." (Emphasis added.) (R-S.67:33, R.App. 215.) This clearly is not a requirement for a specific order as Grota perplexingly insists on claiming. A data layout is merely a list that tells the user what order the fields are in.

Grota's counsel is twisting the facts of this case and the open records law to try to argue, yet again, that the raw data can never be taken out of the Market Drive database. Instead of stating his previous argument that it's a derivative work protected by copyright, they now claim compliance would create a new record and therefore, they are not required to grant the request.

Grota contends that any copy of a record, is itself, a new record. They further contend that since an authority is not required to create a record, copying of a record is not required. This is a gross mischaracterization of the open records law, arrived at only by viewing this language narrowly, against disclosure. That interpretation is exactly the opposite of what is required since the open records laws are to be interpreted in favor of disclosure.

WIREData is requesting an electronic copy. While this creates a duplicate of the record, it does not create a new record. Grota's position is illogical in that if an electronic copy is a new record, then a Xerox copy would also be a new record. If so, then no one would ever be able to make a copy of a public record.

Similarly, extracting data does not create a new record, but rather is a form of copying to which the requester is entitled. This

position is supported by the Wisconsin Court of Appeals in MPA v.

Jones:

As 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. See Schultz, 208 Wis. 2d at 578 ("We must construe statutes to avoid absurd results.") . . . A potent open records law must remain open to technological advances so that its statutory terms remain true to the law's intent.

**B. EXTRACTING DATA IS SPECIFICALLY
CONTEMPLATED BY THE STATUTE.**

The alternatives proposed by the 7th Circuit are also supported by Wis. Stat. § 19.36(6) which states:

If a record is subject to disclosure under 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.

Now, apparently, this act of separating information subject to disclosure from information not subject to disclosure, would, according to the Grota, create a new record. Obviously that is not the case since it is specifically authorized by statute.

**C. THE SEVENTH CIRCUIT COURT OF APPEALS
SPECIFICALLY HELD THAT THE DATABASE CAN
BE COPIED IF THE PURPOSE IS TO GET AT THE
DATA REQUESTED BY WIREDATA.**

Grota makes an argument about “thin copyrights¹²” in order to attempt to confuse this court about the holding in the Seventh Circuit Court of Appeals. Grota quotes a section from the decision which discusses Grota’s copyright in the specific organization of data that he had. (Grota brief, page 32-33). However Grota left out the rest of the paragraph where the court held:

“But **WIREDATA** doesn't want the Market Drive compilation. It isn't in the business of making tax assessments, which is the business for which Market Drive is designed. It only wants the raw data, the data the assessors inputted into Market Drive. Once it gets those data it will sort them in accordance with its own needs, which have to do with providing the information about properties that is useful to real estate brokers as opposed to taxing authorities. (*Assessment Technology*, 350 F3D 363)

Thus, the court makes it clear that Grota does not have any copyright in the facts presented or in anyone else’s organization of said facts. Accordingly, the court’s decision specifically states that this action of copying the database is legal.

VII. THE FEES THAT GROTA SOUGHT TO CHARGE INCLUDED PROFITS AND OTHER IMPROPER CHARGES AND CONDITIONS.

¹² If data which is not copyrightable (such as facts) are organized or presented in a unique specific order or presentation, then there is a thin copyright on that particular order. However that does not protect the information, data or facts from being copied and then presented in a different order.

Grota attempted to charge fees that included a profit for himself. (R-S. 61:10, R. App. 164). For example, in the Village of Sussex, he attempted to charge \$6,600 + \$3,132 + an undetermined license fee if WIREdata sought to utilize the public records in any data it made available to others. In contrast, Pelkey admitted that he could use existing software and provide a copy of these records for less than \$200 (if he uses the longest possible method and far less if he uses a simpler 2 to 4 minute operation). Thus although Grota contends that this is a highly technical and confusing situation, his own expert witness says otherwise. Pelkey even made it clear that the assessors themselves should have known how to make a copy without needing any technical involvement.

Thus the fees demand by Grota may be what he wants to charge but are far in excess of the “actual necessary and direct cost” authorized by the open records law.(Wis. Stat. Sec.19.35(3)) The purpose of the amount Grota wishes to charge was also obvious to the 7th Circuit Court of Appeals who found:

“But what is more fundamental is that since AT has no ownership or other legal interest in the data collected by the assessor, it has no legal ground for making the acquisition of that data more costly for **WIREdata**. AT is trying to use its copyright to sequester uncopyrightable data, presumably in the hope of extracting a license fee from **WIREdata**. (*Assessment Technology*, 350 F3rd 645)

Thus although Grota would like to say this is the actual fees he would like to have one of his corporations charge to another of his corporations, the amounts are not authorized by statutes.

VIII. THE MUNICIPALITIES ARE PROPER PARTIES AS THEY HAVE NOT COMPLIED WITH THE OPEN RECORDS LAW AND ARE LIABLE EVEN IF GROTA IS AN AUTHORITY.

The Municipalities' position is basically 'we agree that WIREdata is entitled to the records under the open records law, but we hired an independent contractor to do our assessments, he has the records, therefore, this doesn't involve us.' That is an untenable position that does nothing to protect public policy interests embodied in the open records law.

The Municipalities are authorities as defined in 19.32(1),

“ . public body corporate and politic created by constitution, law, ordinance, rule or order . . . ”

The Municipalities are the governmental body statutorily obligated to collect information regarding taxation assessments and to provide its citizens the opportunity to review assessment data collected in order to challenge those assessments. See Wis. Stat. §§

70.32 and 70.47. While the Municipalities fulfill this obligation through its assessor, the obligation is still its own.

A. THE LAW DOES NOT CONTEMPLATE DIVESTING THE MUNICIPALITIES FROM THEIR ROLE AS AUTHORITY MERELY BECAUSE THEY DO NOT HAVE PHYSICAL CUSTODY OF THE RECORD.

Wis. Stat. § 19.33(4) states in relevant part:

The legal custodian shall be vested by the authority with full legal power to render decisions and carry out the duties of the authority under this subchapter.

Similarly, Wis. Stat. § 19.36(3) states:

Each authority shall make available for inspection and copying under 19.35(1) any record produced or collected under a contract entered into by an authority to the same extent as if the record were maintained by the authority. (Emphasis added.)

Neither of these statutes divests the municipality of the power and obligations as the authority. Instead they merely impart on the custodian or contractor the same power and obligation as the municipality. Nor is there anything under Wis. Stat. § 70.055 to suggest that the application of the open records law should be different than if the custodian were an employee of the governmental entity.

Further to this point, the Court of Appeals in Journal/Sentinel Inc. v. School Board of Shorewood, *supra*, 186 Wis. 2d at 453, held

that despite not having custody of the record, the school board of Shorewood was an authority under the public records law. The court went onto hold:

The school board appellants' argument thus resolves to whether a public body may avoid the public access mandated by the public records law by delegating both the record's creation and custody to an agent. Posing this question provides its answer: it may not.

In Shorewood, the court held that a law firm's creation and custody of a "memorandum of understanding" on behalf of the school board was "attributable to the school board to the same extent as if the document were created or kept by school board personnel." Id. In other words, the party obligated and responsible for the records creation and maintenance (*i.e.*, the owner) is responsible for the actions of the party in whose custody it places the records to the same extent as if it had possession of the records itself for purposes of the public-records laws.

The cases cited by the Municipalities in an attempt to argue that the authority can only be the party in possession of the records are distinguishable from our situation. In each instance, the record at issue was kept in the custody of the governmental entity for whose benefit or under whose obligation it was created – not as here, an independent contractor hired by the governmental entity statutorily

charged with the records creation. In Woznicki v. Erickson, 202 Wis.2d 178, 549 N.W.2d 699 (1996), the record was a criminal file held by the St. Croix County District Attorney. In Osborn v. Bd. of Regents, 254 Wis. 2d 266, 647 N.W.2d 158 (2002), the records were University of Wisconsin admissions records held by the University Board of Regents. Finally, in Grebner v. Schiebel, 240 Wis. 2d 551, 624 N.W.2d 892 (Ct. App. 2001), the records were county polling data held by the Polk County Clerk's Office. In each case, these records were created for the custodian's own benefit. This is not the case with Grota or Matthies, who only create and maintains the assessment record because the Municipalities have contracted with him to do so. His obligation under the open records law is an extension of the Municipalities' obligation under Wis. Stat. Chapter 70.

B. TO HOLD THAT A MUNICIPALITY IS NOT AN AUTHORITY AND HAS NO INTEREST IN OPEN RECORDS REQUESTS IS AN ABSURD RESULT WHICH WOULD UNDERMINE THE PRESUMPTION OF ACCESS OF INFORMATION TO CITIZENS.

This is particularly true in a situation such as this, where the assessor has engaged in what effectively amounts to a taking of public information and the municipality – obligated to collect and

maintain the records – claims it may not have the records without first paying fees over-and-above the compensation it pays the assessor just to do his job.

C. TO THE EXTENT GROTA HAS NOT PROPERLY
COMPLIED WITH THE OPEN RECORDS LAW,
NEITHER HAVE THE MUNICIPALITIES.

The Municipalities' appointed assessor and custodian denied the records when it conditioned release on copyright license fees and excessive and unnecessary costs, in contravention of Wis. Stat. § 19.35(3)(a). Grota as assessor and custodian is an authority to the same extent as the Municipalities, the party statutorily obligated to obtain and maintain the records, pursuant to Wis. Stat. § 19.36, and Journal/Sentinel, Inc. v. School Bd. of Shorewood, *supra*, 186 Wis. 2d at 453. As was the case in Journal/Sentinel v. Shorewood, Grota's actions on behalf of the Municipalities were action by the Municipalities for the purposes of the open records law. Id. Therefore, Grota's denial of the request was a denial by the Municipalities.

This court should find that it is critical for government to be both responsive and responsible for the actions of all of their agents and employees relative to the response given to an open records

request. The position of the municipalities that they should not be involved is without merit. The obligations of the municipalities is well set out in Wis. Stat. Secs. 19.33(4) and 19.36(3).

In addition, it must also be observed that these tax records are information which the municipalities are required to keep and utilize in order to perform their own tax assessment and collection functions. It is neither right, nor fair nor the law to allow the municipalities to duck their open records responsibilities by passing the buck.

D. DESPITE THE MUNICIPALITIES' ASSERTIONS THAT WIREDATA IS ENTITLED TO THE REQUESTED RECORDS, IT HAS DONE NOTHING TO OBTAIN THE RECORDS RELEASE.

The Municipalities' assertion that, as a practical matter, it was incapable of providing the records itself because it didn't have physical custody of them ignores two basic facts: 1) they did have an electronic copy of the database that could have been copied and provided to WIREdata; and 2) there is nothing in the record to indicate that the Municipalities made any attempt to secure the records, even for themselves.

1. The Municipalities could have provided WIREdata with an electronic version of what it had.

First, according to Pelkey, copies of the Access database can be made from the versions of the data that accompany even a Read only copy of Market Drive. (R-S.61:47-48, R. App.201-02) The Municipalities of Sussex and Thiensville admit to having a read-only version of the database in its possession. (R-S.60:1-2, R.App. 153-54.) Therefore, despite this perceived limitation, the Municipalities could have produced the records without Grota's cooperation.

2. The Municipalities never actively tried to obtain the full records, despite the fact that it could have.

The 7th Circuit's decision stating that Grota can not control dissemination of the data via his thin copyright in the Market Drive compilation applies to the Municipalities equally, if not more so. See Assessment Technologies of WI, LLC v. WIREdata, Inc., 350 F.3d 640 (7th Cir. 2003). Grota has no legal standing to limit the Municipalities to a read-only version of its own data, nor can Grota limit the Municipalities to certain portions of the data. The Municipalities can receive from Grota the full database in any format it chooses.

[Were AT] [t]o 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. (Emphasis in original.)

Id. at 646-47. Nor can Grota legally charge the Municipalities anything for a copy of its own data (in any format – electronic or otherwise) beyond the compensation he receives as assessor.¹³

Despite the 7th Circuit's holding, there is nothing in the record to indicate that the Municipalities has ever attempted to obtain the electronic records from Grota, except under his terms, or insist that their assessor comply with the law.

E. COMMUNICATIONS BETWEEN PELKEY AND
WIREDATA APPLY TO GROTA AND THE
MUNICIPALITIES EQUALLY.

The Municipalities are asking this Court to ignore the reality of the events leading up to the filing of the mandamus action when arguing that a third party is not a proper recipient of an open records request, and therefore, communications to Pelkey have nothing to do with them.

To the extent that Pelkey responded to the request on Grota's behalf, that response applies to the Municipalities as well.

Furthermore, the Municipalities knew Pelkey was in receipt of the open records request and was responding to it on Grota's behalf. (

¹³ Even if the Village were to pay Pelkey (or some other computer programmer) for his cost to make the copy, this could be done minimally according to Pelkey's own testimony regarding the five methods of receiving this data. (See p. 5, herein.)

John Macy's May 22, 2001 letter to Grota specifically references Pelkey's May 18th letter) It also cautions that Macy may recommend to the Village that it adopt a different approach from Grota in this regard if Macy is not satisfied that Pelkey's response is appropriate under the open records law.¹⁴)(R.55:46-47, R. App. 211-12) In response, Pelkey sends a letter to Macy explaining Grota's position. Finally, Grota himself told the Municipalities that he was the proper party to address this matter and that the Municipalities should send all further inquiries to him directly.

The subsequent enhancements were made to Pelkey because he told WIREdata that he was representing the assessor for the Municipalities and was going to process WIREdata's open records request to the Municipalities. (R.-S. 69:46, R.App. 271.) The truth of these representations has been confirmed by Grota himself. (R-S.8:6, R.App.102, R-S.21:2, R.App.125; R-S.69:25-26, R.App.292-93;) It would have been foolish for WIREdata to proceed other than as it did. The distinction the Municipalities now tries to derive between State of Wisconsin ex. rel. Milwaukee Police Association v. Jones,

¹⁴ An approach the Village notably did not take.

237 Wis. 2d 840, 615 N.W.2d 190 (Ct. App. 2000), and the instant case are inappropriate and should be ignored.

F. THE MUNICIPALITIES CAN BE HELD LIABLE FOR THE ACTIONS OF ITS ASSESSOR.

Regardless of whether Grota is an Authority, the municipalities remain liable for the failure to comply with the open records request pursuant to Wis. Stat. Sec 19.37 (a).

The relevant language states:

Costs and fees shall be paid by the authority affected or the unit of government of which it is a part, or by the unit of government by which the legal custodian under s. 19.33 is employed . .(Emphasis added) .

The above description includes the Municipalities as well as Grota as custodian of the records.

The argument of the Municipalities merely reiterates their previous arguments, that Grota as custodian is the authority who could have fulfilled the request and, therefore, the entire open records action has nothing to do with them. This conclusion could not be farther from the truth.

As argued more fully above, the statutes and case law hold that Grota's obligations and liability under the open records law are only an extension of the Municipalities' because the action of Grota were done at the request and for the benefit of the Municipalities

itself. That the Municipalities have hired an independent contractor to collect and maintain the records (it is statutorily obligated to keep) does not mean that it is devoid of all responsibility under the open records laws. It is responsible for Grota's actions as if it had conducted them itself.

To hold otherwise would weaken the presumption of openness of records, allowing municipalities to disclaim interest or responsibility merely because another party has physical custody of the record. This is particularly dangerous in a situation like this, where the custodian has attempted to claim exclusive control over public documents in exchange for unlawful license fees and costs – even as to the municipality itself. Municipalities must remain involved in open records matters – and, therefore, liable for the failure of their custodians – to properly respond to requests thereunder, if only to ensure that the workings of government remain open to the public and that the open records law remains strong.

G. BOTH THE INDEPENDENT CONTRACTOR AND THE MUNICIPALITY ARE PROPER PARTIES.

It is clear that in situations like the current case, it is necessary to include the assessor (regardless if an Authority or

Independent Contractor) in order to get complete relief of production of the records – especially if the assessor does not want to release the records. (Wis. Stats Section 803.03 (1))

An analysis of the facts of this case shows this is the most egregious type of noncompliance with an open records request – it is really an intentional effort by a public official to exact a tribute. This is not an innocent city official not knowing what to do, it is a very sophisticated authority and custodian who is trying to get around the mandates of the open record law so that he can make an addition profit. WIREdata does not begrudge Grota making a profit when he created the assessment work for the city – he can certainly do so. But if one does that type of work, then you must comply with all of the laws relative to what you produce.

The delays in this case show that it is important for this court to make a clear policy statement on public records – if you are a custodian, the public record must be produced or you must state in very clear precise language all of your reasons for not providing same.

IX. THE POSITION OF THE MUNICIPALITIES AND THE APPRAISAL COMPANIES IS CONTRARY TO THE PHILOSOPHY AND POLICIES BEHIND AND INHERENT IN THE OPEN RECORDS LAW.

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.

The policy in this area was best stated and reflected by the legislature and contained within the statute which clearly states:

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. Wis Stat Sec. 19.31

Accordingly, this court should closely examine the actions of the custodian and municipalities in his case. If the court determines (as we believe) that the delay and the various

actions are in clear opposition to the policy as framed in “open records”, then this court is requested to, in the clearest possible language, establish a bright line decision that this type of “open records” response shall not be tolerated.

Another reason why this court should take a strong stance is that the Authority-Custodian here attempted to give a response (a PDF) which he knew would be the hardest form for the requester to use. Regardless of the issues concerning the PDF, it is inherently wrong for a custodian to be able to choose a response on the basis that it will be the hardest format for the requester to utilize. The very concept of open government would suggest that the format of the response should be as identical as possible to the way in which the custodian keeps the records. The purpose is for the requester to see, comprehend and understand the information given. Otherwise what is to stop an authority from translating a record into some esoteric little-known language and give that record to the requester. Grota admitted that he chose a PDF since that would be hard for the requester to use. If the

concept behind open records means anything, then it should mean that that type of behavior is not tolerated.

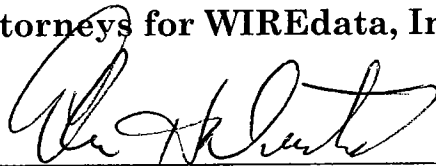
CONCLUSION

This Court has often held that the presumption of openness of records prevails. Neither the assessor or the municipalities have truly provided any real reason why the records should not have been produced – except that it is clearly against the financial interests of Mr. Grotz.

WIREdata respectfully requests that this Court affirm, in whole, the decision of the Court of Appeals.

Dated at Milwaukee, Wisconsin this 3rd day of August, 2007.

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FORM AND LENGTH CERTIFICATION

I certify that this brief conforms to the rules contained in Wis. Stat. § (Rule) 809.19(8)(b) and (c) for a brief produced using proportional serif font: The length of this brief is 17,965 words inclusive of footnotes, and pages. The font is Century Schoolbook, used on Microsoft Word 2002, 13 point.

Respectfully Submitted, August 3, 2007:

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I hereby certify that three copies of WIREdata, Incorporated's Brief have been served on the following attorneys and/or interested parties by US

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/s/

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**SUPREME COURT
STATE OF WISCONSIN
APPEAL NOS. 2005AP1473; 2006AP174; 2006AP175**

**WIREDATA, INC.,
Plaintiff-Respondent,**

v.

**VILLAGE OF SUSSEX and
VILLAGE OF SUSSEX CUSTODIAN
Defendants-Co-Appellants-Cross Petitioners,
GROTA APPRAISALS, LLC and
MICHAEL L. GROTA,
ASSESSMENT TECHNOLOGIES OF WI, LLC
Defendant - Appellants-Petitioners.**

**WIREDATA, INC.,
Plaintiff-Appellant,**

v.

**VILLAGE OF THIENSVILLE,
Defendant-Respondent,
GROTA APPRAISALS, LLC and
MICHAEL L. GROTA,
ASSESSMENT TECHNOLOGIES OF WI, LLC,
Defendants – Respondents – Petitioners.**

**WIREDATA, INC.,
Plaintiff-Appellant,**

v.

**CITY OF PORT WASHINGTON,
Defendant – Respondent – Cross Petitioner,
MATTHIES ASSESSMENTS, INC.,
Defendant – Respondent,
AMERICAN FAMILY INSURANCE COMPANY,
Intervenor.**

**APPENDIX OF RESPONDENT WIREDATA, INC. -
VOLUME I**

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The record for the Waukesha case was paginated by the Clerk of Court for Waukesha County.

However, as to Ozaukee County, the record for these cases were divided into three separate paginations by the Clerk of Court for Ozaukee County: (1) the documents filed in WIREData v. Village of Thiensville, et al., 01-CV-198, 2001-2003; (2) the documents filed in WIREData v. City of Port Washington, et al., 01-CV-216, 2001-2003; and (3) both cases from January 2004 to December 2005.

Since the record numbers for each pagination start with 1, we have referred to the appropriate record as follows:

Reference in Brief	Case Name	Trial Case No.	Record Years
R-TH	WIREData, Inc. v. Village of Thiensville, et al.	01-CV-198	2001-2003
R-PW	WIREData, Inc. v. City of Port Washington, et al.	01-CV-216	2001-2003
R-PWTH	Thiensville and Port Washington after consolidation		2004-2005
R-S	WIREData, Inc. v. Village of Sussex, et al.	01-CV-1403	2001-2005

**INDEX TO PLAINTIFF-RESPONDENT-RESPONDENT WIREDATA'S
APPENDIX**

<u>Description</u>	<u>Record</u>	<u>Appendix</u>
VOLUME I WAUKESHA COUNTY PORTION		
Amended Summons & Complaint	R-S 8	R. App. 101-123
Grota Answer, Affirmative Defenses & Counterclaims	R-S 21	R. App. 124-138
Village's Answer and Affirmative Defenses to Plaintiff's Amended Complaint	R-S 11	R. App. 139-145
Notice of Motion and Motion for Summary Judgment	R-S 57	R. App. 146-148
Affidavit of Peter Shuttleworth in Support of Plaintiff's Motion for Summary Judgment	R-S 59	R. App. 149-152
Affidavit of M.Chris Schwartz	R-S 60	R. App. 153-154
Affidavit of Emily C. Canedo in Support of Plaintiff's Motion for Summary Judgment	R-S 61	R. App. 155-208
Defendants, Michael L. Grota, et al's Notice of Motion and Motion for Summary Judgment	R-S 55	R. App. 209-212
Affidavit of Emily C. Canedo in Support of Plaintiff's Response to Defendant. Michael L. Grota, Grota Appraisals, LLC and Assessment Technologies of WI, LLC's Motion for Summary Judgment	R-S 67	R. App. 213-266

Affidavit of Emily C. Canedo in Support of Plaintiff's Response to Village of Sussex's Motion for Summary Judgment	R-S 64	R. App. 267-280
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Second Affidavit of Emily C. Canedo	R-S 69	R. App. 281-311
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Affidavit of Thomas Curtis

VOLUME II OZAUKEE COUNTY PORTION

First Amended Complaint	R-TH 11	R. App. 312-320
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Answer, Affirmative Defenses and Counterclaims	R-TH 14	R. App. 321-322
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Affidavit of Dianne Robertson	R-TH 41	R. App. 323
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Decision Hearing on Motion for Summary Judgment	R-TH 66	R. App. 324-326
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First Amended Complaint	R-PW 17	R. App. 327-340
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Answer and Affirmative Defenses to Plaintiff's Amended Complaint	R-PW 29	R. App. 341-344
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Exhibits from Grota's Notice of Motion and Motion for Summary Judgment	R-PWTH 33	R. App. 345-356
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Affidavit of Emily Canedo in Support of Plaintiff's Motion for Summary Judgment	R-PWTH 37	R. App. 357-400
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Affidavit of Peter Shuttleworth in Support of Plaintiff's Motion for Summary Judgment	R-PWTH 38	R. App. 401-404
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Affidavit of Mark Grams	R-PWTH 39	R. App. 405-406
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Exhibit H from the Affidavit of Emily Canedo	R-PWTH 53	R. App. 407-411
Affidavit of Emily Canedo in Support of Plaintiff's Response to the Village of Thiensville Motion for Summary Judgment	R-PWTH 55	R. App. 412-434
Exhibit C from the Affidavit of Emily Canedo	R-PWTH 62	R. App. 435-438
Affidavit of Emily Canedo in Support of Plaintiff's Response to Defendant, Michael L. Grota, et al. Summary Judgment Motion	R-PWTH 64	R. App. 439-468
Affidavit of Tom Curtis	R-PWTH 77	R. App. 469
Second Affidavit of Emily Canedo	R-PWTH 78	R. App. 470-481
Additional Exhibits from Grota's Notice of Motion and Motion for Summary Judgment	R-PWTH 33	R. App. 482-489

WIREdata, Inc.

Plaintiff,

v.

FIRST AMENDED COMPLAINT

Case No. 01-CV-1403

Case Codes 30707

30701

Village of Sussex,
Grota Appraisals, LLC in its capacity as Assessor for the Village of Sussex,
Michael L. Grota, and
Assessment Technologies of WI, LLC

Defendants.

THIS IS AN AUTHENTICATED COPY OF AN
ORIGINAL DOCUMENT FILED IN THE CLERK
OF COURTS OFFICE, WAUKESHA COUNTY

SEP 9 8 2001

FIRST AMENDED COMPLAINT

CLERK OF CIRCUIT COURT

NOW COMES the Plaintiff, WIREdata Inc., by its attorneys, Deutch & Weiss, as and for an **Amended Complaint** against the Defendants, the Village of Sussex, Grota Appraisals, LLC in its capacity as Assessor for the Village of Sussex, Michael L. Grota and Assessment Technologies of WI, LLC, alleges and shows to the Court as follows:

PARTIES

1. Plaintiff WIREdata, Inc., is a Wisconsin corporation with its principal place of business at 11430 W. North Ave., Milwaukee, WI 53226.
2. Defendant Village of Sussex (hereinafter "Village") is, upon information and belief, a Wisconsin municipal corporation with its principal place of business at N64 W23760 Main Street, Sussex, WI 53089.
3. Defendant Grota Appraisals, LLC, (hereinafter "Appraisals") upon information and belief, is the Assessor for the Village of Sussex, and a Wisconsin Limited Liability Company

with its principal place of business at N89W16800 Appleton Ave., Menomonee Falls, WI 53051.

The Registered Agent and owner of Appraisals is Michael L. Grotz.

4. Defendant Michael L. Grotz is an adult residing in the State of Wisconsin and, upon information and belief, is Appraisals designated individual required by Wis. Stat. § 61.197(1)(f) to file the official oath and sign the Affidavit of the Assessor.

5. Defendant Assessment Technologies of WI, LLC (hereinafter "Technologies"), upon information and belief, is a Wisconsin Limited Liability Company its principal place of business is also at N89W16800 Appleton Ave., Menomonee Falls, WI 53051. Upon information and belief, Defendant Michael L. Grotz owns and controls Technologies, which is a proper party to this action under Wis. Stat. § 806.04(11) as it has, or claims it has, an interest which would be affected by any declaration.

FACTS

6. Plaintiff re-alleges and incorporates the allegations made in paragraphs 1-5.

7. On or about November 11th, 1999 the Village entered into a "Contract for Maintenance of Assessment Records" (hereinafter the "Contract") with Appraisals whereby the Village hired Appraisals to, *inter alia*, fill the Appointed Statutory Position of the Village Assessor. The Contract commenced as of January 1, 2000 and terminates December 31, 2004. A true and correct copy of the Contract and its attachments is affixed hereto as **Exhibit D** and its terms are incorporated herein by reference.

8. In connection with the Contract, Appraisals agreed to convert the Village assessment records to a computerized format. The Contract documents specifically provided that the Village owned any and all records kept or produced by Appraisals while performing the

assessment services and that Appraisals would store and maintain the records during the term of the agreement. See **Exhibit D**.

9. At the time Appraisals executed the Contract, Michael Grota individually, was the sole owner of both Appraisals and Technologies, and had actual or constructive knowledge of the terms of every agreement between the Village and Appraisals as well as Appraisals and Technologies.

10. That on or about April 20th, 2001 Plaintiff, through its vice president, sent a registered letter, return receipt requested, to the Defendant Village of Sussex/Village Clerk formally asking for an electronic/digital copy of the real estate property records used by the Village Assessor in determining the assessments of real estate parcels located within the Village of Sussex. The April 20th Letter also asked that Plaintiff be notified of any costs involved prior to producing the property records. A true and correct copy of the return receipt is attached as **Exhibit A**.

11. That on or about April 20th, 2001 Plaintiff, through its vice president, sent a registered letter, return receipt requested, to the Defendant Village Assessor (Appraisals) formally asking for an electronic/digital copy of the real estate property records used by the Village Assessor in determining the assessments of real estate parcels located within the Village of Sussex. The April 20th Letter also asked that Plaintiff be advised of any costs involved prior to producing the property records. A true and correct copy of the return receipt is attached as **Exhibit A**.

12. On or about April 24th, 2001 Alan H. Deutch, one of the attorneys for the Plaintiff, sent a letter detailing the Plaintiff's request and the legal basis for copying the

requested records to the Village Attorney. A true and correct copy of the Letter is attached as **Exhibit B**.

13. After several discussions between counsel, on or about May 4th, 2001 Plaintiff was contacted by an Andrew Pelkey, an agent of Appraisals, to arrange the transfer of the information requested by the Plaintiff.

14. On or about May 18th, 2001 Plaintiff received an e-mail, attached as **Exhibit C**, from Pelkey outlining the cost and terms of producing the records, which were:

- A. A \$6,600.00 one-time fee to program, test and export the data;
- B. A \$.50 per-parcel charge over and above the \$6,600 programming fee;
- C. An annual update fee of \$.15 per-parcel;
- D. A provision restricting Plaintiff from reselling the data en mass to another source; and
- E. A provision that if Plaintiff "added value" to any part of the data and distributed it to another party, Plaintiff would require its customer to pay the Defendant's fees in addition to any fees added by Plaintiff.

15. Appraisals, by letter dated June 12, 2001, notified the Village that Technologies owned the assessment software used in performing the Contract. The letter also stated that Appraisals' use of the program was pursuant to a licensing agreement and that the software contained "valuable proprietary databases" which were the "intellectual property of Technologies" that could not be disseminated to anyone without its prior written consent. A true and correct copy of the letter is attached as **Exhibit E**.

16. The Defendants have refused to comply with Plaintiffs' request in conformance with the open-records laws.

CAUSES OF ACTION:

VIOLATION OF THE WISCONSIN OPEN RECORDS LAW

17. Plaintiff re-alleges and incorporates the allegations made in paragraphs 1-16.
18. Under Wisconsin Statute § 19.32(1) Appraisals, while acting as the Assessor for the Village, is an "Authority" as that term is used in Wis. Stats. §§ 19.31 to 19.39.
19. The property information identified and requested in Plaintiff's April 20th Letter is a "Record" as that term is defined in Wis. Stat. § 19.32(2) and is subject to inspection and copying pursuant to Wis. Stat. § 19.35.
20. Pursuant to the Contract, the records requested are owned by the Village and in the custody of Appraisals.
21. Wisconsin Statute § 19.35(3)(a) allows an Authority to impose a fee upon the requestor of a record which may not exceed the actual, necessary and direct cost of reproducing the records.
22. The fees demanded by the Defendant's to copy the computer records violates Wis. Stat. § 19.35(3)(a) as it significantly exceeds the actual, necessary and direct cost to reproduce the information.
23. The terms restricting the Plaintiff's use of, and the refusal to provide, the data violates Wisconsin's Open Records Laws as the information is public, not private, property.
24. Pursuant to Wis. Stat. § 19.31 the Plaintiff has a direct interest in this action as providing people with information regarding the affairs of government has been declared by the Wisconsin Legislature to be an essential function of a representative government and an integral part of the duties of officers and employees whose responsibility it is to provide such information.

25. Pursuant to Wis. Stat. § 19.37(a) Plaintiff is entitled to a Writ of Mandamus compelling the Defendants to produce for inspection and copying all of the records sought in Plaintiff's April 20th written requests at a fee that does not exceed the actual, necessary and direct costs of reproduction or restrict the Plaintiff's subsequent use of the information.

26. Pursuant to Wis. Stat. § 19.37(2)(a) Plaintiff is also entitled to its reasonable attorney fees in bringing this action and damages of not less than \$100.00.

27. Plaintiff has no other adequate remedy at law.

SECOND CAUSE OF ACTION:

DECLARATORY JUDGMENT (Wis. Stat. § 806.04)

28. Plaintiff re-alleges and incorporates the allegations made in paragraphs 1-27.

29. Wisconsin Statute § 806.04(2) permits any person interested under a written contract to have the Court determine questions of the construction or validity of the contract by obtaining a declaration of rights, status or other legal relations thereunder.

30. The Village entered into a Contract with Appraisals to fill the statutory position of Village Assessor as well as to provide ancillary assessment services. Please see **Exhibit D**, the terms of which are incorporated herein by reference.

31. The Contract provided, *inter alia*, that the Village owned all the records produced by Appraisals while performing assessment services for the Village.

32. Technologies, which was owned and controlled by Grota at the time the Contract was executed, claims an interest in the requested records by virtue of a licensing agreement with Appraisals prohibiting the dissemination of the data without the prior written consent of Technologies.

33. Plaintiff claims a right to inspect and copy the information pursuant to the Wisconsin Open Records Laws because, *inter alia*, the data is public, not private, property and any agreement to the contrary is unenforceable as it violates §§ 19.31 to 19.37.

34. The purpose of this Action is to, *inter alia*, determine whether Technologies has ownership rights to the records or otherwise has the ability to prevent their inspection and copying by the general public and in this case the Plaintiff.

35. In the alternative, the purpose of this Action is to obtain a declaration that the Assessor, a municipal official, is prohibited from entering into a contract or agreement that restricts access to public records or otherwise violates the Open Records Law and is therefore void.

36. There exists a justiciable case and controversy to-wit:

- a. The Parties have an interest in contesting the claims asserted in the action;
- b. The interests of the Parties are adverse;
- c. The Plaintiff has a legally protectible interest in the outcome of the action; and
- d. The controversy is ripe for judicial determination.

37. A judgment or decree in this Action will terminate the controversy or remove an uncertainty giving rise to the proceeding.

WHEREFORE, Plaintiff, WIREdata Inc., requests that this Court issue a Writ of Mandamus:

1. Directing the Defendants to produce and copy the records requested by Plaintiff at a cost complying with Wis. Stat. § 19.35(3)(a) and without any restrictions on the Plaintiff's use of the data;

2. Plaintiff further demands judgment against the Defendants for damages in an amount to be determined at trial, but not less than \$100.00, the costs of this action, and Plaintiff's attorney fees pursuant to Wisconsin Statute § 19.37;

3. In addition to/in the alternative, Plaintiff demands a declaratory judgment pursuant to § 806.04 that the property records sought are subject to inspection and copying under the Open Records Laws;

4. In addition to/in the alternative, Plaintiff asks for a declaration that the records are owned by the Village pursuant to the Contract with Appraisals and that the Contract and its terms are valid and enforceable;

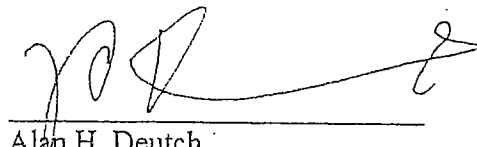
5. In addition to/in the alternative, Plaintiff asks for a declaration that the terms of the licensing agreement purportedly conferring the records ownership upon Technologies is unenforceable as it violates the Open Records Law, the terms of the Contract and public policy;

6. In addition to/in the alternative, Plaintiff asks for a declaration that a municipal official (in this case the Assessor) is prohibited from entering into a contract that restricts access to public records and/or violates the Open Records Law, and such an agreement is therefore void; and

7. For such other and further relief as the Court may deem just and equitable.

Dated at Milwaukee, Wisconsin this 26th day of September, 2001.

DEUTCH & WEISS



Alan H. Deutch
Attorney for Plaintiffs
State Bar No. 01013249
J.P. Fernandes

State Bar No. 1029671

P.O. ADDRESS:

7670 N. Port Washington Rd.
Suite 102
Glendale, WI
(414) 247-9958

Is your RETURN ADDRESS completed on the reverse side?

SENDER:

- Complete items 1 and/or 2 for additional services.
- Complete items 3, 4a, and 4b.
- Print your name and address on the reverse of this form so that we can return this card to you.
- Attach this form to the front of the mailpiece, or on the back if space does not permit.
- Write "Return Receipt Requested" on the mailpiece below the article number.
- The Return Receipt will show to whom the article was delivered and the date delivered.

I also wish to receive the following services (for an extra fee):

- ☐ Addressee's Address
- ☐ Restricted Delivery

Consult postmaster for fee.

3. Article Addressed to:
Village Clerk
Custodian of Records
Village of Sussex
N64W23760 Main St
Sussex, Wisconsin 53089

4a. Article Number
2032 739 336

4b. Service Type
☒ Registered ☐ Certified
☐ Express Mail ☐ Insured
☒ Return Receipt for Merchandise ☐ COD

7. Date of Delivery
4-28-2001

5. Received By: (Print Name)
C. Deen

6. Signature: (Addressee or Agent)
X [Signature]

8. Addressee's Address (Only if requested and fee is paid)

PS Form 3811, December 1994

Domestic Return Receipt

Thank you for using Return Receipt Service.

Is your RETURN ADDRESS completed on the reverse side?

SENDER:

- Complete items 1 and/or 2 for additional services.
- Complete items 3, 4a, and 4b.
- Print your name and address on the reverse of this form so that we can return this card to you.
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3. Article Addressed to:
Village Assessor
Village of Sussex
N64W23760 Main St.
Sussex, Wisconsin 53089

4a. Article Number
2032 739 337

4b. Service Type
☒ Registered ☐ Certified
☐ Express Mail ☐ Insured
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7. Date of Delivery
4-28-2001

5. Received By: (Print Name)
C. Deen

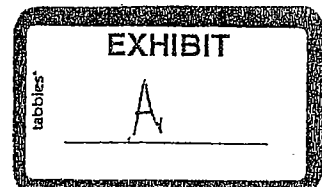
6. Signature: (Addressee or Agent)
X [Signature]

8. Addressee's Address (Only if requested and fee is paid)

PS Form 3811, December 1994

Domestic Return Receipt

Thank you for using Return Receipt Service.



Deutch & Weiss

(not a public utility)

Suite 102

7670 N. Port Washington Rd.

Glendale, WI 53217

(414) 247-9958

(414) 247-9959 FAX

in H. Deutch
an H. Deutch, S.C.)
ine E. Weiss
ess Law Office, S.C.)
es L. McAlister
Fernandes

Paralegals
Sandra D. Trester
Nichole J. Genoves
Sande L. Wells
Ellen L. Krudinger

April 24th, 2001

John P. Macy
Arenz, Molter, Macy & Riffle, S.C.
720 N. East Ave.
P.O. Box 1348
Waukesha, WI 53187-1348

Re: Village of Sussex Open Records Request.

Dear Mr. Macy:

This is to advise you that our client, WIREDATA, has made a formal written request for a computerized/digital copy of some of the public property records for the Village of Sussex.

Based on the history of your governmental officials, I suspect that they may be giving some thought to denying my client's requests. The purpose of this letter is to inform you that if the request is denied in whole or in part or if the Municipality tries to charge an amount which is not the actual and direct cost of the copying, we will be seeking immediate relief via a mandamus action pursuant to Wis. Stat. § 19.37. I would like to remind you that the basic rule is that any person who seeks access to "any" public record "has the right to inspect" that record, unless the law provides an exception. Journal/Sentinel, Inc., v School District of Shorewood, 186 Wis. 2d 443, 450, 521 N.W.2d 165 (Ct. App. 1994). Moreover, Wis. Stats. §§ 19.32 to 19.37 are to be construed in every instance with a presumption of complete public access and requests may only be denied in exceptional cases. Wis. Stat. § 19.31.

The property data sought by my client is clearly a "record" subject to public disclosure seeing as the public-records law defines "record" as:

"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. "Record" does not include drafts, notes, preliminary computations and like materials prepared for the originators personal use or prepared by the originator in the name of a person for whom the originator is working; materials which are purely the personal property of the custodian and have no relation to his or her office; materials t

April 24th, 2001

John P. Macy

Arenz, Molter, Macy & Riffle, S.C.

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which access is limited by copyright, patent or bequest; and published materials in the possession of an authority other than a public library which are available for sale, or which are available for inspection at a public library.

Wis. Stat. § 19.32(2)(emphasis added).

An "authority" is defined as, *inter alia*, any "state or local office . . . board, commission, committee, council, department or public body corporate and politic created by constitution, law, ordinance, rule or order." Wis. Stat. § 19.32(1). Obviously, the property data is a "record" under the open-records law which has been created or is being kept by an "authority," here your client/municipality or a subdivision of it.

I would point to some additional guidance in OAG 27-86, an opinion issued by the Wisconsin Attorney General; where the Department of Public Instruction ("DPI") asked whether it would be contrary to the open-records law to enter into a contract for computerized cataloging services which would limit public access to records concerning the authority's holdings that were created on behalf of the authority pursuant to the contract. *See* OAG 27-86 pg. 980. The Attorney General concluded that any agreement to refuse to provide copies of computer tapes, other than those containing computer programs, would be inconsistent with state law. *Id.* at 985.

Our Legislature expressly addressed the issue of copying computer data in Wis. Stat. § 19.36(4). The statute states that while a computer *program* is not subject to copying, "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." Wis. Stat. § 19.36(4). The court of appeals recently applied this language in Milwaukee Police Association v Jones, 2000 WI App 146, 237 Wis. 2d 840, 615 N.W.2d 190 (Ct. App. 2000). The plaintiffs in that case sought a digital (computer) copy of a 911 call, but only received a traditional analog tape recording of the conversation. *Id.* at ¶ 5. The trial court issued a writ of mandamus for the digital copy which was affirmed by the appellate court. *Id.* at ¶ 9. The court held that the MPA had the right to access and copy the digital source material of the 911 call as well as the end product of the computer program. *Id.* at ¶ 17. On a policy level, the court noted "as technology advances and computer systems are refined, it would be sadly ironic if courts could disable Wisconsin's open records laws by limiting its reach." *Id.* at ¶ 19. It follows that my client has the right to access and copy this computerized data.

I am also concerned that your client may try to become "creative" in ascertaining the costs involved. Here I would like to remind you that Wisconsin statute § 19.35(3)(a) provides

April 24th, 2001

John P. Macy

Arenz, Molter, Macy & Riffle, S.C.

Page 3 of 4

that an authority may impose a fee "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." Again, we can turn to two Attorney General Opinions for some additional guidance:

In OAG 40-83, the Attorney General was asked, *inter alia*, if a municipality could establish its own copying fees by ordinance on a basis other than "actual necessary or direct costs" by virtue of the clause in § 19.35(a) that reads "unless a fee is otherwise established by law." OAG 40-83 at 1349. The Attorney General opined that the term "law" as used in § 19.35(a) referred to state statutory law and that the Legislature intended to minimize copying fees except for those for whom a special provision was created. *See id.* The Opinion goes on to state "It would be inconsistent with these goals to interpret the statute to allow a multitude of local governments to adopt their own fee schedules without regard to actual costs." *Id.*

Another relevant Opinion is posted on the Attorney General's website and is dated January 17, 1996. In that letter/opinion, the Attorney General concluded "that if an authority copies a document onto a computer disk it can only charge the actual, necessary and direct cost of that copying. It cannot charge its usual per page photocopying cost because that cost was not the actual or necessary cost of copying." The letter/opinion goes on to state that if the authority provides the disk or otherwise does not accept outside disks for fear of viruses, the authority must make certain that it is charging its actual cost for providing the disk and that the actual cost is no more than a reasonable retail price. Thus even if there is a statute proscribing a certain fee, the fee can not be charged if the information is transferred to a disk, only the actual cost of the disk and only if the disk is provided by the authority.

As additional information, I am also sending a copy of the request letters which were sent both to the municipal Clerk and Assessor. We are providing these materials to you so that your client can know that we are extremely serious in our request. I am sure you also recognize that a significant portion of the information in this letter would also appear in the legal memoranda which would support our action for a writ of mandamus. Since we have made a legitimate effort to support our request for these documents, please be advised that if we are forced to start a mandamus action, we will also be seeking reimbursement of attorney fees.

April 24th, 2001

John P. Macy

Arenz, Molter, Macy & Riffle, S.C.

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I sincerely hope that all of this will be moot and that your client will supply the information in the appropriate form in a timely manner.

Very truly yours,
DEUTCH & WEISS

Alan H. Deutch

Cc: Tom Curtis WIREdata

April 20, 2001.

Village Assessor
Village of Sussex
N64W23760 Main Street
Sussex, Wisconsin 53089

This is to formally request an electronic/digital copy of the detailed real estate property records (showing the specific characteristics of each parcel and the improvements thereupon) used and/or maintained by the Assessor in determining the proper assessments for each parcel within the Village of Sussex.

Please advise us in writing of when this copy may be picked up and/or of any conditions relating thereto. If there is any cost involved, please advise us in writing of said costs before incurring same.

Sincerely,
WIREdata Corporation

Thomas F. Curtis
Vice President

Cc: Alan H. Deutch

April 20, 2001

Village Clerk
Custodian of Records
Village of Sussex
N64W23760 Main Street
Sussex, Wisconsin 53089

This is to formally request 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 your municipality in determining the proper assessments for each parcel within the Village of Sussex.

Please advise us in writing of when this copy may be picked up and/or of any conditions relating thereto. If there is any cost involved, please advise us in writing of said costs before incurring same.

Sincerely,
WIREdata Corporation

Thomas F. Curtis
Vice President

Cc: Alan H. Deutch

Dear Tom:

Below are the specifications for six files I will give you for each municipality. These files will give you a complete picture of what each property looks like. The first file is the property file. There will be one record for each property (or tax key number) in the municipality. All land and improvement information will be exported into separate files because there is a "one-to-many" relationship between a property and the information contained in the other files.

Please note that although there may be a place to enter a piece of information, it is up to the individual assessor to enter the data. For example, I don't think many assessors fill in zoning because the county property lister does not have it because municipalities usually keep zoning information on paper maps.

Regarding districts, the current version of Market Drive being used by assessors only has one field for school district (usually the elementary school district). The next release will be able to distinguish between elementary and high school districts. I was thinking of the next release when I told you I could distinguish between the two.

I have added land and improvements values to each file. These would be current year (2001) assessed values. I would recommend that we export the data after the assessor has made changes from the board of review to ensure that the numbers are accurate. However, if you are not going to publish the numbers, we can probably export the data sooner.

Assuming that what is documented below is all of the requirements, there is a one-time cost of \$6600 to program and test the export. The remaining cost for the data is 50 cents per parcel. Incorporated into this cost is the cost of running the export, checking the result and burning the CDs. Assuming you want all the data we can give you, the total cost will be substantially less than the cost of getting the data on paper, since each property takes a minimum of 4 pages to print. Following the export specifications is a partial list of the municipalities we have data for and the approximate parcel count for each. This will help give you an idea on the cost for a typical municipality. More data is available for other municipalities in the state. Please let me know what areas of the state you are interested in.

Once you have a current copy of the data, we can provide you with an annual update after each board of review. The cost for the update is 15 cents per parcel assuming that you do not want us to change the format of the export. The update is for all parcels whether or not they have changed (that is why it is only 15 cents). We didn't want to get into a discussion on what constitutes a change or deal with tracking which parcels changed since the last time we gave you an update. The cost of the update includes gathering the data, running the export, checking the results, and burning the CDs.

Finally, the costs quoted here assume that you are not reselling the data in mass to another source. This data is meant for you and your subscribers to view. If you want to "add value" to any part of this data and distribute it in mass to another company, you will need to make your customer for our

"In addition to your list for your added value."

If you have any questions, please do not hesitate to call.

Best Regards,

Andrew Pelkey
Senior Consultant

Property file: Contains one record for each parcel (tax key number) in the municipality. Named something like "Village of Sussex properties.txt". This file will contain the following fields:

Field Example Note

Tax key number 413-9989-002

County Washington

Street number 3500

Street direction S

Street name 76th Street, #7 Will include the property unit number at the end.

Owner name Andrew Pelkey

Secondary owner name Lisa Pelkey

Owner address line 1 2400 W Bluemound Rd

Owner address line 2 Suite 120

Owner city Badger

Owner state WI

Owner zip 99123

Zoning R1

School district 5323 The current version of Market Drive does not distinguish between elementary and high school district. The next release will.

Zoning This data is maintained at the county level. I don't know of many assessors (especially in smaller communities) that fill it in.

Land file: Contains one record for each land parcel in the municipality. If property has more than one land parcel (e.g. a farm), there will be multiple records for the same tax key number. Named something like "Village of Sussex land.txt". This file will contain the following fields:

Field Example Note

Tax key number 413-9989-002

Class Residential

Width 380

Depth 3813

Acres 3.331 Not always width * depth (lot may be irregularly shaped).

Land value

Residential buildings file: Contains one record for each residential building in the municipality. If property has more than one residential building (rare but it happens), there will be multiple records for the same tax key number. Named something like "Village of Sussex residential buildings.txt". This file will contain the following fields:

Field Example Note

Tax key number 413-9989-002

Class Washington

Story height 1 story w attic 1 story, 1 story w attic, 1.5 story, 2 story, 2 story w attic, 1.5 story

Style Colonial Defined by assessor ranch, bi-level, tri-level, cape code, colonial, old style, etc

Occupancy Type Single family Defined by assessor single family, mother-in-law, condo, 2 family, apartment, etc

Exterior wall Aluminum Defined by assessor wood, brick, stone, masonry, metal, brick, stone, masonry frame, etc

Fuel type Asphalt (kingston) refined by address
 Year built 1973
 Year remodeled 1993
 Easement type Full Home, crawl, partial, full
 Heat type Basic Home, space, basic, A/C
 Fuel type Gas Gas, electric, oil, wood/coal
 System type Warm air Warm air, baseboard, hot water, steam
 Bedrooms 3
 Family rooms 1 Family rooms only. Living rooms are counted as "other rooms"
 Other rooms 1
 Full baths 2
 Half baths 1
 Interior rating Average Excellent, very good, good, average, fair, poor, very poor
 Exterior rating Good Excellence, very good, good, average, fair, poor, very poor
 Fireplace stacks 1
 Fireplace openings 1
 Other fireplaces 0
 Basement garage stalls 0
 Other feature 1 Whirlpool
 Other feature 2 Drain in garage floor
 Basement SF 1,000
 Rec room SF 250 The rec room SF is included in the Basement SF. Therefore, do NOT add the two numbers together to produce a total Basement SF.
 FELA SF 400 Finished Basement Living Area. This number represents basement area that can be include in SFLA. Like rec room SF, the square footage here is included in Basement SF.
 First floor SF 1,000
 Second floor SF 0
 Finished attic SF 0
 Unfinished attic SF 0
 Unfinished area SF 0
 Patio SF 150
 Open porch SF 150
 Screen porch SF 150
 Enclosed porch SF 150
 Wood deck SF 150
 Attached garage SF 250
 SFLA 1400 Total SF Living Area. This will be FELA SF + First Floor SF + Second Floor SF + Finished Attic SF
 Building value

Commercial buildings file: Contains one record for each commercial building in the municipality. If property has more than one commercial building, there will be multiple records for the same tax key number. Named something like "Village of Sussex commercial buildings.txt". This file will contain the following fields:

Field Example Note
 Tax key number 413-9989-002
 Class Commercial
 Stories 2
 Description Walgreens
 Building value

Other buildings file: Contains one record for each other building improvement (not in the municipality). Other building improvements are mostly farm buildings but can also include things like pools and detached garages. If property has more than one other building improvement, there will be multiple records for the same tax key number. Named something like "Village of Sussex other.txt". This file will contain the following fields:

Field Example Note
 Tax key number 413-9989-101
 Class Other
 Type Deck Barn

Wichita, KS
 10/1/42
 OSL v. MSL

Other improvements: Contains one record for each other improvement in the municipality. Other improvements are slightly different than OBIs. They are miscellaneous improvements that for one reason or another were not valued as any of the other types of improvements. They are not widely used. If property has more than one other improvement, there will be multiple records for the same tax key number. Named something like "Village of Sussex other improvements.txt". This file will contain the following fields:

Field Example Note
 Tax key number 413-9989-C02
 Class Agri other
 Description Billboard next to highway
 Improvement value

Parcel Counts for typical Municipalities (a partial list)

County	Municipality	Parcel Count	Initial Cost	Annual Maintenance (cost per year)
Washington	T-Erin	2472	\$1,236	\$371
Washington	T-Hartford	2547	\$1,274	\$362
Washington	T-Jackson	2654	\$1,327	\$398
Washington	T-Kewaskum	1103	\$554	\$166
Washington	T-Polk	2812	\$1,406	\$422
Washington	T-Richfield	5206	\$2,603	\$781
Washington	T-Trenton	2911	\$1,456	\$437
Washington	T-West Bend	2499	\$1,250	\$375
Washington	V-Jackson	1623	\$811	\$253
Washington	V-Newburg	330	\$165	\$50
Washington	V-Slinger	1538	\$719	\$216
Washington	V-Germantown	7579	\$3,790	\$1,137
Waukesha	T-Merton	3600	\$1,800	\$540
Waukesha	T-Summit	2500	\$1,250	\$375
Waukesha	V-North Prairie	500	\$250	\$75
Waukesha	T-Ottawa	1800	\$900	\$270
Waukesha	T-Delafield	3600	\$3,600	\$1,080
Ozaukee	T-Grafton	2358	\$1,179	\$354
Ozaukee	V-Thiensville	1210	\$605	\$182
Dodge	T-Ashippun	2297	\$1,149	\$345
Dodge	T-Herman	1892	\$946	\$284
Dodge	T-Hubbard	1833	\$917	\$275
Dodge	V-Nesho	253	\$127	\$38
Dodge	T-Theresa	1200	\$600	\$180
Dodge	V-Theresa	392	\$196	\$59
Jefferson	C-Lake Mills	1876	\$938	\$281
Calumet	T-Stockbridge	1000	\$500	\$150
Calumet	V-Stockbridge	500	\$250	\$75
Calumet	T-Brotherstown	1000	\$500	\$150
Sherboygan	V-Random Lake	710	\$355	\$107
Sherboygan	T-Bixhart Lake	344	\$172	\$52
Sherboygan	T-Bkine	1800	\$900	\$270
Sherboygan	T-Blymouth	2344	\$1,172	\$352
Brown	T-Brown	1810	\$905	\$272
Brown	V-Howard	800	\$400	\$120
Brown	T-Brown	1800	\$900	\$270

Plant V-Adelphi	4	\$1,100	\$77
Plant C-George n. Bay	5000	\$1,400	\$750
Plant T-Liberty Grove	2000	\$1,700	\$300
Fond du Lac V-North Fond du Lac	1500	\$750	\$225
Fond du Lac T-Eden	600	\$300	\$90

EXHIBIT D

DELETED FOR
BREVITY

(SEE R.8:24-40)

EXHIBIT E

DELETED FOR
BREVITY

(SEE R.8:41-44)

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Daniel R. Johnson, WI Bar No. 1,033,981
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Attorneys for Defendants Assessment Technologies of WI, LLC, Grota Appraisals, LLC and Michael L. Grota

**IN THE STATE OF WISCONSIN - CIRCUIT COURT
WAUKESHA COUNTY**

Wire Data, Inc.

Plaintiff

v.

Village of Sussex,
Grota Appraisals, LLC,
Michael L. Grota, and
Assessment Technologies of WI, LLC.
Defendants.

**Answer, Affirmative Defenses and
Counterclaims**
Case No. 01CV1403

ANSWER, AFFIRMATIVE DEFENSES AND COUNTERCLAIMS

Defendants Grota Appraisals, LLC, Michael L. Grota, and Assessment Technologies of WI, LLC, by their attorneys, Ryan Kromholz & Manion, S.C. by Joseph A. Kromholz and Daniel R. Johnson, as and for its Answer, Affirmative Defenses and Counterclaims, pleads as follows:

1. Admit.
2. Admit
3. Admit
4. Admit that Michael L. Grota is an adult residing in the State of Wisconsin.
The remaining allegations are denied.
5. Admit that Assessment Technologies of WI, LLC is a Wisconsin Limited Liability Company having a principal place of business at N89W16800

1 Appleton Ave., Menomonee Falls, WI 53051. Admit that Defendant
2 Michael L. Grotta owns and controls Assessment Technologies of WI,
3 LLC. Admit that Assessment Technologies of WI, LLC has an interest
4 which would be affected by any declaration. The remaining allegations
5 are denied.

6 6. Defendants reallege and incorporate the answers in paragraphs 1-5.

7 7. The terms of the "Contract for Maintenance of Assessment Records"
8 speak for themselves. Any allegation contrary to those terms is denied.
9 The remaining allegations are admitted.

10 8. The terms of the "Contract for Maintenance of Assessment Records"
11 speak for themselves. Any allegation contrary to those terms is denied.
12 The remaining allegations are admitted.

13 9. Admit.

14 10. Admit.

15 11. Admit.

16 12. Admit.

17 13. Admit.

18 14. Lack information as to when Plaintiff received said e-mail and therefore
19 deny. The terms of said e-mail speak for themselves. Any allegation
20 contrary to those terms is denied. The remaining allegations are
21 admitted. Affirmatively allege that an additional offer was given dated
22 June 20, 2001, to process 2,685 parcels into a digital format for \$3,132.
23 Affirmatively allege that a representative sample record was 10 pages
24 long, and that for a total of 26,850 pages of printed matter, an average
25 cost per page is approximately \$0.1166 / page.

26 15. Lack information as to the date of the letter therefore deny. The terms of

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1 the letter speak for themselves. Any allegation contrary to those terms
2 is denied. The remaining allegations are admitted.

3 16. Denied.

4 17. Defendants reallege and incorporate the answers in paragraphs 1-16.

5 18. Admit.

6 19. Denied.

7 20. The terms of the contract speak for themselves. Any allegation contrary to
8 those terms is denied. Deny that "the records requested" are records.
9 Deny that the "records requested" are owned by the Village. The
10 remaining allegations are admitted.

11 21. Admit.

12 22. Denied.

13 23. Denied.

14 24. Lack information and belief and therefore deny.

15 25. Denied.

16 26. Denied.

17 27. Denied. Affirmatively allege that on numerous occasions, Defendant
18 Grota Appraisals has offered analog copies of the property record
19 cards, and that Plaintiff is free to inspect and/or copy the analog
20 property record cards, yet Plaintiff has refused to inspect and/or copy
21 the analog property record cards.

22 28. Defendants reallege and incorporate the answers in paragraphs 1-27.

23 29. Admit.

24 30. The terms of the Contract speak for themselves. Any allegation contrary
25 to those terms is denied. The remaining allegations are admitted.

26 31. The terms of said contract speak for themselves. Any allegation contrary

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1 to those terms is denied. The remaining allegations are admitted. Deny
2 that Plaintiff seeks a "record" in this case, as that term is defined by
3 Wis.Stat. § 19.32(2).

4 32. Admit.

5 33. Lack information and belief as to what Plaintiff claims and therefore deny.
6 Deny the remaining allegations.

7 34. Lack information and belief as to what the purpose of this action is and
8 therefore deny. The remaining allegations are denied. Affirmatively
9 allege that Plaintiff does not seek a "record" in this case, as that term is
10 defined by Wis.Stat. § 19.32(2).

11 35. Lack information and belief as to what the purpose of this action is and
12 therefore deny. The remaining allegations are denied.

13 36. Lack information and belief as to what Plaintiffs interests are and therefore
14 deny. Deny the remaining allegations.

15 37. Lack information and belief as to what "removing an uncertainty giving
16 rise to the proceeding" means and therefore deny. Deny that a
17 judgment or decree in this action will terminate the controversy.

18
19 Defendants Grota Appraisals, LLC, Michael L. Grota, and Assessment
20 Technologies of WI, LLC responds to Plaintiff's Request for Relief as follows:

- 21 1. Deny that Plaintiff is entitled to the relief sought in ¶ 1.
22 2. Deny that Plaintiff is entitled to the relief sought in ¶ 2.
23 3. Deny that Plaintiff is entitled to the relief sought in ¶ 3.
24 4. Deny that Plaintiff is entitled to the relief sought in ¶ 4.
25 5. Deny that Plaintiff is entitled to the relief sought in ¶ 5.
26 6. Deny that Plaintiff is entitled to the relief sought in ¶ 6.

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1 7. Deny that Plaintiff is entitled to the relief sought in ¶ 7.
2

3 AFFIRMATIVE DEFENSES

- 4 1. Assessment Technologies of WI, LLC is an indispensable party that cannot be
5 joined in this action.
- 6 2. Another case pending before the Eastern District of Wisconsin, Assessment
7 Technologies of WI, LLC v. WireData, Inc., is the first filed action between
8 Assessment Technologies of WI, LLC and WireData, Inc. and this case is
9 preempted by the Federal case.
- 10 3. Assessment Technologies of WI, LLC is not subject to Wisconsin Open
11 Records law, Wis.Stat. §§ 19.31 *et seq.*
- 12 4. The "records" sought are not "records" as that term is defined in Wis.Stat. §
13 19.32(2).
- 14 5. The requested information is protected by copyright.
- 15 6. The requested information contains trade secrets.
- 16 7. License.
- 17 8. Misappropriation.
- 18 9. The Complaint fails to state a claim for which relief may be granted.
- 19 10. Plaintiff lacks standing.
- 20 11. Failure or want of consideration.
- 21 12. Failure to mitigate damages.
- 22 13. Plaintiff is not a beneficiary of any contract alleged in the Complaint.
- 23 14. Copies of the "electronic/digital copy of the real estate property record cards"
24 are offered for sale.
- 25 15. The requests identified in ¶¶ 10 -11 of Plaintiff's Amended Complaint are
26 without a reasonable limitation as to subject matter or length of time

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1 represented.

2 16. The requests identified in ¶¶ 10 -11 of Plaintiff's Amended Complaint do not
3 constitute sufficient requests.

4 17. The requests identified in ¶¶ 10 -11 of Plaintiff's Amended Complaint would
5 require an authority to create a new record by extracting information from
6 existing copyrighted material and compiling the information in a new format.

7 18. The fees demanded by Assessment Technologies of WI, LLC are actual,
8 necessary and direct costs of reproduction and transcription.
9

10 COUNTERCLAIMS

11
12 1. Assessment Technologies Of WI, LLC ("Assessment Technologies") is a Wisconsin
13 corporation located at N89W16800 Appleton Ave, Menomonee Falls, WI 53051 and is
14 engaged in software development and licensing.
15

16 2. Grota Appraisals, LLC is a Wisconsin corporation located at N89W16800 Appleton
17 Ave, Menomonee Falls, WI 53051 and is engaged in real estate appraisals.
18

19 3. Upon information and belief, Wire Data, Inc. ("Wire Data") is a Wisconsin
20 corporation located at 11430 West North Ave, Wauwatosa, WI 53226 and is engaged
21 in the business of collecting and distributing property-related information for resale to
22 mostly housing industry professionals.

23 FIRST CAUSE OF ACTION

24 Temporary and Final Injunction

25 Preventing and Restraining Copyright Infringement

26 4. The allegations of paragraphs 1- 3 are incorporated as if fully set forth herein.

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- 1
- 2 5. Wire Data is entitled to requested "electronic/digital cop[ies] of the real estate
- 3 property records used" in the Village of Sussex under Wisconsin Open Records Law,
- 4 Wis.Stat. §§ 19.31 – 19.37.
- 5
- 6 6. Wire Data alleges failure to produce requested "electronic/digital cop[ies] of the real
- 7 estate property records used" in the Village of Sussex, allegedly in violation of
- 8 Wisconsin Open Records Law, Wis.Stat. §§ 19.31 – 19.37.
- 9
- 10 7. Assessment Technologies owns copyrights to a software program called Market
- 11 Drive™ 2000.
- 12
- 13 8. Assessment Technologies licenses, on a limited and non-exclusive basis, the Market
- 14 Drive™ 2000 software to property appraisers, including Grota Appraisals, LLC and
- 15 Matthies Assessments, Inc.
- 16
- 17 9. Licensees of Market Drive™ 2000 software, including Grota Appraisals, LLC and
- 18 Matthies Assessments, Inc., enter raw property appraisal data from property record
- 19 cards ("the raw data") into the Market Drive™ 2000 software.
- 20
- 21 10. The Market Drive™ 2000 software selects, coordinates, and arranges the raw data in
- 22 such a way that the resulting digital data compilation ("the digital data compilation"),
- 23 as a whole, constitutes an original work of authorship that did not exist prior to the
- 24 manipulation of the data by Market Drive™ software.
- 25
- 26 11. A copyright for the digital data compilation is owned by Assessment Technologies of

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1 Wisconsin, LLC. ("the copyrighted digital data compilation").
2

3 12. The copyrighted digital data compilation is registered in the United States Copyright
4 Office.

5
6 13. Upon information and belief, Wire Data has actual knowledge of the copyrights, and
7 the fact that the United States Copyright Office has registered the copyrights.
8

9 14. Property appraisers, including Grota Appraisals, LLC and Matthies Assessments, Inc.,
10 do not have a license to distribute aforesaid Market Drive™ 2000 software or aforesaid
11 copyrighted digital data compilation.
12

13 15. The "electronic/digital cop[ies] of the real estate property records used" demanded by
14 Wire Data in the respective municipalities, is the copyrighted digital data compilation.
15

16 16. Wire Data is not entitled to a copy of the copyrighted digital data compilation under
17 Wisconsin Open Records Law Wis.Stat. §§ 19.31 – 19.37 because copyrighted material
18 is exempt from open records requests.
19

20 17. Wire Data does not have a license from Assessment Technologies to view, receive,
21 distribute, copy, or prepare derivative works of, the copyrighted digital data
22 compilation.
23

24 18. If Wire Data obtains its requested Writ of Mandamus directing the defendants to
25 produce and copy the requested "electronic/digital cop[ies] of the real estate property
26 records used" in the respective municipalities, Wire Data will infringe or induce
27

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infringement of Assessment Technologies' exclusive copyrights in the copyrighted digital data compilation.

19. Assessment Technologies is entitled to a temporary and final injunction preventing and restraining Wire Data from infringing Assessment Technologies' exclusive copyrights in the copyrighted digital data compilation.

SECOND CAUSE OF ACTION

Temporary and Final Injunction

Preventing and Restraining Trade Secret Misappropriation – Wis.Stat. § 134.90

20. The allegations of paragraphs 1-19 are incorporated as if fully set forth herein.

21. The copyrighted digital data compilation contains trade secret information regarding the architecture and methodologies of Market Drive™ 2000 software to select, coordinate, and arrange the raw data, including a pattern, compilation, program, method, technique or process ("the trade secret information").

22. The trade secret information derives actual and potential independent economic value from not being generally known to, and not being readily ascertainable by proper means by, other persons who can obtain economic value from its disclosure or use.

23. The trade secret information is the subject of efforts to maintain its secrecy that are reasonable under the circumstances.

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1 24. If Wire Data obtains its requested Writ of Mandamus directing the defendants to
2 produce and copy the requested "electronic/digital cop[ies] of the real estate property
3 records used" in the respective municipalities, Wire Data will have misappropriated
4 Assessment Technologies' trade secrets contained in the copyrighted digital data
5 compilation.

6
7 25. Assessment Technologies is entitled to a temporary and final injunction preventing
8 and restraining Wire Data from misappropriating Assessment Technologies' trade
9 secrets under Wis.Stat. § 134.90 (3)(a).

10
11 THIRD CAUSE OF ACTION

12 Temporary and Final Injunction

13 Preventing and Restraining Common Law Misappropriation

14
15 26. The allegations of paragraphs 1-25 are incorporated as if fully set forth herein.

16
17 27. Upon information and belief, Wire Data intends to use Assessment Technologies of
18 WI, LLC's copyrighted digital database compilation.

19
20 28. Upon information and belief, Wire Data is in competition with Assessment
21 Technologies of WI, LLC.

22
23 29. Assessment Technologies of WI, LLC has put significant time, skill, and money into
24 the development of Market Drive™ software and the copyrighted digital database
25 compilation.

26
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R-App. 133

1 30. Wire Data's use of the Assessment Technologies of WI, LLC's Market Drive™
2 software and the copyrighted digital database compilation or copies of each, in
3 competition with Assessment Technologies of WI, LLC, would grant Wire Data a
4 significant advantage in the competition between Wire Data and Assessment
5 Technologies of WI, LLC, because Assessment Technologies of WI, LLC, and not
6 Wire Data, has expended the energy to produce Assessment Technologies of WI,
7 LLC's Market Drive™ software and the copyrighted digital database compilation.
8

9 31. If Wire Data obtains its requested Writ of Mandamus directing the defendants to
10 produce and copy the requested "electronic/digital cop[ies] of the real estate property
11 records used" in the respective municipalities, Wire Data will have misappropriated the
12 copyrighted digital data compilation and Market Drive™ software.
13

14 FOURTH CAUSE OF ACTION

15 Intentional Interference With Contractual Relationship

16 32. Grota Appraisals, LLC has a contractual relationship with the Village of Sussex.
17

18 33. Wire Data, Inc. interfered with the contractual relationship.
19

20 34. Upon information and belief, Wire Data's interference with the contractual
21 relationship between Grota Appraisals, LLC and the Village of Sussex was and is
22 intentional.
23

24 35. Wire Data's interference with the contractual relationship between Grota Appraisals,
25 LLC and the Village of Sussex caused Grota Appraisals' performance of the
26 contractual relationship to be more expensive and burdensome.
27

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1
2 36. Wire Data's interference with the contractual relationship between Grota Appraisals,
3 LLC and the Village of Sussex caused harm to Grota Appraisals, LLC.
4

5 37. As a direct and proximate result of the harm caused to Grota Appraisals, LLC, Grota
6 Appraisals, LLC has suffered damages in an amount to be determined at trial.
7

8 WHEREFORE, Assessment Technologies of WI, LLC, Grota Appraisals, LLC
9 prays for relief as follows:
10

11 A. For a temporary and final injunction enjoining Wire Data, its officers, agents,
12 servants, employees and attorneys, and those persons in active concert or
13 participation with it who receive actual notice of the decree of this Court by
14 personal service or otherwise, from directly or indirectly infringing Assessment
15 Technologies' exclusive copyrights in the copyrighted digital data compilation.
16

17 B. For temporary and final injunction enjoining Wire Data, its officers, agents,
18 servants, employees and attorneys, and those persons in active concert or
19 participation with it who receive actual notice of the decree of this Court by
20 personal service or otherwise, from directly or indirectly misappropriating
21 Assessment Technologies' trade secrets embodied in the Market Drive™ software.
22

23 C. For temporary and final injunction enjoining Wire Data, its officers, agents,
24 servants, employees and attorneys, and those persons in active concert or
25 participation with it who receive actual notice of the decree of this Court by
26 personal service or otherwise, from directly or indirectly misappropriating
27

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R-App. 135

1 Assessment Technologies copyrighted digital database compilation and the Market
2 Drive™ software.

3
4 D. That Wire Data be directed to pay the costs, attorney's fees and interest incurred
5 herein.

6
7 E. That Wire Data be directed to pay all damages in an amount to be proved at trial.

8
9 F. That the Plaintiff have such other and further relief as the circumstances of the
10 case may require or as this Court deems just and proper.

11
12
13 A JURY TRIAL IS HEREBY DEMANDED

14
15 Respectfully submitted:

16 Date: December 17, 2001

Ryan, Kromholz & Manion, S.C.

17 By: 

18 Joseph A. Kromholz (State Bar No. 1002464)
19 Daniel R. Johnson (State Bar No. 1033981)
20 RYAN KROMHOLZ & MANION, S.C.
21 P. O. Box 26618
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22 Attorneys for Defendants Assessment,
23 Technologies of WI, LLC, Grota Appraisals,
24 LLC, and Michael L. Grota.

25
26
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R-App. 136

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Attorneys for Defendants Assessment Technologies of WI, LLC, Grota Appraisals, LLC, and Michael L. Grota

IN THE STATE OF WISCONSIN - CIRCUIT COURT
WAUKESHA COUNTY

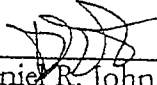
Wire Data, Inc. Plaintiff		
v.		
Village of Sussex, Grota Appraisals, LLC, Michael L. Grota, Assessment Technologies of WI, LLC. Defendants.		Certificate of Service Case No. 01CV1403

I hereby certify that a true and correct copy of Defendants Assessment Technologies of WI, LLC, Grota Appraisals, LLC and Michael L. Grota Answer, Affirmative Defenses and Counterclaims has been served upon the following attorneys of record by First Class Mail as follows:

Alan H. Deutch
7670 North Port Washington Road
Suite 102
Glendale, WI 53217
Attorney For Plaintiff Wire Data, Inc.

1 Atty. Andrew Schwaba
2 Crivello, Carlson, Mentkowski & Steeves, Inc.
3 710 North Plankinton Avenue
4 Milwaukee, Wisconsin 53203
5 Attorney for Defendant Village of Sussex

6 this 17TH Day of December, 2001.

7 
8 _____
9 Daniel R. Johnson
10 Ryan Kromholz & Manion, S.C.
11 P.O. Box 26618
12 Milwaukee, WI 53226-0618

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R-App. 138

WIREDATA, INC.,

Plaintiff,

v.

Case No. 01-CV-1403

Case Code 30707

VILLAGE OF SUSSEX,
GROTA APPRAISALS, LLC,
In its capacity as Assessor for the Village of
Sussex, and MICHAEL L. GROTA,

Defendants.

**VILLAGE'S ANSWER AND AFFIRMATIVE DEFENSES TO PLAINTIFF'S
AMENDED COMPLAINT**

The defendants, Village of Sussex and the Village of Sussex Custodian of Records, by its attorneys, CRIVELLO, CARLSON, MENTKOWSKI & STEEVES, S.C., submit this Answer and Affirmative Defenses to the plaintiff's Amended Complaint:

1. In answer to paragraph 1 of the plaintiff's Amended Complaint, deny knowledge or information sufficient to form a belief as to the truth of the allegation contained therein and therefore deny the same putting the plaintiff to its proof thereon.

2. In answer to paragraph 2 of the plaintiff's Amended Complaint, admit the allegations contained therein.

3. In answer to paragraph 3 of the plaintiff's Amended Complaint, admit the allegations contained therein.

4. In answer to paragraph 4 of the plaintiff's Amended Complaint, admit the allegations contained therein.

5. In answer to paragraph 5 of the plaintiff's Amended Complaint, deny knowledge or information sufficient to form a belief as to the truth of the allegation contained therein and therefore deny the same putting the plaintiff to its proof thereon.

6. In answer to paragraph 6 of the plaintiff's Amended Complaint, repeats, realleges, and incorporates by reference all allegations, averments, denials and affirmative defenses as contained within the text of this responsive pleading.

7. In answer to paragraph 7 of the plaintiff's Amended Complaint, admit the allegations contained therein.

8. In answer to paragraph 8 of the plaintiff's Amended Complaint, deny.

9. In answer to paragraph 9 of the plaintiff's Amended Complaint, deny knowledge or information sufficient to form a belief as to the truth of the allegation contained therein and therefore deny the same putting the plaintiff to its proof thereon.

10. In answer to paragraph 10 of the plaintiff's Amended Complaint, admit the allegations contained therein.

11. In answer to paragraph 11 of the plaintiff's Amended Complaint and its subparts, deny knowledge or information sufficient to form a belief as to the truth of the allegations contained therein and therefore deny the same putting plaintiff to its proof thereon.

12. In answer to paragraph 12 of the plaintiff's Amended Complaint, deny knowledge or information sufficient to form a belief as to the truth of the allegation contained therein and therefore deny the same putting the plaintiff to its proof thereon.

13. In answer to paragraph 13 of the plaintiff's Amended Complaint, deny knowledge or information sufficient to form a belief as to the truth of the allegation contained therein and therefore deny the same putting the plaintiff to its proof thereon.

14. In answer to paragraph 14 of the plaintiff's Amended Complaint, deny knowledge or information sufficient to form a belief as to the truth of the allegations contained therein and therefore deny the same putting plaintiff to its proof thereon.

15. In answer to paragraph 15 of the plaintiff's Amended Complaint, deny.

16. In answer to paragraph 16 of the plaintiff's Amended Complaint, deny.

17. In answer to paragraph 17 of the plaintiff's Amended Complaint, the defendant repeats, realleges and incorporates by reference all allegations, averments, denials and affirmative defenses as contained within the text of this responsive pleading.

18. In answer to paragraph 18 of the plaintiff's Amended Complaint, admit.

19. In answer to paragraph 19 of the plaintiff's Amended Complaint, deny.

20. In answer to paragraph 20 of the plaintiff's Amended Complaint, admit the records requested by the Plaintiff are in the custody of an agent of the Village, Grota Appraisals, LLC. As further answer, deny.

21. In answer to paragraph 21 of the plaintiff's Amended Complaint, affirmatively state that the allegation is not a complete or correct statement of the law; as further answer, deny.

22. In answer to paragraph 22 of the plaintiff's Amended Complaint, deny.

23. In answer to paragraph 23 of the plaintiff's Amended Complaint, deny.

24. In answer to paragraph 24 of the plaintiff's Amended Complaint, deny knowledge or information sufficient to form a belief as to the truth of the allegations contained therein and therefore deny the same putting plaintiff to its proof thereon.

25. In answer to paragraph 25 of the plaintiff's Amended Complaint, deny.

26. In answer to paragraph 26 of the plaintiff's Amended Complaint, deny.

27. In answer to paragraph 27 of the plaintiff's Amended Complaint, deny knowledge or information sufficient to form a belief as to the truth of the allegations contained therein and therefore deny the same putting plaintiff to its proof thereon.

28. In answer to paragraph 28 of the plaintiff's Amended Complaint, the defendant repeats, realleges and incorporates by reference all allegations, averments, denials and affirmative defenses as contained within the text of this responsive pleading.

29. In answer to paragraph 29 of the plaintiff's Amended Complaint, deny that the allegation is a complete and correct description of applicable law, as further deny.

30. In answer to paragraph 30 of the plaintiff's Amended Complaint, admit.

31. In answer to paragraph 31 of the plaintiff's Amended Complaint, deny.

32. In answer to paragraph 32, of the plaintiff's Amended Complaint, deny knowledge or information sufficient to form a belief as to the truth of the allegation contained therein and therefore deny the same putting the plaintiff to its proof thereon.

33. In answer to paragraph 33 of the plaintiff's Amended Complaint, deny.

34. In answer to paragraph 34 of the plaintiff's Amended Complaint, deny knowledge or information sufficient to form a belief as to the truth of the allegations contained therein and therefore deny the same putting plaintiff to its proof thereon.

35. In answer to paragraph 35 of the plaintiff's Amended Complaint, deny knowledge or information sufficient to form a belief as to the truth of the allegations contained therein and therefore deny the same putting plaintiff to its proof thereon.

36. In answer to paragraph 36 of the plaintiff's Amended Complaint, deny.

37. In answer to paragraph 37 of the plaintiff's Amended Complaint, deny.

AFFIRMATIVE DEFENSES

As and for affirmative defenses to the plaintiff's Amended Complaint, these defendants submit the following:

A. The plaintiff's Amended Complaint contains claims which fail to state claim upon which relief may be granted;

B. The plaintiff's Amended Complaint contains claims against parties that lack the capacity to be sued;

C. These defendants are protected from suit under common law and statutory immunities and privileges;

D. The plaintiff's claims are subject to the limitations and immunities contained within Wisconsin Statutes § 893.80;

E. These defendants complied with Wis. Stat. § 70.055 requiring the dismissal of these defendants from this action.

F. Plaintiff's Amended Complaint fails to state a claim upon which relief may be granted.

WHEREFORE, these answering defendants respectfully request judgment as follows:

A. For dismissal of the plaintiff's Amended Complaint upon its merits;

B. For the costs and disbursements of this action;

C. For such other relief as this court deems just and equitable.

Dated this 4th day of October, 2001.

CRIVELLO, CARLSON, MENKOWSKI &
STEEVES

Attorneys for defendants Village of Sussex and
Village of Sussex Custodian of Records

By: Andrew J. Schwaba

RAYMOND J. POLLEN

State Bar No. 1000036

ANDREW J. SCHWABA

State Bar No. 1029167

P.O. ADDRESS:

710 North Plankinton Avenue
Milwaukee, Wisconsin 53203
(414) 271-7722

VILLAGE OF SUSSEX'S
MOTION TO DISMISS
AND BRIEF IN SUPPORT
DELETED FOR BREVITY
(R.11:1-7)

WIREDATA, Inc

Plaintiff

v.

Village of Sussex,

Grota Appraisals, LLC in its capacity as Assessor for the Village of Sussex,

Michael L. Grota and Assessment Technologies of WI, LLC.

Defendants.

Case No. 01-CV-1403

Case Code 30707

Notice of Motion and Motion for Summary Judgment

TO: All Counsel of Record

Please take notice that on the 20th day of December ²⁰⁰⁴ at 1:00 O'clock PM or as soon thereafter as counsel may be heard, Counsel for WIREDATA will and does hereby move the court for Summary judgment ordering the defendants to produce a digital electronic copy of the original database along with the data layout specifications for the property record card data as requested by the Plaintiff at a cost not to exceed \$25.00 per municipality. As specified by the Plaintiffs the data shall be in a form either as it then existed (i.e., in an Access database) or in an electronic digital export (either "fixed length, comma-quote, pipe delimited") of the property record card information along with the along with the data layout specifications of the export. WIREDATA also request punitive damages, costs and attorney fees all pursuant to statute.

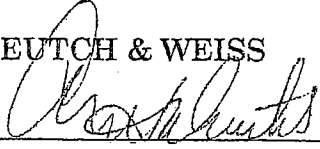
In the alternative, WIREDATA requests Partial Summary Judgment against all defendants determining that:

1. That WIREDATA is entitled to receive a full and complete copy of the computerized database containing the Property Record Card data as requested (including the layout specifications);
2. That cost for the copy shall not exceed \$25.00 per municipality;
3. That, if the copy is an export of that part of the database which contains the Property Record Card information, said copy shall be of the Access database in an electronic digital export (either "fixed length, comma-quote, pipe delimited") of the property record card information along with the along with the data layout specifications of the export;
4. For Punitive Damages in the amount of \$100,000.00; and
5. For the Plaintiffs cost and attorney fees in this action.

That the grounds for this motion are as shown in the affidavits and memorandum attached hereto.

Dated at Milwaukee, Wisconsin this 1st day of November, 2004.

DEUTCH & WEISS



Alan H. Deutch

Attorney for Plaintiff
State Bar No. 01013249

P.O. ADDRESS:

7670 N. Port Washington Rd.
Suite 200
Milwaukee, WI 53217
(414) 247-9958
(F) (414) 247-9959

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.

3. In order to be able to effectively and practically understand and use the public record information requested, WIREdata needs to receive it in form that can be accurately input into a computer. Based on Affiant's experience and knowledge of working with computerized and paper data as it relates to real estate, if WIREdata were to receive paper printed copies of the data and then attempt to scan or otherwise input the information into a computerized database, there is a high probability that there would be errors which would not be in the original computer database as maintained by the assessor and/or municipality.
4. Further, if WIREdata accepted the paper copies of the property record card information and did not input them into a computerized database, it would make the public data effectively not understandable as it would be extremely difficult, if not practically impossible, to

constantly organize and reorganize the data in order to compare each individual element thereof.

5. 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 "[a]ny electronic output and media is acceptable (i.e., fixed length, comma-quote, pipe delimited)."
6. Based on affiants over 20 years of dealing with computerized databases, the specification that WIREdata desired the copy in "[a]ny electronic output and media is acceptable (i.e., fixed length, comma-quote, pipe delimited)" would effectively specify that WIREdata is requesting an electronic digital copy of the database in its then current state or gives the assessors an option to export the property record card data in a fashion that allows it to be read and imported into another database program.

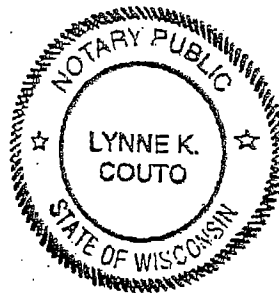
7. The Microsoft Access program includes "import and export" functions which make it easy to produce an electronic digital copy of the data. Further, the specifications of "fixed length, comma-quote, pipe delimited" are general database terms which are part of industry standard data interchange protocols and ones which anyone with just a passing familiarity of computer databases would understand is a request for data is that is easily able to be copied from one computer onto a CD and then into another database program.

Executed at Milwaukee, Wisconsin, this 1st day of November, 2004.

Peter Shuttleworth
Peter Shuttleworth

Subscribed and Sworn to before me
This 1st day of October, 2004
November

Lynne K. Couto
Notary Public, Milwaukee, Wisconsin
My Commission 3/16/04



RECEIVED AUG 10 2004

S# 600

STATE OF WISCONSIN CIRCUIT COURT WAUKESHA COUNTY

WIREDATA, INC.

Plaintiff,

VILLAGE OF SUSSEX,
GROTA APPRAISALS, LLC,
and MICHAEL L. GROTA

Defendants.

NOV - 2 2004

WAUKESHA CO. WIS.
CIVIL DIVISION

Case No. 01-CV-1403

AFFIDAVIT OF M. CHRIS SWARTZ

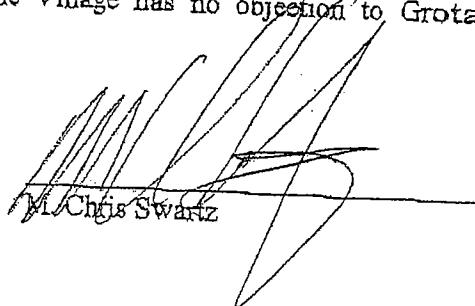
STATE OF WISCONSIN }

COUNTY OF WAUKESHA }

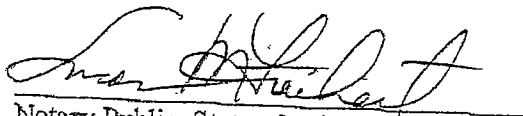
- 1) I, M. Chris Swartz, am the Village Administrator for the Village of Sussex (the "Village").
- 2) The Village contracted with Michael Grota ("Grota") of Grota Appraisals, LLC as an independent contractor to conduct official assessments on behalf of the Village and maintain the Village's real estate property record cards, as well as the information recorded on those cards (the "Data").
- 3) Grota is the authority and custodian of the Village's Data pursuant to Wis. Stat. § 19.32 and Grota has the same Data in an electronic digital format. Grota has specifically maintained the Data in a computerized electronic digital format because of the various advantages of maintaining and using records in that format compared to a paper or hard copy format.
- 4) The Data is the property of the Village and the Village has not granted Grota permission or authority to sell or transfer the Village's property rights in the Data.
- 5) It is the Village's position that the Data, which is the subject of WIREDATA's request, is subject to the requirements of the Wisconsin Open Records Law. The Village has no objection to Grota giving WIREDATA an electronic digital copy of the Data.
- 6) In 2001, the Village had possession of a limited database that contained the zoning, square footage and assessment amount of the residential properties in the village. The

Village did not have possession of all of the Data or a copy of the Market Drive database that contained the information requested by WIREdata. The Village believed that its database was copyrighted with Market Drive software and that Assessment Technologies' ("AT") copyright prevented the Village from distributing the Data without AT's permission, which it did not give.

- 7) It is my understanding that the decision of the United States Court of Appeals for the Seventh Circuit in *Assessment Technologies of WI, LLC v. WIREdata, Inc.*, 350 F.3d 640 (7th Cir. 2003), determined that it is not a violation of copyright to provide the Data to WIREdata. The Village has no information why Grota determined why the Data should not be produced under the Open Records Law.
- 8) It is the Village's position that Grota, as the authority and custodian, makes the determination whether WIREdata's request for the 2001 Data for the Village of Sussex should be granted. If Grota determines that WIREdata may be given an electronic digital copy in an ASCII, comma or pipe delimited file or a Microsoft Access database that is not encrypted or password protected, the Village has no objection to Grota giving WIREdata a copy of the same.


M. Chris Swartz

Subscribed and sworn to before
me this 9th day of AUGUST
2004.


Notary Public, State of Wisconsin
My Commission Expires: 01-14-07

STATE OF WISCONSIN	CIRCUIT COURT CIVIL DIVISION	WAUKESHA COUNTY
--------------------	---------------------------------	-----------------

WIREdata, Inc.

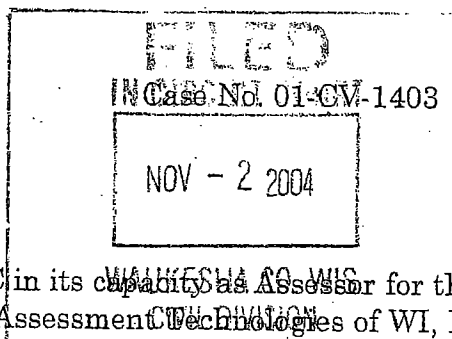
Plaintiff,

v.

Village of Sussex,

Grota Appraisals, LLC in its capacity as Assessor for the Village of Sussex,
Michael L. Grota and Assessment Technologies of WI, LLC.

Defendants.



**AFFIDAVIT OF EMILY C. CANEDO
IN SUPPORT OF PLAINTIFF'S MOTION FOR SUMMARY
JUDGMENT**

STATE OF WISCONSIN)

) ss.

MILWAUKEE COUNTY)

Emily C. Canedo, being first duly sworn on oath, deposes and states
that:

I am one of the attorneys for the plaintiff, WIREdata, Inc., and make
this affidavit on their behalf in support of plaintiff's motion for summary
judgment.

2. Attached hereto collectively as Exhibit A are true and correct copies of
pages from Michael Grota's deposition, conducted on June 22, 2004.

3. Attached hereto collectively as Exhibit B are true and correct copies of
pages from Ernest Matthies' deposition, conducted on August 18, 2004.

CLERK OF CIRCUIT COURT
MILWAUKEE COUNTY
NOV 3 2004

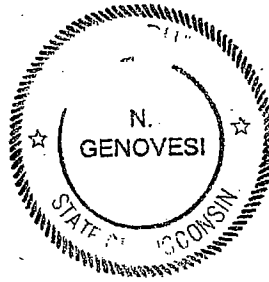
4. Attached hereto collectively as Exhibit C are true and correct copies of pages from Andrew Pelkey's deposition, conducted on September 22, 2004.
6. Attached hereto collectively as Exhibit D are true and correct copies of pages from Thomas Curtis' deposition, conducted on July 27, 2004.
7. Attached hereto as Exhibit E are true and correct copies of Exhibit 3 and Exhibit 4 as marked at the deposition of Thomas Curtis, conducted on July 27, 2004.
8. On or about February 6, 2004, I contacted attorneys for the defendants, renewing WIREdata's request for the data in light of the Seventh Circuit decision on the copyright issue. The defendant's attorneys either did not respond or stated that they would not or could not provide the data. Attached hereto as Exhibit F is a true and correct copy of the letters received from the defendants' attorneys in response to my inquiry.
9. Attached hereto as Exhibit G is a true and correct copy of Exhibit 8 as marked at the deposition of Peter Shuttleworth, conducted on July 28, 2004.

Executed in Milwaukee, Wisconsin this 30th day of October, 2004.

Emily C. Canedo
Emily C. Canedo

SUBSCRIBED AND SWORN to before
me this 30th day of October, 2004.

N. Genovesi
Notary Public, State of Wisconsin
My commission expires: 11/27/05



1 IN THE CIRCUIT COURT OF WAUKESHA COUNTY
2 STATE OF WISCONSIN

3 WIREdata, Inc.,

4 Plaintiff,

5 vs.

Case No. 01 CV 1403

6 VILLAGE OF SUSSEX,
7 GROTA APPRAISALS, LLC, in its
8 capacity as Assessor for the
Village of Sussex, MICHAEL L.
GROTA and ASSESSMENT TECHNOLOGIES
OF WI, LLC,

COPY

9 Defendants.

10 DEPOSITION OF: MICHAEL L. GROTA

11 June 22, 2004
12 3360 Gateway Road
Brookfield, WI 53045

13 APPEARANCES: DEUTCH & WEISS, by
14 ALAN H. DEUTCH,
Attorney for the Plaintiff,
15 7670 N. Port Washington Road
Fox Point, WI 53217

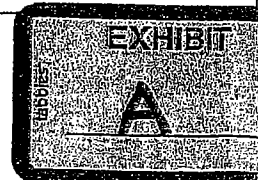
16 CRIVELLO, CARLSON & MENTKOWSKI,
17 S.C., by ERIN FAY,
Attorney for Village of Sussex
18 and City of Port Washington,
Defendants,
19 710 N. Plankinton Avenue
Milwaukee, WI 53203

20 RYAN, KROMHOLZ & MANION, S.C., by
21 DANIEL R. JOHNSON,
Attorney for Grota Appraisals, LLC,
22 in its capacity as Assessor for the
Village of Sussex, Michael L. Grota
23 and Assessment Technologies of WI,
LLC, Defendants,
24 P.O. Box 26618
Milwaukee, WI 53226-0618

25 Reported by Betty K. Vande Boom, Registered
Professional Reporter and Notary Public.

BEYER REPORTING, INC. 414-529-8826

R-App. 158



1 A I cannot necessarily interpret that I'm not an
2 elected official. Personally I am custodian of the
3 assessment records.

4 Q You are custodian of the assessment records you
5 said?

6 A That's correct.

7 Q Okay. When you say you're not an elected official,
8 you do not, do you believe that you are a public
9 official of any sort, or type?

10 MR. JOHNSON: Objection. As to form.

11 MR. DEUTCH:

12 Q Answer please.

13 A I believe that I'm an appointed assessor to fill a
14 vacant elected position, that most communities have
15 gone to an appointed assessor to fill what would be
16 a, you know, a municipal position, or function.
17 And that I believe it would be on the same order as
18 a village trustee, only for an appointed position.

19 Q So you believe you are, or not a public official,
20 you, yourself, Michael Grota?

21 A I believe, well, I believe Grota Appraisals acts as
22 a public official. I happen to be the owner of
23 Grota Appraisals, and at least for the Village of
24 Sussex do sign the assessment roll.

25 Q You likewise sign the assessment roll for the

- 1 Village of Thiensville?
- 2 A I have not, and I don't believe that I ever have.
- 3 Q Who signs the assessment roll, if you know, for
- 4 Thiensville?
- 5 A I believe Robert Grotz.
- 6 Q Okay. That's your brother?
- 7 A Brother, and/or father, have signed in the past.
- 8 Q Okay. Both are named Robert?
- 9 A That's correct.
- 10 Q Is there a different middle initial, or is one a
- 11 junior?
- 12 A C is brother. G is father.
- 13 Q Okay. Now, sir, do you agree that, I think you
- 14 just responded, but I want to make sure, that you
- 15 are the custodian of the assessment records, for the
- 16 Village of Sussex?
- 17 A Correct.
- 18 Q And are you likewise the custodian of the village
- 19 records, the real estate assessment records that is
- 20 for the Village of Thiensville?
- 21 A Grotz Appraisals is the custodian of records.
- 22 Q In both cases?
- 23 A Correct.
- 24 Q Okay. How about for the City of Port Washington?
- 25 A No, sir.

1 correct?

2 MR. JOHNSON: I'm going to object to the
3 form of that question. Could you please restate
4 the question? I don't understand it. I think it's
5 compound as well.

6 MR. DEUTCH: Please restate the question.

7 (Pending Question Read Back by the
8 Reporter.)

9 MR. JOHNSON: I'm going to object.
10 That's an ambiguous question as well. Purview?
11 Custody? Control?

12 THE WITNESS:

13 A I don't believe so.

14 MR. DEUTCH:

15 Q Why do you not believe so, sir?

16 A Because in the world of software, and not just with
17 Assessment Technologies' software, if somebody
18 wanted to, if the building inspector had, you know,
19 his building inspection records in a software
20 program, there would be a conversion necessary to
21 get that assessment, that building inspection data
22 out.

23 Q How do you know that, sir?

24 A Because I believe that I'm familiar with
25 contractual building inspectors that use their own

1 proprietary software.

2 Q Do any of them use software that you, or one of
3 your companies have created?

4 A No, sir.

5 Q So you don't know of your own knowledge what the
6 contracts are between the villages, their building
7 inspectors, or the building inspectors' use of
8 other companies, do you, sir?

9 A No, sir.

10 Q That's correct what I said?

11 A That's correct.

12 Q So let's stay with things that you know. In point
13 of fact, can you give me -- let's go right back to
14 the original basis. The village official asks
15 Grota Appraisals for the real estate records, and
16 Assessment Technologies said no, there's no way
17 that the village official could get it; is that
18 correct?

19 A No, that isn't true.

20 Q Well, how isn't that true, sir? You just, you
21 realize you're trying to change your own testimony?

22 MR. JOHNSON: Alan, quit being
23 argumentative. You're restating his testimony, and
24 let him testify for himself.

25 THE WITNESS:

1 are necessary, Assessment Technologies has never
2 denied a conversion, if asked. And there is, in
3 Grota Appraisals addendum contract there is a
4 provision to protect the community.

5 Q And what's that provision?

6 A That if Grota Appraisals is no longer retained by
7 that community, it would provide the assessment
8 data to the community in a format that they could
9 use.

10 Q Let's back up in your answer a little bit. You
11 said Assessment Technologies has never denied a
12 request of a community to produce data?

13 A It's never been asked.

14 Q Well, did you ask Assessment Technologies as part
15 of the request that was made for open records from
16 WIREdata?

17 A Yes, I did.

18 Q And what did Assessment Technologies respond?

19 A That relates back to the Mr. Pelkey's conversation
20 with Mr. Curtis, that there would be a cost of
21 producing that to WIREdata.

22 Q So that in point of fact, Assessment Technologies
23 was saying no, unless you pay the cost; is that
24 correct?

25 A In this specific case, yes.

1 Q And in point of fact, it was not cost, but the,
2 what you call the retail value. You used a term.
3 I can't remember.

4 MR. JOHNSON: Well, you can look at the
5 transcript again.

6 MR. DEUTCH:

7 Q Do you remember what the term was, sir?

8 A To which question?

9 Q As to the rate that you would, that you were using
10 the 50 cent rate per record.

11 A That that was a cost that was passed by Assessment
12 Technologies in respect to programming.

13 Q Okay. That was the current market rate I believe
14 you used?

15 A That was a rate that was put out there by
16 Assessment Technologies.

17 Q Did that include both cost and profit to Assessment
18 Technologies?

19 A It certainly was intended to cover the costs.

20 Q And intended to provide some profit to Assessment
21 Technologies?

22 A I believe that there was some profit built into
23 that fee.

24 Q You said that you --

25 (Exhibit No. 2 & 3 marked

1 A Zero.

2 Q Pardon?

3 A Nothing.

4 Q Okay. And that was data that it got
5 electronically; is that correct?

6 A That's correct.

7 (Exhibit No. 4 marked
8 the Reporter.)

9 MR. DEUTCH:

10 Q I'm going to show you what's been marked for
11 identification as Exhibit 4. Have you ever seen
12 that document before?

13 A I believe that I have, I'm uncertain, but I believe
14 I've seen a similar, if not this particular record,
15 one that's similar. Either between Thiensville, or
16 Sussex.

17 Q And you understood that this was the request by
18 WIREdata for an electronic digital copy of the
19 assessor records that are on the property record
20 card?

21 A It's a vague request, but I'm aware that that was,
22 this was submitted by WIREdata.

23 Q And as the assessor did you take any actions to
24 fulfill that request?

25 A Again that relates back to Andy Pelkey's

1 conversation with Mr. Curtis.

2 (Exhibit No. 5 marked by

3 the Reporter.)

4 MR. DEUTCH:

5 Q I show you what's been marked for identification as
6 Exhibit 5. That, the top page of that appears to
7 be a copy of Exhibit 4, but then the next page down
8 is that the letter from Mr. Pelkey?

9 A That would be correct.

10 Q That letter at the bottom refers to the fact that
11 the Village of Sussex had a copy of Market Drive's
12 data base; is that correct?

13 MR. JOHNSON: Where are you looking,
14 Alan?

15 THE WITNESS:

16 A The GIS data base?

17 MR. DEUTCH:

18 Q Yes.

19 A That's correct.

20 Q Okay. And how does the GIS data base differ from
21 the, from the appraisal data base?

22 A I couldn't tell you.

23 Q Is it the same?

24 A I don't believe so.

25 Q But you -- okay. On what basis do you believe it's

1 characteristics?

2 A That is one of our functions for perfecting the
3 assessment roll.

4 Q Okay. And isn't it easier to do that on a
5 computerized versus noncomputerized basis?

6 A Perhaps.

7 Q Why do you say perhaps?

8 A Depending on which software is used.

9 Q Okay. So some software you think is harder to use?

10 A Some software does not give that ability to make
11 comparisons.

12 Q Would you agree with me that it's easier to compare
13 things that are in a digital mode as compared to a
14 hand mode? Physical hand mode?

15 A Again depends on which software we're talking
16 about.

17 Q No, I'm not talking -- okay. Let's talk about
18 Market Drive's software compared to using the
19 property record cards themselves. If I wanted to
20 compare all of the four-bedroom-like style homes,
21 I'd find it easier to do it in a digital sense than
22 in a property record card sense; isn't that
23 correct?

24 A That's correct.

25 Q All right. Now as part of Assessment Technologies

1 Q Well, you went to mediation, didn't you, sir?

2 A Yes.

3 Q Matter wasn't resolved at mediation, was it?

4 A No, sir.

5 Q Point of fact, prior to three weeks ago, what
6 indications, if any, did you give to WIREdata that
7 you would be producing any information?

8 A There has been no dialogue between myself and
9 WIREdata.

10 Q What indications do you believe were given by
11 anyone on your behalf that you'd be producing that
12 data, prior to the actual production of it three
13 weeks ago?

14 A There's been talk all along of producing that, but
15 what was going to be the fee for the format that
16 you, that you would find most helpful.

17 Q What else has WIREdata done, other than as you've
18 said, rushed to court to get the data?

19 A On behalf of Sussex?

20 Q On behalf of, in the situation of Sussex, or --
21 strike that -- what municipal, what contracts do
22 you believe WIREdata has interfered with in any
23 way, shape, or form?

24 A Well, I believe trying to exercise the contracts of
25 Thiensville and Sussex with an attempt to require

1 Grota Appraisals to convert, or exercise that
2 clause, which would be exercisable only by Grota
3 Appraisals and the community upon Grota Appraisals
4 departure from that community.

5 Q You talking about the clause that was referenced in
6 litigation?

7 A Go back to there was an addendum that was, that's
8 contained in the contract for computer conversion.
9 No. It's actually not there. There's an addendum
10 that doesn't appear to be included here.

11 Q And that addendum is one that sets up the basis
12 under which the cities would be absolutely entitled
13 to a data base?

14 A That they would be entitled to the assessment data.
15 That's correct.

16 Q Okay. Now certainly Grota Appraisals, or
17 Assessment Technologies could at any time at will
18 simply give the cities, give the villages involved
19 that data base; correct?

20 A Going through the required work to get it to a data
21 base, that was outside of the copyright data base,
22 that's correct.

23 Q But if they wanted to give them even a copy of a
24 copyright data base, they could have done that? If
25 Assessment --

1 information as requested by WIREdata for just the
2 cost, without any profits involved to WIRE, without
3 any profits involved to Assessment Technologies,
4 Grotta, or any company you own?

5 A In a digital form?

6 Q In a digital form.

7 A No. Wait. Actually, the answer is, I mean, yes.
8 The PDF was given.

9 Q Okay. Does that PDF have any restriction on it
10 from putting it into a data base, from reading it,
11 or putting it into a data base?

12 A I can't answer that question.

13 Q Did you have any conversation -- why can't you
14 answer that question?

15 A I don't know about the limitations of the different
16 file formats.

17 Q Did you ever have any conversations with Mr.
18 Pelkey, or anyone else, concerning whether that
19 data could be put into a digital data base?

20 A I believe that he said it may be difficult to do.

21 Q And did he say why it would be difficult to do?

22 A No, he didn't.

23 Q Did he say whether or not he was including any
24 protections in it to prevent it from being done?

25 A I don't believe that he's done that.

STATE OF WISCONSIN CIRCUIT COURT OZAUKEE COUNTY

WIREDATA, INC.,

Plaintiff,

COPY

-vs-

Case No. 01-CV-198

VILLAGE OF THIENSVILLE, GROTA
APPRAISALS, LLC, MICHAEL L.
GROTA, ASSESSMENT TECHNOLOGIES
OF WISCONSIN, LLC,

DEPOSITION OF:
ERNIE MATTHIES

August 18, 2004

Defendants.

STATE OF WISCONSIN CIRCUIT COURT WAUKESHA COUNTY

WIREDATA, INC.,

Plaintiff,

-vs-

Case No. 01-CV-1403

VILLAGE OF SUSSEX, GROTA
APPRAISALS, LLC, and
MICHAEL L. GROTA,

Defendants.

STATE OF WISCONSIN CIRCUIT COURT OZAUKEE COUNTY

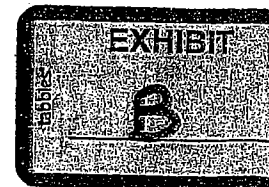
WIREDATA, INC.,

Plaintiff,

-vs-

Case No. 01-CV-216-B2

CITY OF PORT WASHINGTON and



1 MR. DEUTCH:

2 Q. And why not?

3 A. I couldn't produce it due to the restrictions in
4 the contract with Assessment Technologies,
5 without their explicit cooperation in the matter.
6 The request by Port Washington to release the
7 data to WIREdata in a database format would again
8 have to be cleared through Assessment
9 Technologies, and that has not -- that
10 clarification has not been given by them.

11 I'm forbidden by my contract, and as far
12 as it being -- well, I'll just leave it at
13 that.

14 Q. So you believe that you're forbidden by your
15 contract to release data that somebody else
16 already -- that somebody else owns? By somebody
17 else, I mean the municipality?

18 A. Yes. Yes.

19 Q. Does your contract with the municipality require
20 you to maintain their ownership of their data of
21 the records?

22 MS. BUELL: It's vague. Objection.

23 MR. DEUTCH: Yeah. I agree it is
24 vague.

25 THE WITNESS:

IN THE CIRCUIT COURT OF OZAUKEE COUNTY

STATE OF WISCONSIN

WIREDATA, INC.,

Plaintiff,

vs.

Case No. 01-CV-198

VILLAGE OF THIENSVILLE, VILLAGE
OF THIENSVILLE CUSTODIAN OF RECORDS,
GROTA APPRAISALS, LLC IN ITS CAPACITY
AS THE ASSESSOR FOR THE VILLAGE OF
THIENSVILLE, MICHAEL L. GROTA, and
ASSESSMENT TECHNOLOGIES OF WI, LLC,

COPY

Defendants.

WIREDATA, INC.,

Plaintiff,

vs.

Case No. 01-CV-000216

VILLAGE OF PORT WASHINGTON
and MATTHIES ASSESSMENTS,

Defendants,

and

AMERICAN FAMILY INSURANCE,

Intervenor.

EXAMINATION of ANDREW PELKEY taken at
the instance of the Plaintiff, under and pursuant to
Section 804.05 of the Wisconsin Statutes, pursuant to
Notice, before LAURELL L. BRESLOW-COLLIEN, Court Reporter
and Notary Public in and for the State of Wisconsin, at
RYAN KROMHOLZ & MANION, S.C., 3360 Gateway Road,
Brookfield, Wisconsin, on the 22nd day of September, 2004,
commencing at 1:13 p.m. and concluding at 2:28 p.m.

1 Q Any other database that they can select?

2 A No.

3 Q So the data is now kept in either a SQL Server
4 database or an Access database; is that correct?

5 A Yes.

6 Q And both of those are Microsoft products?

7 A Yeah.

8 Q Unfortunately sometimes things get a little slurred,
9 so if you can, use yes rather than yeah. In either
10 case, if you wanted to make a copy of certain parts
11 of the data and the data only as is exists in either
12 SQL Server or Access, are you familiar with the
13 export functions?

14 A No.

15 Q Have you ever made a copy of the database?

16 A Yes.

17 Q What did you do to use -- to make a copy?

18 A I used Windows Explorer.

19 Q You used Windows Explorer just to copy the file?

20 A Yes.

21 Q So that if you wanted to make a copy of -- in
22 2000 -- Strike that. When did you add the option of
23 having a SQL database?

24 A 2002.

25 Q So in 2001 the only database that was then being

1 used was Access; correct?

2 A Yes.

3 Q Okay. And if you wanted to make a copy of the data
4 that was in the Access database, could you do it by
5 just using windows Explorer to copy the file?

6 A No.

7 Q What would you need to do to do that?

8 A You would need something to take the data out of the
9 database if you just want to copy the data.

10 Q And what would you need to take it out?

11 A Well, I'm a programmer so I use programs.

12 Q Okay. Could you use the Access program itself?

13 A Yes.

14 Q And you could take it out simply by making -- by
15 asking it to export a copy; correct?

16 A Yes.

17 Q On the typical file that you dealt with, how long
18 would it take you to give the commands to export a
19 copy of the database?

20 A All tables?

21 Q Yes. If you just did it as -- the fastest way you
22 could do it, not all cities just one city.

23 A One database, all tables, one at a time, export each
24 table one at a time using Access?

25 Q You can export them faster than one at a time, can't

1 would be less obvious to determine what all that
2 stuff is.

3 Q But in any event if you gave somebody that entire
4 database, they would then have all the property
5 record card information plus other information;
6 right?

7 A Most of it.

8 Q What percent of it would they have?

9 A They have everything but pictures and sketches.

10 Q And the second way you said to do it would be to use
11 the -- to create a property record card report; is
12 that correct?

13 A To use the property record card report that already
14 exists.

15 Q And then to export that?

16 A Yes.

17 Q How would you do that?

18 A You'd run it and then there's -- we use Crystal
19 Reports to create the report and then Crystal Report
20 as an export tool which exports in a variety of
21 formats.

22 Q Do you know the formats it exports it into?

23 A I know some of them.

24 Q Can you tell me?

25 A Excel, Word, CSV.

1 A No.

2 Q Why not?

3 A It's -- the export is very poor.

4 Q Okay. Presuming that the export were not very poor,
5 if you were using Crystal Reports to prepare a
6 report on a database -- Strike that. The last time
7 that you used Crystal Reports then to try this was
8 in 2001?

9 A Yes.

10 Q So you don't know how Crystal Reports works at the
11 current time doing it?

12 A We haven't changed the version that we're using of
13 Crystal, so the one that we're using, I know how it
14 works.

15 Q Do you know whether Crystal Reports has been updated
16 since then?

17 A It has.

18 Q And you've elected not to get a new version of it?

19 A Not yet.

20 Q Okay. You said it also -- Crystal Reports also
21 exports to Word?

22 A Yes.

23 Q And to a comma-delimited?

24 A Yes.

25 Q What is a comma-delimited file?

1 A It's a file that has text in it with commas between
2 values.

3 Q And it's easier to translate -- would you agree it's
4 easier to translate a comma-delimited file into
5 another database than it would be to translate a
6 PDF?

7 A Yes.

8 Q Have you ever tried making a -- or exporting the
9 property record card information using a
10 comma-delimited file?

11 A Yes.

12 Q And what happened?

13 A It's awful.

14 Q By whose definition?

15 A Me as a programmer.

16 Q Do you have any samples of that?

17 A Not with me.

18 Q Did you ever discuss giving any of the Excel or
19 comma-delimited formats to WIREdata?

20 A Yes.

21 Q And who did you discuss that with?

22 A Bob Grota.

23 Q And when did you discuss that?

24 A Must have been 2001 or something.

25 Q And what was your decision at that point?

1 A That the formats were so awful that you wouldn't
2 want them.

3 Q Did you ever contact WIREdata?

4 A About?

5 Q About doing that, about giving them a
6 comma-delimited file?

7 A I did not contact them, no.

8 Q Now, if you were using Crystal Reports and the
9 property record report to do it, you would be
10 getting only the property record card data; is that
11 correct?

12 A When you say to do it, you mean?

13 Q Let me back up. I'm talking about if I came to you
14 and said I want a copy of the 2001 and I had the
15 database that I handed you or you had Sussex data
16 and I want a copy of just the information that is on
17 the property record card --

18 A Yes.

19 Q -- one way I can get that we talked about and I
20 would get that data and more would be just making a
21 copy of the database; correct?

22 A Yes.

23 Q Second way I can get it is you said by running the
24 property record card report and exporting it using
25 Crystal Reports; correct?

1 A Yes.

2 Q Okay. If I were using the second method, I'd be
3 getting only the property record card information;
4 correct?

5 A Yes.

6 Q Then I wouldn't be getting any other information?

7 A That's correct.

8 Q Would I be getting it in a coded fashion or in a
9 English fashion?

10 A English.

11 Q And how long would it take to make -- to run this
12 and to -- run either in Excel or comma-delimited
13 Crystal Report if I wanted that?

14 A It depends on the number of properties. It's quite
15 lengthy to run it because each property can take
16 five to 10 pages, four to 10 pages, I mean it can be
17 long. So it might take, depending on the speed of
18 the computer, how big the database is, it might take
19 an hour, two.

20 Q But that's just the computer chunking away, it
21 doesn't need a person sitting there?

22 A During the middle of the process, that's correct.
23 It might take an hour to run, but you don't have to
24 sit there. You do have to -- a human does have to
25 intervene in the middle because once it previews on

1 A I don't know.

2 Q Did you ever look it up? Did you ever try it?

3 A It's hard to measure because the space is used up
4 and then immediately discarded. You don't really
5 have a stopping point where you can say stop, okay,
6 how much was used up. It's hard to tell.

7 Q Have you ever used the export function in Access or
8 in SQL Server?

9 A Access, yes, SQL Server, no.

10 Q If I want to use the export function in Access, I
11 can simply tell it what columns or what fields I
12 want and it will export only those fields; is that
13 correct?

14 A I don't recall if it gives you the ability to do it
15 field by field.

16 Q How do you believe it works?

17 A I don't recall. I mean I know you click -- you
18 right mouse click on the table, you choose export,
19 and then there's a bunch of dialogue boxes of which
20 are fuzzy to me because I don't do it very often and
21 I don't know the exact steps.

22 Q Do you know if you can memorize the transaction so
23 that you can repeat it over and over for different
24 databases?

25 A I don't think so. I think you have to do them one

1 at a time.

2 Q You also said that another way of making it -- of
3 making a copy is by writing a program to do it; is
4 that correct?

5 A Yes.

6 Q Have you figured the amount of time it would take to
7 write a program to export that information?

8 A That information is?

9 Q The property record card information.

10 A No.

11 Q Did you ever estimate it?

12 A No.

13 Q Did you at one time estimate something to be \$6,000?

14 A Sure, yes, \$6,600.

15 Q What work were you estimating for that?

16 A That was the work required to give the data that
17 WIREdata specifically asked for.

18 Q That was the information that you and Tom Curtis
19 (phonetic) were talking about?

20 A That's correct.

21 Q How many hours of time did you figure for that?

22 A 66.

23 Q 66 hours or 66 --

24 A Uh-huh, 66 hours.

25 Q And once you had that program, you could use it on

1 Q And with the 66 hours of time, you've done the
2 sorting out and the translation?

3 A Yes.

4 Q And either way the person ends up with the property
5 record card data, correct, the person receiving it?

6 A No.

7 Q Okay. What doesn't he have?

8 A In the case of the export of just the data that Tom
9 asked for, he just gets the data he asked for, which
10 is not everything on the property record.

11 Q But in the first case I would have gotten the full
12 property record card information?

13 A Yes.

14 Q And the first case it's just copying the entire
15 database?

16 A Yes.

17 Q Did you have a reason why you didn't just copy the
18 entire database?

19 A Yes.

20 Q And why was that?

21 A They're not a licensed user.

22 Q Any other reason?

23 A Tom didn't want that, he wanted something that was
24 easy to use, and he explicitly said what he wanted
25 and that wasn't what he asked for.

1 Q Did you ever ask him would he just like the entire
2 database?

3 A No.

4 Q So how do you know that that's not what he wanted?

5 A I gave him what he asked for. That's not what he
6 asked for. He wanted very specific I want the data
7 in this particular format, I want these particular
8 fields presumably to make it easy for him to bring
9 the data in. He did, as I recall, say that he
10 wanted something very simple, he didn't want to make
11 it complicated. Obviously that wasn't going to be
12 simple for him.

13 Q Why in 2002 did you add a password protection to the
14 Access database?

15 A Two reasons, the biggest one was to protect our
16 design, and the second one is we sometimes have
17 problems with users monkeying with the data which we
18 have to fix later, which is a big pain.

19 Q Is it the same password for all of them?

20 A Yes.

21 Q Have you ever been asked by any municipality for
22 that password?

23 A No.

24 Q How difficult would it be to take the Access
25 database or the SQL Server database and make a copy

1 of that database that was not password protected?

2 A I can't speak for SQL Server. Access is relatively
3 easy.

4 Q By relatively, within minutes?

5 A Yes.

6 Q So if I wanted to take a copy of a 2004 Access
7 database, strip out the password, and give somebody
8 just the unprotected information, now we're maybe
9 looking at a total of four minutes, I'm adding two
10 minutes for the password, two minutes for the copy?

11 A Yes.

12 Q And how much time -- Well, strike that. You are
13 aware -- Strike that.

14 Were you asked in 2003 or 2004 to make a
15 copy of the data at any time?

16 A I'm not sure what you're asking.

17 Q Okay. At any time in 2003 or 2004 did anybody ask
18 you to make a copy of the Sussex, Thiensville or
19 Port Washington data? By the data I'll call it the
20 property record card data.

21 A Yes.

22 Q And who asked you to do that?

23 A It might have been Mike or it might have been Bob.
24 I'm not sure.

25 Q And what did they ask you to do?

1 A To export the property record card information to a
2 PDF so I could give it to them.

3 Q Give it to who?

4 A To whoever they were going to give it to.

5 Q Did you have a discussion with them about whether
6 you'd use PDF versus any other of the exports
7 available?

8 A Yes.

9 Q And what was said during that discussion?

10 A Well, they wanted an export of the thing, and I told
11 them that the formats other than PDF weren't worth
12 anything so the PDF was the best copy reproduction
13 of the property records report by far, so that's
14 what we gave them.

15 Q Did you tell either of the Mr. Grotas that by using
16 PDF it would also make it more difficult for the
17 person who's getting it to put it into a database?

18 A We didn't discuss necessarily what the person
19 getting it was going to do, but it is -- we did say
20 that it would be more difficult to reverse engineer.

21 Q And who asked you about whether that would be more
22 difficult to reverse engineer?

23 A I don't know if anybody asked me or whether I
24 offered it.

25 Q Isn't it a fact that the reason you selected PDF is

1 because you knew of all of the formats available
2 that would be the most difficult to reverse
3 engineer?

4 A No.

5 Q Is there any of those formats other than PDF --
6 Strike that. Of all the formats that you're
7 familiar with with Crystal Reports, which one would
8 be the most difficult to reverse engineer the data?

9 A I can't say.

10 Q Of the ones you know.

11 A They're all difficult because they're not -- the
12 other ones, the format on the PDF is very nice, it
13 lays out just as it is really exactly what the thing
14 looks like, it does a really good job. The other
15 ones are so awful I couldn't tell you which one was
16 the worst to deal with. I know that the other ones
17 not all the data appears to export.

18 Q Then why would you say it makes it more difficult to
19 reverse engineer a PDF?

20 A Because you don't have -- a slight distinction, you
21 don't have -- it doesn't appear like commas and text
22 values and stuff like that. It has a special format
23 which gives it the ability to look exact.

24 Q So that of all of them the one that would be the
25 most difficult to reverse engineer would be a PDF?

1 A I guess in that sense.

2 Q Pardon?

3 A Yes.

4 Q Isn't it a fact that you chose that because you knew
5 that would be the most difficult for WIREdata to
6 use?

7 A No.

8 Q Who asked you about the reverse engineering of the
9 information?

10 A I don't know.

11 Q Did you volunteer it or was that asked of you?

12 A I'm not sure.

13 Q You said that in the current version of Market Drive
14 the user decides whether he wants to use SQL Server
15 or Access database; is that correct?

16 A Yes.

17 Q Is that a decision once made that can be changed so
18 the data each year can be changed back and forth?

19 A No.

20 Q So it's a permanent decision once you make it?

21 A There is a conversion in one case if you went to
22 Access from SQL Server, there's no conversion back,
23 and you wouldn't change every year.

24 Q I understand that. I'm just asking if it's a
25 permanent decision basically?

1 feels it's too slow, one of the options they have to
2 do because of size, one -- if it's too slow because
3 of size, one option they have is to move to SQL
4 Server.

5 Q Did you ever create a copy of the Market Drive
6 information for Sussex to use under GIS -- for a GIS
7 investigation?

8 A No.

9 Q Do you know how they got one?

10 A No.

11 Q Did you ever know that Sussex had a copy that they
12 were using for some sort of GIS work?

13 A No.

14 Q What made you decide to print out or export the
15 Crystal Reports in 2003 for those three
16 municipalities to WIREdata?

17 A I did not export them to WIREdata.

18 Q Or to a PDF file?

19 A I was asked to export them.

20 Q So it wasn't an idea that you had, somebody came in
21 and said can you export this stuff?

22 A That's correct.

23 Q At that time did you try to export it to Excel?

24 A No.

25 Q Did you try to export it to Word?

1 A No.

2 Q Did you try to export it to a comma-delimited file?

3 A No.

4 Q You just went right to PDF?

5 A Yes.

6 Q Okay. Other than the conversations that you say you
7 had with WIREdata in 2001 concerning making a copy,
8 have you had any subsequent conversations with
9 anybody from WIREdata?

10 A No.

11 Q Now, if you wanted to -- we've gone through three of
12 the four ways of making a copy. You said the fourth
13 way would be exporting the tables?

14 A Yes.

15 Q And how would that differ from giving somebody
16 the -- a copy of the entire database?

17 A Well, the database you get one file and everything
18 would still be in the original structure as I
19 designed it. The export would be in individual
20 files, although still would have a representation of
21 the format that it was originally stored in.

22 Q Have you ever experienced -- Strike that. How long
23 would it take you to export any particular table of
24 Access?

25 A That depends on the size of the table. It would be

1 relatively short, a couple minutes, more if it's
2 really big.

3 Q Do you know how many tables were involved -- Strike
4 that. Do you know how many tables would be involved
5 in obtaining the property record card information?

6 A No, not off the top of my head.

7 Q What's your best estimate?

8 A Not code -- not concerning -- coding is okay?

9 Q Yes.

10 A Having code is okay?

11 Q Right.

12 A Twenty.

13 Q If it were 20 tables, how long does an export -- and
14 if somebody asked you just give me an export of
15 those 20 tables, would you agree that you could
16 probably do that human time in under 10 or 15
17 minutes?

18 A No.

19 Q How long do you think it would take?

20 A Well, if it's a couple minutes apiece and it's two
21 minutes apiece, that's 20 tables, that's 40 minutes
22 not counting getting the thing and wrapping that up
23 and getting that off to them, so you know --

24 Q So about 40 minutes you think?

25 A Forty minutes to an hour.

1 Q That would give you the entire copy?

2 A No, that will give you just the tables that are
3 involved with the property record card.

4 Q All right. And in that hour you've included the
5 time to go get the file; is that correct?

6 A Yeah.

7 Q Is there any other way that you know of to make a
8 copy of either the data or the database than what
9 you've said?

10 A No. Not that I can think of.

11 Q Do you have any authority -- have you ever run into
12 any problems using Crystal Reports?

13 A Yes.

14 Q Who do you consult with when you have problems with
15 Crystal Reports?

16 A The manufacturer.

17 Q And you call them on a general line?

18 A Yes.

19 Q General help line?

20 A Uh-huh, yes.

21 Q You don't have any other outside authority that you
22 use?

23 A No.

24 Q What version of Crystal Reports do you currently
25 have?

1 e-mail it to me.

2 Q Do they do it by using that same Windows Explorer
3 function that we talked about?

4 A They might.

5 Q What other ways do you know of that they might do
6 it?

7 A They might use the backup function inside of Market
8 Drive.

9 Q And if they use the backup function inside of Market
10 Drive, that just creates another database?

11 A Creates a zipped up database.

12 Q A zipped up database is basically a database that
13 uses a program called Zip to compress or uncompress;
14 is that right?

15 A Yes.

16 Q And it gives it a different name?

17 A Yes.

18 Q Is there anything other than the database that's
19 sent on that when you make that backup?

20 A There are -- yes.

21 Q What else is sent?

22 A There are -- you can back up pictures, you can back
23 up sketches which aren't part of the database but
24 stored outside. You can back up letters that they
25 have set up.

1 Q You say they can so it's not automatic that they
2 automatically do that?

3 A There are some options in the backup to say, you
4 know, don't back this part up.

5 Q So a user of Market Drive would be able to just
6 click backup --

7 A Uh-huh.

8 Q -- and only database --

9 A Uh-huh.

10 Q -- and not have the letters, not have the pictures,
11 and have on a CD the entire backup of the database;
12 is that correct?

13 A No.

14 Q What would they have?

15 A They would have a backup of the main database. They
16 can back that up, but it's not going to put it on a
17 CD.

18 Q How do they get it on a CD?

19 A You have to use a burner to do that.

20 Q And that's not part of the Market Drive program?

21 A No. No.

22 Q So that they then have it in a file; is that
23 correct?

24 A Yes.

25 Q What's the name of that file usually called?

1 A The name of the town dot zip.

2 Q So that -- and is that placed by the programming of
3 something into a specific folder?

4 A The user decides where it goes.

5 Q The user decides where it goes?

6 A Uh-huh.

7 Q So the user could just -- and how long does that
8 typically take to make a zipped up copy of the
9 program?

10 A Depends how big it is.

11 Q Say one of about 5,000 properties?

12 A A couple minutes maybe.

13 Q Okay.

14 A Five minutes. I don't know.

15 Q Then how long would it take to put that onto a CD?

16 A Today's CD-ROM burners, a couple minutes.

17 Q How about a CD-ROM burner in 2004 -- in 2001,
18 rather?

19 A Ten minutes, 15 minutes, something like that.

20 Q It would depend on what equipment the user has?

21 A And how big the file is, yeah.

22 Q They could do all of that without going to you; is
23 that correct?

24 A Yes.

25 Q All right. Now let's go back to that a minute. In

1 2001 if somebody used either the backup or Windows
2 to create a copy and put it on a CD, you'd agree
3 with me that that whole process using either
4 function could be done in under five minutes?

5 A No.

6 Q How long would you say?

7 A I'm sorry, did you say including burning it to a CD?

8 Q Right.

9 A Probably take them 15 minutes to a half an hour.

10 Q To burn it to a CD?

11 A No, to get the thing, to make the copy, and burn it
12 to a CD, yeah, somewhere in there.

13 Q Okay. Now, the resultant that they would have, the
14 thing that's on the CD, first of all if it's zipped
15 you have to simply run it through a program
16 called -- it was originally called PK.Zip to unzip
17 it; right?

18 A Yes.

19 Q And all it means is to compress or uncompress;
20 correct?

21 A Right.

22 Q Now, once I had that file, I can use Microsoft
23 Access, that program, to open that file; correct?

24 A Yes.

25 Q All right. I don't need anything else? I don't

1 need Market Drive to open that?

2 A That's correct.

3 Q And then it would be up to me what I'd want to take
4 out of it or use it; right?

5 A Yes.

6 Q So that in fact there's a fifth way to make a backup
7 of the data, you went through four before but
8 there's also -- I'm sorry, a fifth way to make a
9 copy. That fifth way is backing up using Market
10 Drive?

11 A Yes.

12 Q And of that half an hour that you estimated, you had
13 originally said in two minutes we could do it using
14 Windows.

15 A That was just copying the file, you didn't count
16 burning.

17 Q That's what I'm saying. I want to be clear that two
18 minutes of that 30 minutes is copying the file, the
19 rest is burning it?

20 A Yes.

21 Q Okay. Given the CDs that are typically available
22 running at four to eight and greater times speed
23 today, would you agree that you could make that in
24 probably under two to three minutes?

25 A The actual burn time would only be five minutes,

1 yes.

2 Q So that may be seven minutes total today. Depends
3 on the equipment; right?

4 A Yeah, but -- if you had to -- if you only do one and
5 not a whole series of them, there's time to find a
6 CD, open the software, there's a lot of little steps
7 that go along and, you know, it's a -- so slight
8 difference like two minutes versus five minutes
9 versus 15 is a little ridiculous. It's 15 to 30
10 minutes, somewhere in there, for a person to say out
11 of the blue go burn this thing for me, back it up
12 and burn it.

13 Q Where are your offices located?

14 A I work out of my home.

15 Q Do you maintain any offices at the location of
16 Assessment Technologies?

17 A No.

18 Q So if somebody from Assessment Technologies said you
19 have all of the databases, they'd be wrong; right?

20 A That's correct.

21 Q If you wanted to access a particular city's
22 database, you have to go to the assessor that's got
23 that to ask him for it; right?

24 A That's correct.

25 Q Regardless of -- Strike that. Presuming you were

1 going to use Windows to make that copy, what rate do
2 you charge to make those copies? What's your
3 billing rate?

4 A To whom?

5 Q To Assessment Technologies.

6 A \$90 an hour.

7 Q Do you have -- do you do work for other people?

8 A Yes.

9 Q What percentage of your work is Assessment
10 Technologies?

11 A I don't know, 30 percent maybe.

12 Q What do your billing rates range for for your other
13 clients?

14 A It's none of your concern.

15 Q Pardon?

16 A That's none of your concern. I'm not telling you.
17 That's private information between them, it has
18 nothing to do with this. Move on.

19 Q Let me just ask you this. There's some greater and
20 some less than what you --

21 A I'm not going to answer that.

22 Q Why not?

23 A It's none of your concern.

24 Q Well, somebody's hiring you to do work, you don't
25 publish what your rates are, you don't tell people

1 what your rates are?

2 A That's a different question.

3 Q What are your rates that you tell people they are?

4 A \$100 an hour.

5 Q Have you done work for -- other than Assessment
6 Technologies, have you done work for less than that?

7 A When?

8 Q Hourly rate. In the last three years.

9 A No.

10 Q Do you employ any people?

11 A No.

12 Q Would you agree with me that if a person who's
13 sophisticated enough to use Market Drive, not
14 program but to use it, wanted to use Windows
15 Explorer to make a copy or wanted to use Crystal
16 Reports to make a copy or wanted to use backup to
17 make a copy of the database or whatever subsection
18 they're looking at, they can do it themselves and
19 don't need to involve you?

20 A That's correct.

21 Q Do you know the quality -- do you know people at
22 Grota -- Strike that.

23 Do you know people at Assessment
24 Technologies that would be capable of doing --
25 making those copies without involving you?

1 MR. DEUTCH: I have a follow-up one. Go
2 ahead.

3 MS. FAY: I don't have anything at this
4 point.

5 EXAMINATION

6 BY MR. DEUTCH:

7 Q You said you've never been out to any of the
8 municipalities?

9 A No, that's not what I said.

10 Q Some of the municipalities have only read only
11 versions, right, of Market Drive?

12 A They have something called the viewer version.

13 Q The viewer version you didn't go out to install?

14 A No.

15 Q If you have a viewer version or any other version,
16 that's information that's in Market Drive that
17 doesn't affect Access; right?

18 A I'm not sure I understand your question.

19 Q Remember how we talked about you can use Windows
20 Explorer to make a copy of what version you have?

21 A Yes.

22 Q Of the information you have?

23 A Yes.

24 Q You could use Windows to do that regardless if you
25 had a viewer version or what version you had of

1 Market Drive; correct?

2 A That's correct.

3 Q So if somebody had just a read-only version, they
4 could still use Windows to make a copy of the
5 database?

6 A That's correct.

7 MR. DEUTCH: Thank you. I have nothing
8 else. Any follow-up of the follow-up?

9 MR. CAIN: No.

10 MR. DEUTCH: Thank you.

11 (Deposition concluded at 2:28 p.m.)

12 * * *

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STATE OF WISCONSIN
OZAUKEE COUNTY

WIREDATA, INC.,

Plaintiff,

VS

Case No. 01-CV-198

VILLAGE OF THIENSVILLE,
GROTA APPRAISALS, LLC,
MICHAEL L. GROTA, ASSESSMENT
TECHNOLOGIES OF WISCONSIN, LLC,

Defendants.

STATE OF WISCONSIN
WAUKESHA COUNTY

WIREDATA, INC.,

Plaintiff,

VS

Case No. 01-CV-1403

VILLAGE OF SUSSEX,
GROTA APPRAISALS, LLC,
and MICHAEL L. GROTA,

Defendants.

Deposition of:
Thomas Curtis

July 27, 2004

9:00 a.m.

Taken at:

Deutch & Weiss
7670 North Port Washington Road
Suite 102
Milwaukee, Wisconsin 53217

EXHIBIT

Barbara Dassow Court Reporter 262-367-5205
Post Office Box 180411 Delafield, Wisconsin 53018

1 THE WITNESS: They would not give me the
2 data.

3 MR. JOHNSON:

4 Q. I am asking you what Grota Appraisals told you?

5 A. That they would not give me the data.

6 Q. Grota Appraisals told you they would not give --

7 A. They would not give me the data.

8 Q. Was that in writing?

9 A. I would have to look that up at the office.

10 Q. Did you ever talk to Andy Pelkey about this
11 request?

12 A. I did.

13 Q. What was Mr. Pelkey's response?

14 A. His response was that he could sell us the data.

15 Q. Sell you the data?

16 A. That is correct.

17 Q. What do you mean by sell?

18 A. So much per parcel.

19 Q. How much per parcel?

20 A. I would have to look that up unless someone has it
21 handy.

22 Q. Do you know who Mr. Pelkey is?

23 A. He is a programmer.

24 Q. Do you know whether he works for Grota Appraisals?

25 A. I do not know that.

1 for the City of Port Washington?

2 A. I don't know that either.

3 Q. Why don't you know that?

4 A. As I have previously stated there was a document
5 written by me to him which you did not care to
6 give me so I cannot tell you what I asked him for.
7 I could look it up.

8 MR. DEUTCH: Could you read back the
9 last question and answer, please?

10 (Record read aloud by the court
11 reporter.)

12 MR. JOHNSON: Mark this, please.

13 (Exhibit No. 4 marked for identification
14 by the court reporter.)

15 MR. JOHNSON:

16 Q. I have handed you what has been marked as Exhibit
17 No. 4. This is the document you're referring to?

18 A. Yes. This would have been what I would have asked
19 him for, yes.

20 MR. DEUTCH: You need to talk up a bit.

21 THE WITNESS: Yes, this appears to be
22 what I asked him for.

23 MR. JOHNSON:

24 Q. Is this a document that you wrote?

25 A. Yes, it is.

EXHIBIT E
DELETED FOR
BREVITY

(SEE R. 61:52-57)

EXHIBIT F
DELETED FOR
BREVITY

(SEE R. 61:58-61)

EXHIBIT G
DELETED FOR
BREVITY

(SEE R. 61:62-65)

1 Joseph A. Kromholz WI Bar No. 1,002,464
2 Daniel R. Johnson, WI Bar No. 1,033,981
3 RYAN KROMHOLZ & MANION, S.C.
4 P. O. Box 26618
Milwaukee, Wisconsin 53226-0618
Telephone: (262) 783-1300
Facsimile: (262) 783-1211

5 Attorneys for Defendants Grota Appraisals, LLC, and Michael L. Grota & Assessment Technologies,
6 LLC.

7 **IN THE STATE OF WISCONSIN - CIRCUIT COURT**
8 **WAUKESHA COUNTY**

9 Wire Data, Inc.

10 Plaintiff

11 v.

12 Village of Sussex,
13 Grota Appraisals, LLC,
14 Michael L. Grota,
Assessment Technologies of WI, LLC.
Defendants.

**NOTICE OF MOTION AND MOTION
FOR SUMMARY JUDGMENT**
Case No. 01CV1403

15
16
17 PLEASE TAKE NOTICE that on the 20th day of December, 2004 at 2:00 PM or as
18 soon thereafter as counsel can be heard, at the Waukesha County Courthouse, in the
19 courtroom assigned to the Honorable Mark S. Gempeler, defendants Assessment
20 Technologies of WI, LLC, Grota Appraisals, LLC, and Michael L. Grota, by their attorneys,
21 Ryan Kromholz & Manion, S.C. by Joseph A. Kromholz and Daniel R. Johnson, will present
22 the following motion:
23
24
25
26
27
28

DEFENDANT MICHAEL L.
GROTA'S
BRIEF IN SUPPORT OF
MOTION FOR SUMMARY
JUDGMENT AND
EXS. A-L AND N-Z
DELETED FOR BREVITY
(R.55:2-43, 46-72)

LAW OFFICES OF
ARENZ, MOLTER, MACY & RIFFLE, S.C.

720 N. EAST AVENUE
P.O. BOX 1348
WAUKESHA, WISCONSIN 53187-1348

DALE W. ARENZ
DONALD S. MOLTER, JR.
JOHN P. MACY,
COURT COMMISSIONER
H. STANLEY RIFFLE,
COURT COMMISSIONER

RICK D. TRINDL
ERIC J. LARSON
JULIE A. AQUAVIA
DYAN E. BARBEAU
GRETCHEN U. STEVENS

TELEPHONE 548-1340
FACSIMILE 548-9211
ARFA CODE 262

May 22, 2001

MIKE GROTA
VILLAGE ASSESSOR
VILLAGE OF SUSSEX
N64 W23760 MAIN STREET
SUSSEX WI 53089

Re: Village of Sussex
Wiredata Public Records Request
Attorney Letter Dated May 21, 2001

Dear Mr. Grotz:

Enclosed please find a correspondence that we received from Attorney Alan Deutch along with an enclosure that he forwarded. The enclosure is a correspondence from Andrew Pelkey to a representative of Wiredata.

After you have an opportunity to review the enclosed please contact me at your earliest convenience. I have several very significant concerns in this regard. Please explain to me how you believe the costs outlined in Andrew Pelkey's letter can be justified as the "actual, necessary and direct costs" of producing these public records. Conceptually, I believe it would be very difficult to argue in litigation that these computer records each have a distinct cost for copying. The time and effort of copying two records onto a disk or copying 2000 records onto a disk does not seem to me to be significantly different, as I understand the situation. Perhaps you can explain to me, however, why you believe this is justified under the public records laws.

Andrew Pelkey's correspondence, to me, reads more like an advertisement than it does like a public records response. While I appreciate any efforts that you can make to resolve this short of litigation, you should know that Attorney Deutch has informed me that he is prepared to go to litigation at any point in time, and these correspondences from Andrew Pelkey are likely to be used against you, and possibly also against the Village of Sussex. I do not represent you as to your



LAW OFFICES OF
ARENZ, MOLTER, MACY & RIFFLE, S.C.

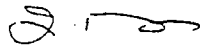
Mike Grota, Village of Sussex
May 22, 2001
Page Number 2

private interests in these matters, and you should not consider these thoughts to be legal advice in that regard. I do represent the Village of Sussex, however, and unless you can further justify your position as to the costs you intend to charge, I may be making recommendations to the Village of Sussex that differ significantly from the position taken in Andrew Pelkey's correspondence. I believe that the Village of Sussex is not willing to go to litigation in order to protect your private interests, particularly if they conflict with the public records laws.

I look forward to hearing from you at your earliest convenience.

Yours very truly,

ARENZ, MOLTER, MACY & RIFFLE, S.C.



John P. Macy

JPM/jc

Enclosure

cc: Mike Knapp, Village President
Chris Swartz, Village Administrator

J/E/Letter/Wiredata Open Records. Atty Letter.sus.ltr

STATE OF WISCONSIN	CIRCUIT COURT	WAUKESHA COUNTY
--------------------	---------------	-----------------

WIREdata, Inc.

Plaintiff,

v.

Case No. 01-CV-1403

Village of Sussex,
Grota Appraisals, LLC
in its capacity as Assessor for the Village of Sussex,
Michael L. Grota and Assessment Technologies of WI, LLC.

Defendants.

**AFFIDAVIT OF EMILY C. CANEDO
IN SUPPORT OF PLAINTIFF'S RESPONSE TO DEFENDANT
MICHAEL L. GROTA, GROTA APPRAISALS, LLC AND
ASSESSMENT TECHNOLOGIES OF WI, LLC'S MOTION FOR
SUMMARY JUDGMENT**

STATE OF WISCONSIN)
) ss.
MILWAUKEE COUNTY)

Emily C. Canedo, being first duly sworn on oath, deposes and states that:

1. I am one of the attorneys for the plaintiff, WIREDATA, Inc., and make this affidavit on its behalf in support of plaintiff's response to the above-named defendants' Motion for Summary Judgment.
2. Attached hereto as Exhibit A is a true and correct copy of correspondence from Mr. Thomas Curtis to Mr. Andrew Pelkey marked as Exhibit 3 at the deposition of Thomas Curtis conducted on July 27, 2004.

3. Attached hereto as Exhibit B is a true and correct copy of correspondence from Mr. Andrew Pelkey to Mr. Thomas Curtis as Exhibit 4 at the deposition of Thomas Curtis conducted on July 27, 2004.
4. Attached hereto as Exhibit C is a true and correct copy of a letter from Mr. Alan Deutch to Mr. Eric Larson of the Village of Sussex, dated May 21, 2001.
5. Attached hereto collectively as Exhibit D are true and correct copies of pages from Michael Grota's deposition, conducted on June 22, 2004.
6. Attached hereto collectively as Exhibit E are true and correct copies of pages of Mr. Andrew Pelkey's deposition conducted on September 22, 2004.
7. Attached hereto collectively as Exhibit G are true and correct copies of pages from Thomas Curtis' deposition, conducted on July 27, 2004.
8. Attached hereto as Exhibit H is a true and correct copy of a letter from Mr. Joseph Kromholz to Mr. Alan Deutch, dated July 12, 2001.
9. Attached hereto collectively as Exhibit I are true and correct copies of pages from Michael Grota's deposition, conducted on September 7, 2001.

Executed this 29th day of November, 2004.

Emily C. Canedo
Emily C. Canedo

SUBSCRIBED AND SWORN to before
me this 29th day of November, 2004.

Amy Wenger
Notary Public, State of Wisconsin
My commission expires: 1-7-07

Andy;

Selected fields requested from Market Drive software. Any type of electronic output and media is acceptable (i.e., fixed length, comma-quote, pipe delimited). We would need a data layout, if the fields are not in the order below.

Taxkey
County
Municipality
Town, Village or City Indicator
Property Prefix
Property Street Number
Property Street Direction
Property Street Name
Property Unit Number
Zip Code

Owner Name 1
Owner Name 2
Owner Address
Owner City
Owner State
Owner Zip Code

Property Class

Acres

Zoning

Land Use

Building Type

Number of Stories

Story code

(Example: 1, 1+attic)

Number of Units

Building Square Feet

Basement Type

(Full, partial, etc.)

Attic

(Yes/No/Type: Finished/etc.)

Pool

(Yes/No/Type: Inground/etc.)

Fireplace

Air Conditioning

Heating Type

Total Number of Rooms

Number of Bedrooms

Number of Full Baths

Number of Half Baths

Garage Type

(# stalls, attached, detached, etc)

Sidewalk

Exterior Wall Type

Exterior Condition

Year Built

Year Remodeled

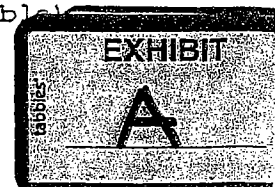
Effective Year Built

Historic Designation

Census Tract

School District

(4 digit state code, if available)



Township
Range
Quarter
Section

Thanks,

Tom Curtis
800-229-9211

Dear Tom:

Below are the specifications for six files I will give you for each municipality. These files will give you a complete picture of what each property looks like. The first file is the property file. There will be one record for each property (or tax key number) in the municipality. All land and improvement information will be exported into separate files because there is a "one-to-many" relationship between a property and the information contained in the other files.

Please note that although there may be a place to enter a piece of information, it is up to the individual assessor to enter the data. For example, I don't think many assessors fill in zoning because the county property lister does not have it because municipalities usually keep zoning information on paper maps.

Regarding districts, the current version of Market Drive being used by assessors only has one field for school district (usually the elementary school district). The next release will be able to distinguish between elementary and high school districts. I was thinking of the next release when I told you I could distinguish between the two.

I have added land and improvements values to each file. These would be current year (2001) assessed values. I would recommend that we export the data after the assessor has made changes from the board of review to ensure that the numbers are accurate. However, if you are not going to publish the numbers, we can probably export the data sooner.

Assuming that what is documented below is all of the requirements, there is a one-time cost of \$6600 to program and test the export. The remaining cost for the data is 50 cents per parcel. Incorporated into this cost is the cost of running the export, checking the result and burning the CDs. Assuming you want all the data we can give you, the total cost will be substantially less than the cost of getting the data on paper, since each property takes a minimum of 4 pages to print. Following the export specifications is a partial list of the municipalities we have data for and the approximate parcel count for each. This will help give you an idea on the cost for a typical municipality. More data is available for other municipalities in the state. Please let me know what areas of the state you are interested in.

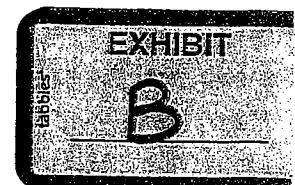
Once you have a current copy of the data, we can provide you with an annual update after each board of review. The cost for the update is 15 cents per parcel assuming that you do not want us to change the format of the export. The update is for all parcels whether or not they have changed (that is why it is only 15 cents). We did not want to get into a discussion on what constitutes a change or deal with tracking which parcels changed since the last time we gave you an update. The cost of the update includes gathering the data, running the export, checking the results, and burning the CDs.

Finally, the costs quoted here assume that you are not reselling the data in mass to another source. This data is meant for you and your subscribers to view. If you want to "add value" to any part of this data and distribute it in mass to another company, you will need to charge your customer for our fee in addition to your fees for your added value.

If you have any questions, please do not hesitate to call.

Best Regards,

Andrew Pelkey
Senior Consultant



Property file: Contains one record for each parcel (tax key number) in the municipality. Named something like "Village of Sussex properties.txt". This file will contain the following fields:

Field	Example	Note
Tax key number	413-9989-002	
County	Washington	
Street number	3500	
Street direction	S	
Street name	76 th street, #7	Will include the property unit number at the end.
Owner name	Andrew Pelkey	
Secondary owner name	Lisa Pelkey	
Owner address line 1	2400 W Bluemound Rd	
Owner address line 2	Suite 120	
Owner city	Badger	
Owner state	WI	
Owner zip	99123	
Zoning	R1	
School district	5323	The current version of Market Drive does not distinguish between elementary and high school district. The next release will.
Zoning		This data is maintained at the county level. I don't know of many assessors (especially in smaller communities) that fill it in.

Land file: Contains one record for each land parcel in the municipality. If property has more than one land parcel (e.g. a farm), there will be multiple records for the same tax key number. Named something like "Village of Sussex land.txt". This file will contain the following fields:

Field	Example	Note
Tax key number	413-9989-002	
Class	Residential	
Width	380	
Depth	3818	
Acres	3.331	Not always width * depth (lot may be irregularly shaped).
Land value		

Residential buildings file: Contains one record for each residential building in the municipality. If property has more than one residential building (rare but it happens), there will be multiple records for the same tax key number. Named something like "Village of Sussex residential buildings.txt". This file will contain the following fields:

Field	Example	Note
Tax key number	413-9989-002	
Class	Washington	
Story height	1 story w/attic	1 story, 1 story w/attic, 1.5 story, 2 story, 2 story w/attic, 2.5 story
Style	Colonial	Defined by assessor (ranch, by-level, tri-level, cape code, colonial, old style, etc)
Occupancy (Use)	Single family	Defined by assessor (single family, mother-in-law, condo, 2 family, apartment, etc)
Exterior wall	Alum/vinyl	Defined by assessor (wood, block, stucco, alum/vin metal, brick, stone, msnry/frame, etc)
Roof type	Asphalt shingles	Defined by assessor
Year built	1973	
Year remodeled	1993	
Basement type	Full	None, crawl, partial, full

Heat type	Basic	None, space, basic, A/C
Fuel type	Gas	Gas, electric, oil, wood/coal
System type	Warm air	Warm air, baseboard, hot water, steam
Bedrooms	3	
Family rooms	1	Family rooms only. Living rooms are counted as "other rooms"
Other rooms	1	
Full baths	2	
Half baths	1	
Interior rating	Average	Excellent, very good, good, average, fair, poor, very poor
Exterior rating	Good	Excellent, very good, good, average, fair, poor, very poor
Fireplace stacks	1	
Fireplace openings	1	
Other fireplaces	0	
Basement garage stalls	0	
Other feature 1	Whirlpool	
Other feature 2	Drain in garage floor	
Basement SF	1,000	
Rec room SF	250	The rec room SF is included in the Basement SF. Therefore, do NOT add the two numbers together to produce a total basement SF.
FBLA SF	400	Finished Basement Living Area. This number represents basement area that can be include in SFLA. Like rec room SF, the square footage here is included in Basement SF.
First floor SF	1,000	
Second floor SF	0	
Finished attic SF	0	
Unfinished attic SF	0	
Unfinished area SF	0	
Patio SF	150	
Open porch SF	150	
Screen porch SF	150	
Enclosed porch SF	150	
Wood deck SF	150	
Attached garage SF	250	
SFLA	1400	Total SF Living Area. This will be FBLA SF + First Floor SF + Second Floor SF + Finished Attic SF
Building value		

Commercial buildings file: Contains one record for each commercial building in the municipality. If property has more than one commercial building, there will be multiple records for the same tax key number. Named something like "Village of Sussex commercial buildings.txt". This file will contain the following fields:

Field	Example	Note
Tax key number	413-9989-002	
Class	Commercial	
Stories	2	
Description	Walgreens	
Building value		

Other buildings file: Contains one record for each other building improvement (OBI) in the municipality. Other building improvements are mostly farm building but can also include things like pools and detached garages. If

property has more than one other building improvement, there will be multiple records for the same tax key number. Named something like "Village of Sussex OBIs.txt". This file will contain the following fields:

Field	Example	Note
Tax key number	413-9989-002	
Class	Agri other	
Type	Bank barn	
Width	50	
Depth	40	
OBI value		

Other improvements: Contains one record for each other improvement in the municipality. Other improvements are slightly different than OBIs. They are miscellaneous improvements that for one reason or another were not valued as any of the other types of improvements. They are not widely used. If property has more than one other improvement, there will be multiple records for the same tax key number. Named something like "Village of Sussex other improvements.txt". This file will contain the following fields:

Field	Example	Note
Tax key number	413-9989-002	
Class	Agri other	
Description	Billboard next to highway	
Improvement value		

Parcel Counts for typical Municipalities (a partial list)

County	Municipality	Parcel Count	Initial Cost	Annual Maintenance (cost per year)
Washington	T-Erin	2472	\$1,236	\$371
Washington	T-Hartford	2547	\$1,274	\$382
Washington	T-Jackson	2654	\$1,327	\$398
Washington	T-Kewaskum	1108	\$554	\$166
Washington	T-Polk	2812	\$1,406	\$422
Washington	T-Richfield	5206	\$2,603	\$781
Washington	T-Trenton	2911	\$1,456	\$437
Washington	T-West Bend	2499	\$1,250	\$375
Washington	V-Jackson	1623	\$811	\$253
Washington	V-Newburg	330	\$165	\$50
Washington	V-Slinger	1538	\$719	\$216
Washington	V-Germantown	7579	\$3,790	\$1,137
Waukesha	T-Merton	3600	\$1,800	\$540
Waukesha	T-Summit	2500	\$1,250	\$375
Waukesha	V-North Prairie	500	\$250	\$75
Waukesha	T-Ottawa	1800	\$900	\$270
Waukesha	T-Delafield	3600	\$3,600	\$540
Ozaukee	T-Grafton	2358	\$1,179	\$354
Ozaukee	V-Thiensville	1210	\$605	\$182
Dodge	T-Ashippun	2297	\$1,149	\$345
Dodge	T-Herman	1892	\$946	\$284
Dodge	T-Hubbard	1833	\$917	\$275
Dodge	V-Neosho	253	\$127	\$38
Dodge	T-Theresa	1200	\$600	\$180
Dodge	V-Theresa	392	\$196	\$59
Jefferson	C-Lake Mills	1876	\$938	\$281

Law Offices of
Deutch & Weiss

(an Association of Legal Professionals)
(not a partnership)

Suite 102
7670 N. Port Washington Rd.
Glendale, WI 53217
(414) 247-9958
(414) 247-9959 FAX

Alan H. Deutch
(Alan H. Deutch, S.C.)
Monte E. Weiss
(Weiss Law Office, S.C.)
James L. McAlister
J.P. Fernandes

Paralegals:
Nichole J. Genovesi
Miranda N. Cobb
Sande L. Wells
Ellen L. Krodinger

May 21st, 2001

VIA FACSIMILE

Mr. Eric Larson
720 N. East Ave.
P.O. Box 1348
Waukesha, WI 53187-1348

Re: Village of Sussex.


Dear Mr. Larson:

Please be advised that the attached response is unacceptable as your assessor is asking far more than the actual and necessary costs for copying the data as evidenced by, *inter alia*, their trying to obtain a per-record charge as well as the attempt to restrict my client's use of the data once it is transferred.

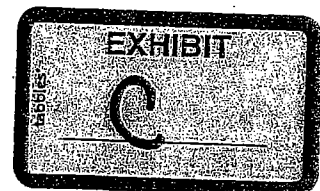
While we are seeking only the six data files enumerated in the attachment and not the computer program itself, we do not agree with the charges outlined. We believe they are not the actual and direct costs of reproduction. Furthermore, we do not agree with the additional non-monetary terms of the letter.

If you have any additional questions or concerns, please contact me at your earliest convenience.

Very truly yours,
DEUTCH & WEISS


Alan H. Deutch

R-App. 221



1 IN THE CIRCUIT COURT OF WAUKESHA COUNTY
2 STATE OF WISCONSIN

3 WIREDATA, Inc.,

4 Plaintiff,

5 vs.

Case No. 01 CV 1403

6 VILLAGE OF SUSSEX,
7 GROTA APPRAISALS, LLC, in its
8 capacity as Assessor for the
9 Village of Sussex, MICHAEL L.
10 GROTA and ASSESSMENT TECHNOLOGIES
11 OF WI, LLC,

COPY

12 Defendants.

13 DEPOSITION OF: MICHAEL L. GROTA

14 June 22, 2004
15 3360 Gateway Road
16 Brookfield, WI 53045

17 APPEARANCES: DEUTCH & WEISS, by
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22 CRIVELLO, CARLSON & MENTKOWSKI,
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RYAN, KROMHOLZ & MANION, S.C., by
DANIEL R. JOHNSON,
Attorney for Grota Appraisals, LLC,
in its capacity as Assessor for the
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Reported by Betty K. Vande Boom, Registered
Professional Reporter and Notary Public.

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R-App. 222

EXHIBIT

D

1 think something's vague?

2 MR. JOHNSON: Well, form and relevancy.

3 MR. DEUTCH: That's what I'm saying. I
4 want to know what it is we are stipulating to. If
5 you want to stipulate to reserve the objection that
6 it calls for a legal conclusion, fine, that one I
7 have no problem with.

8 MR. JOHNSON: Okay.

9 MR. DEUTCH:

10 Q All right. Now, sir, as part of your contract with
11 the Village of Sussex are you required to carry
12 insurance on records?

13 A Required, or my contract states that I do carry it?
14 I do carry what they call valuable papers coverage.

15 Q And who do you carry that with?

16 A I believe it's Secura Insurance.

17 Q Is that part of a standard fire and theft policy
18 that you may have, or do you have specific
19 insurance that you get as an assessor?

20 A I have standard liability.

21 Q As an assessor, or --

22 A For my business.

23 Q Do you, are you familiar with the law known as the
24 open records law?

25 A Yes.

1 Q Do you consider yourself a, an authority as that
2 term is defined in that statute?

3 A Authority meaning application of that law? Or an
4 authority to interpret that law?

5 Q Authority of the application of that law?

6 MR. JOHNSON: Do you have a copy of it so
7 we can read through it?

8 MR. DEUTCH: Of what?

9 MR. JOHNSON: The open records law. The
10 definition of authority in there is about two
11 paragraphs long.

12 MR. DEUTCH:

13 Q Sure. Let me first ask, are you aware of what it
14 is, sir?

15 A I'm not sure what you're speaking of.

16 Q I'm going to show you a print of what's 1931, 1932
17 rather, sub one.

18 MR. JOHNSON: Is there a question pending
19 right now, Alan?

20 MR. DEUTCH:

21 Q Yes. I asked him if he's an authority, if he
22 understands that statute.

23 A I believe I understand that.

24 Q You're saying you are an authority as defined
25 there?

1 A I cannot necessarily interpret that I'm not an
2 elected official. Personally I am custodian of the
3 assessment records.

4 Q You are custodian of the assessment records you
5 said?

6 A That's correct.

7 Q Okay. When you say you're not an elected official,
8 you do not, do you believe that you are a public
9 official of any sort, or type?

10 MR. JOHNSON: Objection. As to form.

11 MR. DEUTCH:

12 Q Answer please.

13 A I believe that I'm an appointed assessor to fill a
14 vacant elected position, that most communities have
15 gone to an appointed assessor to fill what would be
16 a, you know, a municipal position, or function.
17 And that I believe it would be on the same order as
18 a village trustee, only for an appointed position.

19 Q So you believe you are, or not a public official,
20 you, yourself, Michael Grota?

21 A I believe, well, I believe Grota Appraisals acts as
22 a public official. I happen to be the owner of
23 Grota Appraisals, and at least for the Village of
24 Sussex do sign the assessment roll.

25 Q You likewise sign the assessment roll for the

- 1 Village of Thiensville?
- 2 A I have not, and I don't believe that I ever have.
- 3 Q Who signs the assessment roll, if you know, for
- 4 Thiensville?
- 5 A I believe Robert Grota.
- 6 Q Okay. That's your brother?
- 7 A Brother, and/or father, have signed in the past.
- 8 Q Okay. Both are named Robert?
- 9 A That's correct.
- 10 Q Is there a different middle initial, or is one a
- 11 junior?
- 12 A C is brother. G is father.
- 13 Q Okay. Now, sir, do you agree that, I think you
- 14 just responded, but I want to make sure, that you
- 15 are the custodian of the assessment records for the
- 16 Village of Sussex?
- 17 A Correct.
- 18 Q And are you likewise the custodian of the village
- 19 records, the real estate assessment records that is
- 20 for the Village of Thiensville?
- 21 A Grota Appraisals is the custodian of records.
- 22 Q In both cases?
- 23 A Correct.
- 24 Q Okay. How about for the City of Port Washington?
- 25 A No, sir.

1 WIREdata that were requested?

2 A Did not have that ability to produce in, with
3 relative ease to Assessment Technologies' client
4 list. So Grota Appraisals did not have the ability
5 to do that requested function. That was, that was
6 given to us by the software company.

7 Q And when was that given to you by the software
8 company?

9 A It was created to the best of my knowledge this
10 spring.

11 Q And what was created?

12 A The ability to send that to PDF, or a rich text
13 type file.

14 Q Prior to that -- strike that -- you own both
15 Assessment Technologies and Grota Appraisals a
16 hundred percent; correct?

17 A That's correct.

18 Q So you're saying you had an argument with yourself
19 as to --

20 MR. JOHNSON: Going to object to the form
21 of this question as it's argumentative.

22 MR. DEUTCH:

23 Q Go ahead and answer.

24 A Well, Assessment Technologies has more than Grota
25 Appraisals as a client, and there are two separate

1 businesses for two separate reasons, and two
2 separate functions. Assessment Technologies
3 believed it was in their best interests to provide
4 that output of the software to its entire client
5 list, not just Grota Appraisals, and not just this
6 lawsuit.

7 MR. JOHNSON: Can we hold on a second,
8 Alan? I need a bathroom break.

9 (Short recess.)

10 MR. DEUTCH:

11 Q Now, sir, I'd like for you to tell me each and
12 every reason that you told WIREdata why you were
13 not producing the records as demanded?

14 MR. JOHNSON: Again, same objection to
15 the point that it seeks attorney-client privileged
16 information.

17 MR. DEUTCH:

18 Q I'm asking each and every thing he told WIREdata.

19 A I'm not sure that I had conversation with WIREdata.

20 Q Did you give any communications to WIREdata as to
21 your reasons for not producing the records?

22 A Myself? Or Grota Appraisals, or Assessment
23 Technologies? Who are we talking about?

24 Q Any of the entities that you own, or control?

25 A I believe a contractor may have had dialogue with

1 WIREdata on behalf of Assessment Technologies.

2 Q Okay. And who is that contractor?

3 A Andy Pelkey.

4 Q Okay. Does Mr. Pelkey own any part of Grota
5 Appraisals?

6 A No.

7 Q Does he have any, is he just a contractor, or does
8 he have any other relationship to Grota Appraisals?

9 A No other relationship.

10 Q Okay. And were you aware of whatever communication
11 Mr. Pelkey sent to WIREdata?

12 A I believe I've heard the feedback of those
13 conversations.

14 Q And what was the feedback that you thought you
15 heard?

16 A That WIREdata requested information in a specific
17 format, requesting, you know, some items on the
18 property record card, and that what, I believe Mr.
19 Pelkey relayed what the cost of providing that
20 information would be.

21 Q Have you -- you been involved in both the federal
22 and state lawsuits; is that correct?

23 A That is correct.

24 Q You heard several times WIREdata say that it would
25 have taken the data in any format, in any digital

1 are necessary, Assessment Technologies has never
2 denied a conversion, if asked. And there is, in
3 Grota Appraisals addendum contract there is a
4 provision to protect the community.

5 Q And what's that provision?

6 A That if Grota Appraisals is no longer retained by
7 that community, it would provide the assessment
8 data to the community in a format that they could
9 use.

10 Q Let's back up in your answer a little bit. You
11 said Assessment Technologies has never denied a
12 request of a community to produce data?

13 A It's never been asked.

14 Q Well, did you ask Assessment Technologies as part
15 of the request that was made for open records from
16 WIREdata?

17 A Yes, I did.

18 Q And what did Assessment Technologies respond?

19 A That relates back to the Mr. Pelkey's conversation
20 with Mr. Curtis, that there would be a cost of
21 producing that to WIREdata.

22 Q So that in point of fact, Assessment Technologies
23 was saying no, unless you pay the cost; is that
24 correct?

25 A In this specific case, yes.

1 Q And in point of fact, it was not cost, but the,
2 what you call the retail value. You used a term.
3 I can't remember.

4 MR. JOHNSON: Well, you can look at the
5 transcript again.

6 MR. DEUTCH:

7 Q Do you remember what the term was, sir?

8 A To which question?

9 Q As to the rate that you would, that you were using
10 the 50 cent rate per record.

11 A That that was a cost that was passed by Assessment
12 Technologies in respect to programming.

13 Q Okay. That was the current market rate I believe
14 you used?

15 A That was a rate that was put out there by
16 Assessment Technologies.

17 Q Did that include both cost and profit to Assessment
18 Technologies?

19 A It certainly was intended to cover the costs.

20 Q And intended to provide some profit to Assessment
21 Technologies?

22 A I believe that there was some profit built into
23 that fee.

24 Q You said that you --

25 (Exhibit No. 2 & 3 marked

IN THE CIRCUIT COURT OF OZAUKEE COUNTY

STATE OF WISCONSIN

WIREDATA, INC.,

Plaintiff,

vs.

Case No. 01-CV-198

VILLAGE OF THIENSVILLE, VILLAGE
OF THIENSVILLE CUSTODIAN OF RECORDS,
GROTA APPRAISALS, LLC IN ITS CAPACITY
AS THE ASSESSOR FOR THE VILLAGE OF
THIENSVILLE, MICHAEL L. GROTA, and
ASSESSMENT TECHNOLOGIES OF WI, LLC,

COPY

Defendants.

WIREDATA, INC.,

Plaintiff,

vs.

Case No. 01-CV-000216

VILLAGE OF PORT WASHINGTON
and MATTHIES ASSESSMENTS,

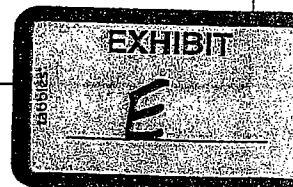
Defendants,

and

AMERICAN FAMILY INSURANCE,

Intervenor.

EXAMINATION of ANDREW PELKEY taken at
the instance of the Plaintiff, under and pursuant to
Section 804.05 of the Wisconsin Statutes, pursuant to
Notice, before LAURELL L. BRESLOW-COLLIEN, Court Reporter
and Notary Public in and for the State of Wisconsin, at
RYAN KROMHOLZ & MANION, S.C., 3360 Gateway Road,
Brookfield, Wisconsin, on the 22nd day of September, 2004,
commencing at 1:13 p.m. and concluding at 2:28 p.m.



1 Q And same thing is true through today; correct?

2 A Yes.

3 Q In 2001 the data was really kept in an Access
4 database; is that correct?

5 A Yes.

6 Q Is that same thing also correct now?

7 A No.

8 Q You no longer use Access?

9 A We do.

10 Q But the data's not kept in an Access database?

11 A Sometimes.

12 Q Okay. Since I want to know what it takes to make a
13 copy of it, how do you know when it's kept in an
14 Access database and when it's not?

15 A The user configures which database they -- if they
16 want it in Access or not, the user decides.

17 Q So the user can decide to use a non Microsoft Access
18 database?

19 A That's correct.

20 Q And what database is usually then used?

21 A Microsoft SQL Server.

22 MR. JOHNSON: I'm sorry, could you spell
23 SQL for her?

24 THE WITNESS: S-Q-L.

25 BY MR. DEUTCH:

1 Q Any other database that they can select?

2 A No.

3 Q So the data is now kept in either a SQL Server
4 database or an Access database; is that correct?

5 A Yes.

6 Q And both of those are Microsoft products?

7 A Yeah.

8 Q Unfortunately sometimes things get a little slurred,
9 so if you can, use yes rather than yeah. In either
10 case, if you wanted to make a copy of certain parts
11 of the data and the data only as is exists in either
12 SQL Server or Access, are you familiar with the
13 export functions?

14 A No.

15 Q Have you ever made a copy of the database?

16 A Yes.

17 Q What did you do to use -- to make a copy?

18 A I used Windows Explorer.

19 Q You used Windows Explorer just to copy the file?

20 A Yes.

21 Q So that if you wanted to make a copy of -- in
22 2000 -- Strike that. When did you add the option of
23 having a SQL database?

24 A 2002.

25 Q So in 2001 the only database that was then being

1 used was Access; correct?

2 A Yes.

3 Q Okay. And if you wanted to make a copy of the data
4 that was in the Access database, could you do it by
5 just using windows Explorer to copy the file?

6 A No.

7 Q What would you need to do to do that?

8 A You would need something to take the data out of the
9 database if you just want to copy the data.

10 Q And what would you need to take it out?

11 A Well, I'm a programmer so I use programs.

12 Q Okay. Could you use the Access program itself?

13 A Yes.

14 Q And you could take it out simply by making -- by
15 asking it to export a copy; correct?

16 A Yes.

17 Q On the typical file that you dealt with, how long
18 would it take you to give the commands to export a
19 copy of the database?

20 A All tables?

21 Q Yes. If you just did it as -- the fastest way you
22 could do it, not all cities just one city.

23 A One database, all tables, one at a time, export each
24 table one at a time using Access?

25 Q You can export them faster than one at a time, can't

1 would be less obvious to determine what all that
2 stuff is.

3 Q But in any event if you gave somebody that entire
4 database, they would then have all the property
5 record card information plus other information;
6 right?

7 A Most of it.

8 Q What percent of it would they have?

9 A They have everything but pictures and sketches.

10 Q And the second way you said to do it would be to use
11 the -- to create a property record card report; is
12 that correct?

13 A To use the property record card report that already
14 exists.

15 Q And then to export that?

16 A Yes.

17 Q How would you do that?

18 A You'd run it and then there's -- we use Crystal
19 Reports to create the report and then Crystal Report
20 as an export tool which exports in a variety of
21 formats.

22 Q Do you know the formats it exports it into?

23 A I know some of them.

24 Q Can you tell me?

25 A Excel, Word, CSV.

- 1 A No.
- 2 Q Why not?
- 3 A It's -- the export is very poor.
- 4 Q Okay. Presuming that the export were not very poor,
- 5 if you were using Crystal Reports to prepare a
- 6 report on a database -- Strike that. The last time
- 7 that you used Crystal Reports then to try this was
- 8 in 2001?
- 9 A Yes.
- 10 Q So you don't know how Crystal Reports works at the
- 11 current time doing it?
- 12 A We haven't changed the version that we're using of
- 13 Crystal, so the one that we're using, I know how it
- 14 works.
- 15 Q Do you know whether Crystal Reports has been updated
- 16 since then?
- 17 A It has.
- 18 Q And you've elected not to get a new version of it?
- 19 A Not yet.
- 20 Q Okay. You said it also -- Crystal Reports also
- 21 exports to Word?
- 22 A Yes.
- 23 Q And to a comma-delimited?
- 24 A Yes.
- 25 Q What is a comma-delimited file?

1 A It's a file that has text in it with commas between
2 values.

3 Q And it's easier to translate -- would you agree it's
4 easier to translate a comma-delimited file into
5 another database than it would be to translate a
6 PDF?

7 A Yes.

8 Q Have you ever tried making a -- or exporting the
9 property record card information using a
10 comma-delimited file?

11 A Yes.

12 Q And what happened?

13 A It's awful.

14 Q By whose definition?

15 A Me as a programmer.

16 Q Do you have any samples of that?

17 A Not with me.

18 Q Did you ever discuss giving any of the Excel or
19 comma-delimited formats to WIREdata?

20 A Yes.

21 Q And who did you discuss that with?

22 A Bob Grotz.

23 Q And when did you discuss that?

24 A Must have been 2001 or something.

25 Q And what was your decision at that point?

1 A That the formats were so awful that you wouldn't
2 want them.

3 Q Did you ever contact WIREdata?

4 A About?

5 Q About doing that, about giving them a
6 comma-delimited file?

7 A I did not contact them, no.

8 Q Now, if you were using Crystal Reports and the
9 property record report to do it, you would be
10 getting only the property record card data; is that
11 correct?

12 A When you say to do it, you mean?

13 Q Let me back up. I'm talking about if I came to you
14 and said I want a copy of the 2001 and I had the
15 database that I handed you or you had Sussex data
16 and I want a copy of just the information that is on
17 the property record card --

18 A Yes.

19 Q -- one way I can get that we talked about and I
20 would get that data and more would be just making a
21 copy of the database; correct?

22 A Yes.

23 Q Second way I can get it is you said by running the
24 property record card report and exporting it using
25 Crystal Reports; correct?

1 A Yes.

2 Q Okay. If I were using the second method, I'd be
3 getting only the property record card information;
4 correct?

5 A Yes.

6 Q Then I wouldn't be getting any other information?

7 A That's correct.

8 Q Would I be getting it in a coded fashion or in a
9 English fashion?

10 A English.

11 Q And how long would it take to make -- to run this
12 and to -- run either in Excel or comma-delimited
13 Crystal Report if I wanted that?

14 A It depends on the number of properties. It's quite
15 lengthy to run it because each property can take
16 five to 10 pages, four to 10 pages, I mean it can be
17 long. So it might take, depending on the speed of
18 the computer, how big the database is, it might take
19 an hour, two.

20 Q But that's just the computer chunking away, it
21 doesn't need a person sitting there?

22 A During the middle of the process, that's correct.
23 It might take an hour to run, but you don't have to
24 sit there. You do have to -- a human does have to
25 intervene in the middle because once it previews on

1 A I don't know.

2 Q Did you ever look it up? Did you ever try it?

3 A It's hard to measure because the space is used up
4 and then immediately discarded. You don't really
5 have a stopping point where you can say stop, okay,
6 how much was used up. It's hard to tell.

7 Q Have you ever used the export function in Access or
8 in SQL Server?

9 A Access, yes, SQL Server, no.

10 Q If I want to use the export function in Access, I
11 can simply tell it what columns or what fields I
12 want and it will export only those fields; is that
13 correct?

14 A I don't recall if it gives you the ability to do it
15 field by field.

16 Q How do you believe it works?

17 A I don't recall. I mean I know you click -- you
18 right mouse click on the table, you choose export,
19 and then there's a bunch of dialogue boxes of which
20 are fuzzy to me because I don't do it very often and
21 I don't know the exact steps.

22 Q Do you know if you can memorize the transaction so
23 that you can repeat it over and over for different
24 databases?

25 A I don't think so. I think you have to do them one

1 Q Did you ever ask him would he just like the entire
2 database?

3 A No.

4 Q So how do you know that that's not what he wanted?

5 A I gave him what he asked for. That's not what he
6 asked for. He wanted very specific I want the data
7 in this particular format, I want these particular
8 fields presumably to make it easy for him to bring
9 the data in. He did, as I recall, say that he
10 wanted something very simple, he didn't want to make
11 it complicated. Obviously that wasn't going to be
12 simple for him.

13 Q Why in 2002 did you add a password protection to the
14 Access database?

15 A Two reasons, the biggest one was to protect our
16 design, and the second one is we sometimes have
17 problems with users monkeying with the data which we
18 have to fix later, which is a big pain.

19 Q Is it the same password for all of them?

20 A Yes.

21 Q Have you ever been asked by any municipality for
22 that password?

23 A No.

24 Q How difficult would it be to take the Access
25 database or the SQL Server database and make a copy

1 of that database that was not password protected?

2 A I can't speak for SQL Server. Access is relatively
3 easy.

4 Q By relatively, within minutes?

5 A Yes.

6 Q So if I wanted to take a copy of a 2004 Access
7 database, strip out the password, and give somebody
8 just the unprotected information, now we're maybe
9 looking at a total of four minutes, I'm adding two
10 minutes for the password, two minutes for the copy?

11 A Yes.

12 Q And how much time -- Well, strike that. You are
13 aware -- Strike that.

14 Were you asked in 2003 or 2004 to make a
15 copy of the data at any time?

16 A I'm not sure what you're asking.

17 Q Okay. At any time in 2003 or 2004 did anybody ask
18 you to make a copy of the Sussex, Thiensville or
19 Port Washington data? By the data I'll call it the
20 property record card data.

21 A Yes.

22 Q And who asked you to do that?

23 A It might have been Mike or it might have been Bob.
24 I'm not sure.

25 Q And what did they ask you to do?

1 A To export the property record card information to a
2 PDF so I could give it to them.

3 Q Give it to who?

4 A To whoever they were going to give it to.

5 Q Did you have a discussion with them about whether
6 you'd use PDF versus any other of the exports
7 available?

8 A Yes.

9 Q And what was said during that discussion?

10 A Well, they wanted an export of the thing, and I told
11 them that the formats other than PDF weren't worth
12 anything so the PDF was the best copy reproduction
13 of the property records report by far, so that's
14 what we gave them.

15 Q Did you tell either of the Mr. Grotas that by using
16 PDF it would also make it more difficult for the
17 person who's getting it to put it into a database?

18 A We didn't discuss necessarily what the person
19 getting it was going to do, but it is -- we did say
20 that it would be more difficult to reverse engineer.

21 Q And who asked you about whether that would be more
22 difficult to reverse engineer?

23 A I don't know if anybody asked me or whether I
24 offered it.

25 Q Isn't it a fact that the reason you selected PDF is

1 because you knew of all of the formats available
2 that would be the most difficult to reverse
3 engineer?

4 A No.

5 Q Is there any of those formats other than PDF --
6 Strike that. Of all the formats that you're
7 familiar with with Crystal Reports, which one would
8 be the most difficult to reverse engineer the data?

9 A I can't say.

10 Q Of the ones you know.

11 A They're all difficult because they're not -- the
12 other ones, the format on the PDF is very nice, it
13 lays out just as it is really exactly what the thing
14 looks like, it does a really good job. The other
15 ones are so awful I couldn't tell you which one was
16 the worst to deal with. I know that the other ones
17 not all the data appears to export.

18 Q Then why would you say it makes it more difficult to
19 reverse engineer a PDF?

20 A Because you don't have -- a slight distinction, you
21 don't have -- it doesn't appear like commas and text
22 values and stuff like that. It has a special format
23 which gives it the ability to look exact.

24 Q So that of all of them the one that would be the
25 most difficult to reverse engineer would be a PDF?

1 A I guess in that sense.

2 Q Pardon?

3 A Yes.

4 Q Isn't it a fact that you chose that because you knew
5 that would be the most difficult for WIREdata to
6 use?

7 A No.

8 Q Who asked you about the reverse engineering of the
9 information?

10 A I don't know.

11 Q Did you volunteer it or was that asked of you?

12 A I'm not sure.

13 Q You said that in the current version of Market Drive
14 the user decides whether he wants to use SQL Server
15 or Access database; is that correct?

16 A Yes.

17 Q Is that a decision once made that can be changed so
18 the data each year can be changed back and forth?

19 A No.

20 Q So it's a permanent decision once you make it?

21 A There is a conversion in one case if you went to
22 Access from SQL Server, there's no conversion back,
23 and you wouldn't change every year.

24 Q I understand that. I'm just asking if it's a
25 permanent decision basically?

1 relatively short, a couple minutes, more if it's
2 really big.

3 Q Do you know how many tables were involved -- Strike
4 that. Do you know how many tables would be involved
5 in obtaining the property record card information?

6 A No, not off the top of my head.

7 Q What's your best estimate?

8 A Not code -- not concerning -- coding is okay?

9 Q Yes.

10 A Having code is okay?

11 Q Right.

12 A Twenty.

13 Q If it were 20 tables, how long does an export -- and
14 if somebody asked you just give me an export of
15 those 20 tables, would you agree that you could
16 probably do that human time in under 10 or 15
17 minutes?

18 A No.

19 Q How long do you think it would take?

20 A Well, if it's a couple minutes apiece and it's two
21 minutes apiece, that's 20 tables, that's 40 minutes
22 not counting getting the thing and wrapping that up
23 and getting that off to them, so you know --

24 Q So about 40 minutes you think?

25 A Forty minutes to an hour.

1 Q That would give you the entire copy?

2 A No, that will give you just the tables that are
3 involved with the property record card.

4 Q All right. And in that hour you've included the
5 time to go get the file; is that correct?

6 A Yeah.

7 Q Is there any other way that you know of to make a
8 copy of either the data or the database than what
9 you've said?

10 A No. Not that I can think of.

11 Q Do you have any authority -- have you ever run into
12 any problems using Crystal Reports?

13 A Yes.

14 Q Who do you consult with when you have problems with
15 Crystal Reports?

16 A The manufacturer.

17 Q And you call them on a general line?

18 A Yes.

19 Q General help line?

20 A Uh-huh, yes.

21 Q You don't have any other outside authority that you
22 use?

23 A No.

24 Q What version of Crystal Reports do you currently
25 have?

1 e-mail it to me.

2 Q Do they do it by using that same Windows Explorer
3 function that we talked about?

4 A They might.

5 Q What other ways do you know of that they might do
6 it?

7 A They might use the backup function inside of Market
8 Drive.

9 Q And if they use the backup function inside of Market
10 Drive, that just creates another database?

11 A Creates a zipped up database.

12 Q A zipped up database is basically a database that
13 uses a program called Zip to compress or uncompress;
14 is that right?

15 A Yes.

16 Q And it gives it a different name?

17 A Yes.

18 Q Is there anything other than the database that's
19 sent on that when you make that backup?

20 A There are -- yes.

21 Q What else is sent?

22 A There are -- you can back up pictures, you can back
23 up sketches which aren't part of the database but
24 stored outside. You can back up letters that they
25 have set up.

1 Q You say they can so it's not automatic that they
2 automatically do that?

3 A There are some options in the backup to say, you
4 know, don't back this part up.

5 Q So a user of Market Drive would be able to just
6 click backup --

7 A Uh-huh.

8 Q -- and only database --

9 A Uh-huh.

10 Q -- and not have the letters, not have the pictures,
11 and have on a CD the entire backup of the database;
12 is that correct?

13 A No.

14 Q What would they have?

15 A They would have a backup of the main database. They
16 can back that up, but it's not going to put it on a
17 CD.

18 Q How do they get it on a CD?

19 A You have to use a burner to do that.

20 Q And that's not part of the Market Drive program?

21 A No. No.

22 Q So that they then have it in a file; is that
23 correct?

24 A Yes.

25 Q What's the name of that file usually called?

- 1 A The name of the town dot zip.
- 2 Q So that -- and is that placed by the programming of
- 3 something into a specific folder?
- 4 A The user decides where it goes.
- 5 Q The user decides where it goes?
- 6 A Uh-huh.
- 7 Q So the user could just -- and how long does that
- 8 typically take to make a zipped up copy of the
- 9 program?
- 10 A Depends how big it is.
- 11 Q Say one of about 5,000 properties?
- 12 A A couple minutes maybe.
- 13 Q Okay.
- 14 A Five minutes. I don't know.
- 15 Q Then how long would it take to put that onto a CD?
- 16 A Today's CD-ROM burners, a couple minutes.
- 17 Q How about a CD-ROM burner in 2004 -- in 2001,
- 18 rather?
- 19 A Ten minutes, 15 minutes, something like that.
- 20 Q It would depend on what equipment the user has?
- 21 A And how big the file is, yeah.
- 22 Q They could do all of that without going to you; is
- 23 that correct?
- 24 A Yes.
- 25 Q All right. Now let's go back to that a minute. In

1 2001 if somebody used either the backup or Windows
2 to create a copy and put it on a CD, you'd agree
3 with me that that whole process using either
4 function could be done in under five minutes?

5 A No.

6 Q How long would you say?

7 A I'm sorry, did you say including burning it to a CD?

8 Q Right.

9 A Probably take them 15 minutes to a half an hour.

10 Q To burn it to a CD?

11 A No, to get the thing, to make the copy, and burn it
12 to a CD, yeah, somewhere in there.

13 Q Okay. Now, the resultant that they would have, the
14 thing that's on the CD, first of all if it's zipped
15 you have to simply run it through a program
16 called -- it was originally called PK Zip to unzip
17 it; right?

18 A Yes.

19 Q And all it means is to compress or uncompress;
20 correct?

21 A Right.

22 Q Now, once I had that file, I can use Microsoft
23 Access, that program, to open that file; correct?

24 A Yes.

25 Q All right. I don't need anything else? I don't

1 need Market Drive to open that?

2 A That's correct.

3 Q And then it would be up to me what I'd want to take
4 out of it or use it; right?

5 A Yes.

6 Q So that in fact there's a fifth way to make a backup
7 of the data, you went through four before but
8 there's also -- I'm sorry, a fifth way to make a
9 copy. That fifth way is backing up using Market
10 Drive?

11 A Yes.

12 Q And of that half an hour that you estimated, you had
13 originally said in two minutes we could do it using
14 Windows.

15 A That was just copying the file, you didn't count
16 burning.

17 Q That's what I'm saying. I want to be clear that two
18 minutes of that 30 minutes is copying the file, the
19 rest is burning it?

20 A Yes.

21 Q Okay. Given the CDs that are typically available
22 running at four to eight and greater times speed
23 today, would you agree that you could make that in
24 probably under two to three minutes?

25 A The actual burn time would only be five minutes,

1 going to use Windows to make that copy, what rate do
2 you charge to make those copies? What's your
3 billing rate?

4 A To whom?

5 Q To Assessment Technologies.

6 A \$90 an hour.

7 Q Do you have -- do you do work for other people?

8 A Yes.

9 Q What percentage of your work is Assessment
10 Technologies?

11 A I don't know, 30 percent maybe.

12 Q What do your billing rates range for for your other
13 clients?

14 A It's none of your concern.

15 Q Pardon?

16 A That's none of your concern. I'm not telling you.
17 That's private information between them, it has
18 nothing to do with this. Move on.

19 Q Let me just ask you this. There's some greater and
20 some less than what you --

21 A I'm not going to answer that.

22 Q Why not?

23 A It's none of your concern.

24 Q Well, somebody's hiring you to do work, you don't
25 publish what your rates are, you don't tell people

1 MR. DEUTCH: I have a follow-up one. Go
2 ahead.

3 MS. FAY: I don't have anything at this
4 point.

5 E X A M I N A T I O N

6 BY MR. DEUTCH:

7 Q You said you've never been out to any of the
8 municipalities?

9 A No, that's not what I said.

10 Q Some of the municipalities have only read only
11 versions, right, of Market Drive?

12 A They have something called the viewer version.

13 Q The viewer version you didn't go out to install?

14 A No.

15 Q If you have a viewer version or any other version,
16 that's information that's in Market Drive that
17 doesn't affect Access; right?

18 A I'm not sure I understand your question.

19 Q Remember how we talked about you can use Windows
20 Explorer to make a copy of what version you have?

21 A Yes.

22 Q Of the information you have?

23 A Yes.

24 Q You could use Windows to do that regardless if you
25 had a viewer version or what version you had of

1 Market Drive; correct?

2 A That's correct.

3 Q So if somebody had just a read-only version, they
4 could still use Windows to make a copy of the
5 database?

6 A That's correct.

7 MR. DEUTCH: Thank you. I have nothing
8 else. Any follow-up of the follow-up?

9 MR. CAIN: No.

10 MR. DEUTCH: Thank you.

11 (Deposition concluded at 2:28 p.m.)

12 * * *

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STATE OF WISCONSIN
OZAUKEE COUNTY

WIREDATA, INC.,

Plaintiff,

VS

Case No. 01-CV-198

VILLAGE OF THIENSVILLE,
GROTA APPRAISALS, LLC,
MICHAEL L. GROTA, ASSESSMENT
TECHNOLOGIES OF WISCONSIN, LLC,

Defendants.

STATE OF WISCONSIN
WAUKESHA COUNTY

WIREDATA, INC.,

Plaintiff,

VS

Case No. 01-CV-1403

VILLAGE OF SUSSEX,
GROTA APPRAISALS, LLC,
and MICHAEL L. GROTA,

Defendants.

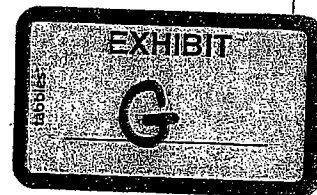
Deposition of:
Thomas Curtis

July 27, 2004

9:00 a.m.

Taken at:

Deutch & Weiss
7670 North Port Washington Road
Suite 102
Milwaukee, Wisconsin 53217



Barbara Dasso Court Reporter 262-367-5205
Post Office Box 180411 Delafield, Wisconsin 53018

1 MR. JOHNSON: I have nothing further.

2 EXAMINATION

3 BY MS. BUELL:

4 Q. Good morning, Mr. Curtis. I think it's still
5 morning. I introduced myself before we started
6 today. My name is Maile Buell. I represent
7 Matthies Assessments.

8 You testified earlier that, and let me
9 know if I have misquoted for misparaphrased your
10 testimony, you said that normally municipalities
11 pursuant to a records request will send data and a
12 bill; is that an accurate assessment of your
13 testimony?

14 A. Yes.

15 Q. What is the bill normally or what is the charge
16 normally that you are charged or that WIREdata is
17 charged for the data?

18 A. It is in the -- normally in the \$100 to \$400
19 range.

20 Q. Do you know what that charge entails?

21 A. No.

22 MS. BUELL: I would like this marked,
23 please.

24 (Exhibit No. 6 was marked for
25 identification by the court reporter.)

- 1 see the data.
- 2 Q. Your computer can access the data because it must
- 3 be able to display it on your screen; correct?
- 4 A. It's displaying what I am looking at, but I cannot
- 5 access the data within the screen that I am
- 6 looking at.
- 7 Q. But you can view it with your own eyes; correct?
- 8 A. That is correct.
- 9 Q. Why can't you access it with your computer?
- 10 A. Because Adobe Acrobat Reader or Writer does not
- 11 provide a mechanism to extract the data that is
- 12 presented on the screen.
- 13 Q. What are the programmers doing that Dorothy and the
- 14 other two, what are they doing to process that
- 15 data then, the verification process, how are they
- 16 doing that, by looking at it?
- 17 A. No, they are doing it electronically. It's a
- 18 fairly complicated process of routines and
- 19 programming.
- 20 Q. They are creating a computer program?
- 21 A. Yes, programs, multiple.
- 22 Q. Multiple programs for what purpose?
- 23 A. To extract the data contained on the PDF that I
- 24 may see on my screen.
- 25 Q. Just one more question. I think we talked about

RYAN KROMHOLZ & MANION, S.C.

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Arnold J. Ericson (Of Counsel)

July 12, 2001

Alan H. Deutch
7670 North Port Washington Road
Suite 102
Glendale, WI 53217

Re: WIREdata, Inc. v. Village of Sussex et al, Waukesha County Case No. 01CV1403
WIREdata, Inc. v. Village of Thiensville et al, Ozaukee County Case No. 01CV198B1

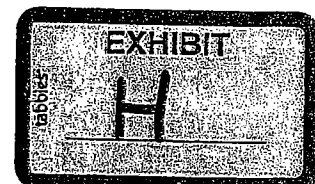
Dear Mr. Deutch:

We represent Grota Appraisals, LLC, and Michael L. Grota in certain intellectual property matters. We respond to your "open records" request and subsequent lawsuits.

It appears to us that at the time the present suits were filed that you were unaware of all the facts surrounding this matter. This letter is intended to provide those missing facts. Grota Appraisals, LLC uses Market Drive™ software, under a very limited license granted from Assessment Technologies of WI, LLC. Market Drive™ software is a copyrighted computer program developed by Assessment Technologies of WI, LLC. Although we are not authorized to divulge most of the confidential aspects of a contractual relationship between Assessment Technologies of WI, LLC and Grota Appraisals, LLC, we are authorized to inform you that Grota Appraisals, LLC contractually cannot disseminate Market Drive™ software data compilation without prior consent from Assessment Technologies of WI, LLC. Assessment Technologies of WI, LLC has not consented to any dissemination of Market Drive™ software data compilation to your clients.

Grota Appraisals, LLC has sublicensed the Village of Sussex and the Village of Thiensville (collectively the "respective villages") certain read-only capabilities of Market Drive™ software. Among the read-only capabilities that the Village of Sussex and the Village of Thiensville have acquired through sublicense is the ability to read and print data that was once "property record cards" in raw analog format. The Market Drive™ software selects, coordinates, and arranges the data input from the raw analog property record cards in such a way that the resulting digital data compilation, as a whole, constitutes an original work of authorship that did not exist prior to the manipulation of the data by Market Drive™ software. The copyright for this digital data compilation is owned by Assessment Technologies of Wisconsin, LLC.

R-App. 260



The sublicenses to the respective villages do not include the right to enter data into the copyrighted Market Drive™ software, do not include the right to have Market Drive™ software perform data manipulation, and do not include the right to disseminate the copyrighted digital data compilation produced by Market Drive™ software.

The data produced by Market Drive™ software is copyrighted, in part due to Market Drive™ software's actions upon the raw assessment data as a compiler. See, eg, ProCD v. Zeidenberg, 86 F.3d 1447 (7th Cir. 1996)(data compiled by copyrighted program "within the subject matter of copyright.") The data produced by Market Drive™ software is a work, fixed in a tangible medium of expression, formed by the collection and assembly of preexisting data that are selected, coordinated, or arranged in such a way that the resulting work, as a whole, constitutes an original work of authorship. Assessment Technologies of WI, LLC chooses which facts to include, in what order to place them, and how to arrange the collected data so that the data may be used effectively by readers. If Grota Appraisals, LLC were to provide the Market Drive™ software data compilation, Grota Appraisals, LLC would impermissibly copy, without authority or license from Assessment Technologies of WI, LLC, the manner in which the compiler has selected and arranged the raw data. For this reason, Grota Appraisals, LLC will not breach its contractual obligations to Assessment Technologies of WI, LLC by disseminating the Market Drive™ software data compilation in digital format, and Grota Appraisals, LLC will not infringe copyrights held by Assessment Technologies of WI.

That digital data produced by Market Drive™ software also contains trade secrets regarding many aspects of the mechanics and operation of the Market Drive™ software program that are over and above the copyright protection afforded to the Market Drive™ software itself. The data compilations produced by Market Drive™ software clearly derives independent economic value, actual or potential, from not being generally known to, and not being readily ascertainable by proper means by, other persons who can obtain economic value from its disclosure or use. Peter Shuttleworth, an agent of your client, acknowledged as much in the October 25, 1999 issue of "Realty Times" when he stated "[t]here should be some consideration, because the data does have value and it brings value to the web sites who display it. That's why there's all this fighting over who's got the data and who doesn't." Grota Appraisals, LLC will not misappropriate Assessment Technologies of WI, LLC's trade secrets by providing the Market Drive™ software data compilation.

The data compilation from Market Drive™ software will not be provided because it is copyrighted, because Grota Appraisals, LLC is contractually precluded from doing so, and because the data contains trade secrets. Complying with your "open records" request would infringe these rights that are exclusive to Assessment Technologies of WI, LLC.

In contrast to the data that is data compilation by Market Drive™ software, Grota Appraisals, LLC can provide copies of analog property record cards that existed prior to the manipulation of the data by Market Drive™ software. From our understanding of the correspondence to date, both Grota Appraisals, LLC and the Village of Sussex have offered to provide for copying or inspection of the property record cards themselves, the raw data prior to manipulation. The raw facts, prior to input into Market Drive™ software, may be copied at will, subject to the copy costs outlined in previous correspondence. To date, your client has refused this offer to access the property record cards. Grota Appraisals, LLC does not have any responsive "electronic/digital copy of the detailed real

Alan H. Deutch
July 12, 2001
Page 3 of 3

estate property records" besides the copyrighted and trade secret Market Drive™ software data compilation, which we have already indicated will not and cannot be provided.

In order to avoid copyright infringement and trade secret misappropriation by either the respective villages or your client, we urge you to reconsider the appropriate business resolutions that Assessment Technologies of WI, LLC has presented to date. The proposed business resolution would also avoid tortious interference with the contract between Assessment Technologies of WI, LLC and Grota Appraisals, LLC, as well as the contracts between Grota Appraisals, LLC and the respective villages, and avoid contributory or inducing copyright infringement by the respective Villages.

In view of the facts, it is our position that no reasonable basis exists for continuation of these suits. The records that your client desires can be obtained, they simply cannot be provided in the format your client requested without the infringement of Assessment Technologies of WI, LLC's copyrights and the risk of trade secret misappropriation. The law explicitly excludes copyrighted information from open records requests. There is no reasonable basis for pursuing the present lawsuit, and for this reason we request that you dismiss the present lawsuits. If the lawsuits continue without reasonable basis after this date, we remind you of the sanctions that may be applied in such a situation. See, e.g., Jandrt v. Jerome Foods, Inc., 227 Wis. 2d 531, 597 N.W.2d 744 (1999).

Sincerely,

RYAN KROMHOLZ & MANION, S.C.

By:

Joseph A. Kromholz

JAK/pjp

Enc: Jandrt v. Jerome Foods, Inc., 227 Wis. 2d 531, 597 N.W.2d 744 (1999)
Cc: Mr. John Macy, Arenz, Molter, Macy & Riffle, S.C. (w/o enclosure)
Mr. Robert Feind, Houseman & Feind (w/o enclosure)

IN THE CIRCUIT COURT OF WAUKESHA COUNTY
STATE OF WISCONSIN

COPY

WIREDATA, Inc.,

Plaintiff,

vs.

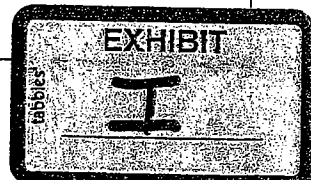
Case No. 01-CV-1403

VILLAGE OF SUSSEX,
VILLAGE OF SUSSEX CUSTODIAN
OF RECORDS, GROTA APPRAISALS, LLC
IN ITS CAPACITY AS ASSESSOR FOR
THE VILLAGE OF SUSSEX, and
MICHAEL L. GROTA,

Defendants.

* ATTORNEYS' EYES ONLY *

EXAMINATION of MICHAEL L. GROTA taken at
the instance of the Plaintiff, under and pursuant to
Section 804.05 of the Wisconsin Statutes, pursuant to
Notice, before LAURELL L. BRESLOW, Court Reporter and
Notary Public in and for the State of Wisconsin, at
DEUTCH & WEISS, 7670 North Port Washington Road,
Suite 102, Glendale, Wisconsin, on the 7th day of
September, 2001, commencing at 10:07 a.m. and concluding
at 12:49 p.m.



1 Social Security number?

2 A 390-70-7265.

3 Q Can you give me a brief description of your formal
4 educational background?

5 A Attended high school, beyond high school I've
6 attended numerous classes, some at a vocational
7 school but have no accredited degree. I've
8 maintained an Assessor 1 designation with the State
9 of Wisconsin, and I believe that's since 1983 and
10 have attended institutes such as Wisconsin Municipal
11 Assessors Institute and Wisconsin Towns Association
12 puts on classes every year as well as various
13 classes throughout the year put on by the Wisconsin
14 Association of Assessing Officers.

15 Q How long have you been an assessor?

16 A I believe this is my 19th year.

17 Q And can you tell me specifically what licenses to
18 perform any occupations that you currently hold or
19 have held.

20 A I hold the Wisconsin Assessor 1 designation.

21 Q Any other license?

22 A No, sir.

23 Q Have you ever been licensed or taken any experience
24 as a real estate broker or salesperson?

25 A No, sir.

1 What municipalities are there that you
2 enter the data electronically in --
3 MR. KROMHOLZ: Objection.
4 BY MR. DEUTCH:
5 Q -- without having a paper card?
6 MR. KROMHOLZ: Objection. Vague as to
7 you.
8 BY MR. DEUTCH:
9 Q By you I mean Assessment Technologies or Grota
10 Appraisals or anybody working for them.
11 A Well, Grota Appraisals is the only firm that does
12 municipal assessment work. I would have to look at
13 our system to see if there are any that do not use
14 the property record cards past or present. They are
15 in most cases always referred to.
16 Q But there are some cases where you've just admitted
17 that you enter it electronically?
18 MR. KROMHOLZ: Objection. Vague.
19 Objection as to admitted. I think you're
20 recharacterizing past testimony.
21 BY MR. DEUTCH:
22 Q Okay, we'll start all over again. You can always
23 read the transcript later. Sir, in some cases Grota
24 Appraisals enters the data electronically without
25 entering it onto the property record card; correct?

1 A In some cases, correct.

2 Q Can you give me an example of a municipality where
3 that could be happening?

4 A That may well happen in the Village of Sussex.

5 Q The most up to date and current data then on the
6 Village of Sussex would be within that database that
7 you've entered material into; is that correct?

8 MR. KROMHOLZ: Objection. Vague.

9 THE WITNESS: It may be.

10 BY MR. DEUTCH:

11 Q Is there any other database that would have that
12 same information, to the best of your knowledge?

13 A There may be printouts from the Market Drive program
14 that are inserted into the property record file
15 keeping it up to date. There may be.

16 Q But those would be generated from that database,
17 right; that electronic database?

18 A From the Market Drive PC program, correct.

19 Q Is there any other place where that same data is
20 available to the best of your knowledge? By that
21 data I'm saying the same data that's on the property
22 record card.

23 A In -- I mean, in its entirety or --

24 Q Yes.

25 A Okay. I believe there is not.

STATE OF WISCONSIN	CIRCUIT COURT	WAUKESHA COUNTY
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WIREDdata, Inc.

Plaintiff,

v.

Case No. 01-CV-1403

Village of Sussex,
Grota Appraisals, LLC
in its capacity as Assessor for the Village of Sussex,
Michael L. Grota and Assessment Technologies of WI, LLC.

Defendants.

**AFFIDAVIT OF EMILY C. CANEDO
IN SUPPORT OF PLAINTIFF'S RESPONSE TO THE VILLAGE OF
SUSSEX' MOTION FOR SUMMARY JUDGMENT**

STATE OF WISCONSIN)

) ss.

MILWAUKEE COUNTY)

Emily C. Canedo, being first duly sworn on oath, deposes and states that:

1. I am one of the attorneys for the plaintiff, WIREDdata, Inc., and make this affidavit on its behalf in support of plaintiff's response to the Village of Sussex' Motion for Summary Judgment.
2. Attached hereto as Exhibit A is a true and correct copy of correspondence from Mr. Thomas Curtis to Mr. Andrew Pelkey marked as Exhibit 3 at the deposition of Thomas Curtis conducted on July 27, 2004.

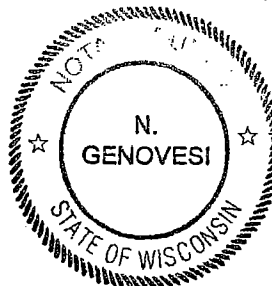
3. Attached hereto as Exhibit B is a true and correct copy of correspondence from Mr. Andrew Pelkey to Mr. Thomas Curtis as Exhibit 4 at the deposition of Thomas Curtis conducted on July 27, 2004.
4. Attached hereto as Exhibit C is a true and correct copy of Exhibit 8 as marked at the deposition of Peter Shuttleworth, conducted on July 28, 2004.
5. Attached hereto collectively as Exhibit D are true and correct copies of pages from Michael Grota's deposition, conducted on June 22, 2004.
6. Attached hereto as Exhibit E is a true and correct copy of the *Contract for Maintenance of Assessment Records, 2000-2004*, between Grota Appraisals, LLC and the Village of Sussex.
7. Attached hereto collectively as Exhibit F are true and correct copies of pages of Mr. Andrew Pelkey's deposition conducted on September 22, 2004.
8. Attached hereto collectively as Exhibit G are true and correct copies of pages from Thomas Curtis' deposition, conducted on July 27, 2004.

Executed in Milwaukee, Wisconsin, this 29th day of November, 2004.

Emily C. Canedo
Emily C. Canedo

SUBSCRIBED AND SWORN to before
me this 29th day of November, 2004.

[Signature]
Notary Public, State of Wisconsin
My commission expires: 4/27/05



Andy;

Selected fields requested from Market Drive software. Any type of electronic output and media is acceptable (i.e., fixed length, comma-quote, pipe delimited). We would need a data layout, if the fields are not in the order below.

Taxkey
County
Municipality
Town, Village or City Indicator
Property Prefix
Property Street Number
Property Street Direction
Property Street Name
Property Unit Number
Zip Code

Owner Name 1
Owner Name 2
Owner Address
Owner City
Owner State
Owner Zip Code

Property Class

Acres

Zoning

Land Use

Building Type

Number of Stories

Story code

(Example: 1, 1+attic)

Number of Units

Building Square Feet

Basement Type

(Full, partial, etc.)

Attic

(Yes/No/Type: Finished/etc.)

Pool

(Yes/No/Type: Inground/etc.)

Fireplace

Air Conditioning

Heating Type

Total Number of Rooms

Number of Bedrooms

Number of Full Baths

Number of Half Baths

Garage Type

(# stalls, attached, detached, etc)

Sidewalk

Exterior Wall Type

Exterior Condition

Year Built

Year Remodeled

Effective Year Built

Historic Designation

Census Tract

School District

(4 digit state code, if available)



Township
Range
Quarter
Section

Thanks,

Tom Curtis
800-229-9211

Dear Tom:

Below are the specifications for six files I will give you for each municipality. These files will give you a complete picture of what each property looks like. The first file is the property file. There will be one record for each property (or tax key number) in the municipality. All land and improvement information will be exported into separate files because there is a "one-to-many" relationship between a property and the information contained in the other files.

Please note that although there may be a place to enter a piece of information, it is up to the individual assessor to enter the data. For example, I don't think many assessors fill in zoning because the county property lister does not have it because municipalities usually keep zoning information on paper maps.

Regarding districts, the current version of Market Drive being used by assessors only has one field for school district (usually the elementary school district). The next release will be able to distinguish between elementary and high school districts. I was thinking of the next release when I told you I could distinguish between the two.

I have added land and improvements values to each file. These would be current year (2001) assessed values. I would recommend that we export the data after the assessor has made changes from the board of review to ensure that the numbers are accurate. However, if you are not going to publish the numbers, we can probably export the data sooner.

Assuming that what is documented below is all of the requirements, there is a one-time cost of \$6600 to program and test the export. The remaining cost for the data is 50 cents per parcel. Incorporated into this cost is the cost of running the export, checking the result and burning the CDs. Assuming you want all the data we can give you, the total cost will be substantially less than the cost of getting the data on paper, since each property takes a minimum of 4 pages to print. Following the export specifications is a partial list of the municipalities we have data for and the approximate parcel count for each. This will help give you an idea on the cost for a typical municipality. More data is available for other municipalities in the state. Please let me know what areas of the state you are interested in.

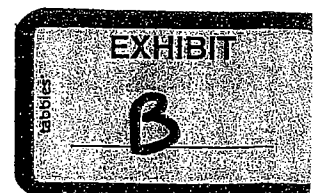
Once you have a current copy of the data, we can provide you with an annual update after each board of review. The cost for the update is 15 centers per parcel assuming that you do not want us to change the format of the export. The update is for all parcels whether or not they have changed (that is why it is only 15 cents). We did not want to get into a discussion on what constitutes a change or deal with tracking which parcels changed since the last time we gave you an update. The cost of the update includes gathering the data, running the export, checking the results, and burning the CDs.

Finally, the costs quoted here assume that you are not reselling the data in mass to another source. This data is meant for you and your subscribers to view. If you want to "add value" to any part of this data and distribute it in mass to another company, you will need to charge your customer for our fee in addition to your fees for your added value.

If you have any questions, please do not hesitate to call.

Best Regards,

Andrew Pelkey
Senior Consultant



Property file: Contains one record for each parcel (tax key number) in the municipality. Named something like "Village of Sussex properties.txt". This file will contain the following fields:

Field	Example	Note
Tax key number	413-9989-002	
County	Washington	
Street number	3500	
Street direction	S	
Street name	76 th street, #7	Will include the property unit number at the end.
Owner name	Andrew Pelkey	
Secondary owner name	Lisa Pelkey	
Owner address line 1	2400 W Bluemound Rd	
Owner address line 2	Suite 120	
Owner city	Badger	
Owner state	WI	
Owner zip	99123	
Zoning	R1	
School district	5323	The current version of Market Drive does not distinguish between elementary and high school district. The next release will.
Zoning		This data is maintained at the county level. I don't know of many assessors (especially in smaller communities) that fill it in.

Land file: Contains one record for each land parcel in the municipality. If property has more than one land parcel (e.g. a farm), there will be multiple records for the same tax key number. Named something like "Village of Sussex land.txt". This file will contain the following fields:

Field	Example	Note
Tax key number	413-9989-002	
Class	Residential	
Width	380	
Depth	3818	
Acres	3.331	Not always width * depth (lot may be irregularly shaped).
Land value		

Residential buildings file: Contains one record for each residential building in the municipality. If property has more than one residential building (rare but it happens), there will be multiple records for the same tax key number. Named something like "Village of Sussex residential buildings.txt". This file will contain the following fields:

Field	Example	Note
Tax key number	413-9989-002	
Class	Washington	
Story height	1 story w/attic	1 story, 1 story w/attic, 1.5 story, 2 story, 2 story w/attic, 2.5 story
Style	Colonial	Defined by assessor (ranch, by-level, tri-level, cape code, colonial, old style, etc)
Occupancy (Use)	Single family	Defined by assessor (single family, mother-in-law, condo, 2 family, apartment, etc)
Exterior wall	Alum/vinyl	Defined by assessor (wood, block, stucco, alum/vinyl metal, brick, stone, msnry/frame, etc)
Roof type	Asphalt shingles	Defined by assessor
Year built	1973	
Year remodeled	1993	
Basement type	Full	None, crawl, partial, full

Heat type	Basic	None, space, basic, A/C
Fuel type	Gas	Gas, electric, oil, wood/coal
System type	Warm air	Warm air, baseboard, hot water, steam
Bedrooms	3	
Family rooms	1	Family rooms only. Living rooms are counted as "other rooms"
Other rooms	1	
Full baths	2	
Half baths	1	
Interior rating	Average	Excellent, very good, good, average, fair, poor, very poor
Exterior rating	Good	Excellent, very good, good, average, fair, poor, very poor
Fireplace stacks	1	
Fireplace openings	1	
Other fireplaces	0	
Basement garage stalls	0	
Other feature 1	Whirlpool	
Other feature 2	Drain in garage floor	
Basement SF	1,000	
Rec room SF	250	The rec room SF is included in the Basement SF. Therefore, do NOT add the two numbers together to produce a total basement SF.
FBLA SF	400	Finished Basement Living Area. This number represents basement area that can be include in SFLA. Like rec room SF, the square footage here is included in Basement SF.
First floor SF	1,000	
Second floor SF	0	
Finished attic SF	0	
Unfinished attic SF	0	
Unfinished area SF	0	
Patio SF	150	
Open porch SF	150	
Screen porch SF	150	
Enclosed porch SF	150	
Wood deck SF	150	
Attached garage SF	250	
SFLA	1400	Total SF Living Area. This will be FBLA SF + First Floor SF + Second Floor SF + Finished Attic SF
Building value		

Commercial buildings file: Contains one record for each commercial building in the municipality. If property has more than one commercial building, there will be multiple records for the same tax key number. Named something like "Village of Sussex commercial buildings.txt". This file will contain the following fields:

Field	Example	Note
Tax key number	413-9989-002	
Class	Commercial	
Stories	2	
Description	Walgreens	
Building value		

Other buildings file: Contains one record for each other building improvement (OBI) in the municipality. Other building improvements are mostly farm building but can also include things like pools and detached garages. If

property has more than one other building improvement, there will be multiple records for the same tax key number. Named something like "Village of Sussex OBIs.txt". This file will contain the following fields:

Field	Example	Note
Tax key number	413-9989-002	
Class	Agri other	
Type	Bank barn	
Width	50	
Depth	40	
OBI value		

Other improvements: Contains one record for each other improvement in the municipality. Other improvements are slightly different than OBIs. They are miscellaneous improvements that for one reason or another were not valued as any of the other types of improvements. They are not widely used. If property has more than one other improvement, there will be multiple records for the same tax key number. Named something like "Village of Sussex other improvements.txt". This file will contain the following fields:

Field	Example	Note
Tax key number	413-9989-002	
Class	Agri other	
Description	Billboard next to highway	
Improvement value		

Parcel Counts for typical Municipalities (a partial list)

County	Municipality	Parcel Count	Initial Cost	Annual Maintenance (cost per year)
Washington	T-Erin	2472	\$1,236	\$371
Washington	T-Hartford	2547	\$1,274	\$382
Washington	T-Jackson	2654	\$1,327	\$398
Washington	T-Kewaskum	1108	\$554	\$166
Washington	T-Polk	2812	\$1,406	\$422
Washington	T-Richfield	5206	\$2,603	\$781
Washington	T-Trenton	2911	\$1,456	\$437
Washington	T-West Bend	2499	\$1,250	\$375
Washington	V-Jackson	1623	\$811	\$253
Washington	V-Newburg	330	\$165	\$50
Washington	V-Slinger	1538	\$719	\$216
Washington	V-Germantown	7579	\$3,790	\$1,137
Waukesha	T-Merton	3600	\$1,800	\$540
Waukesha	T-Summit	2500	\$1,250	\$375
Waukesha	V-North Prairie	500	\$250	\$75
Waukesha	T-Ottawa	1800	\$900	\$270
Waukesha	T-Delafield	3600	\$3,600	\$540
Ozaukee	T-Grafton	2358	\$1,179	\$354
Ozaukee	V-Thiensville	1210	\$605	\$182
Dodge	T-Ashippun	2297	\$1,149	\$345
Dodge	T-Herman	1892	\$946	\$284
Dodge	T-Hubbard	1833	\$917	\$275
Dodge	V-Neosho	253	\$127	\$38
Dodge	T-Theresa	1200	\$600	\$180
Dodge	V-Theresa	392	\$196	\$59
Jefferson	C-Lake Mills	1876	\$938	\$281

Assessment Specialists • Annual Maintenance • Revaluations

N89 W16800 Appleton Avenue • Menomonee Falls, WI 53051

CONTRACT FOR
MAINTENANCE OF ASSESSMENT RECORDS

2000 -2004

THIS AGREEMENT: by and between Grota Appraisals LLC, hereinafter called the "Assessor", and the Village of Sussex, Waukesha County, Wisconsin, hereinafter called the "Village".

The Assessor and the Village for the compensation stated herein, agree as follows:

ARTICLE I

SCOPE OF WORK: the Assessor, having familiarized himself with the local conditions affecting the cost of the work to be done, and the Standard Specifications for the Annual Maintenance of Real and Personal Property Records in the State of Wisconsin pursuant to Chapter 70, Wisconsin State Statutes, hereby agrees to perform everything required to be performed and to complete in a professional manner everything required to be completed to comply with State Statutes regarding the assessment of Real and Personal Property on behalf of the Village and in accordance with the General Agreements as stated in Article Three of this contract.

ARTICLE II

COMPENSATION: the Village shall pay to the Assessor for the performance of the contract the following compensation :

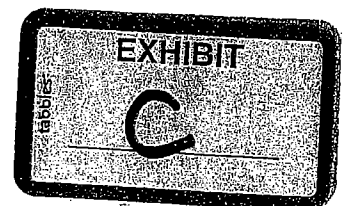
2000 -2004

\$ 21,000 annually

Payable in monthly installments of

\$ 1,750

001033



ARTICLE III

GENERAL AGREEMENTS:

- 1) The contract shall begin January 1, 2000 and end December 31, 2004.
- 2) All normal duties and functions of the Assessor as described and set forth in the Wisconsin State Assessors Manual, including required meetings, will be performed in a timely manner, and in accordance with the Chapter 70 Laws of the State.
- 3) The above fee includes any and all normal assessment duties during its duration, including :
No additional charges for quantity of permits or new plats, Board of Review and further appeals.
- 4) All services requested over and above the normal yearly assessment functions will be charged extra at a mutually agreed upon rate.
- 5) The Assessor will provide his own equipment, work space, storage and security of records, while in his possession.
- 6) The Assessor will carry his own Liability and Records Insurance, to protect the Village from suits for damages, injury, lost or destroyed records. (one million dollars coverage)
- 7) The Assessor is to be considered an Independent Contractor hired to fill an Appointed Statutory Position, and is not subject to withholding tax, insurance programs or benefits.
- 8) Every year at Board of Review meeting or as needed Assessor will inform Village Board on matters concerning but not limited to :
 - a) Compliance with State Statutes on assessment practices.
 - b) Property assessments in relation to current sales of property.
- 9) Work closely with Village Clerk and Building Inspector on matters concerning both offices.
- 10) Mileage & outside telephone expenses are included in the contract price. No additional charges will be made for those items.

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- 11) Oath of office pursuant to Sec. 61.197 (f) WIS. STATS. Michael L. Grota shall be designated as the person responsible for the Assessment and shall file an official oath.
- 12) Approval of this Agreement by the Village Board shall constitute appointment of Assessor as the Village Assessor for the period specified above.
- 13) Within 14 days of the expiration or termination of the contract term, the Assessor shall turn over to the Village: (a) all records prepared or maintained, including, but not limited to, property records cards; personal property forms, maps and other schedules or forms; (b) all records and materials obtained from the Village and not previously returned, to include map and Assessor's records; (c) material specifically obtained and/or used for the performance of assessment work for the Village under contract to include aerial photos, maps depth factor tables, copies of leases and copies of real estate transfer returns.

Additional improved parcels exceeding 50 (fifty) per year of new construction or annexation shall be billed at \$ 60 per parcel. This fee will be billed after the completion of the Board of Review for each year of the contract.

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ARTICLE IV

All of the provisions of the Request For Proposal's are incorporated by reference and made part of this agreement except as specifically modified herein;

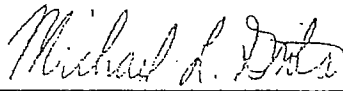
- 1) Assessor will also be available Monday - Friday 8:00 am to 4:30 PM for taxpayer inquires/appointments and Village staff questions. Appraiser/Realtor information requests will also be handled at the Assessor's home office on Monday and Thursday mornings.
- 2) Provide and maintain accurate parcel identification for all Real Estate parcels pursuant to Chapter 70 Wisconsin State Statutes and the Wisconsin Property Assessment Manual.
- 3) Maintain current assessment property record cards in their present format and update values to reflect changes made for that year. New values will be created for any new plats or land divisions. All PRC maintenance will be done in compliance with Wisconsin Property Assessment Manual guidelines.
- 4) Formal "Open Book" conferences will be held to comply with Chapter 70 Wisconsin State Statutes governing Open Book and Board of Review procedures. Discussions with taxpayers will take place throughout the year to handle their questions and concerns.
- 5) Completion of the Assessment Roll with the first meeting of the Board of Review able to be on or before August 30, of the current assessment year. Assessment Roll shall be completed in compliance with the Wisconsin Property Assessment Manual and Chapter 70 Wisconsin State Statutes.
- 6) Completion and submittal of the Assessors Tax Incremental District Report on a timely basis.
- 7) Sign Assessment Roll and attendance at meetings of the Board of Review to defend assessments in that signed roll per Chapter 70 Wisconsin State Statutes.
- 8) Furnish testimony in defense of the valuations established.
- 9) Provide direction and assistance to Administrative Services Department to maintain accurate, timely and effective assessment information using the most current technology.

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SUBMITTED TO THE VILLAGE OF SUSSEX THIS 28TH DAY OF
OCTOBER, 1999

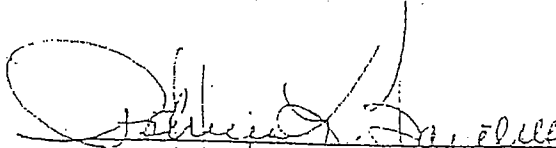

Michael L. Grota


ACCEPTANCE BY VILLAGE:

The above proposal, terms and general agreements are hereby accepted, this

11TH day of NOVEMBER, 1999

BY GOVERNING BODY OF THE VILLAGE OF SUSSEX


President


Administrator


Clerk

001037

THE FOLLOWING
EXHIBITS DELETED FOR
BREVITY:

EX. C (R.64:31-46 ONLY)

EX.D-G (R.64:47-67)

STATE OF WISCONSIN	CIRCUIT COURT CIVIL DIVISION	WAUKESHA COUNTY
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WIREDdata, Inc.

Plaintiff,

Case No. 01-CV-1403

v.

Village of Sussex,
Grota Appraisals, LLC in its
capacity as Assessor for the Village of Sussex,
Michael L. Grota and Assessment Technologies of WI, LLC.

Defendants.

SECOND AFFIDAVIT OF EMILY C. CANEDO

STATE OF WISCONSIN)
) ss.
MILWAUKEE COUNTY)

Emily C. Canedo, being first duly sworn on oath, deposes and states that:

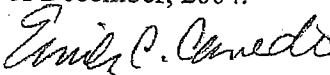
1. I am one of the attorneys for plaintiff, WIREDdata, Inc. and make this affidavit on its behalf.
2. Attached hereto collectively as Exhibit A are true and correct copies of pages from Thomas Curtis' deposition, conducted on July 27, 2004.
3. Attached hereto collectively as Exhibit B are true and correct copies of pages from Peter Shuttleworth's deposition, conducted on July 28, 2004.
4. Attached hereto collectively as Exhibit C are true and correct copies of pages from Michael L. Grota's deposition, conducted on June 22, 2004.
5. Attached hereto collectively as Exhibit D are true and correct copies of pages from Andrew Pelkey's deposition, conducted on September 22, 2004.
6. Attached hereto collectively as Exhibit E are true and correct copies of pages from Andrew Pelkey's deposition, conducted on September 7, 2001.

80-0000-11-000000
18000 18000 11-000000

7. Attached hereto collectively as Exhibit F are true and correct copies of pages from Ernest Matthies' deposition, conducted on August 18, 2004.


8. Attached hereto as Exhibit G is a true and correct copy of Assessment Technologies of WI, LLC's Complaint against WIREdata, Inc., filed on August 3, 2001 in the United States District Court for the Eastern District of Wisconsin, Case No. 01-C-0789.

Executed this 14th day of December, 2004.

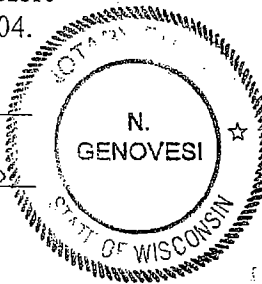


Emily C. Canedo

SUBSCRIBED AND SWORN to before
me this 14th day of December, 2004.



Notary Public, State of Wisconsin
My commission expires: 11/27/05



MR. JOHNSON:

Q. Do you have the data?

A. Not in the format I expected it.

Q. What format did you expect it in?

A. I expected it in a comma-quote delimited ASCII file.

Q. When you made your initial request back in April of 2001, did you ask for it in comma delimited ASCII file?

A. I would have to review my letter to answer the question.

Q. I will just give you one of them. This is for the Village of Thiensville.

(Exhibit No. 1 marked for identification by the court reporter.)

MR. JOHNSON:

Q. Let me know when you have had a chance to review that.

A. Okay.

Q. Does it say anything about comma delimited ASCII files?

A. No.

Q. What are you asking for in this document? Does it say an electronic digital copy; is that correct?

A. Yes.



1 Q. Have you received an electronic digital copy?

2 A. Yes.

3 Q. So when you asked for an electronic digital copy,
4 you were in fact expecting something else?

5 A. Yes.

6 Q. So why did you ask for an electronic digital copy
7 if you were, in fact, expecting something else?

8 A. I was expecting it in a different format.

9 Q. You were expecting it in a different format than
10 what you actually asked for?

11 MR. DEUTCH: Objection. I don't think
12 that -- that is not the fact as to whether the
13 electronic digital copy matches what he asked for.
14 Subject to that.

15 THE WITNESS: If you could rephrase the
16 question.

17 MR. JOHNSON:

18 Q. You asked for an electronic digital copy; correct?

19 A. Correct.

20 Q. You have now received an electronic digital copy;
21 correct?

22 A. Yes.

23 Q. However, you said that what you have received is
24 not what you expected; correct?

25 A. Yes.

1 Q. Do you know how much was spent on each specific
2 case?

3 A. I do not.

4 Q. Do you know how much was spent on Thiensville?

5 A. I don't know.

6 Q. Do you know how much was spent on Port Washington?

7 A. I do not.

8 Q. Do you know how much of that was spent since the
9 moment that you received the data?

10 A. I do not.

11 Q. Is there any way you could find that out?

12 A. I suppose there might be. I don't know.

13 Q. You don't know how you could determine that?

14 MR. DEUTCH: Objection.

15 THE WITNESS: I received invoices like
16 any business, and I could review invoices and look
17 at dates in time. I don't know the answer to your
18 question.

19 MR. JOHNSON:

20 Q. Do you contend that you're entitled to data that
21 is different than electronic files that you
22 already received?

23 A. Yes, I do.

24 Q. Why is that?

25 A. I did not get an electronic copy of the database.



- 1 I got a constructed document file that was
2 extracted from any database that exists. I did
3 not get a copy of a database or manipulable data.
- 4 Q. What was that word?
- 5 A. Manipulable. Data that can be manipulated, how
6 about that?
- 7 Q. Did the open records request that WIREdata filed
8 require the data to be manipulable?
- 9 A. I thought our request was very clear.
- 10 Q. I didn't ask that. I asked whether it required
11 the data to be manipulable?
- 12 A. We made a request of all municipalities, I felt,
13 by industry standards and understandings of the
14 dealings we have with many municipalities and data
15 processing that our request was clear for a copy
16 of the database, that we could use the database.
- 17 Q. Does the word manipulate appear in any of those
18 requests at all?
- 19 A. Probably not.
- 20 Q. So you have received an electronic copy of the
21 data; correct?
- 22 A. I received a PDF file, correct.
- 23 Q. Your request is for an electronic copy of the
24 data, correct, and somehow you think you're
25 entitled to something different than what you have

1 already received?

2 A. That is correct.

3 Q. I guess that you indicate that your request was
4 that the data must be manipulable?

5 A. That is what I said, yes.

6 Q. But your request does not refer to any
7 manipulation of the data; correct?

8 A. We are in the business of requesting data. We
9 asked for data in a file that we can use, and by
10 industry standards our request was clear. I am
11 sorry that is not clear to you.

12 Q. Well, it didn't refer to any data manipulation;
13 did it?

14 A. Not specifically. Go back to my previous
15 response.

16 Q. Let's talk about the factual data for instance
17 whether a house has three bedrooms and the number
18 of square footage in the house. And we will just
19 talk about the facts as the assessor finds them.
20 Do you have any reason to believe that any of the
21 factual data, for instance, whether a house has
22 three bedrooms, do you have any reason to believe
23 any of those facts have been withheld from you?

24 A. I don't know.

25 MR. DEUTCH: Objection, the word

1 MR. JOHNSON: Because haven't you
2 received a PDF file with all that information?

3 MR. DEUTCH: I'm not, not to my
4 knowledge. I don't know.

5 Q Have you taken any actions to send a PDF file of
6 the Village of Thiensville, or City of Port
7 Washington data to WIREdata?

8 A PDF files were sent for the City of Port, the
9 Village of Thiensville, and the Village of Sussex
10 many weeks ago.

11 Q And who were they sent to?

12 A WIREdata corporate offices on North Avenue. I
13 believe.

14 Q And who sent them?

15 A I believe that they were sent out of my office.

16 Q Who in your office did it?

17 A The exactly, I know our programmer copied them
18 over, sent, I believe he sent those to us, where we
19 burned them to CD, and they were mailed out. So
20 they, they would have touched three hands, two of
21 which inside our office, and one from a contractual
22 programmer.

23 Q And who's the contractual programmer?

24 A Andy Pelkey. P E L K E Y.

25 Q Okay. Do you know if these PDF files contain any



1 protection scheme preventing them from being
2 copied?

3 A I, I'm unaware. Only that they were sent in PDF
4 form to WIREDATA. I don't know what you mean
5 scheme.

6 Q Is there anything that you know of that prevents
7 the copying of those PDF files?

8 A To my knowledge I'm not aware of any.

9 MR. JOHNSON: Can we go off the record
10 for a second?

11 (Discussion off the Record.)

12 MR. DEUTCH:

13 Q Is there a reason why you decided to send it by PDF
14 rather than just a copy of the data base?

15 A The data base is copyright protected, and the PDF
16 file format gave a crystal clear representation of
17 the property assessment card information in its
18 entirety. It was better than some of the other
19 text forms that were available, and was very
20 consistent to produce.

21 Q What other text forms were available?

22 A One that comes to mind is rich text. And I'm, I
23 don't portray to be an expert in the different
24 formats available, but PDF was chosen because it
25 was the cleanest representation of that property

1 assessment card.

2 Q Do you know if any letter, or other communication
3 was sent along with it?

4 A I believe that there may have been a short cover
5 letter stating what was included in that mailing.

6 Q And who signed that cover letter?

7 A I'm, I'm not aware. Somebody may have used my
8 stamp, if there was a cover letter sent. I don't
9 recall.

10 Q You personally didn't sign it?

11 A I don't believe I did.

12 Q Okay. Now when you say people, you said that --
13 strike that -- the data base that you sent, or the
14 information you sent by PDF was for what year?

15 A It would have been 2003, because the board of
16 reviews I, I don't believe were yet complete for
17 the 2004 assessment year.

18 Q Okay. Why did you select 2003 versus 2001?

19 A 2003 was the most current information available.

20 Q Okay. 2003 is different than 2001; is that
21 correct?

22 A It has more information, and updated assessment
23 values, as well as any new construction that took
24 place since.

25 Q Okay. So that I understand what your position is

1 businesses for two separate reasons, and two
2 separate functions. Assessment Technologies
3 believed it was in their best interests to provide
4 that output of the software to its entire client
5 list, not just Grota Appraisals, and not just this
6 lawsuit.

7 MR. JOHNSON: Can we hold on a second,
8 Alan? I need a bathroom break.

9 (Short recess.)

10 MR. DEUTCH:

11 Q Now, sir, I'd like for you to tell me each and
12 every reason that you told WIREdata why you were
13 not producing the records as demanded?

14 MR. JOHNSON: Again, same objection to
15 the point that it seeks attorney-client privileged
16 information.

17 MR. DEUTCH:

18 Q I'm asking each and every thing he told WIREdata.

19 A I'm not sure that I had conversation with WIREdata.

20 Q Did you give any communications to WIREdata as to
21 your reasons for not producing the records?

22 A Myself? Or Grota Appraisals, or Assessment
23 Technologies? Who are we talking about?

24 Q Any of the entities that you own, or control?

25 A I believe a contractor may have had dialogue with

1 WIREdata on behalf of Assessment Technologies.

2 Q Okay. And who is that contractor?

3 A Andy Pelkey.

4 Q Okay. Does Mr. Pelkey own any part of Grotta
5 Appraisals?

6 A No.

7 Q Does he have any, is he just a contractor, or does
8 he have any other relationship to Grotta Appraisals?

9 A No other relationship.

10 Q Okay. And were you aware of whatever communication
11 Mr. Pelkey sent to WIREdata?

12 A I believe I've heard the feedback of those
13 conversations.

14 Q And what was the feedback that you thought you
15 heard?

16 A That WIREdata requested information in a specific
17 format, requesting, you know, some items on the
18 property record card, and that what, I believe Mr.
19 Pelkey relayed what the cost of providing that
20 information would be.

21 Q Have you -- you been involved in both the federal
22 and state lawsuits; is that correct?

23 A That is correct.

24 Q You heard several times WIREdata say that it would
25 have taken the data in any format, in any digital

1 Q And are you saying that it would be \$6,000 per
2 municipality, or \$6,000 a one-time shot?

3 A I believe on, and this is Assessment Technologies
4 speaking, because of copyright issue, it would have
5 charged the market price for that, for performing
6 that service.

7 Q And what do you believe the market price was?

8 A I believe that that's been stated as 50 cents per
9 parcel, the first year, and 10 cents per parcel
10 each year after that.

11 Q That doesn't represent what the cost would be to
12 Assessment Technologies, does it?

13 A Since we've never applied and gone through with
14 this, I'm not sure what that cost would be. If the
15 cost would be more, or less, than those stated
16 fees.

17 Q You're telling me that, do you know -- strike that
18 -- have you ever made a copy of a file that's on a
19 computer?

20 A Have I personally?

21 Q Uh-hum. Yes. You.

22 A I may have copied a file from my network to my C
23 drive, or back and forth.

24 Q Okay. What makes you think any more than that
25 amount of work would be, any more effort than that

1 would be necessary?

2 A I've been led to believe that there has to be a
3 conversion from Market Drive to another format.

4 Q And who led you to believe that?

5 A I guess, I mean many people. As well as Andy
6 Pelkey.

7 Q Have you read the decision in the 7th Circuit Court
8 of Appeals on the Assessment Technologies-WIREdata
9 case?

10 A Yes.

11 Q Do you understand them, do you believe?

12 A I believe so.

13 Q Do you understand what the comments of misuse of
14 copyright mean?

15 A I believe so.

16 Q Do you understand that that can make you personally
17 liable?

18 MR. JOHNSON: I'm going to object to
19 these questions as argumentative, and I'm going to
20 instruct my client not to answer.

21 MR. DEUTCH:

22 Q Okay. Now you're saying you believe it would have
23 taken \$6,000 from your contractor; is that correct?
24 To produce the data base request?

25 A That's correct.

1 A I'm not sure what good that would have done them,
2 but yes.

3 Q You're aware of the fact, sir, that you have the
4 program Market Drive, and then Market Drive
5 operates on a variety of different data bases;
6 right?

7 A That's correct.

8 Q Okay. And if Assessment Technologies wanted to, it
9 could have made a, just a straight up copy of that
10 data base and given it to the municipalities;
11 correct?

12 A Correct.

13 Q Okay. And the cost and time of doing that would
14 have been under an hour?

15 A I'm not sure of that, but they could have done
16 that.

17 Q All right. Do you have any reason to believe that
18 it would have been longer than an hour to copy
19 that, a data base onto a CD and mail it?

20 A I don't know the answer to that question.

21 Q Who would know the answer to that question?

22 A Andrew Pelkey.

23 Q Okay. Are those data bases password protected at
24 the current time?

25 A To the best of my knowledge, yes.

1 Q And they are the assessors for the City of Port
2 Washington; correct?

3 A That's correct.

4 Q Have you ever done any assessment work for Port
5 Washington?

6 A The City of Port Washington, I don't believe I
7 have.

8 Q Are you aware of any open records requests at the
9 City of Port Washington?

10 A I believe that, yes, I am.

11 Q Do you have any personal knowledge of those
12 requests?

13 A Other than that they are similar to that of the
14 Village of Thiensville and Village of Sussex.

15 Q And do you know when those open records requests
16 happened?

17 A Approximately three years ago.

18 Q Okay. And are you aware of any of the responses to
19 those open records requests?

20 A I believe that they were denied.

21 Q And do you remember why they were denied?

22 A Due to reliance on Assessment Technologies'
23 copyright.

24 Q And you have personal knowledge of that denial;
25 correct?

1 A Yes.

2 Q Did you assist in any of those open records
3 responses?

4 A Andy Pelkey performed a, you know, the making of a
5 PDF file containing the City of Port Washington, I
6 believe 2003 assessment data.

7 Q Okay. All right. Now Assessment Technologies
8 itself does not have a contract with the Village of
9 Sussex; correct?

10 A They do not have a written contract with the
11 Village of Sussex, correct.

12 Q Okay. Who is the assessor for the Village of
13 Sussex?

14 A Grota Appraisals.

15 Q And Grota Appraisals is a limited liability
16 corporation?

17 A Correct.

18 Q And then Grota Appraisals has a contract with
19 Assessment Technologies?

20 A That is correct.

21 Q Now are you aware of any other open records
22 requests for the Village of Sussex?

23 A There was I believe David Broadfoot, on behalf of a
24 different company, that now ceases to exist, made a
25 request several years, well, prior to the WIREdata

1 A Yes.

2 Q The particular databases that were being used by

3 Grota Appraisals, who had those, who had possession

4 of those?

5 A Grota Appraisals.

6 Q So you didn't have it?

7 A That's correct.

8 Q So if Mr. Grota says that you had it, he'd be wrong?

9 A He may have given me a copy on occasion for one

10 purpose or another, but I don't keep the master

11 copy.

12 Q From 2001 to the present date, do you have the

13 master copy of any of the databases for any of the

14 municipalities --

15 A No.

16 Q -- that are on Market Drive or use Market Drive?

17 A No.

18 Q So that if I wanted to simply make a copy of the

19 data of any municipality, would you agree with me

20 that that would be under 15 minutes to do from start

21 to finish?

22 A No.

23 Q How long -- why not?

24 A Because we were talking database before and now

25 you're talking about just data, which you made a



1 codes mean?

2 A No.

3 Q So they just -- if you want to change it, you have
4 to change it for everything for that group?

5 A Yes.

6 Q Have you ever received the database from any other
7 assessor or assessment that's using -- assessment
8 group that's using Market Drive other than Grotta
9 Appraisals?

10 A Yes.

11 Q Have you ever received it from Matthies Assessment?

12 A I don't know what Matthies does.

13 Q From the ones you received, did anybody ask you to
14 make a copy of either that database or the property
15 record card data?

16 A Not that I recall.

17 Q Now, you said that somebody else other than you
18 keeps the master copy of the database; right?

19 A That's correct.

20 Q So that in order to do that they have to make a copy
21 to give you?

22 A Yes.

23 Q How do they make that copy to give it to you?

24 A There's a variety of ways. They could burn it to a
25 CD, they could send it on a zip disk, they would

1 A Well, no, you have to -- that just creates files.

2 You have to burn the CD.

3 Q And how long do you think it would take you to put
4 those files on the CD? Five minutes?

5 A No, it takes longer to burn a CD than that. Depends
6 on how much data there is of course. A CD can
7 take -- you fill a CD up entirely it could take over
8 an hour. One municipality isn't going to fill up a
9 whole CD. A whole bunch of them would fill up a CD.

10 Q I'm just saying one.

11 A Just one. Yeah, it's 15 minutes, a half an hour
12 type of thing probably to do one, if you did them
13 one at a time.

14 Q So that you could -- once the program is written --

15 A Yes.

16 Q -- you could click on it?

17 A Yes.

18 Q You can click on it and it would execute, you'd come
19 back and it may take you another 10 or 15 minutes
20 and to take the results and put them onto a CD?

21 A 15 to 30, yeah.

22 Q What's the cost of a CD?

23 A A buck and a quarter.

24 Q So on what basis did you determine 50 cents here?

25 A I didn't determine 50 cents.



1 Q I'm sorry, it's in your letter, right?

2 A Yes.

3 Q Who determined 50 cents?

4 A Assessment Technologies did.

5 Q What would Assessment Technologies pay to you --

6 A Uh-huh.

7 Q -- to generate the program and to run it?

8 A \$6,600 plus the time it takes me to do it. It was
9 time and materials. It wasn't a fixed amount. They
10 just hired me on a time and materials basis, so
11 however long it takes is however long it takes. You
12 know, 15 to 30 minutes per municipality if that's
13 what you want to know.

14 Q All right.

15 A To create the CD. I don't know how long it takes to
16 run it. I generally don't charge them to run a long
17 process and I can do other things, you know, I don't
18 charge them to run a long process.

19 Q So that typically you might charge them another \$25?
20 If you had already written the program and they said
21 go run it on Erin, Town of Erin, it might be \$25
22 additional?

23 A Not necessarily. It depends on -- I mean, if it's
24 during the daytime and I can't do anything, I have
25 to wait for that thing to finish, then I'm charging

1 well, I should say there were three reasons. The
2 second is I wasn't sure what they were really
3 asking for. It's not that I didn't reply. It's
4 that they never replied or specified or clarified
5 the matter.

6 Q. But you were prepared to give them written
7 documents, right?

8 A. Of course.

9 Q. And you felt you knew what they wanted for
10 written documents?

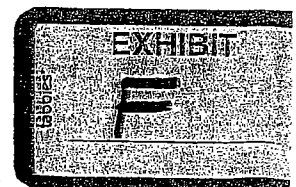
11 A. Well, they stated in the letter something to do
12 with the property record card, and we do maintain
13 the PA-500 property record cards as I described
14 earlier. So if that work was a suitable answer
15 to their request, that could easily have been
16 provided.

17 Q. And you also knew that you had the property
18 record cards in electronic fashion on Market
19 Drive, isn't that correct?

20 A. No. That's not correct.

21 Q. Okay. What's incorrect about it?

22 A. At that point in time -- you're using the word
23 "electronic records," and at that point in time I
24 was unclear of what an electronic record was and
25 what exactly they were requiring of me, and it



1 was never specified or clarified. The only -- I
2 made an assumption.

3 Q. And what was your assumption?

4 A. Because the word "fields" were mentioned, or to
5 map the fields or describe the fields, something
6 along those lines, I assumed that it was a
7 request for a database.

8 Q. Okay. And did you give them that database?

9 A. No.

10 Q. And why not?

11 A. I was precluded from complying with the request
12 due to my contract with Assessment Technologies.

13 Q. Was that the only reason you didn't give them the
14 database?

15 A. No. Actually there was a second reason.

16 Q. And what was that?

17 A. It wasn't clear to me that that was a lawful
18 request following the open records law. I didn't
19 know if that exceeded the open records law.

20 Q. And in what way would it have exceeded the open
21 records law?

22 A. In what way?

23 Q. Yeah.

24 A. My understanding of the open records law at that
25 time was that I had the duty and responsibility

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U.S. DISTRICT COURT
EASTERN DISTRICT - WI
FILED

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FRON B. NEDILSKY
CLERK

Attorneys for Assessment Technologies of WI, LLC

A.E. GOODSTEIN
U.S. MAGISTRATE JUDGE

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF WISCONSIN

ASSESSMENT TECHNOLOGIES OF WI,
LLC,

Plaintiff

v.

WIRE DATA, INC.

Defendant.

COMPLAINT

JURY TRIAL DEMANDED

Case No. **01-C-0789**

Plaintiff, Assessment Technologies Of WI, LLC, located at N89W16800 Appleton Ave, Menomonee Falls, WI 53051, by its attorneys, Ryan Kromholz & Manion, S.C. by Joseph A. Kromholz and Daniel R. Johnson, as and for its Complaint alleges as follows:

THE PARTIES

1. Plaintiff Assessment Technologies Of WI, LLC ("Assessment Technologies") is a Wisconsin corporation located at located at N89W16800 Appleton Ave, Menomonee Falls, WI 53051 and is engaged in the software development and licensing.
2. Upon information and belief, Defendant Wire Data, Inc. ("Wire Data") is a Wisconsin corporation located at 11430 West North Ave, Wauwatosa, WI 53226 and is engaged in the business of collecting and distributing property-related information for resale to mostly



housing industry professionals.

JURISDICTION AND VENUE

3. This action arises under the Copyright Laws of the United States, 17 U.S.C. §§ 101 et seq.
4. This action arises under the trade secret laws of the State of Wisconsin, Wis.Stat. § 134.90.
5. This Court has subject matter jurisdiction over this action pursuant to 28 U.S.C. §§ 1331 and 1338(a).
6. This Court has personal jurisdiction over Wire Data in accordance with Wis. Stat. § 801.05(1).
7. This Court has personal jurisdiction over Wire Data in accordance with Wis. Stat. § 801.05(3).
8. This Court has supplemental jurisdiction over causes of action plead herein under the trade secret laws of the State of Wisconsin, Wis.Stat. § 134.90 in accordance with 28 U.S.C. § 1367(a) because the trade secret claims are so related to the copyright claims in this action that they form part of the same case or controversy under Article III of the United States Constitution.
9. Venue in this action is proper in this district pursuant to 28 U.S.C. § 1391(b) because Plaintiff's claim arose in this district.
10. Venue in this action is proper in this district pursuant to 28 U.S.C. § 1400(b) and 28 U.S.C.

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§ 1391(c) because Defendant Wire Data resides in this district as the term "resides" is defined in 28 U.S.C. § 1391(c) and because Defendant Wire Data is subject to personal jurisdiction in this district.

FIRST CAUSE OF ACTION

Temporary and Final Injunction

Preventing and Restraining Copyright Infringement— 17 U.S.C. § 502

11. The allegations of paragraphs 1- 10 are incorporated as if fully set forth herein.

12. On 30 May 2001, Wire Data filed an action in the State of Wisconsin Circuit Court – Ozaukee County, styled WIREData, Inc. v. Village of Thiensville, et al, Case No. 01CV198_B1 ("Wire Data I"), a copy of which is attached as Exhibit B. Grota Appraisals, LLC is a co-defendant in Wire Data I.

13. On 8 June 2001, Wire Data filed an action in the State of Wisconsin Circuit Court – Waukesha County, styled WIREData, Inc. v. Village of Sussex, et al, Case No. 01CV1403 ("Wire Data II"), a copy of which is attached as Exhibit A. Grota Appraisals, LLC is a co-defendant in Wire Data II.

14. On 12 June 2001, Wire Data filed an action in the State of Wisconsin Circuit Court – Ozaukee County, styled WIREData, Inc. v. City of Port Washington, et al, Case No. 01CV216_B2 ("Wire Data III"), a copy of which is attached as Exhibit C. Matthies Assessments, Inc. is a co-defendant in Wire Data III.

15. In Wire Data I, Wire Data II, and Wire Data III, Wire Data alleges that Wire Data is

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entitled to requested "electronic/digital cop[ies] of the real estate property records used" in the respective municipalities, The Village of Sussex, the Village of Thiensville, and the City of Port Washington under Wisconsin Open Records Law, Wis.Stat. §§ 19.31 – 19.37. See Exs. A, B, & C at ¶¶ 7, 7, and 5, respectively.

16. In Wire Data I, Wire Data II, and Wire Data III, Wire Data alleges failure to produce requested "electronic/digital cop[ies] of the real estate property records used" in the respective municipalities, The Village of Sussex, the Village of Thiensville, and the City of Port Washington, allegedly in violation of Wisconsin Open Records Law, Wis.Stat. §§ 19.31 – 19.37. See Exs. A, B, & C at ¶¶ 17, 18, and 15, respectively.

17. Plaintiff Assessment Technologies owns copyrights to a software program called Market Drive™ 2000. See Exhibit F, attached.

18. Assessment Technologies licenses, on a limited and non-exclusive basis, the Market Drive™ 2000 software to property appraisers, including Grota Appraisals, LLC and Matthies Assessments, Inc. See Exhibits D and E.

19. Licensees of Market Drive™ 2000 software, including Grota Appraisals, LLC and Matthies Assessments, Inc., enter raw property appraisal data from property record cards ("the raw data") into the Market Drive™ 2000 software.

20. The Market Drive™ 2000 software selects, coordinates, and arranges the raw data in such a way that the resulting digital data compilation ("the digital data compilation"), as a whole, constitutes an original work of authorship that did not exist prior to the manipulation of the data by Market Drive™ software.

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1
2 21. A copyright for the digital data compilation is owned by Assessment Technologies of
3 Wisconsin, LLC. ("the copyrighted digital data compilation").
4

5 22. Property appraisers, including Grota Appraisals, LLC and Matthies Assessments, Inc., do
6 not have a license to distribute aforesaid Market Drive™ 2000 software or aforesaid
7 copyrighted digital data compilation.
8

9 23. The "electronic/digital cop[ies] of the real estate property records used" demanded by Wire
10 Data in the respective municipalities, is the copyrighted digital data compilation.
11

12 24. Wire Data is not entitled to a copy of the copyrighted digital data compilation under
13 Wisconsin Open Records Law Wis.Stat. §§ 19.31 – 19.37 because copyrighted material is
14 exempt from open records requests.
15

16 25. Wire Data does not have a license from Assessment Technologies to view, receive,
17 distribute, copy, or prepare derivative works of, the copyrighted digital data compilation.
18

19 26. If, in Wire Data I, Wire Data II, or Wire Data III, Wire Data obtains its requested Writs of
20 Mandamus directing the defendants in Wire Data I, Wire Data II, or Wire Data III to
21 produce and copy the requested "electronic/digital cop[ies] of the real estate property
22 records used" in the respective municipalities, Wire Data will infringe or induce
23 infringement of Assessment Technologies' exclusive copyrights in the copyrighted digital
24 data compilation.
25

26 27. Assessment Technologies is entitled to a temporary and final injunction preventing and
27

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1 restraining Wire Data from infringing Assessment Technologies' exclusive copyrights in the
2 copyrighted digital data compilation under 17 U.S.C. § 502.

3
4
5 SECOND CAUSE OF ACTION

6 Temporary and Final Injunction

7 Preventing and Restraining Trade Secret Misappropriation – Wis.Stat. § 134.90
8
9

10 28. The allegations of paragraphs 1-27 are incorporated as if fully set forth herein.
11

12 29. The copyrighted digital data compilation contains trade secret information regarding the
13 architecture and methodologies of Market Drive™ 2000 software to select, coordinate
14 and arrange the raw data, including a pattern, compilation, program, method, technique o
15 process (“the trade secret information”).
16

17 30. The trade secret information derives actual and potential independent economic value from
18 not being generally known to, and not being readily ascertainable by proper means by
19 other persons who can obtain economic value from its disclosure or use.
20

21 31. The trade secret information is the subject of efforts to maintain its secrecy that ar
22 reasonable under the circumstances. See Exhibits D and E.
23

24 32. If, in Wire Data I, Wire Data II, or Wire Data III, Wire Data obtains its requested Writ
25 Mandamus directing the defendants in Wire Data I, Wire Data II, or Wire Data III t
26 - produce and copy the requested “electronic/digital cop[ies] of the real estate propert

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1 records used" in the respective municipalities, Wire Data will have misappropriated
2 Assessment Technologies' trade secrets contained in the copyrighted digital data
3 compilation.

4
5 33. Assessment Technologies is entitled to a temporary and final injunction preventing and
6 restraining Wire Data from misappropriating Assessment Technologies' trade secrets under
7 Wis.Stat. § 134.90 (3)(a).
8
9

10 WHEREFORE, Plaintiff prays for relief as follows:
11

12 A. For a temporary and final injunction enjoining Wire Data, its officers, agents
13 servants, employees and attorneys, and those persons in active concert or
14 participation with it who receive actual notice of the decree of this Court by
15 personal service or otherwise, from directly or indirectly infringing Assessment
16 Technologies' exclusive copyrights in the copyrighted digital data compilation.
17

18 B. For temporary and final injunction enjoining Wire Data, its officers, agents
19 servants, employees and attorneys, and those persons in active concert or
20 participation with it who receive actual notice of the decree of this Court by
21 personal service or otherwise, from directly or indirectly misappropriating
22 Assessment Technologies' trade secrets embodied in the Market Drive™ software
23

24 C. That Wire Data be directed to pay the Plaintiffs costs and interest incurred herein
25

26 D. That the Plaintiff have such other and further relief as the circumstances of the
27

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1 case may require or as this Court deems just and proper.
2
3

4 A JURY TRIAL IS HEREBY DEMANDED
5

6 Respectfully submitted:

7 Date: August 3, 2001

Ryan, Kromholz & Manion, S.C.

8 By: 
9

10 Joseph A. Kromholz (State Bar No. 1002464)

11 Daniel R. Johnson (State Bar No. 1033981)

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14 Milwaukee, Wisconsin 53226-0618

15 Attorneys for Plaintiff Assessment Technologies of
16 WI, LLC
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CERTIFICATION OF APPENDIX

I hereby certify that filed with this brief, either as a separate document or as a part of this brief, is an appendix that complies with Wis. Stats. § 809.19(2)(a) and that contains: (1) a table of contents titled as an index and (2) portions of the record essential to an understanding of the issues raised.

I further certify that if the record is required by law to be confidential, the portions of the record included in the appendix are reproduced using first names and last initials instead of full names of persons, specifically including juveniles and parents of juveniles, with a notation that the portions of the record have been so reproduced to preserve confidentiality and with appropriate references to the record.

Respectfully Submitted, August 3, 2007:

By: 

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**SUPREME COURT
STATE OF WISCONSIN
APPEAL NOS. 2005AP1473; 2006AP174; 2006AP175**

**WIREDATA, INC.,
Plaintiff-Respondent,**

v.

**VILLAGE OF SUSSEX and
VILLAGE OF SUSSEX CUSTODIAN
Defendants-Co-Appellants-Cross Petitioners,
GROTA APPRAISALS, LLC and
MICHAEL L. GROTA,
ASSESSMENT TECHNOLOGIES OF WI, LLC
Defendant - Appellants-Petitioners.**

**WIREDATA, INC.,
Plaintiff-Appellant,**

v.

**VILLAGE OF THIENSVILLE,
Defendant-Respondent,
GROTA APPRAISALS, LLC and
MICHAEL L. GROTA,
ASSESSMENT TECHNOLOGIES OF WI, LLC,
Defendants – Respondents – Petitioners.**

**WIREDATA, INC.,
Plaintiff-Appellant,**

v.

**CITY OF PORT WASHINGTON,
Defendant – Respondent – Cross Petitioner,
MATTHIES ASSESSMENTS, INC.,
Defendant – Respondent,
AMERICAN FAMILY INSURANCE COMPANY,
Intervenor.**

**APPENDIX OF RESPONDENT WIREDATA, INC. -
VOLUME II**

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Attorneys For WIREDATA, INC.

The record for the Waukesha case was paginated by the Clerk of Court for Waukesha County.

However, as to Ozaukee County, the record for these cases were divided into three separate paginations by the Clerk of Court for Ozaukee County: (1) the documents filed in WIREData v. Village of Thiensville, et al., 01-CV-198, 2001-2003; (2) the documents filed in WIREData v. City of Port Washington, et al., 01-CV-216, 2001-2003; and (3) both cases from January 2004 to December 2005.

Since the record numbers for each pagination start with 1, we have referred to the appropriate record as follows:

Reference in Brief	Case Name	Trial Case No.	Record Years
R-TH	WIREData, Inc. v. Village of Thiensville, et al.	01-CV-198	2001-2003
R-PW	WIREData, Inc. v. City of Port Washington, et al.	01-CV-216	2001-2003
R-PWTH	Thiensville and Port Washington after consolidation		2004-2005
R-S	WIREData, Inc. v. Village of Sussex, et al.	01-CV-1403	2001-2005

**INDEX TO PLAINTIFF-RESPONDENT-RESPONDENT WIREDATA'S
APPENDIX**

<u>Description</u>	<u>Record</u>	<u>Appendix</u>
VOLUME I WAUKESHA COUNTY PORTION		
Amended Summons & Complaint	R-S 8	R. App. 101-123
Grota Answer, Affirmative Defenses & Counterclaims	R-S 21	R. App. 124-138
Village's Answer and Affirmative Defenses to Plaintiff's Amended Complaint	R-S 11	R. App. 139-145
Notice of Motion and Motion for Summary Judgment	R-S 57	R. App. 146-148
Affidavit of Peter Shuttleworth in Support of Plaintiff's Motion for Summary Judgment	R-S 59	R. App. 149-152
Affidavit of M.Chris Schwartz	R-S 60	R. App. 153-154
Affidavit of Emily C. Canedo in Support of Plaintiff's Motion for Summary Judgment	R-S 61	R. App. 155-208
Defendants, Michael L. Grota, et al's Notice of Motion and Motion for Summary Judgment	R-S 55	R. App. 209-212
Affidavit of Emily C. Canedo in Support of Plaintiff's Response to Defendant. Michael L. Grota, Grota Appraisals, LLC and Assessment Technologies of WI, LLC's Motion for Summary Judgment	R-S 67	R. App. 213-266

Exhibit H from the Affidavit of Emily Canedo	R-PWTH 53	R. App. 407-411
Affidavit of Emily Canedo in Support of Plaintiff's Response to the Village of Thiensville Motion for Summary Judgment	R-PWTH 55	R. App. 412-434
Exhibit C from the Affidavit of Emily Canedo	R-PWTH 62	R. App. 435-438
Affidavit of Emily Canedo in Support of Plaintiff's Response to Defendant, Michael L. Grotta, et al. Summary Judgment Motion	R-PWTH 64	R. App. 439-468
Affidavit of Tom Curtis	R-PWTH 77	R. App. 469
Second Affidavit of Emily Canedo	R-PWTH 78	R. App. 470-481
Additional Exhibits from Grotta's Notice of Motion and Motion for Summary Judgment	R-PWTH 33	R. App. 482-489

WIREData, Inc.

Plaintiff,

First Amended Complaint

v.

Case No. 01-CV-198_B1

Case Code 30707

30701

Village of Thiensville,
Assessment Technologies of WI, LLC,
Grota Appraisals, LLC in its capacity as the Assessor for the Village of Thiensville, and
Michael L. Grota

Defendants.

FIRST AMENDED COMPLAINT

NOW COMES the Plaintiff, WIREData Inc., by its attorneys, Deutch & Weiss, as and for an **Amended Complaint** against the Defendants, the Village of Thiensville, Assessment Technologies of WI, LLC, Grota Appraisals, LLC in its capacity as the Assessor for the Village of Thiensville and Michael L. Grota, alleges and shows to the Court as follows:

PARTIES

1. Plaintiff WIREData, Inc., is a Wisconsin corporation with its principal place of business at 11430 W. North Ave., Milwaukee, WI 53226.
2. Defendant Village of Thiensville (hereinafter "Village") is, upon information and belief, a Wisconsin municipal corporation with its principal place of business at 250 Elm Street, Thiensville, WI 53092.
3. Defendant Assessment Technologies of WI, LLC (hereinafter "Technologies"), upon information and belief, is a Wisconsin Limited Liability Company with its principal place of business at N89W16800 Appleton Ave., Menomonee Falls, WI 53051. Upon information and

13. After several discussions between counsel in connection with another pending records request involving Technologies and Appraisals, on or about May 4th, 2001 Plaintiff was contacted by an Andrew Pelkey, an agent of Appraisals, to arrange the transfer of the information requested by the Plaintiff.

14. On or about May 18th, 2001 Plaintiff received an e-mail, attached as **Exhibit E**, from Pelkey outlining the cost and terms of producing the records, which were:

- A. A \$6,600.00 one-time fee to program, test and export the data;
- B. A \$.50 per-parcel charge over and above the \$6,600 programming fee;
- C. An annual update fee of \$.15 per-parcel;
- D. A provision restricting Plaintiff from reselling the data en mass to another source; and
- E. A provision that if Plaintiff “added value” to any part of the data and distributed it to another party, Plaintiff would require its customer to pay the Defendant’s fees in addition to any fees added by Plaintiff.

15. Appraisals, by letter dated June 12, 2001 notified the Village that Technologies owned the assessment software used in performing the Contract. The letter also stated that Appraisals’ use of the program was pursuant to a licensing agreement and that the software contained “valuable proprietary databases” which were the “intellectual property of Technologies” that could not be disseminated to anyone without its prior written consent. A true and correct copy of the letter is attached as **Exhibit F**.

16. On July 12, 2001 Plaintiff was notified through counsel, that Technologies would not consent to the electronic transfer of any records requested as it owned the electronic data. A true and correct copy of the letter is attached as **Exhibit G**.

WIREdata CORPORATION

PO BOX 711 MILWAUKEE, WI 53201 • 414/778-5400 • FAX 778-6143

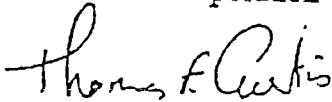
April 20, 2001

Village Clerk
Custodian of Records
Village of Theinsville
250 Elm Street
Theinsville, Wisconsin 53092

This is to formally request 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 your municipality in determining the proper assessments for each parcel within the Village of Theinsville.

Please advise us in writing of when this copy may be picked up and/or of any conditions relating thereto. If there is any cost involved, please advise us in writing of said costs before incurring same.

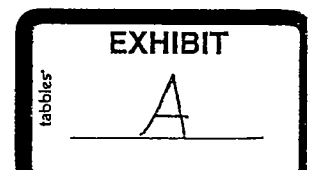
Sincerely,
WIREdata Corporation



Thomas F. Curtis
Vice President

Cc: Alan H. Deutch

R-App. 314



Is your RETURN ADDRESS completed on the reverse side?

SENDER: • Complete items 1 and/or 2 for additional services. • Complete items 3, and 4a & b. • Print your name and address on the reverse of this form so that we can return this card to you. • Attach this form to the front of the mailpiece, or on the back if space does not permit. • Write "Return Receipt Requested" on the mailpiece below the article number. • The Return Receipt will show to whom the article was delivered and the date delivered.		I also wish to receive the following services (for an extra fee): 1. <input type="checkbox"/> Addressee's Address 2. <input type="checkbox"/> Restricted Delivery Consult postmaster for fee.
3. Article Addressed to: Village Clerk Custodian of Records Village of Theinsville 250 Elm Street Theinsville, WI 53092	4a. Article Number Z 032 739 340	Thank you for using Return Receipt Service.
5. Signature (Addressee) K. T. Tuck	4b. Service Type <input checked="" type="checkbox"/> Registered <input type="checkbox"/> Insured <input type="checkbox"/> Certified <input type="checkbox"/> COD <input type="checkbox"/> Express Mail <input checked="" type="checkbox"/> Return Receipt for Merchandise	
6. Signature (Agent) K. T. Tuck	7. Date of Delivery 4-20-2001	
8. Addressee's Address (Only if requested and fee is paid)		

PS Form 3811, December 1991 U.S. GPO: 1992-352-714 DOMESTIC RETURN RECEIPT

Is your RETURN ADDRESS completed on the reverse side?

SENDER: • Complete items 1 and/or 2 for additional services. • Complete items 3, and 4a & b. • Print your name and address on the reverse of this form so that we can return this card to you. • Attach this form to the front of the mailpiece, or on the back if space does not permit. • Write "Return Receipt Requested" on the mailpiece below the article number. • The Return Receipt will show to whom the article was delivered and the date delivered.		I also wish to receive the following services (for an extra fee): 1. <input type="checkbox"/> Addressee's Address 2. <input type="checkbox"/> Restricted Delivery Consult postmaster for fee.
3. Article Addressed to: Village Assessor Village of Theinsville 250 Elm Street Theinsville, WI 53092	4a. Article Number Z 032 739 341	Thank you for using Return Receipt Service.
5. Signature (Addressee) K. T. Tuck	4b. Service Type <input checked="" type="checkbox"/> Registered <input type="checkbox"/> Insured <input type="checkbox"/> Certified <input type="checkbox"/> COD <input type="checkbox"/> Express Mail <input checked="" type="checkbox"/> Return Receipt for Merchandise	
6. Signature (Agent)	7. Date of Delivery 4/22/01	
8. Addressee's Address (Only if requested and fee is paid)		

PS Form 3811, December 1991 U.S. GPO: 1992-352-714 DOMESTIC RETURN RECEIPT

WIREdata CORPORATION

P.O. BOX 733, MILWAUKEE, WI 53201 • 414/778-5400 • FAX 778-6143

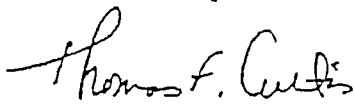
April 20, 2001

Village Assessor
Village of Theinsville
250 Elm Street
Theinsville, Wisconsin 53092

This is to formally request an electronic/digital copy of the detailed real estate property records (showing the specific characteristics of each parcel and the improvements thereupon) used and/or maintained by the Assessor in determining the proper assessments for each parcel within the Village of Theinsville.

Please advise us in writing of when this copy may be picked up and/or of any conditions relating thereto. If there is any cost involved, please advise us in writing of said costs before incurring same.

Sincerely,
WIREdata Corporation


Thomas F. Curtis
Vice President

Cc: Alan H. Deutch

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3. Article Addressed to: Village Clerk Custodian of Records Village of Theinsville 250 Elm Street Theinsville, WI 53092		4a. Article Number Z 032 739 340	
5. Signature (Addressee) K. TUNDAK		4b. Service Type <input checked="" type="checkbox"/> Registered <input type="checkbox"/> Insured <input type="checkbox"/> Certified <input type="checkbox"/> COD <input type="checkbox"/> Express Mail <input checked="" type="checkbox"/> Return Receipt for Merchandise	
6. Signature (Agent) K. TUNDAK		7. Date of Delivery 4-20-2001	
		8. Addressee's Address (Only if requested and fee is paid)	

PS Form 3811, December 1991 U.S. GPO: 1992-322-714 DOMESTIC RETURN RECEIPT

Thank you for using Return Receipt Service.

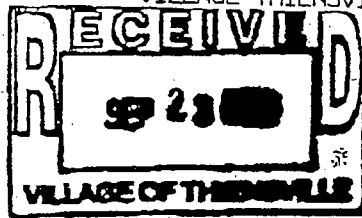
Is your RETURN ADDRESS completed on the reverse side?

SENDER: • Complete items 1 and/or 2 for additional services. • Complete items 3, and 4a & b. • Print your name and address on the reverse of this form so that we can return this card to you. • Attach this form to the front of the mailpiece, or on the back if space does not permit. • Write "Return Receipt Requested" on the mailpiece below the article number. • The Return Receipt will show to whom the article was delivered and the date delivered.		I also wish to receive the following services (for an extra fee): 1. <input type="checkbox"/> Addressee's Address 2. <input type="checkbox"/> Restricted Delivery Consult postmaster for fee.	
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6. Signature (Agent) K. TUNDAK		7. Date of Delivery 4/22/01	
		8. Addressee's Address (Only if requested and fee is paid)	

PS Form 3811, December 1991 U.S. GPO: 1992-322-714 DOMESTIC RETURN RECEIPT

Thank you for using Return Receipt Service.

GROTA APPRAISALS, LLC



PAGE 02/04
XII A

Phone: (414) 253-1142
Fax: (414) 253-4096
www.AssessorData.com
Email: astech@exocpc.com

Assessment Specialists • Annual Maintenance • Revaluations

N89 W16800 Appleton Avenue • Menomonee Falls, WI 53051

CONTRACT FOR MAINTENANCE OF ASSESSMENT RECORDS 2000 - 2001

THIS AGREEMENT: by and between Grota Appraisals LLC, hereinafter called the "Assessor", and the Village of Thiensville, Ozaukee County, Wisconsin, hereinafter called the "Village".

WITNESSETH: the Assessor and the Village for the compensation stated herein, agree as follows:

ARTICLE I

SCOPE OF WORK: the Assessor, having familiarized himself with the local conditions affecting the cost of the work to be done, and the Standard Specifications for the Annual Maintenance of Real and Personal Property Records in the State of Wisconsin pursuant to Chapter 70, Wisconsin State Statutes, hereby agrees to perform everything required to be performed and to complete in a professional manner everything required to be completed to comply with State Statutes regarding the assessment of Real and Personal Property on behalf of the Village of Thiensville and in accordance with the General Agreements as stated in Article Three of this contract.

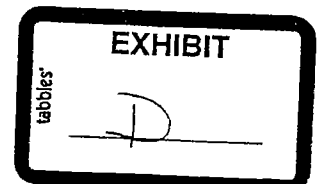
ARTICLE II

COMPENSATION: the Village shall pay to the Assessor for the performance of the contract the following compensation of \$ 5,600 (Five Thousand Six Hundred Dollars), such amount to be paid as follows:

2000 - 2001

January	15,	\$ 1,000	July	15,	\$ 900
March	15,	\$ 1,000	September	15,	\$ 900
May	15,	\$ 900	November	15,	\$ 900

R-App. 318



GROTA APPRAISALS, LLC

Phone: (414) 253-1142

Fax: (414) 253-4098

www.AssessorData.com

Email: astech@execpc.com

Assessment Specialists • Annual Maintenance • Revaluations

N89 W16800 Appleton Avenue • Menomonee Falls, WI 53051

ARTICLE III**GENERAL AGREEMENTS:**

- 1) The contract shall begin January 1, 2000 and end December 31, 2001 .
- 2) All normal duties and functions of the Assessor as described and set forth in Volume I of the Wisconsin State Assessors Manual, including required meetings, will be performed in a timely manner, and in accordance with the Chapter 70 Laws of the State.
- 3) All services requested over and above the normal yearly assessment functions will be charged extra at a mutually agreed upon rate.
- 4) The Assessor will provide his own equipment, work space, storage and security of records, while in his possession.
- 5) The Assessor will carry his own Liability and Records Insurance, to protect the Village from suits for damages, injury, lost or destroyed records.
- 6) The Assessor is to be considered an Independent Contractor hired to fill an Appointed Statutory Position, and is not subject to withholding tax, insurance programs or benefits.

SUBMITTED TO THE VILLAGE OF THIENSVILLE THIS 20TH DAY OF
SEPTEMBER, 1999

Michael L Grota

GROTA APPRAISALS, LLC

Phone: (414) 253-1142
Fax: (414) 253-4098
www.AssessorData.com
Email: astech@execpc.com

Assessment Specialists • Annual Maintenance • Revaluations

N89 W16800 Appleton Avenue • Menomonee Falls, WI 53051

ACCEPTANCE BY VILLAGE:

The above contract, terms and general agreements are hereby accepted, this

18th day of October, 1999

BY GOVERNING BODY OF THE VILLAGE OF THIENSVILLE

ATTEST:

Authorized Official Signatures and Titles:

Ronald A. Molyneux
President

Paul V. Zaty
Trustee

Ronald H. Sieritz
Trustee

Diane J. Robertson
Manager

John R. Hoffman
Clerk

NOTARY OR
VILLAGE SEAL

1 Joseph A. Kromholz WI Bar No. 1,002,464
2 Daniel R. Johnson, WI Bar No. 1,033,981
3 RYAN KROMHOLZ & MANION, S.C.
4 P. O. Box 26618
5 Milwaukee, Wisconsin 53226-0618
6 Telephone: (262) 783-1300
7 Facsimile: (262) 783-1211

8 Attorneys for Defendants Assessment Technologies of WI, LLC, Grota Appraisals, LLC, and
9 Michael L. Grota

10 **IN THE STATE OF WISCONSIN - CIRCUIT COURT**
11 **OZAUKEE COUNTY**

12 Wire Data, Inc.

13 Plaintiff

14 v.

15 Village of Thiensville,
16 Grota Appraisals, LLC,
17 Michael L. Grota, and
18 Assessment Technologies of WI, LLC.
19 Defendants.

20 Answer, Affirmative Defenses and
21 Counterclaims
22 Case No. 01CV198

23 **ANSWER, AFFIRMATIVE DEFENSES AND COUNTERCLAIMS**

24 Defendants Grota Appraisals, LLC, Michael L. Grota, and Assessment
25 Technologies of WI, LLC, by their attorneys, Ryan Kromholz & Manion, S.C. by Joseph A.
26 Kromholz and Daniel R. Johnson, as and for its Answer, Affirmative Defenses and
27 Counterclaims, pleads as follows:

28 1. Admit.

2. Admit

3. Admit that Assessment Technologies of WI, LLC is a Wisconsin Limited
Liability Company having a principal place of business at N89W16800
Appleton Ave., Menomonee Falls, WI 53051. Admit that Defendant
Michael L. Grota owns and controls Assessment Technologies of WI,
LLC. Admit that Assessment Technologies of WI, LLC has an interest

1 which would be affected by any declaration. The remaining allegations
2 are denied.

3 4. Admit

4 5. Admit that Michael L. Grotz is an adult residing in the State of Wisconsin.
5 The remaining allegations are denied.

6 6. Defendants reallege and incorporate the answers in paragraphs 1-5.

7 7. The terms of the "Contract for Maintenance of Assessment Records"
8 speak for themselves. Any allegation contrary to those terms is denied.
9 The remaining allegations are admitted.

10 8. The terms of the "Contract for Maintenance of Assessment Records"
11 speak for themselves. Any allegation contrary to those terms is denied.
12 The remaining allegations are admitted.

13 9. Admit.

14 10. Admit.

15 11. Admit.

16 12. Admit.

17 13. Admit.

18 14. Lack information as to when Plaintiff received said e-mail and therefore
19 deny. The terms of said e-mail speak for themselves. Any allegation
20 contrary to those terms is denied. The remaining allegations are
21 admitted. Affirmatively allege that an additional offer was given dated
22 June 20, 2001, to process 2,685 parcels into a digital format for \$3,132.
23 Affirmatively allege that a representative sample record was 10 pages
24 long, and that for a total of 26,850 pages of printed matter, an average
25 cost per page is approximately \$0.1166 / page.

26 15. Lack information as to the date of the letter therefore deny. The terms of

27 RYAN KROMHOLZ & MANION, S.C.
28 P. O. Box 26618
Milwaukee, Wisconsin 53226-0618
Telephone: (262) 783-1300
Facsimile: (262) 783-1211

STATE OF WISCONSIN

CIRCUIT COURT

OZAUKEE COUNTY

WIREDATA, INC.,

Plaintiff,

vs.

Case No. 01-CV-198

VILLAGE OF THIENSVILLE, et al,
Defendants.

AFFIDAVIT OF DIANNE ROBERTSON

Dianne Robertson, being first duly sworn on oath, deposes and says as follows:

1. That your affiant is the Village Administrator for the Village of Thiensville and Custodian of Records for all Village assessment records.
2. That the Village, through its assessor, compiles assessment information in both a digital format using the Market Drive 2000 program and handwritten property record cards.
3. A computer loaded with Market Drive 2000 software and used by the Village Assessor, Grota Appraisals, LLC, and Village employees is stored at the Village of Thiensville Village Hall.
4. The Market Drive 2000 software is the only electronic/digital real estate property assessment record in the possession of the Village of Thiensville.

Dated this 14th day of April, 2003.

Dianne S. Robertson
Dianne Robertson

Subscribed and sworn to before me
this 14 day of April, 2003.

STEVEN M. CAIN
Notary Public, State of Wisconsin
My commission is/expires perpet

1 STATE OF WISCONSIN

CIRCUIT COURT

OZAUKEE COUNTY

2 BRANCH II

3
4 WIREDATA, INC.,)

5 Plaintiff,)

6 vs.)

7 VILLAGE OF THIENSVILLE, VILLAGE OF)
8 THIENSVILLE Custodian of Records,)
9 GROTA APPRAISALS, LLC., MICHAEL R.)
GROTA, and ASSESSMENT TECHNOLOGIES)
OF WI, LLC.,)

10 Defendants.)

11
12 WIREDATA, INC.,)

13 Plaintiff,)

14 CITY OF PORT WASHINGTON and)
MATTHIES ASSESSMENTS, INC.,)

15 Defendants,)

16 and)

17 AMERICAN FAMILY MUTUAL)
18 INSURANCE COMPANY,)

19 Intervenor.)

Case No. 01-CV-198

DECISION HEARING ON
MOTIONS FOR
SUMMARY JUDGMENT

Case No. 01-CV-216

Ozaukee Co. Courthouse
Port Washington, WI
May 16, 2003

20 BEFORE: HON. TOM R. WOLFGAM
21 Circuit Judge Presiding

22
23 APPEARANCES:

24 WIREDATA, INC., Plaintiff, appeared by ALAN H. DEUTCH,
25 its attorney.

1 issue preclusion does apply. I have had a chance to review
2 the law on the subject. It's been cited here appropriately.
3 There was just a new case that came out on it rather
4 recently within the past couple of weeks reaffirming the
5 standard that the courts need to apply in issue preclusion.
6 Surprisingly, it dealt with a municipal court finding in
7 Madison, which isn't even a court of record.

8 But assuming, arguendo, that the issues
9 presented to Judge Hassin mirrored the issues that are being
10 dealt with in this Court, and he has already decided it, I
11 am satisfied that issue preclusion applies. The plaintiffs
12 are still going to have the opportunity to appeal that, and
13 obviously if they would overturn it it would have the same
14 effect on these cases.

15 But over and above that, even if I weren't
16 deciding it on that basis, I think that the defendants are
17 entitled in this matter to summary judgment. I mean really
18 the whole crux of this argument is that public documents,
19 public data in a form that's more usable should be made
20 accessible to the plaintiffs for their own use. There has
21 already been a federal court decision deciding that the
22 copyright laws apply to that documentation. And I wish I
23 could take credit for this analogy, but I can't. The court
24 reporter sitting there making what really is a record in
25 this matter. It's the piece of paper that's coming out of

1 his machine. And to me that's analogous to the written
2 documents that are contained -- that is in fact the real
3 public record in this matter. It's not as useful to people.
4 You can't look at the little marks that are coming out of
5 his machine and make heads or tails out of them necessarily.
6 He can. But really no one else can. It's not in
7 particularly usable form, at least not as usable as the
8 diskette that's being created in his machine as well, which
9 allows him to plug it into a computer and have it analyzed
10 by a software program designed to read it which will make
11 the information a lot more usable.

12 But just because he is inputting a public record
13 into that disk does not make that disk and the associated
14 use of it public information. You are entitled to look at,
15 in my view, the paper which is the actual public record, but
16 you are not entitled to get a copy of his disk to plug it
17 into your software or use it to aid you in the ultimate
18 result that he is trying to garner, which is a transcript in
19 this thing. I think that analogy applies perfectly to this.

20 Without belaboring it, I don't think there are
21 any issues of material fact that have to be decided here
22 yet. The issue of the copyright was decided in federal
23 court. It's clearly an exception to the open records law.
24 And I am going to grant the summary judgment motions on that
25 basis as well. Someone prepare an order.

WIREData, Inc.

Plaintiff,

v.

FIRST AMENDED COMPLAINT

Case No. 01-CV-216-B2

Case Code 30707

City of Port Washington,
Matthies Assessments, Inc.

In its capacity as the Assessor for the City of Port Washington, and
Assessment Technologies of Wisconsin LLC

Defendants.

FIRST AMENDED COMPLAINT

NOW COMES the Plaintiff, WIREData Inc., by its attorneys, Deutch & Weiss, as and for an **Amended Complaint** against the Defendants, the City of Port Washington, Matthies Assessments, Inc. in its capacity as the Assessor for the City of Port Washington and Assessment Technologies of Wisconsin LLC, alleges and shows to the Court as follows:

PARTIES

1. Plaintiff WIREData, Inc., is a Wisconsin corporation with its principal place of business at 11430 W. North Ave., Milwaukee, WI 53226.
2. Defendant City of Port Washington (hereinafter "City") is, upon information and belief, a Wisconsin municipal corporation with its principal place of business at 100 W. Grand Ave., Port Washington, WI 53074.
3. Defendant Matthies Assessments, Inc. (hereinafter "Assessor"), upon information and belief, is the Assessor for the City of Port Washington, and is also a Wisconsin corporation

with its principal place of business at 338 Humar St. Unit # 2, West Bend, WI 53095. The Registered Agent of Defendant Matthies Assessments, Inc. is Ernest T. Matthies.

4. Defendant Assessment Technologies of WI, LLC (hereinafter "Technologies"), upon information and belief, is a Wisconsin Limited Liability Company with its principal place of business at N89W16800 Appleton Ave., Menomonee Falls, WI 53051. Technologies is a proper party to this action under Wis. Stat. § 806.04(11) as it has, or claims it has, an interest that would be affected by any declaration.

FACTS

5. Plaintiff re-alleges and incorporates the allegations made in paragraphs 1-4.

6. That on or about April 25th, 2001 Plaintiff sent a letter to the City Treasurer formally asking for an electronic/digital copy of the real estate property records used by the Assessor in determining the assessments of real estate parcels located within the City of Port Washington. The April 25th Letter also enclosed a written approval form authorizing the City Assessor to produce the requested information. A true and correct copy of the Letter is attached as **Exhibit A**.

7. That on or about May 4th, 2001 the City Treasurer responded in writing that the Plaintiffs could "certainly" obtain the information and asked that the records request be directed to the Assessor, Matthies Assessments, Inc. The City also executed the written form authorizing the release of the data. A true and correct copy of the Letter is attached as **Exhibit B**.

8. On or about May 9th, 2001 Plaintiff forwarded the written request as well as the signed authorization form directly to the Assessor. A true and correct copy of the Letter is attached as **Exhibit C**.

9. On May 22nd, 2001 the Assessor informed the Plaintiff in writing that he was unable to provide a copy of the City's assessment database because the "Market Drive" license/purchase contract entered into with Technologies prohibited him from distributing copies of the database to others claiming that he did not have the right to supply the Plaintiff with the requested information. A true and correct copy of the Letter is attached as **Exhibit D**.

CAUSES OF ACTION:

VIOLATION OF THE WISCONSIN OPEN RECORDS LAW

10. Plaintiff re-alleges and incorporates the allegations made in paragraphs 1-9.
11. Under Wisconsin Statute § 19.32(1) the City and the Assessor are considered an "Authority" as that term is used in Wis. Stats. §§ 19.31 to 19.39.
12. The property information identified and requested in Plaintiff's April 25th and May 9th Letters are "Records" as that term is defined in Wis. Stat. § 19.32(2) subject to inspection and copying pursuant to Wis. Stat. § 19.35.
13. The records formally requested by the Plaintiff are, upon information and belief, in the custody of the Assessor, an agent of the City, and pursuant to Wis. Stat. § 19.36(3) are subject to inspection and copying to the same extent as if the City itself maintained the data.
14. Under Wis. Stat. § 19.36(4) material used as input for a computer program or the material produced as a product of a computer program is also subject to inspection and copying.
15. The data requested by the Plaintiff is material used as "input" or material "produced" by the computer program and is subject to inspection and copying.
16. The contractual terms relied upon by the Assessor in denying the Plaintiff's access to, and use of, the records violates the Wisconsin's Open Records Laws, as the

information is public, not private, property under Wis. Stats. §§ 19.31 to 19.37 and is therefore void and unenforceable.

17. Under Wis. Stat. § 19.31 the Plaintiff has a direct interest in this Action as providing people with information regarding the affairs of government has been declared by the Wisconsin Legislature to be an essential function of a representative government and an integral part of the duties of officers and employees whose responsibility it is to provide such information.

18. As provided by Wis. Stat. § 19.37(a), the Plaintiff is entitled to a Writ of Mandamus compelling the Defendants to produce all of the records sought in the Plaintiff's written request at a fee that does not exceed the actual, necessary and direct costs of reproduction.

19. Consistent with Wis. Stat. § 19.37(2)(a) Plaintiff is also entitled to its reasonable attorney fees in bringing this action and damages of not less than \$100.00.

20. Plaintiff has no other adequate remedy at law.

SECOND CAUSE OF ACTION:

DECLARATORY JUDGMENT (Wis. Stat. § 806.04)

21. Plaintiff re-alleges and incorporates the allegations made in paragraphs 1-20.

22. Wisconsin Statute § 806.04(2) permits any person interested under a written contract to have a Court determine questions of the construction or validity of the contract by obtaining a declaration of rights, status or other legal relations thereunder.

23. The City entered into a contract with Matthies Assessments to fill the statutory position of City Assessor as well as to provide ancillary assessment services.

24. Technologies now asserts an ownership interest in the requested records by virtue of a licensing agreement with the Assessor supposedly prohibiting the dissemination of the digital data without the prior written consent of Technologies.

25. Plaintiff claims a right to inspect and copy the digital information under the Wisconsin Open Records Laws because, *inter alia*, the data is public, not private, property and any agreement to the contrary is unenforceable as it violates Wis. Stats. §§ 19.31 to 19.37.

26. The purpose of this Action is to, *inter alia*, determine whether Technologies has ownership rights to the records or otherwise has the ability to prevent their inspection and copying by the general public and in this case the Plaintiff.

27. In the alternative, the purpose of this Action is to obtain a declaration that the Assessor, as a municipal official, is prohibited from entering into a contract or agreement restricting access to public records in defiance of the Open Records Laws rendering such an agreement void and unenforceable.

28. There exists a justiciable case and controversy to-wit:

- a. The Parties have an interest in contesting the claims asserted in this Action;
- b. The interests of the Parties are adverse;
- c. The Plaintiff has a legally protectible interest in the outcome of the Action; and
- d. The controversy is ripe for judicial determination.

29. A judgment or decree in this Action will terminate the controversy or remove an uncertainty giving rise to the proceeding.

WHEREFORE, Plaintiff, WIREDATA Inc., requests that this Court issue a Writ of Mandamus:

1. Directing the Defendants to produce and copy the records requested by Plaintiff at a cost complying with Wis. Stat. § 19.35(3)(a) and without any restrictions on the Plaintiff's subsequent use of the data;

2. Plaintiff further demands judgment against the Defendants for damages in an amount to be determined at trial, but not less than \$100.00, the costs of this action, and Plaintiff's attorney fees pursuant to Wisconsin Statute § 19.37;

3. In addition to/in the alternative, Plaintiff demands a declaratory judgment pursuant to § 806.04 that the electronic property records are subject to inspection and copying under the Open Records Laws;

4. In addition to/in the alternative, Plaintiff asks for a declaration that the records are owned by the City not a private entity;

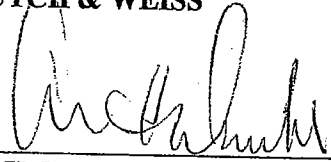
5. In addition to/in the alternative, Plaintiff asks for a declaration that the terms of the licensing agreement purportedly conferring the records ownership and control upon Technologies is unenforceable as it violates the Open Records Laws and public policy;

6. In addition to/in the alternative, Plaintiff asks for a declaration that a municipal official (in this case the Assessor) is prohibited from entering into a contract restricting access to public records in violation of the Open Records Laws, and any such agreement is therefore void; and

7. For such other and further relief as the Court may deem just and equitable.

Dated at Milwaukee, Wisconsin this 27 day of November, 2001.

DEUTCH & WEISS



Alan H. Deutch
Attorney for Plaintiff
State Bar No. 01013249

P.O. ADDRESS:

Deutch & Weiss
7670 N. Port Washington Rd.
Suite 102
Glendale, WI
(414) 247-9958
(414) 247-9959 (Fax)

WIREdata CORPORATION

P.O. BOX 733, MILWAUKEE, WI 53201 • 414/778-5400 • FAX 778-6143

April 25, 2001

Mary Bley Treasurer
City of Port Washington
Post Office Box 307
Port Washington, Wisconsin 53074-0307

Dear Mary:

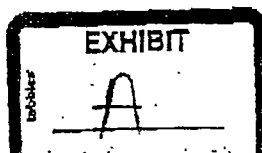
It was a pleasure talking with you recently regarding the detailed property information for the City of Port Washington.

As we discussed Matthies Assessments Incorporated is the assessor for the City of Port Washington and I will be sending a request letter to acquire the detailed property information to Matthies Assessments as soon as we receive your written approval to release this data. Enclosed is a self-addressed stamped envelope to return the approval form.

WIREdata Corporation is interested in acquiring the detailed property information or assessor information such as square footage, age, number of bedrooms, number of baths, property class, etc. We are also interested in the sales data, such as the sale date, sale price, if available, transfer fee, type of transfer for the above mentioned municipalities. Please include the number of parcels, a current record layout, a copy of the property record card you are currently using and 10 data sheets, selected at random, for each of the above mentioned municipalities.

We would also like to know when the last complete revaluation or reassessment was done and when the next complete revaluation is scheduled.

Please give me a call at 414-778-6154 with any questions you might have and to discuss what the estimated cost will be to reproduce the detailed property information and what type of media the information will be reproduced on. If you prefer to e-mail me, my email address is dradley@wiredata.com.



R-App. 334

Page 2
Mary Bley

WIREDATA Corporation appreciates your cooperation and I look forward to hearing from you at your earliest convenience.

Sincerely,

WIREDATA Corporation

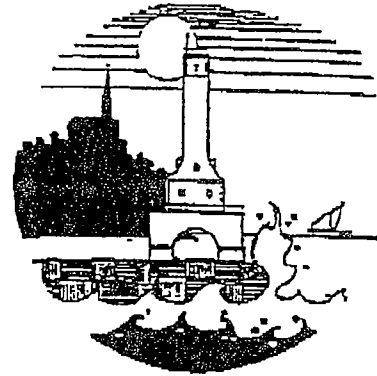
A handwritten signature in cursive script that reads "Dorothy Radley". The signature is fluid and elegant, with the first name and last name clearly distinguishable.

Dorothy Radley
Data Acquisition Specialist

city of
Port Washington

100 W. Grand Avenue
P.O. Box 307
Port Washington, WI 53074

Administrative Office (414) 284-5585
Public Works (414) 284-2600
FAX (414) 284-7224



May 4, 2001

WIREDATA Corporation
Attn: Dorthy
11430 W. North Ave.
Wauwatosa, WI 53226

Dear Dorthy,

I discussed your request with the City Administrator. You certainly may obtain information from Matthies Assessments. Please direct your request directly to Matthies; please also direct your questions regarding their charges for these services directly to them.

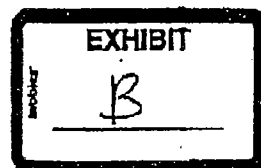
The most recent city-wide reassessment was conducted in 1997. We have not yet scheduled the next reevaluation.

If you have any questions, Dorthy, please contact me anytime at your convenience.

Sincerely,

Mary Bley

Mary Bley, Treasurer
City of Port Washington



MAY 9 REC'D 2001

R-App. 336

WIREdata CORPORATION

P.O. BOX 733, MILWAUKEE, WI 53201 • 414/778-5400 • FAX 778-6143

May 9, 2001

Ernest Matthies
Matthies Assessments Incorporation
Post Office Box 241
West Bend, Wisconsin 53095

Dear Ernest Matthies:

WIREdata Corporation is requesting the assessor information or detailed property information for the City of Port Washington.

Per my conversation with Pat, who directed me to Mary Bley at the City of Port Washington, we obtained the written approval, enclosed, to acquire the detailed property information for the City of Port Washington.

WIREdata Corporation is requesting the detailed property information or assessor information such as square footage, age, number of bedrooms, number of baths, property class, etc. Please include the number of parcels, a current record layout, 10 printed data sheets, selected at random, code list for each field, and a copy of the property record card you are currently using.

Please give me a call at 414-778-6154 with any questions you might have and to discuss what the estimated cost will be to reproduce the detailed property information, to determine the fields to be reproduced and what type of media the data will be reproduced on. We anticipate receiving the data by June 15, 2001. If the data will be delayed for any reason, please call me at the above-mentioned number. I can also be reached by email at dradley@wiredata.com.

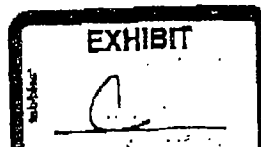
WIREdata Corporation appreciates your cooperation and I look forward to hearing from you at your earliest convenience.

Sincerely,

WIREdata Corporation

Dorothy Radley

Dorothy Radley
Data Acquisition Specialist



R-App. 337

1712

WIREDATA CORPORATION

PO BOX 733 MILWAUKEE, WI 53201 • 414/778-5400 • FAX 778-6143

April 25, 2001

City of Port Washington
Post Office Box 307
Port Washington, Wisconsin 53074-0307

Dear Mary Bley:

Please indicate your approval for Matthies Assessments Incorporated to release the assessor or detailed property information for the City of City of Port Washington to WIREDATA Corporation, with your signature below.

Mary K. Bley



Matthies Assessments Inc.

PO Box 241
West Bend, WI 53095-0241

Phone: (262) 338-9314
Fax: (262) 338-9318
E-Mail: matthies_inc@hotmail.com

May 22, 2001

Wiredata Corp.
Dorothy Radley
PO Box 733
Milwaukee, WI 53201-0733

Re: Request for detailed data

Dear Ms. Radley:

I have received your request for "detailed property information" in your letter dated May 9th. I assume that by detailed property information, you are requesting a copy of the assessment data base used to store assessment data for the City of Port Washington.

Our firm just completed placing Port Washington on on a new assessment software system called "Market Drive", which we purchased from :

Assessment Technologies
N89 W16790 Appleton Av.
Menomonee Falls, WI 53051
Ph: (262) 253-1142

I spoke with Robert Grota, one of the principles at Assessment Technologies regarding your request for a copy of the Port Washington database. He informed me that my license/purchase agreement with his firm precludes me from complying with your request. This contract specifies that the 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". According to Mr. Grota, this means that I do not have the right to provide your firm with a copy of the Port Washington database.

If you wish to pursue this matter further, I would suggest that you contact Robert Grota at Assessment Technologies directly. He will be better able than I to explain the licensing agreements that accompany the use of the Market Drive assessment system.

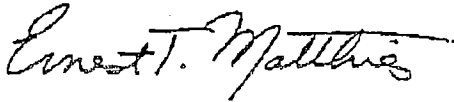
R-App. 339

Complete Municipal Property
Assessment Services



MAY 24 2001

Sincerely,

A handwritten signature in cursive script, reading "Ernest T. Matthies".

Ernest T. Matthies, Assessor
City of Port Washington

p.s. Assessment data printouts of individual parcels are available upon request for a reasonable fee. Access to assessment data in this format is available to the public upon request.

Em

Cc: M. Bley, R Grota

WIREDATA, INC.,

Plaintiff,

v.

Case No. 01-CV-216-B2

Case Code: 30707

CITY OF PORT WASHINGTON and
MATTHIES ASSESSMENTS, INC.
in its capacity as the Assessor for
the City of Port Washington,

Defendants.

ANSWER AND AFFIRMATIVE DEFENSES TO PLAINTIFF'S AMENDED COMPLAINT

The defendant, City of Port Washington, by its attorneys, CRIVELLO, CARLSON, MENTKOWSKI & STEEVES, S.C., submits this Answer to the plaintiff's Amended Complaint:

1. In answer to paragraph 1 of the plaintiff's Complaint, denies knowledge or information sufficient to form a belief as to the truth of the allegations contained therein and therefore deny the same putting plaintiff to its proof thereon.
2. In answer to paragraph 2 of the plaintiff's Complaint, admits the allegations contained therein.
3. In answer to paragraph 3 of the plaintiff's Complaint, admits that defendant, Matthies Assessments, Inc., is an independent contractor acting as Assessor for the City of Port Washington. In further answer to paragraph 3 of the plaintiff's Complaint, denies knowledge or information sufficient to form a belief as to the truth of the remaining allegations contained therein and therefore deny the same putting plaintiff to its proof thereon.

4. In answer to paragraph 4 of the plaintiff's Complaint, admits that defendant, Assessment Technologies is a Wisconsin Limited Liability Company. In further answer to paragraph 3 of the plaintiff's Complaint, denies knowledge or information sufficient to form a belief as to the truth of the remaining allegations contained therein and therefore deny the same putting plaintiff to its proof thereon.

5. In answer to paragraph 5 of the plaintiff's Complaint, defendant repeats, realleges, and incorporates by reference all allegations, averments, denials and affirmative defenses as contained within the text of this responsive pleading.

6. In answer to paragraph 6 of the plaintiff's Complaint, admits the allegations contained therein.

7. In answer to paragraph 7 of the plaintiff's Complaint, admits the allegations contained therein.

8. In answer to paragraph 8 of the plaintiff's Complaint, admits the allegations contained therein.

9. In answer to paragraph 9 of the plaintiff's Complaint, denies knowledge or information sufficient to form a belief as to the truth of the allegations contained therein and therefore deny the same putting plaintiff to its proof thereon.

10. In answer to paragraph 10 of the plaintiff's Complaint, defendant repeats, realleges, and incorporates by reference all allegations, averments, denials, and affirmative defenses as contained within the text of this responsive pleading.

11. In answer to paragraph 11 of the plaintiff's Complaint, deny.

12. In answer to paragraph 12 of the plaintiff's Complaint, denies knowledge or information sufficient to form a belief as to the truth of the allegations contained therein and therefore deny the same putting plaintiff to its proof thereon.

13. In answer to paragraph 13 of the plaintiff's Complaint, admits the records formally requested by the Plaintiff are in the custody of the Assessor for the City, Matthies Assessments, Inc. As further answer, deny.

14. In answer to paragraph 14 of the plaintiff's Complaint, affirmatively state that the allegation is merely a legal conclusion for which no answer is required.

15. In answer to paragraph 15 of the plaintiff's Complaint, deny.

16. In answer to paragraph 16 of the plaintiff's Complaint, deny.

17. In answer to paragraph 17 of the plaintiff's Complaint, denies knowledge or information sufficient to form a belief as to the truth of the allegations contained therein and therefore deny the same putting plaintiff to its proof thereon.

18. In answer to paragraph 18 of the plaintiff's Complaint, deny.

19. In answer to paragraph 19 of the plaintiff's Complaint, deny.

20. In answer to paragraph 20 of the plaintiff's Complaint, deny.

AFFIRMATIVE DEFENSES

As and for affirmative defenses to the plaintiff's Complaint, this defendant submits the following:

A. The plaintiff's Complaint contains claims which fail to state claim upon which relief may be granted;

B. This defendant is protected from suit under common law and statutory immunities and privileges;

C. The plaintiff's claims are subject to the limitations and immunities contained within Wis. Stat. § 893.80;

D. This defendant complied with Wis. Stat. § 70.055, requiring the dismissal of the City of Port Washington from this action.

WHEREFORE, this defendant respectfully requests a judgment as follows:

- A. For dismissal of the plaintiff's Complaint upon its merits;
- B. Any costs and disbursements of this action;
- C. For such other relief as this Court deems just and equitable.

Dated this 17th day of December, 2001.

CRIVELLO, CARLSON, MENTKOWSKI & STEEVES,
S.C.

Attorneys for the Defendant City of Port Washington

BY: Andrew J. Schwaba
RAYMOND J. POLLEN
State Bar #1000036
ANDREW J. SCHWABA
State Bar #1029167

P.O. ADDRESS:
710 North Plankinton Avenue
Milwaukee, Wisconsin 53203
(414) 271-7722

PROOF OF SERVICE

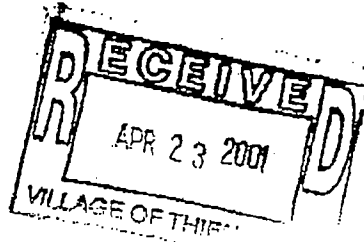
The undersigned certifies that the foregoing document
was served upon all counsel of record in the above matter
by depositing a copy thereof in the U.S. mail with postage
prepaid on 12/17/01

Linda Ambrose

WIREdata CORPORATION

P.O. BOX 733, MILWAUKEE, WI 53201 • 414/778-5400 • FAX 778-6143

April 20, 2001



Village Assessor
Village of Theinsville
250 Elm Street
Theinsville, Wisconsin 53092

This is to formally request an electronic/digital copy of the detailed real estate property records (showing the specific characteristics of each parcel and the improvements thereupon) used and/or maintained by the Assessor in determining the proper assessments for each parcel within the Village of Theinsville.

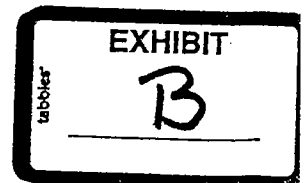
Please advise us in writing of when this copy may be picked up and/or of any conditions relating thereto. If there is any cost involved, please advise us in writing of said costs before incurring same.

Sincerely,
WIREdata Corporation

Thomas F. Curtis
Vice President

Cc: Alan H. Deutch

R-App. 345



Village of Athensville 20 Elm Street Athensville, WI 51092-1802

FAX

Date:

4/23/01

Number of pages including cover sheet:

2

To:

GROTA APPRAISALS

Phone:

Fax phone:

263-253-4098

CC:

From:

JERRY

Phone:

242-3720

Fax phone:

242-4743

REMARKS:

☐ Urgent☐ For your review☐ Reply ASAP☐ Please comment

I HAVE ADVISED him that I
FORWARDED it to you! He WANTS
me to FORWARD it to our attorney.
He feels that he will NOT get a
RESPONSE FROM GROTA APP.
Let us know Jerry

EXHIBIT

C

LAW OFFICES
HOUSEMAN & FEIND, LLP
1214 THIRTEENTH AVENUE
POST OFFICE BOX 104
GRAFTON, WISCONSIN 53024-0104

Ralph E. Houseman
Robert L. Feind, Jr.
John M. Gallo
Paul V. Malloy
Michael P. Herbrand

Jane E. Miller
Steven M. Cain

TELEPHONE
(262) 377-0600
FACSIMILE
(262) 377-6080

June 4, 2001

Mr. Alan H. Deutch
Deutch & Weiss
7670 N. Port Washington Rd., Ste. 102
Glendale, WI 53217

RE: Village of Thiensville Open Records Request

Dear Mr. Deutch:

Your open records request on behalf of your client, WIREDATA, has been forwarded to our office for review. To date, we are still evaluating the capability of the software application used by our assessor. Once we are fully informed as to the specific capabilities of the program, we will be in a better position to properly evaluate your open records request.

As we continue to evaluate your request, we ask that you postpone any filing of a writ of mandamus. Thank you for your cooperation in this regard.

Very truly yours,

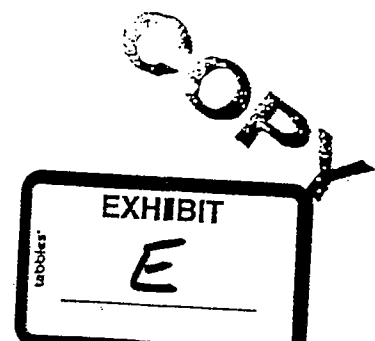
HOUSEMAN & FEIND, LLP
Attorneys for the Village of Thiensville

Steven M. Cain
Assistant Village Attorney

SMC:sl
cc: Village of Thiensville

VALIDIT

R-App. 347



GROTA APPRAISALS, LLC

Phone: (262) 253-1142

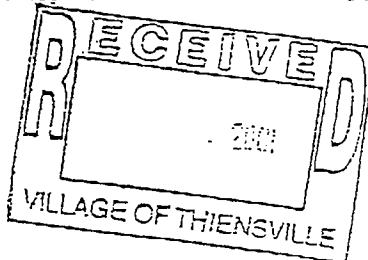
Fax: (262) 253-4098

www.AssessorData.com

Email: astech@exaspco.co

Assessment Specialists • Annual Maintenance • Revaluations

N89 W16800 Appleton Avenue • Menomonee Falls, WI 53051



June 12, 2001

Village of Thiensville
Diane Robertson
250 Elm St.
Thiensville, WI 53092

Re: Open records request by Wiredata

Dear Diane,

Assessment Technologies of Wisconsin LLC owns the Market Drive PC assessment software used under a licensing agreement by Grota Appraisals LLC that acts as the Assessor for your Village.

Enclosed is a copy sent to attorney John Macy on behalf of the Village of Sussex. The conclusion of this letter, digital assessment information is available within the limitations as stated.

Grota Appraisals could export digital information on a time and material basis if requested to do so. The cost of this process may be comparable to receiving paper copies of the property record card.

The Village should notify Wiredata of records availability. This should remove the Village from this open records request. Should Wiredata choose to order copies of assessment information they should contact Grota Appraisals.

The Market Drive PC software contains valuable proprietary databases and is the intellectual property of Assessment Technologies of Wisconsin LLC. Furthermore these databases cannot be disseminated to anyone without the prior written consent of Assessment Technologies.

I would be happy to discuss any questions you may have.

Respectfully,

Michael L. Grota
Grota Appraisals LLC

cc. Arny. Robert Feind

EXHIBIT

R-App. 348





VILLAGE OF THIENSVILLE

250 Elm Street
Thiensville, WI 53092-1602

Phone (262) 242-37
Fax (262) 242-47

June 29, 2001

Mr. Alan H. Deutch
Deutch & Weiss
7670 N. Port Washington Road, Suite 102
Glendale, WI 53217

RE: WIREdata, Inc. v. Village of Thiensville, et al
Case No. 01-CV-198

Dear Mr. Deutch:

The Village of Thiensville is in receipt of the above captioned mandamus action. At this time, the Village is in a position to grant your open records request. As you are aware, the Village has been willing to provide you with hard copies of all available records, and was in the process of evaluating its appraiser's software capabilities. At this time, we were concerned that your request involved the disclosure of computer programs exempt from the Open Records Law. On June 4, 2001 our Village Attorney's office advised you that we were still evaluating the extent of our appraiser's computer capabilities.

We can now advise you that as of June 15, 2001, we have received a letter from Grotz Appraisals, LLC which indicates that Grotz Appraisals could export digital information on a time and material basis if requested to do so. A copy of this letter is attached for your review. You will note that Grotz Appraisals indicates that they wish you to contact them directly to obtain records in a digital format. The Village Assessor reserves the right, pursuant to 19.35(3)(f), Wisconsin Statutes, to require prepayment of the estimated costs of producing the records requested.

The Village trusts that you understand the difficulty the Village faced when evaluating an independent contractor's software capabilities. We assume that this response will allow you to dismiss the lawsuit against the Village of Thiensville. Please feel free to contact me if you have any questions or concerns. In any event, I would like to hear from you within the next ten days so we can advise the Village Attorney as to the necessity of preparing for litigation in the event the mandamus action moves forward.

Sincerely,

Dianne S. Robertson
Dianne S. Robertson
Village Administrator

Enclosure

Cc: Attorney Robert L. Feind, Jr.
Grotz Appraisals, LLC

EXHIBIT

R-App. 349



May 4, 2001

Mr. John P. Macy, S.C.
Arenz, Moller, Macy & Riffle, S.C.
720 N East Avenue
PO Box 1348
Waukesha, WI 53187-1348

Dear Mr. Macy:

I have received a copy of a letter from Thomas F. Curtis to the Village of Sussex assessor requesting an electronic/digital copy the detailed real estate property records for each property in the village. The Village of Sussex uses a computer software application called "Market Drive 2000" to collect and value all real property in the village. This software application contains the only digital copy of the information Mr. Curtis is requesting.

The information Mr. Curtis is requesting can be output to a laser printer using the Market Drive software. Unfortunately, Market Drive 2000 was not programmed to export this report to any other format with one exception. There is an unsupported feature that allows a report to be output in a Microsoft Word format. The reason it is unsupported is that this feature does not work very well. It works OK for simple "list" reports but the property records report is very complex. As a result, the Word format was extremely poor and, in my opinion, unusable. You may want to give Mr. Curtis a sample of the printed property records report and an exported report for the same property so he can decide for himself.

Providing the information, whether on paper or exported to the Word format for all properties in the village is no small task. The Village of Sussex has over 2000 properties. Since a single computer isn't going to have enough disk space to print and export all properties at once, each property record card would have to be printed and exported individually. This will be very time consuming. Market Drive 2000 was designed for an assessor. An assessor using Market Drive 2000 does not need to print and file all property records cards since they can print them on demand whenever they need them.

If Mr. Curtis wants a copy of the "raw data" used by the Market Drive 2000 program that cannot be copied for two reasons. First, the design and format of the databases is a trade secret and is the intellectual property of Assessment Technologies of WI, LLC. Second, WI Statute 19.37(4) states that a computer program is not subject to examination or copying. It goes on to say that material used as input or output may be copied. In this case that would be the previously mentioned property records report. WI Statute 19.35(1)(L) provides further direction for your client stating that an authority is not required to create new programs that compile existing data into new formats.

Best Regards,

Andrew C. Pelkey
Senior Consultant

BUSINESS SOFTWARE DEVELOPMENT

R-App. 350



LAW OFFICES OF
ARENZ, MOLTER, MACY & RIFFLE, S.C.

720 N. EAST AVENUE
P.O. BOX 1348
WAUKESHA, WISCONSIN 53187-1348

DALE W. ARENZ
DONALD S. MOLTER, JR.
JOHN P. MACY,
COURT COMMISSIONER
H. STANLEY RIFFLE,
COURT COMMISSIONER
RICK D. TRINDL
ERIC J. LARSON
JULIE A. AQUAVIA
DYAN E. BARBEAU
GRETCHEN U. STEVENS

TELEPHONE 548-1340
FACSIMILE 548-9211
ARFA CODE 262

May 22, 2001

MIKE GROTA
VILLAGE ASSESSOR
VILLAGE OF SUSSEX
N64 W23760 MAIN STREET
SUSSEX WI 53089

Re: Village of Sussex
Wiredata Public Records Request
Attorney Letter Dated May 21, 2001

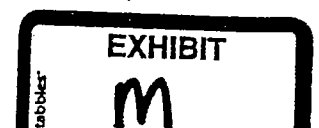
Dear Mr. Grotta:

Enclosed please find a correspondence that we received from Attorney Alan Deutch along with an enclosure that he forwarded. The enclosure is a correspondence from Andrew Pelkey to a representative of Wiredata.

After you have an opportunity to review the enclosed please contact me at your earliest convenience. I have several very significant concerns in this regard. Please explain to me how you believe the costs outlined in Andrew Pelkey's letter can be justified as the "actual, necessary and direct costs" of producing these public records. Conceptually, I believe it would be very difficult to argue in litigation that these computer records each have a distinct cost for copying. The time and effort of copying two records onto a disk or copying 2000 records onto a disk does not seem to me to be significantly different, as I understand the situation. Perhaps you can explain to me, however, why you believe this is justified under the public records laws.

Andrew Pelkey's correspondence, to me, reads more like an advertisement than it does like a public records response. While I appreciate any efforts that you can make to resolve this short of litigation, you should know that Attorney Deutch has informed me that he is prepared to go to litigation at any point in time, and these correspondences from Andrew Pelkey are likely to be used against you, and possibly also against the Village of Sussex. I do not represent you as to your

R-App. 351



LAW OFFICES OF
ARENZ, MOLTER, MACY & RIFFLE, S.C.

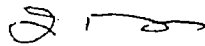
Mike Grotz, Village of Sussex
May 22, 2001
Page Number 2

private interests in these matters, and you should not consider these thoughts to be legal advice in that regard. I do represent the Village of Sussex, however, and unless you can further justify your position as to the costs you intend to charge, I may be making recommendations to the Village of Sussex that differ significantly from the position taken in Andrew Pelkey's correspondence. I believe that the Village of Sussex is not willing to go to litigation in order to protect your private interests, particularly if they conflict with the public records laws.

I look forward to hearing from you at your earliest convenience.

Yours very truly,

ARENZ, MOLTER, MACY & RIFFLE, S.C.



John P. Macy

JPM/jc

Enclosure

cc: Mike Knapp, Village President
Chris Swartz, Village Administrator

J/E/Letter/Wiredata Open Records. Atty Letter.sus.ltr

May 25, 2001

Mr. John P. Macy, S.C.
Arenz, Molter, Macy & Riffle, S.C.
720 N East Avenue
PO Box 1348
Waukesha, WI 53187-1348

Dear Mr. Macy:

This letter is in response to your letter dated May 22, 2001 and to previous issues raised. I will try to address each point one at a time for clarity purposes.

With regard to the open records request from WireData, my understanding is that WireData has asked for all property record information in electronic format. Grotz Appraisals, who is contracted by the Village to perform assessment work, uses a software package called Market Drive to fulfill their contract with the Village. The Village in turn pays Grotz Appraisals a fee for their services. The Market Drive software used by Grotz Appraisals does have the ability to export a property record card to a text file (this would be considered an electronic copy of the report). Each property would have to be exported one at a time. As a result, exporting all properties would be very labor intensive and would be done on a time and material basis.

With regard to the open record request from Mr. David Broadfoot of Taurean, Mr. Broadfoot has asked for all property record information in a comma delimited record format. The Market Drive software used by Grotz Appraisals does not have that ability.

With regard to the GIS data that was given by Grotz Appraisals to the Village of Sussex, you will need some background information. The design of the Market Drive software and its databases are the intellectual property of Assessment Technologies of WI, LLC and are considered by Assessment Technologies to be a trade secret. No licensed user of the Market Drive software, including Grotz Appraisals, can disclose the design of the Market Drive program (including its databases) without prior consent from Assessment Technologies. If such consent is given, the party receiving the program or database cannot, in turn, disclose the same information without the prior consent of Assessment Technologies. Assessment Technologies has spent a great deal of resources to develop this technology and it represents its most significant asset. If the design of the software or its database were to be given to a competitor, Assessment Technologies would lose its competitive advantage in the marketplace. Because of this fact, Assessment Technologies will only license its technologies to parties who agree to use it for a specific, predetermined purpose. This is consistent with most other software applications licenses sold in the marketplace today.

Grotz Appraisals was given the authority to give the Village of Sussex a copy of Market Drive's GIS database for a specific, predetermined purpose. The Village administrator



wanted to merge the data with their GIS system for internal uses only. It was under that pretense that Assessment Technologies approved the transfer. Assessment Technologies has not given the Village of Sussex the authority to distribute that GIS database.

Finally, WireData asked Assessment Technologies for a proposal to gather assessment data for them. This was not an open records request since Assessment Technologies is a private company, not a municipal government. As such, this request has nothing to do with the Village of Sussex. That said, WireData asked Assessment Technologies what it would cost for Assessment Technologies to perform the following services for WireData.

1. Collect assessment data from numerous municipalities after each board of review
2. Convert this data to a format specified by WireData
3. Provide WireData with annual updates of the information.

Any work done by Assessment Technologies for WireData is a private transaction. The costs outlined in the proposal represent a reasonable alternative for WireData. I would remind Attorney Deutch that when WireData talks with me or my client (Assessment Technologies), he is not talking to the government.

If I have not addressed any of your questions or concerns, please feel free to contact me.

Best Regards,

Andrew Pelkey
Senior Consultant

LAW OFFICES OF
ARENZ, MOLTER, MACY & RIFFLE, S.C.

720 N. EAST AVENUE
P.O. BOX 1348

WAUKESHA, WISCONSIN 53187-1348

DALE W. ARENZ
DONALD S. MOLTER, JR.
JOHN P. MACY,
COURT COMMISSIONER
H. STANLEY RIFFLE,
COURT COMMISSIONER

RICK D. TRINDL
ERIC J. LARSON
JULIE A. AQUAVIA
DYAN E. RABBEAU
GRETCHEN U. STEVENS

TELEPHONE 548-1344
FACSIMILE 548-9211
AREA CODE 262

May 29, 2001

MIKE GROTA
VILLAGE ASSESSOR
VILLAGE OF SUSSEX
N64 W23760 MAIN STREET
SUSSEX, WI 53089

Re: Village of Sussex Wire Data Records Request
Taurean Records Request
Status

Dear Mr. Grota:

I am writing to confirm a recent telephone conversation regarding the above-named matters. It is my understanding that you will be doing all of the following:

1. You are to provide me a written response as to your position regarding the Taurean records request. Specifically, you are to indicate whether that information that he has requested is in existence; if it is in existence, you are to advise me as to the actual, necessary, and direct costs of producing the same.
2. Regarding Wire Data, several issues came out of our discussions, and you are to consider these matters and advise me your position;
 - a. How is it that the information could be provided to the Village for GIS purposes in a comprehensible format, but cannot be provided to Wire Data in a comprehensible format without additional programming?
 - b. What is your position regarding the Village copying its GIS CD onto a blank CD and providing that in response to the records request received by the Village Clerk?

R-App. 355



LAW OFFICES OF
ARENZ, MOLTER, MACY & RIFFLE, S.C.

Mike Grota, Village Assessor
May 29, 2001
Page 2


- c. What is your best estimate of the actual, necessary, and direct costs of copying this information to disk (assuming that no additional programming is being done in order to do so)?
- d. You stated that copying of the 6 files that Wire Data has requested would need to be done individual-record by individual-record, and therefore would be time consuming. It would be helpful to me, conceptually, if you could have your computer programmer describe to me why that would need to be the case, and why instead it could not simply be copied globally, each of the 6 files in their entirety.

It is my understanding that you are to provide me with these written responses within the next several days. We are then to convene a meeting which will include myself, the Village Administrator, the Thiensville Attorney, and perhaps a representative from Thiensville, and you, in order to determine how best to respond to these matters in compliance to the public records laws.

If you should have any questions regarding these matters, please do not hesitate to contact me.

Yours very truly,

ARENZ, MOLTER, MACY & RIFFLE, S.C.



John P. Macy

JPM/mr

cc: Mike Knapp, Village President
Chris Swartz, Village Administrator

MF/O/E/LETTERS/SX-RE WIRE DATA

1. I am one of the attorneys for the plaintiff, WIREdata, Inc., and make this affidavit on their behalf in support of plaintiff's motion for summary judgment.
2. Attached hereto collectively as Exhibit A are true and correct copies of pages from Michael Grota's deposition, conducted on June 22, 2004.
3. Attached hereto collectively as Exhibit B are true and correct copies of pages from Ernest Matthies' deposition, conducted on August 18, 2004.
4. Attached hereto collectively as Exhibit C are true and correct copies of pages from Dianne Robertson's deposition, conducted on August 11, 2004.
5. Attached hereto collectively as Exhibit D are true and correct copies of pages from Andrew Pelkey's deposition, conducted on September 22, 2004.
6. Attached hereto collectively as Exhibit E are true and correct copies of pages from Thomas Curtis' deposition, conducted on July 27, 2004.
7. Attached hereto as Exhibit F are true and correct copies of Exhibit 3 and Exhibit 4 as marked at the deposition of Thomas Curtis, conducted on July 27, 2004.
8. On or about February 6, 2004, I contacted attorneys for the defendants, renewing WIREdata's request for the data in light of the Seventh Circuit decision on the copyright issue. The defendant's attorneys either did not respond or stated that they would not or could not provide the data. Attached hereto as Exhibit G is a true and correct copy of the letters received from the defendants attorneys in response to my inquiry.

9. Attached hereto as Exhibit H is a true and correct copy of Exhibit 8 as marked at the deposition of Peter Shuttleworth, conducted on July 28, 2004.

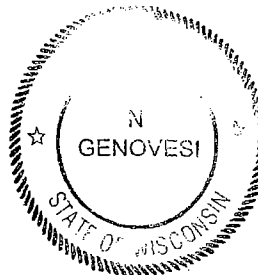
Executed in Milwaukee, Wisconsin, this 1st day of November

2004.

Emily C. Canedo
Emily C. Canedo

SUBSCRIBED AND SWORN to before
me this 1st day of November, 2004.

[Signature]
Notary Public, State of Wisconsin
My commission expires: 11/1/10



1 A I cannot necessarily interpret that I'm not an
2 elected official. Personally I am custodian of the
3 assessment records.

4 Q You are custodian of the assessment records you
5 said?

6 A That's correct.

7 Q Okay. When you say you're not an elected official,
8 you do not, do you believe that you are a public
9 official of any sort, or type?

10 MR. JOHNSON: Objection. As to form.

11 MR. DEUTCH:

12 Q Answer please.

13 A I believe that I'm an appointed assessor to fill a
14 vacant elected position, that most communities have
15 gone to an appointed assessor to fill what would be
16 a, you know, a municipal position, or function.
17 And that I believe it would be on the same order as
18 a village trustee, only for an appointed position.

19 Q So you believe you are, or not a public official,
20 you, yourself, Michael Grota?

21 A I believe, well, I believe Grota Appraisals acts as
22 a public official. I happen to be the owner of
23 Grota Appraisals, and at least for the Village of
24 Sussex do sign the assessment roll.

25 Q You likewise sign the assessment roll for the

- 1 Village of Thiensville?
- 2 A I have not, and I don't believe that I ever have.
- 3 Q Who signs the assessment roll, if you know, for
- 4 Thiensville?
- 5 A I believe Robert Grota.
- 6 Q Okay. That's your brother?
- 7 A Brother, and/or father, have signed in the past.
- 8 Q Okay. Both are named Robert?
- 9 A That's correct.
- 10 Q Is there a different middle initial, or is one a
- 11 junior?
- 12 A C is brother. G is father.
- 13 Q Okay. Now, sir, do you agree that, I think you
- 14 just responded, but I want to make sure, that you
- 15 are the custodian of the assessment records for the
- 16 Village of Sussex?
- 17 A Correct.
- 18 Q And are you likewise the custodian of the village
- 19 records, the real estate assessment records that is
- 20 for the Village of Thiensville?
- 21 A Grota Appraisals is the custodian of records.
- 22 Q In both cases?
- 23 A Correct.
- 24 Q Okay. How about for the City of Port Washington?
- 25 A No, sir.

1 are necessary, Assessment Technologies has never
2 denied a conversion, if asked. And there is, in
3 Grota Appraisals addendum contract there is a
4 provision to protect the community.

5 Q And what's that provision?

6 A That if Grota Appraisals is no longer retained by
7 that community, it would provide the assessment
8 data to the community in a format that they could
9 use.

10 Q Let's back up in your answer a little bit. You
11 said Assessment Technologies has never denied a
12 request of a community to produce data?

13 A It's never been asked.

14 Q Well, did you ask Assessment Technologies as part
15 of the request that was made for open records from
16 WIREdata?

17 A Yes, I did.

18 Q And what did Assessment Technologies respond?

19 A That relates back to the Mr. Pelkey's conversation
20 with Mr. Curtis, that there would be a cost of
21 producing that to WIREdata.

22 Q So that in point of fact, Assessment Technologies
23 was saying no, unless you pay the cost; is that
24 correct?

25 A In this specific case, yes.

1 Q And in point of fact, it was not cost, but the,
2 what you call the retail value. You used a term.
3 I can't remember.

4 MR. JOHNSON: Well, you can look at the
5 transcript again.

6 MR. DEUTCH:

7 Q Do you remember what the term was, sir?

8 A To which question?

9 Q As to the rate that you would, that you were using
10 the 50 cent rate per record.

11 A That that was a cost that was passed by Assessment
12 Technologies in respect to programming.

13 Q Okay. That was the current market rate I believe
14 you used?

15 A That was a rate that was put out there by
16 Assessment Technologies.

17 Q Did that include both cost and profit to Assessment
18 Technologies?

19 A It certainly was intended to cover the costs.

20 Q And intended to provide some profit to Assessment
21 Technologies?

22 A I believe that there was some profit built into
23 that fee.

24 Q You said that you --

25 (Exhibit No. 2 & 3 marked

1 A Zero.

2 Q Pardon?

3 A Nothing.

4 Q Okay. And that was data that it got
5 electronically; is that correct?

6 A That's correct.

7 (Exhibit No. 4 marked
8 the Reporter.)

9 MR. DEUTCH:

10 Q I'm going to show you what's been marked for
11 identification as Exhibit 4. Have you ever seen
12 that document before?

13 A I believe that I have, I'm uncertain, but I believe
14 I've seen a similar, if not this particular record,
15 one that's similar. Either between Thiensville, or
16 Sussex.

17 Q And you understood that this was the request by
18 WIREdata for an electronic digital copy of the
19 assessor records that are on the property record
20 card?

21 A It's a vague request, but I'm aware that that was,
22 this was submitted by WIREdata.

23 Q And as the assessor did you take any actions to
24 fulfill that request?

25 A Again that relates back to Andy Pelkey's

1 conversation with Mr. Curtis.

2 (Exhibit No. 5 marked by
3 the Reporter.)

4 MR. DEUTCH:

5 Q I show you what's been marked for identification as
6 Exhibit 5. That, the top page of that appears to
7 be a copy of Exhibit 4, but then the next page down
8 is that the letter from Mr. Pelkey?

9 A That would be correct.

10 Q That letter at the bottom refers to the fact that
11 the Village of Sussex had a copy of Market Drive's
12 data base; is that correct?

13 MR. JOHNSON: Where are you looking,
14 Alan?

15 THE WITNESS:

16 A The GIS data base?

17 MR. DEUTCH:

18 Q Yes.

19 A That's correct.

20 Q Okay. And how does the GIS data base differ from
21 the, from the appraisal data base?

22 A I couldn't tell you.

23 Q Is it the same?

24 A I don't believe so.

25 Q But you -- okay. On what basis do you believe it's

1 A. No. I don't think so.

2 Q. Can you describe the computer system you put it
3 up on?

4 A. In 1996, my firm, Matthies Assessments, worked to
5 develop an assessment prototype, assessment
6 software prototype, and that software was used
7 for the 1997 year for the City of Port
8 Washington.

9 Q. You say a prototype. Was it a specific program,
10 or was it just a layout of a database?

11 A. It was a full-functioning assessment program with
12 the ability to capture sales, to analyze sales,
13 to make mass adjustments, and to create
14 reports.

15 Q. Did that program have a name?

16 A. It was a prototype. We just called it the
17 Matthies Program at the time.

18 Q. Is that program still in existence?

19 A. No, it's not.

20 Q. Okay. Did you -- with the Matthies Program,
21 did you store the data using any particular
22 database?

23 A. Yes, we did. It was -- it wasn't an ACCESS
24 database. I forget the actual brand at the time,
25 but it was a competing --

DEPOSITION OF ERNIE MATTHIES - 8/18/04

1 Q. From any source.

2 A. Market Drive has a roll-over feature that
3 captures the data for each year.

4 Q. Okay. And does it give you then an electronic
5 copy of that?

6 A. I've never gone into it. There is -- you can
7 access the data by the year.

8 Q. So your understanding is if I asked you for
9 something based on the 2001 records, you'd be
10 able to give that to me?

11 A. I believe so.

12 MS. BUELL: I'll object. I don't think
13 you were making a question that called for a
14 legal conclusion. I think you meant just what's
15 in his possession versus what legally he would be
16 required to provide you?

17 MR. DEUTCH: Right. Ignoring legally,
18 I'm asking him if he decided that he wanted to
19 and could give me a copy, he'd be able to do so.
20 I just want to know that it exists.

21 Q. And you're saying it does, correct?

22 A. Yes.

23 Q. Does Market Drive allow you to make a backup of
24 the data?

25 A. Yes, it does.

1 Q. And how often do you do that?

2 A. As I use the program, once a week.

3 Q. What do you do with the backups?

4 A. I just store it on a removable hard drive.

5 Q. And then where do you put that removable hard
6 drive?

7 A. I keep it. I keep it in various places. I have
8 a copy -- I have a copy at the assessor's office
9 in the City of Port Washington.

10 Q. How many -- is there any time where you put it on
11 a hard drive or a CD that you then just put aside
12 and keep?

13 A. Well, I do -- I have two hard drives, removable
14 hard drives that I'll rotate from my office to
15 the City of Port Washington so that -- for
16 obvious reasons.

17 Q. When you say removable hard drives, are you
18 talking something like a zip drive, or are you
19 talking an actual hard drive itself?

20 A. It's like a zip drive in principle. It's just a
21 drive D, removable hard drive.

22 Q. Do you ever back it up to a fixed copy, to an
23 electronic fixed copy like a CD or a disk?

24 A. No, I don't.

25 Q. In the year 2001, did you receive a request from

DEPOSITION OF ERNIE MATTHIES - 8/18/04

1 Assessment Technologies provide any
2 indemnification to you if you act on their
3 contract and fail to give out information on
4 public records?

5 A. Does my contract with Assessment Technologies
6 indemnify me?

7 Q. Right.

8 MS. BUELL: I'll object as to form.

9 THE WITNESS: I don't understand the
10 question. I'm sorry.

11 MR. DEUTCH:

12 Q. Okay. You've not -- you're still refusing to
13 give the data -- what you assume to be the data
14 to WIREdata, is that correct?

15 MS. BUELL: Object as to form.

16 THE WITNESS:

17 A. I do not refuse to provide the public records for
18 any and all properties in the City of Port
19 Washington to WIREdata nor to anybody else who
20 requests them. It's just the format as I
21 understand it. I offered the printouts, I
22 believe the PDF files were offered, and it
23 doesn't appear that WIREdata is actually looking
24 for property records as I understand the term,
25 but breaking ground into the digital area and

1 trying to broaden the definition of the term
2 "record."

3 And I'm at a point where I would comply
4 with any lawful request, but I have to realize --
5 I have to understand from an authority, the
6 court, the judge, State of Wisconsin, that this
7 is indeed a lawful request and I am to comply.

8 When I'm -- when I'm given my orders
9 from an authority with that ability, I will
10 comply.

11 MR. DEUTCH:

12 Q. You understand that you're in the role of
13 municipality assessor?

14 A. Yes.

15 Q. You understand that as municipality assessor, you
16 have to comply with the open records law, is that
17 correct?

18 A. Yes, I do.

19 Q. You understand that you're an authority as
20 defined by that law?

21 MS. BUELL: Object. Calls for a legal
22 conclusion.

23 MR. DEUTCH: Asking his understanding.

24 MS. BUELL: That's not what the law
25 says. And object as to form. Go ahead and

DEPOSITION OF ERNIE MATTHIES - 8/18/04

1 that. You understand that the open records
2 law doesn't cover health records of an
3 individual?

4 MS. BUELL: Calls for a legal
5 conclusion, lacks foundation.

6 MR. DEUTCH:

7 Q. Did you know that?

8 A. I don't know.

9 Q. Presume it doesn't cover health records of an
10 individual. I'm trying to say, is there
11 something like that that's a reason that you're
12 saying well, I'm not giving it to them because it
13 has health records in it?

14 A. No.

15 Q. So you're just not giving it to them because you
16 don't know if it's covered by the open records
17 law, correct?

18 MS. BUELL: Well, that mischaracterizes
19 his prior testimony. He gave several reasons.

20 MR. DEUTCH:

21 Q. You're not giving it to them for two reasons;
22 one, because your contract with Assessment
23 Technologies, and two, because you don't know if
24 it's covered by open records law, is that
25 correct?

1 A. That's correct.

2 Q. And those are your only reasons?

3 A. Yes.

4 Q. Okay. Other than -- does the city have any --
5 strike that. Have you ever made any copies of
6 the assessment database for any part of the city
7 or any division of the city?

8 A. No.

9 Q. Have they ever requested it?

10 A. No.

11 Q. Have you ever made them for any other person
12 other than Assessment Technologies?

13 MS. BUELL: Asked and answered.

14 THE WITNESS:

15 A. No.

16 MR. DEUTCH:

17 Q. Do you agree that one of the ways that you can
18 understand whether assessment data is accurate is
19 by comparing the characteristics of one property
20 to another?

21 A. If assessment data is accurate? Could you define
22 your meaning -- I think the accuracy of each
23 individual parcel depends on its own data. The
24 number of bedrooms for the house next door has
25 nothing to do with the accuracy of another

Deposition of DIANNE ROBERTSON, 8/11/2004 13

1 Is that correct?

2 A And my recollection is that she would back up that

3 system on diskette. After each daily processing

4 she'd back up that information on diskette.

5 Q Who's Scott?

6 A Diskette.

7 Q Oh, onto diskette. And that she would -- onto like

8 a three and a half inch diskette?

9 A Uh-huh.

10 Q And then what would happen to the diskette?

11 A I believe that she'd keep a copy of that in her --

12 in her cabinet.

13 Q Have you ever sent a file or seen a file being sent

14 to the County's server?

15 A No.

16 Q Do you know if that computer was connected, either

17 through the telephone lines or hard lines, to any

18 other computer?

19 A No.

20 Q By that computer I mean the property computer?

21 A No. There's a T1 line that services the e-mail

22 system to the County, but any other computer, no.

23 Q When you say a T1 line that services e-mail, whose

24 e-mail does it service?

25 A Through Ozaukee County.

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1 A I believe it's Business XP.

2 Q And have you ever copied information from one file

3 to another just by clicking and dragging and

4 dropping?

5 A No.

6 Q Have you ever copied information from one file to

7 another in any way?

8 A Yes.

9 Q How do you go about copying information from one

10 file to another?

11 A If I would draft a letter in Word, I could copy

12 certain paragraphs of that letter and paste it into

13 another document.

14 Q Are you aware that there is a -- are you -- Strike

15 that. Are you aware that on that computer there's a

16 series of programs and data files?

17 A On what computer?

18 Q On the computer on your desk top, your laptop.

19 A Repeat that question.

20 Q On your laptop are there a number of programs and a

21 number of data files?

22 A Yes.

23 Q Do you store your data files probably in a My

24 Documents area or something like that?

25 A Yes.

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1 Q But does that T1 line, does that go to this

2 particular computer that has property records on it?

3 A Yes. One of the computers.

4 Q Pardon?

5 A Every one of our computers is connected on a T1 line

6 to the County.

7 Q Okay. So then files can be sent down on that T1

8 line; is that correct?

9 A I have never done it, no.

10 Q Do you know if it can be done?

11 A I don't know.

12 Q Do you have a computer on your desk?

13 A A laptop, yes.

14 Q You have your own laptop?

15 A Yes.

16 Q What programs are you used to running on your

17 laptop?

18 A Word and Excel.

19 Q Have you taken any courses in how to run computers?

20 A No.

21 Q Have you taken any courses in any computer program?

22 A No.

23 Q Have you ever copied -- do you know what folders

24 are -- Strike that. What Windows operating system

25 are you on?

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Deposition of DIANNE ROBERTSON, 8/11/2004 16

1 Q You know that each one of your letters is a separate

2 file; is that correct?

3 A Yes.

4 Q And you know that because probably when you go to

5 open one you have to select which one you have to

6 open?

7 A Yes.

8 Q So you're familiar that computers generally have

9 programs and data files on them?

10 A Yes.

11 Q Did you ever look on the property record card file

12 to see property record-- Strike that. I'm going to

13 have to give names of these computers. One we'll

14 call your desk top, your desk top computer, okay?

15 A Yes.

16 Q That's not the one that has the property information

17 on it or at least in 2001 had the property

18 information; is that correct?

19 A Correct.

20 Q We'll call that other computer that has the property

21 information the property computer, how's that?

22 A Fine.

23 Q If there's other words that you'd like, tell me. Do

24 you know whether the property computer also has

25 programs -- different programs on it?

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1 Let's define data a minute to be the
2 property record card information, all right?
3 A Yes.
4 Q With that understanding, does the Village maintain
5 the data in a computerized electronic digital format
6 because of the various advantages to maintaining and
7 using records in that format as compared to paper or
8 hard copy?
9 A Yes, but it wouldn't have bothered me to have a
10 paper hard copy.
11 Q Pardon?
12 A It would not bother me to have just a paper hard
13 copy.
14 Q Do you know why the Village made the decision then
15 to have a computerized?
16 A No. It was prior to my time.
17 Q But you understand that it keeps it that way because
18 of the advantages of maintaining and using those
19 records in that format; correct?
20 A Correct.
21 Q By that format I mean the electronic digital format?
22 A Correct.
23 MR. DEUTCH: I have nothing further.
24 MS. FAY: I don't have anything.
25 MR. CAIN: No questions.

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1 there was any indemnification; right?
2 MR. CAIN: Objection. She says she
3 doesn't recall.
4 THE WITNESS: I don't recall.
5 MR. DEUTCH: Well, I'm asking if there
6 would be somebody else who would have that
7 knowledge.
8 MR. CAIN: That calls for speculation.
9 She doesn't know.
10 BY MR. DEUTCH:
11 Q You know the people who work in the Village; right?
12 A Yes.
13 Q The person who cleans up village hall wouldn't have
14 any knowledge as to what indemnifications, that
15 would be between the Village and Mr. Grotz; is that
16 correct?
17 A That's correct.
18 Q Is there a village president?
19 A Yes.
20 Q Who is that person?
21 A Donald Molyneux.
22 Q Spell it, please.
23 A M-o-l-y-n-e-u-x.
24 Q And how long has he been in that position?
25 A Quite a long time. I do not know.

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1 MR. DEUTCH: Thank you very much for
2 coming in.
3 THE WITNESS: And I also recall at one
4 point in time, I don't remember the date that I
5 referred either WIREdata or you to Grotz to get the
6 information, so since he is a property -- or an
7 owner of part of that record, I believe he should
8 supply that information to you.
9 MR. DEUTCH: We're back on the record.
10 Q You just added that at the end. You believe that
11 you also instructed Mr. Grotz to give us this
12 information; is that correct?
13 A That's correct.
14 Q And when you instructed him to give us, you mean
15 WIREdata that information; correct?
16 A Correct.
17 Q Did you so instruct him in writing?
18 A I don't recall.
19 Q Do you know -- as long as you went afield into that,
20 does the Village have any agreement for Mr. Grotz to
21 indemnify them in any way from the costs and
22 attorney fees incurred by any party in this open
23 records action?
24 A I do not recall.
25 Q And you're the village administrator, you'd know if

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Deposition of DIANNE ROBERTSON, 8/11/2004 40

1 Q Who maintains the various contracts for the Village?
2 A I have a file for contracts in the Village vault.
3 Q Is it your understanding that you have the files for
4 all the contracts between the Village and Mr. Grotz?
5 A Yes.
6 Q In that capacity have you ever looked in those
7 contracts?
8 A Yes.
9 Q Is there any provision in those contracts that you
10 recall specifically wherein Mr. Grotz or Grotz
11 Appraisals agrees to indemnify the Village because
12 of this particular lawsuit?
13 A Like I told you, I don't recall.
14 MR. DEUTCH: Would you agree to give us a
15 copy of that file regarding Mr. Grotz?
16 MR. CAIN: I believe you guys have all
17 those contracts already.
18 MR. DEUTCH: We have the 2001 one, but I
19 don't --
20 MR. CAIN: That's the only one that's
21 relevant to this matter.
22 MR. DEUTCH: I don't know if it has
23 anything. I'm getting a I don't recall.
24 MR. CAIN: You have the 2001 contract. I
25 know you have it. I think you've referenced it in

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1 Q Any other database that they can select?

2 A No.

3 Q So the data is now kept in either a SQL Server
4 database or an Access database; is that correct?

5 A Yes.

6 Q And both of those are Microsoft products?

7 A Yeah.

8 Q Unfortunately sometimes things get a little slurred,
9 so if you can, use yes rather than yeah. In either
10 case, if you wanted to make a copy of certain parts
11 of the data and the data only as is exists in either
12 SQL Server or Access, are you familiar with the
13 export functions?

14 A No.

15 Q Have you ever made a copy of the database?

16 A Yes.

17 Q What did you do to use -- to make a copy?

18 A I used Windows Explorer.

19 Q You used Windows Explorer just to copy the file?

20 A Yes.

21 Q So that if you wanted to make a copy of -- in
22 2000 -- Strike that. When did you add the option of
23 having a SQL database?

24 A 2002.

25 Q So in 2001 the only database that was then being

1 would be less obvious to determine what all that
2 stuff is.

3 Q But in any event if you gave somebody that entire
4 database, they would then have all the property
5 record card information plus other information;
6 right?

7 A Most of it.

8 Q What percent of it would they have?

9 A They have everything but pictures and sketches.

10 Q And the second way you said to do it would be to use
11 the -- to create a property record card report; is
12 that correct?

13 A To use the property record card report that already
14 exists.

15 Q And then to export that?

16 A Yes.

17 Q How would you do that?

18 A You'd run it and then there's -- we use Crystal
19 Reports to create the report and then Crystal Report
20 as an export tool which exports in a variety of
21 formats.

22 Q Do you know the formats it exports it into?

23 A I know some of them.

24 Q Can you tell me?

25 A Excel, Word, CSV.

- 1 A No.
- 2 Q Why not?
- 3 A It's -- the export is very poor.
- 4 Q Okay. Presuming that the export were not very poor,
5 if you were using Crystal Reports to prepare a
6 report on a database -- Strike that. The last time
7 that you used Crystal Reports then to try this was
8 in 2001?
- 9 A Yes.
- 10 Q So you don't know how Crystal Reports works at the
11 current time doing it?
- 12 A We haven't changed the version that we're using of
13 Crystal, so the one that we're using, I know how it
14 works.
- 15 Q Do you know whether Crystal Reports has been updated
16 since then?
- 17 A It has.
- 18 Q And you've elected not to get a new version of it?
- 19 A Not yet.
- 20 Q Okay. You said it also -- Crystal Reports also
21 exports to Word?
- 22 A Yes.
- 23 Q And to a comma-delimited?
- 24 A Yes.
- 25 Q What is a comma-delimited file?

- 1 A It's a file that has text in it with commas between
2 values.
- 3 Q And it's easier to translate -- would you agree it's
4 easier to translate a comma-delimited file into
5 another database than it would be to translate a
6 PDF?
- 7 A Yes.
- 8 Q Have you ever tried making a -- or exporting the
9 property record card information using a
10 comma-delimited file?
- 11 A Yes.
- 12 Q And what happened?
- 13 A It's awful.
- 14 Q By whose definition?
- 15 A Me as a programmer.
- 16 Q Do you have any samples of that?
- 17 A Not with me.
- 18 Q Did you ever discuss giving any of the Excel or
19 comma-delimited formats to WIREDdata?
- 20 A Yes.
- 21 Q And who did you discuss that with?
- 22 A Bob Grotz.
- 23 Q And when did you discuss that?
- 24 A Must have been 2001 or something.
- 25 Q And what was your decision at that point?

1 A That the formats were so awful that you wouldn't
 2 want them.
 3 Q Did you ever contact WIREdata?
 4 A About?
 5 Q About doing that, about giving them a
 6 comma-delimited file?
 7 A I did not contact them, no.
 8 Q Now, if you were using Crystal Reports and the
 9 property record report to do it, you would be
 10 getting only the property record card data; is that
 11 correct?
 12 A When you say to do it, you mean?
 13 Q Let me back up. I'm talking about if I came to you
 14 and said I want a copy of the 2001 and I had the
 15 database that I handed you or you had Sussex data
 16 and I want a copy of just the information that is on
 17 the property record card --
 18 A Yes.
 19 Q -- one way I can get that we talked about and I
 20 would get that data and more would be just making a
 21 copy of the database; correct?
 22 A Yes.
 23 Q Second way I can get it is you said by running the
 24 property record card report and exporting it using
 25 Crystal Reports; correct?

1 A Yes.

2 Q Okay. If I were using the second method, I'd be
3 getting only the property record card information;
4 correct?

5 A Yes.

6 Q Then I wouldn't be getting any other information?

7 A That's correct.

8 Q Would I be getting it in a coded fashion or in a
9 English fashion?

10 A English.

11 Q And how long would it take to make -- to run this
12 and to -- run either in Excel or comma-delimited
13 Crystal Report if I wanted that?

14 A It depends on the number of properties. It's quite
15 lengthy to run it because each property can take
16 five to 10 pages, four to 10 pages, I mean it can be
17 long. So it might take, depending on the speed of
18 the computer, how big the database is, it might take
19 an hour, two.

20 Q But that's just the computer chunking away, it
21 doesn't need a person sitting there?

22 A During the middle of the process, that's correct.
23 It might take an hour to run, but you don't have to
24 sit there. You do have to -- a human does have to
25 intervene in the middle because once it previews on

1 A I don't know.

2 Q Did you ever look it up? Did you ever try it?

3 A It's hard to measure because the space is used up
4 and then immediately discarded. You don't really
5 have a stopping point where you can say stop, okay,
6 how much was used up. It's hard to tell.

7 Q Have you ever used the export function in Access or
8 in SQL Server?

9 A Access, yes, SQL Server, no.

10 Q If I want to use the export function in Access, I
11 can simply tell it what columns or what fields I
12 want and it will export only those fields; is that
13 correct?

14 A I don't recall if it gives you the ability to do it
15 field by field.

16 Q How do you believe it works?

17 A I don't recall. I mean I know you click -- you
18 right mouse click on the table, you choose export,
19 and then there's a bunch of dialogue boxes of which
20 are fuzzy to me because I don't do it very often and
21 I don't know the exact steps.

22 Q Do you know if you can memorize the transaction so
23 that you can repeat it over and over for different
24 databases?

25 A I don't think so. I think you have to do them one

1 Q Did you ever ask him would he just like the entire
2 database?

3 A No.

4 Q So how do you know that that's not what he wanted?

5 A I gave him what he asked for. That's not what he
6 asked for. He wanted very specific I want the data
7 in this particular format, I want these particular
8 fields presumably to make it easy for him to bring
9 the data in. He did, as I recall, say that he
10 wanted something very simple, he didn't want to make
11 it complicated. Obviously that wasn't going to be
12 simple for him.

13 Q Why in 2002 did you add a password protection to the
14 Access database?

15 A Two reasons, the biggest one was to protect our
16 design, and the second one is we sometimes have
17 problems with users monkeying with the data which we
18 have to fix later, which is a big pain.

19 Q Is it the same password for all of them?

20 A Yes.

21 Q Have you ever been asked by any municipality for
22 that password?

23 A No.

24 Q How difficult would it be to take the Access
25 database or the SQL Server database and make a copy

1 of that database that was not password protected?

2 A I can't speak for SQL Server. Access is relatively
3 easy.

4 Q By relatively, within minutes?

5 A Yes.

6 Q So if I wanted to take a copy of a 2004 Access
7 database, strip out the password, and give somebody
8 just the unprotected information, now we're maybe
9 looking at a total of four minutes, I'm adding two
10 minutes for the password, two minutes for the copy?

11 A Yes.

12 Q And how much time -- Well, strike that. You are
13 aware -- Strike that.

14 Were you asked in 2003 or 2004 to make a
15 copy of the data at any time?

16 A I'm not sure what you're asking.

17 Q Okay. At any time in 2003 or 2004 did anybody ask
18 you to make a copy of the Sussex, Thiensville or
19 Port Washington data? By the data I'll call it the
20 property record card data.

21 A Yes.

22 Q And who asked you to do that?

23 A It might have been Mike or it might have been Bob.
24 I'm not sure.

25 Q And what did they ask you to do?

1 A No.

2 Q Did you try to export it to a comma-delimited file?

3 A No.

4 Q You just went right to PDF?

5 A Yes.

6 Q Okay. Other than the conversations that you say you

7 had with WIREdata in 2001 concerning making a copy,

8 have you had any subsequent conversations with

9 anybody from WIREdata?

10 A No.

11 Q Now, if you wanted to -- we've gone through three of

12 the four ways of making a copy. You said the fourth

13 way would be exporting the tables?

14 A Yes.

15 Q And how would that differ from giving somebody

16 the -- a copy of the entire database?

17 A Well, the database you get one file and everything

18 would still be in the original structure as I

19 designed it. The export would be in individual

20 files, although still would have a representation of

21 the format that it was originally stored in.

22 Q Have you ever experienced -- Strike that. How long

23 would it take you to export any particular table of

24 Access?

25 A That depends on the size of the table. It would be

1 relatively short, a couple minutes, more if it's
2 really big.

3 Q Do you know how many tables were involved -- Strike
4 that. Do you know how many tables would be involved
5 in obtaining the property record card information?

6 A No, not off the top of my head.

7 Q What's your best estimate?

8 A Not code -- not concerning -- coding is okay?

9 Q Yes.

10 A Having code is okay?

11 Q Right.

12 A Twenty.

13 Q If it were 20 tables, how long does an export -- and
14 if somebody asked you just give me an export of
15 those 20 tables, would you agree that you could
16 probably do that human time in under 10 or 15
17 minutes?

18 A No.

19 Q How long do you think it would take?

20 A Well, if it's a couple minutes apiece and it's two
21 minutes apiece, that's 20 tables, that's 40 minutes
22 not counting getting the thing and wrapping that up
23 and getting that off to them, so you know --

24 Q So about 40 minutes you think?

25 A Forty minutes to an hour.

1 Q That would give you the entire copy?

2 A No, that will give you just the tables that are
3 involved with the property record card.

4 Q All right. And in that hour you've included the
5 time to go get the file; is that correct?

6 A Yeah.

7 Q Is there any other way that you know of to make a
8 copy of either the data or the database than what
9 you've said?

10 A No. Not that I can think of.

11 Q Do you have any authority -- have you ever run into
12 any problems using Crystal Reports?

13 A Yes.

14 Q Who do you consult with when you have problems with
15 Crystal Reports?

16 A The manufacturer.

17 Q And you call them on a general line?

18 A Yes.

19 Q General help line?

20 A Uh-huh, yes.

21 Q You don't have any other outside authority that you
22 use?

23 A No.

24 Q What version of Crystal Reports do you currently
25 have?

1 e-mail it to me.

2 Q Do they do it by using that same Windows Explorer
3 function that we talked about?

4 A They might.

5 Q What other ways do you know of that they might do
6 it?

7 A They might use the backup function inside of Market
8 Drive.

9 Q And if they use the backup function inside of Market
10 Drive, that just creates another database?

11 A Creates a zipped up database.

12 Q A zipped up database is basically a database that
13 uses a program called Zip to compress or uncompress;
14 is that right?

15 A Yes.

16 Q And it gives it a different name?

17 A Yes.

18 Q Is there anything other than the database that's
19 sent on that when you make that backup?

20 A There are -- yes.

21 Q What else is sent?

22 A There are -- you can back up pictures, you can back
23 up sketches which aren't part of the database but
24 stored outside. You can back up letters that they
25 have set up.

1 Q You say they can so it's not automatic that they
2 automatically do that?

3 A There are some options in the backup to say, you
4 know, don't back this part up.

5 Q So a user of Market Drive would be able to just
6 click backup --

7 A Uh-huh.

8 Q -- and only database --

9 A Uh-huh.

10 Q -- and not have the letters, not have the pictures,
11 and have on a CD the entire backup of the database;
12 is that correct?

13 A No.

14 Q What would they have?

15 A They would have a backup of the main database. They
16 can back that up, but it's not going to put it on a
17 CD.

18 Q How do they get it on a CD?

19 A You have to use a burner to do that.

20 Q And that's not part of the Market Drive program?

21 A No. No.

22 Q So that they then have it in a file; is that
23 correct?

24 A Yes.

25 Q What's the name of that file usually called?

- 1 A The name of the town dot zip.
- 2 Q So that -- and is that placed by the programming of
- 3 something into a specific folder?
- 4 A The user decides where it goes.
- 5 Q The user decides where it goes?
- 6 A Uh-huh.
- 7 Q So the user could just -- and how long does that
- 8 typically take to make a zipped up copy of the
- 9 program?
- 10 A Depends how big it is.
- 11 Q Say one of about 5,000 properties?
- 12 A A couple minutes maybe.
- 13 Q Okay.
- 14 A Five minutes. I don't know.
- 15 Q Then how long would it take to put that onto a CD?
- 16 A Today's CD-ROM burners, a couple minutes.
- 17 Q How about a CD-ROM burner in 2004 -- in 2001,
- 18 rather?
- 19 A Ten minutes, 15 minutes, something like that.
- 20 Q It would depend on what equipment the user has?
- 21 A And how big the file is, yeah.
- 22 Q They could do all of that without going to you; is
- 23 that correct?
- 24 A Yes.
- 25 Q All right. Now let's go back to that a minute. In

1 2001 if somebody used either the backup or Windows
2 to create a copy and put it on a CD, you'd agree
3 with me that that whole process using either
4 function could be done in under five minutes?

5 A No.

6 Q How long would you say?

7 A I'm sorry, did you say including burning it to a CD?

8 Q Right.

9 A Probably take them 15 minutes to a half an hour.

10 Q To burn it to a CD?

11 A No, to get the thing, to make the copy, and burn it
12 to a CD, yeah, somewhere in there.

13 Q Okay. Now, the resultant that they would have, the
14 thing that's on the CD, first of all if it's zipped
15 you have to simply run it through a program
16 called -- it was originally called PK Zip to unzip
17 it; right?

18 A Yes.

19 Q And all it means is to compress or uncompress;
20 correct?

21 A Right.

22 Q Now, once I had that file, I can use Microsoft
23 Access, that program, to open that file; correct?

24 A Yes.

25 Q All right. I don't need anything else? I don't

1 need Market Drive to open that?

2 A That's correct.

3 Q And then it would be up to me what I'd want to take
4 out of it or use it; right?

5 A Yes.

6 Q So that in fact there's a fifth way to make a backup
7 of the data, you went through four before but
8 there's also -- I'm sorry, a fifth way to make a
9 copy. That fifth way is backing up using Market
10 Drive?

11 A Yes.

12 Q And of that half an hour that you estimated, you had
13 originally said in two minutes we could do it using
14 Windows.

15 A That was just copying the file, you didn't count
16 burning.

17 Q That's what I'm saying. I want to be clear that two
18 minutes of that 30 minutes is copying the file, the
19 rest is burning it?

20 A Yes.

21 Q Okay. Given the CDs that are typically available
22 running at four to eight and greater times speed
23 today, would you agree that you could make that in
24 probably under two to three minutes?

25 A The actual burn time would only be five minutes,

1 yes.

2 Q So that may be seven minutes total today. Depends
3 on the equipment; right?

4 A Yeah, but -- if you had to -- if you only do one and
5 not a whole series of them, there's time to find a
6 CD, open the software, there's a lot of little steps
7 that go along and, you know, it's a -- so slight
8 difference like two minutes versus five minutes
9 versus 15 is a little ridiculous. It's 15 to 30
10 minutes, somewhere in there, for a person to say out
11 of the blue go burn this thing for me, back it up
12 and burn it.

13 Q Where are your offices located?

14 A I work out of my home.

15 Q Do you maintain any offices at the location of
16 Assessment Technologies?

17 A No.

18 Q So if somebody from Assessment Technologies said you
19 have all of the databases, they'd be wrong; right?

20 A That's correct.

21 Q If you wanted to access a particular city's
22 database, you have to go to the assessor that's got
23 that to ask him for it; right?

24 A That's correct.

25 Q Regardless of -- Strike that. Presuming you were

1 what your rates are?

2 A That's a different question.

3 Q What are your rates that you tell people they are?

4 A \$100 an hour.

5 Q Have you done work for -- other than Assessment
6 Technologies, have you done work for less than that?

7 A When?

8 Q Hourly rate. In the last three years.

9 A No.

10 Q Do you employ any people?

11 A No.

12 Q Would you agree with me that if a person who's
13 sophisticated enough to use Market Drive, not
14 program but to use it, wanted to use Windows
15 Explorer to make a copy or wanted to use Crystal
16 Reports to make a copy or wanted to use backup to
17 make a copy of the database or whatever subsection
18 they're looking at, they can do it themselves and
19 don't need to involve you?

20 A That's correct.

21 Q Do you know the quality -- do you know people at
22 Gropa -- Strike that.

23 Do you know people at Assessment
24 Technologies that would be capable of doing --
25 making those copies without involving you?

1 MR. DEUTCH: I have a follow-up one. Go
2 ahead.

3 MS. FAY: I don't have anything at this
4 point.

5 E X A M I N A T I O N

6 BY MR. DEUTCH:

7 Q You said you've never been out to any of the
8 municipalities?

9 A No, that's not what I said.

10 Q Some of the municipalities have only read only
11 versions, right, of Market Drive?

12 A They have something called the viewer version.

13 Q The viewer version you didn't go out to install?

14 A No.

15 Q If you have a viewer version or any other version,
16 that's information that's in Market Drive that
17 doesn't affect Access; right?

18 A I'm not sure I understand your question.

19 Q Remember how we talked about you can use Windows
20 Explorer to make a copy of what version you have?

21 A Yes.

22 Q Of the information you have?

23 A Yes.

24 Q You could use Windows to do that regardless if you
25 had a viewer version or what version you had of

1 Market Drive; correct?

2 A That's correct.

3 Q So if somebody had just a read-only version, they
4 could still use Windows to make a copy of the
5 database?

6 A That's correct.

7 MR. DEUTCH: Thank you. I have nothing
8 else. Any follow-up of the follow-up?

9 MR. CAIN: No.

10 MR. DEUTCH: Thank you.

11 (Deposition concluded at 2:28 p.m.)

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Dear Tom:

Below are the specifications for six files I will give you for each municipality. These files will give you a complete picture of what each property looks like. The first file is the property file. There will be one record for each property (or tax key number) in the municipality. All land and improvement information will be exported into separate files because there is a "one-to-many" relationship between a property and the information contained in the other files.

Please note that although there may be a place to enter a piece of information, it is up to the individual assessor to enter the data. For example, I don't think many assessors fill in zoning because the county property lister does not have it because municipalities usually keep zoning information on paper maps.

Regarding districts, the current version of Market Drive being used by assessors only has one field for school district (usually the elementary school district). The next release will be able to distinguish between elementary and high school districts. I was thinking of the next release when I told you I could distinguish between the two.

I have added land and improvements values to each file. These would be current year (2001) assessed values. I would recommend that we export the data after the assessor has made changes from the board of review to ensure that the numbers are accurate. However, if you are not going to publish the numbers, we can probably export the data sooner.

Assuming that what is documented below is all of the requirements, there is a one-time cost of \$6600 to program and test the export. The remaining cost for the data is 50 cents per parcel. Incorporated into this cost is the cost of running the export, checking the result and burning the CDs. Assuming you want all the data we can give you, the total cost will be substantially less than the cost of getting the data on paper, since each property takes a minimum of 4 pages to print. Following the export specifications is a partial list of the municipalities we have data for and the approximate parcel count for each. This will help give you an idea on the cost for a typical municipality. More data is available for other municipalities in the state. Please let me know what areas of the state you are interested in.

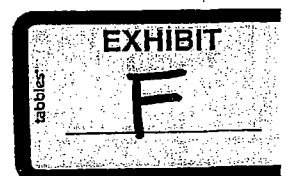
Once you have a current copy of the data, we can provide you with an annual update after each board of review. The cost for the update is 15 cents per parcel assuming that you do not want us to change the format of the export. The update is for all parcels whether or not they have changed (that is why it is only 15 cents). We did not want to get into a discussion on what constitutes a change or deal with tracking which parcels changed since the last time we gave you an update. The cost of the update includes gathering the data, running the export, checking the results, and burning the CDs.

Finally, the costs quoted here assume that you are not reselling the data in mass to another source. This data is meant for you and your subscribers to view. If you want to "add value" to any part of this data and distribute it in mass to another company, you will need to charge your customer for our fee in addition to your fees for your added value.

If you have any questions, please do not hesitate to call.

Best Regards,

Andrew Pelkey
Senior Consultant



Property file: Contains one record for each parcel (tax key number) in the municipality. Named something like "Village of Sussex properties.txt". This file will contain the following fields:

Field	Example	Note
Tax key number	413-9989-002	
County	Washington	
Street number	3500	
Street direction	S	
Street name	76 th street, #7	Will include the property unit number at the end.
Owner name	Andrew Pelkey	
Secondary owner name	Lisa Pelkey	
Owner address line 1	2400 W Bluemound Rd	
Owner address line 2	Suite 120	
Owner city	Badger	
Owner state	WI	
Owner zip	99123	
Zoning	R1	
School district	5323	The current version of Market Drive does not distinguish between elementary and high school district. The next release will.
Zoning		This data is maintained at the county level. I don't know of many assessors (especially in smaller communities) that fill it in.

Land file: Contains one record for each land parcel in the municipality. If property has more than one land parcel (e.g. a farm), there will be multiple records for the same tax key number. Named something like "Village of Sussex land.txt". This file will contain the following fields:

Field	Example	Note
Tax key number	413-9989-002	
Class	Residential	
Width	380	
Depth	3818	
Acres	3.331	Not always width * depth (lot may be irregularly shaped).
Land value		

Residential buildings file: Contains one record for each residential building in the municipality. If property has more than one residential building (rare but it happens), there will be multiple records for the same tax key number. Named something like "Village of Sussex residential buildings.txt". This file will contain the following fields:

Field	Example	Note
Tax key number	413-9989-002	
Class	Washington	
Story height	1 story w/attic	1 story, 1 story w/attic, 1.5 story, 2 story, 2 story w/attic, 2.5 story
Style	Colonial	Defined by assessor (ranch, by-level, tri-level, cape code, colonial, old style, etc)
Occupancy (Use)	Single family	Defined by assessor (single family, mother-in-law, condo, 2 family, apartment, etc)
Exterior wall	Alum/vinyl	Defined by assessor (wood, block, stucco, alum/vinyl, metal, brick, stone, msnry/frame, etc)
Roof type	Asphalt shingles	Defined by assessor
Year built	1973	
Year remodeled	1993	
Basement type	Full	None, crawl, partial, full

Heat type	Basic	None, space, basic, A/C
Fuel type	Gas	Gas, electric, oil, wood/coal
System type	Warm air	Warm air, baseboard, hot water, steam
Bedrooms	3	
Family rooms	1	Family rooms only. Living rooms are counted as "other rooms"
Other rooms	1	
Full baths	2	
Half baths	1	
Interior rating	Average	Excellent, very good, good, average, fair, poor, very poor
Exterior rating	Good	Excellent, very good, good, average, fair, poor, very poor
Fireplace stacks	1	
Fireplace openings	1	
Other fireplaces	0	
Basement garage stalls	0	
Other feature 1	Whirlpool	
Other feature 2	Drain in garage floor	
Basement SF	1,000	
Rec room SF	250	The rec room SF is included in the Basement SF. Therefore, do NOT add the two numbers together to produce a total basement SF.
FBLA SF	400	Finished Basement Living Area. This number represents basement area that can be include in SFLA. Like rec room SF, the square footage here is included in Basement SF.
First floor SF	1,000	
Second floor SF	0	
Finished attic SF	0	
Unfinished attic SF	0	
Unfinished area SF	0	
Patio SF	150	
Open porch SF	150	
Screen porch SF	150	
Enclosed porch SF	150	
Wood deck SF	150	
Attached garage SF	250	
SFLA	1400	Total SF Living Area. This will be FBLA SF + First Floor SF + Second Floor SF + Finished Attic SF
Building value		

Commercial buildings file: Contains one record for each commercial building in the municipality. If property has more than one commercial building, there will be multiple records for the same tax key number. Named something like "Village of Sussex commercial buildings.txt". This file will contain the following fields:

Field	Example	Note
Tax key number	413-9989-002	
Class	Commercial	
Stories	2	
Description	Walgreens	
Building value		

Other buildings file: Contains one record for each other building improvement (OBI) in the municipality. Other building improvements are mostly farm building but can also include things like pools and detached garages. If

property has more than one other building improvement, there will be multiple records for the same tax key number. Named something like "Village of Sussex OBIs.txt". This file will contain the following fields:

Field	Example	Note
Tax key number	413-9989-002	
Class	Agri other	
Type	Bank barn	
Width	50	
Depth	40	
OBI value		

Other improvements: Contains one record for each other improvement in the municipality. Other improvements are slightly different than OBIs. They are miscellaneous improvements that for one reason or another were not valued as any of the other types of improvements. They are not widely used. If property has more than one other improvement, there will be multiple records for the same tax key number. Named something like "Village of Sussex other improvements.txt". This file will contain the following fields:

Field	Example	Note
Tax key number	413-9989-002	
Class	Agri other	
Description	Billboard next to highway	
Improvement value		

Parcel Counts for typical Municipalities (a partial list)

County	Municipality	Parcel Count	Initial Cost	Annual Maintenance (cost per year)
Washington	T-Erin	2472	\$1,236	\$371
Washington	T-Hartford	2547	\$1,274	\$382
Washington	T-Jackson	2654	\$1,327	\$398
Washington	T-Kewaskum	1108	\$554	\$166
Washington	T-Polk	2812	\$1,406	\$422
Washington	T-Richfield	5206	\$2,603	\$781
Washington	T-Trenton	2911	\$1,456	\$437
Washington	T-West Bend	2499	\$1,250	\$375
Washington	V-Jackson	1623	\$811	\$253
Washington	V-Newburg	330	\$165	\$50
Washington	V-Slinger	1538	\$719	\$216
Washington	V-Germantown	7579	\$3,790	\$1,137
Waukesha	T-Merton	3600	\$1,800	\$540
Waukesha	T-Summit	2500	\$1,250	\$375
Waukesha	V-North Prairie	500	\$250	\$75
Waukesha	T-Ottawa	1800	\$900	\$270
Waukesha	T-Delafield	3600	\$3,600	\$540
Ozaukee	T-Grafton	2358	\$1,179	\$354
Ozaukee	V-Thiensville	1210	\$605	\$182
Dodge	T-Ashippun	2297	\$1,149	\$345
Dodge	T-Herman	1892	\$946	\$284
Dodge	T-Hubbard	1833	\$917	\$275
Dodge	V-Neosho	253	\$127	\$38
Dodge	T-Theresa	1200	\$600	\$180
Dodge	V-Theresa	392	\$196	\$59
Jefferson	C-Lake Mills	1876	\$938	\$281

Andy;

Selected fields requested from Market Drive software. Any type of electronic output and media is acceptable (i.e., fixed length, comma-quote, pipe delimited). We would need a data layout, if the fields are not in the order below.

Taxkey
County
Municipality
Town, Village or City Indicator
Property Prefix
Property Street Number
Property Street Direction
Property Street Name
Property Unit Number
Zip Code

Owner Name 1
Owner Name 2
Owner Address
Owner City
Owner State
Owner Zip Code

Property Class
Acres
Zoning
Land Use
Building Type
Number of Stories
Story code
Number of Units
Building Square Feet
Basement Type
Attic
Pool
Fireplace
Air Conditioning
Heating Type
Total Number of Rooms
Number of Bedrooms
Number of Full Baths
Number of Half Baths
Garage Type
Sidewalk
Exterior Wall Type
Exterior Condition
Year Built
Year Remodeled
Effective Year Built
Historic Designation
Census Tract
School District

(Example: 1, 1+attic)

(Full, partial, etc.)
(Yes/No/Type: Finished/etc.)
(Yes/No/Type: Inground/etc.)

(# stalls, attached, detached, etc)

(4 digit state code, if available)

2. Each year, WIREdata requests electronic digital copies of the property record cards from each municipality within certain counties (including the counties in Southeastern Wisconsin) 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.

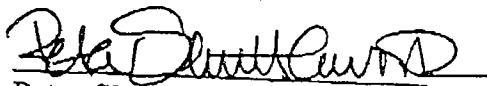
3. In order to be able to effectively and practically understand and use the public record information requested, WIREdata needs to receive it in form that can be accurately input into a computer. Based on Affiant's experience and knowledge of working with computerized and paper data as it relates to real estate, if WIREdata were to receive paper printed copies of the data and then attempt to scan or otherwise input the information into a computerized database, there is a high probability that there would be errors which would not be in the original computer database as maintained by the assessor and/or municipality.

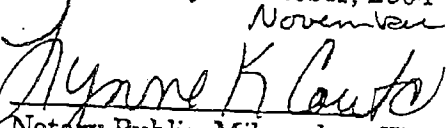
4. Further, if WIREdata accepted the paper copies of the property record card information and did not input them into a computerized database, it would make the public data effectively not understandable as it would be extremely difficult, if not practically impossible, to constantly organize and reorganize the data in order to compare each individual element thereof.
5. 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 "[a]ny electronic output and media is acceptable (i.e., fixed length, comma-quote, pipe delimited)."
6. Based on affiants over 20 years of dealing with computerized databases, the specification that WIREdata desired the copy in "[a]ny electronic output and media is acceptable (i.e., fixed length, comma-

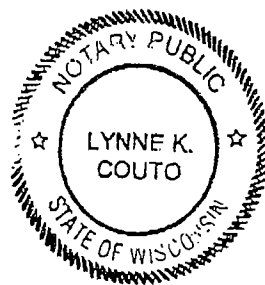
11/01/04 NOV 10 02 AM 212 110 010
quote, pipe delimited)" would effectively specify that WIREdata is requesting an electronic digital copy of the database in its then current state or gives the assessors an option to export the property record card data in a fashion that allows it to be read and imported into another database program.

7. The Microsoft Access program includes "import and export" functions which make it easy to produce an electronic digital copy of the data. Further, the specifications of "fixed length, comma-quote, pipe delimited" are general database terms which are part of industry standard data interchange protocols and ones which anyone with just a passing familiarity of computer databases would understand is a request for data is that is easily able to be copied from one computer onto a CD and then into another database program.

Executed at Milwaukee, Wisconsin, this 1st day of November, 2004.


Peter Shuttleworth

Subscribed and Sworn to before me
This 1st day of October, 2004
November

Notary Public, Milwaukee, Wisconsin
My Commission 3/16/08



STATE OF WISCONSIN	CIRCUIT COURT	OZAUKEE COUNTY
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WIREDdata, Inc.

Plaintiff,

v.

Case No. 01-CV-000216

Case Code 30707

Village of Port Washington and
Matthies Assessments,

Defendants.

AFFIDAVIT OF MARK GRAMS

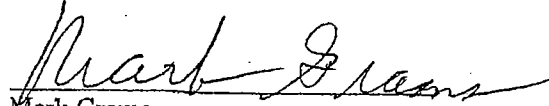
STATE OF WISCONSIN }
COUNTY OF OZAUKEE }

NOV - 1 2004

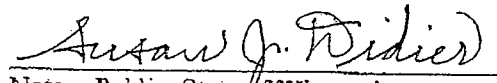
- 1) I, Mark Grams, am the Administrator for the City of Port Washington (the "City").
- 2) The City contracted with Ernest Matthies ("Matthies") of Matthies Assessments, Inc. as an independent contractor to conduct official assessments on behalf of the City and maintain the City's real estate property record cards, as well as the information recorded on those cards (the "Data").
- 3) Matthies is the authority and custodian of the City's Data pursuant to Wis. Stat. § 19.32 and Matthies has the same in an electronic digital format. Matthies specifically has maintained the Data in a computerized electronic digital format because of the various advantages of maintaining and using records in that format compared to a paper or hard copy format.
- 4) The Data belong solely to the City. The City has not given Matthies permission or authority to sell or transfer the City's rights in the Data.
- 5) It is the City's position that the Data is the subject of WIREDdata's request. The City has no objection to Matthies giving WIREDdata an electronic digital copy of the Data.
- 6) It is my understanding that the decision of the United States Court of Appeals for the Seventh Circuit in *Assessment Technologies of WI, LLC v. WIREDdata, Inc.*, 350 F.3d 640 (7th Cir. 2003), determined that it is not a violation of copyright to provide the Data to

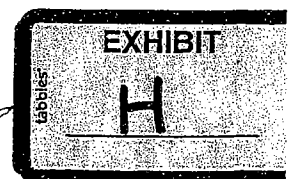
WIREdata. The City does not know whether Matthies has determined if the Data should not be produced.

- 7) It is the City's position that Matthies, makes the determination whether WIREdata's request for the 2001 Data for the City of Port Washington should be granted. If Matthies determines that WIREdata may be given an electronic digital copy in an ASCII, comma or pipe delimited file or a Microsoft Access database that is not encrypted or password protected, the City has no objection to Matthies giving WIREdata such a copy.


Mark Grams

Subscribed and sworn to before
me this 9th day of August
2004.


Notary Public, State of Wisconsin
My Commission Expires: 3-25-07



2001 ASSESSMENT MAINTAINANCE CONTRACT

THIS AGREEMENT by and between Matthies Assessments Inc., hereinafter called the "Assessor", and the City of Port Washington, Ozaukee County, Wisconsin, hereinafter called the "Municipality."

WITNESSETH: The Assessor and Municipality for the consideration stated herein agree as follows:

ARTICLE I

Section I

SCOPE OF WORK: The assessor, having become familiar with the local conditions affecting the cost of the work, and the Standard Specifications for Maintenance of General Property in the State of Wisconsin pursuant to Chapter 70, Wisconsin Statutes hereby agrees to perform everything required to be performed and to complete in a professional manner all of the work required to value the real and personal property of the Municipality in accordance with applicable Wisconsin Statutes and this contract, and other documents consisting as part hereof.

Section II

VALUATION: For the valuation of residential properties, the assessor shall utilize the "Market Drive" Computer Assisted Mass Appraisal System.

For the valuation of commercial properties, the assessor shall use the "Boeckh Commercial Building Valuation System" for computer.

For the valuation of personal property, the assessor shall utilize procedures outlined in Volume 1 of the Wisconsin Property Assessment Manual.

ARTICLE II

COMPENSATION: The Municipality shall pay to the Assessor for the performance of this contract the following compensation:

For the maintainance of real estate and personal property as per Standard Specifications the base compensation of Twenty Thousand Six Hundred Dollars (\$20,600.00), such amount based on the following parcel counts obtained from the 2000 Assessment Roll:

TOTAL IMPROVEMENTS.....	<u>ALL</u>
TOTAL REAL ESTATE PARCEL COUNT.....	<u>ALL</u>
PERSONAL PROPERTY COUNT.....	<u>ALL</u>

ARTICLE III

GENERAL AGREEMENTS:

1. The minimum number of days for open book conferences referred to in Assessor's Agreements, shall be one four hour day and shall be considered as the standard specification for which the assessor shall receive no additional compensation
2. For attending Board of Review as provided in the Assessor's Agreement, there shall be no charge
3. For furnishing testimony in defense of the values established by valuation or appeals to the Department of Revenue or the courts as required in Assessor's Agreement. The only charge to be the cost of travel and expenses.
4. The costs of all postage and printing are to be paid by the assessor.
4. Assessor shall maintain, and shall upon demand show proof of insurance coverage to protect against claims, demands, actions and causes of actions arising from any act or omission of the assessor or his agents and employees in the execution of the work in the following schedule:

Liability

Property Damage per occurrence.....	\$ 50,000.
Bodily Injury per person.....	\$100,000.
per occurrence.....	\$300,000.

Insurance-Valuable Paper. (a) Assessor agrees to carry proper and sufficient insurance to cover loss of municipality's records withdrawn from municipality for assessor's use as well as assessor's records in process under this agreement which are in possession of the assessor.

(b) The assessor shall not be responsible for loss of records destroyed by fire, theft or Act of God while kept in office supplied by municipality.

5. Payment. Payment for services rendered shall be on a monthly basis, beginning in the month contract begins and continued for the term of contract.
7. Assessor shall perform all work required of the assessor as specified in Chapter 70 of the Wisconsin Statutes.
8. Public Relations. The assessor agrees to carry on suitable program of public information in the manner dictated by experience to be the most effective and productive.

9. Assessor agrees to meet upon request with governing body of municipality to discuss areas of work or any problems which might arise and to assist in the resolution of such.
10. Office Space. The municipality shall furnish adequate office space at no cost to assessor in the municipal hall. Office space shall include desk, tables, chairs, file cabinets, heating, lighting, and janitorial services.
11. Office Hours. The Assessor shall hold office hours as needed at the municipal hall in order to be available to the general public.
12. Access to Records. The municipality shall allow access and make available to assessor municipal records such as, but not limited to, previous assessment rolls and records, sewer and water layouts, building permits, tax records, records of special assessments, plats, and any other maps currently in the possession of the municipality, at no cost.
13. The municipality shall aid the assessor in a reasonable promotion of public information concerning the work under this contract.
14. The Assessor shall be an independent contractor pursuant to Sec. 60.307 (4) Wis. Statutes.

SUBMITTED this 18th October, 2000

Firm Name: Matthies Assessments Inc.

By: Ernest T. Matthies
Ernest T. Matthies, President

& Patricia J. Matthies
Patricia J. Matthies, Secretary

Return to:

Matthies Assessments Inc.
P.O. Box 241
West Bend, WI 53095-0241

Acceptance by Municipality:

The above agreement and terms are hereby accepted this

8th day of November, 20 00

By Mark Gottlieb
Mark Gottlieb

Title: Mayor

Attest: Mark Grams
Mark Grams, City Administrator

& Rose Rowe
Rose Rowe, Deputy City Clerk

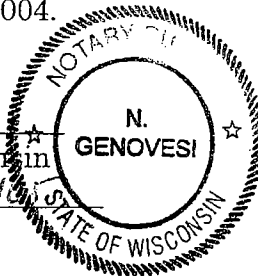
3. Attached hereto as Exhibit B is a true and correct copy of correspondence from Mr. Andrew Pelkey to Mr. Thomas Curtis marked as Exhibit 4 at the deposition of Thomas Curtis, conducted on July 27, 2004.
4. Attached hereto collectively as Exhibit C are true and correct copies of pages from Dianne Robertson's deposition, conducted on August 11, 2004.
5. Attached hereto collectively as Exhibit D are true and correct copies of pages from Michael Grota's deposition, conducted on June 22, 2004.
6. Attached hereto as Exhibit E is a true and correct copy of Exhibit 8 as marked at the deposition of Peter Shuttleworth, conducted on July 28, 2004.
7. Attached hereto collectively as Exhibit F are true and correct copies of pages of Mr. Andrew Pelkey's deposition conducted on September 22, 2004.
8. Attached hereto collectively as Exhibit G are true and correct copies of pages from Thomas Curtis' deposition, conducted on July 27, 2004.

Executed in Milwaukee, Wisconsin, this 29th day of November, 2004.

Emily C. Canedo
Emily C. Canedo

SUBSCRIBED AND SWORN to before me this 29th day of ~~October~~ November, 2004.

N. Genovesi
Notary Public, State of Wisconsin
My commission expires: 11/27/05



IN THE CIRCUIT COURT OF OZAUKEE COUNTY

STATE OF WISCONSIN

WIREDATA, INC.,

Plaintiff,

vs.

Case No. 01-CV-198

VILLAGE OF THIENSVILLE, et al.,

Defendants.

COPY

EXAMINATION of DIANNE ROBERTSON taken at
the instance of the Plaintiff, under and pursuant to
Section 804.05 of the Wisconsin Statutes, pursuant to
Notice, before LAURELL L. BRESLOW-COLLIEN, Court Reporter
and Notary Public in and for the State of Wisconsin, at
DEUTCH & WEISS, 7670 North Port Washington Road, Suite
200, Milwaukee, Wisconsin, on the 11th day of August,
2004, commencing at 8:07 a.m. and concluding at 8:54 a.m.

2004 DEC - 1 AM 10:03
OZAUKEE COUNTY
CLERK OF CIRCUIT COURT



Deposition of DIANNE ROBERTSON, 8/11/2004 9

1 records law.

2 Q Okay. So you have some understanding of the open

3 records law?

4 A Yes.

5 Q Do you believe that the information requested by

6 WIREdata is -- comes under the open records law?

7 A I believe it does, but I did not know how to respond

8 to this one because my understanding is we do not

9 have to create a record and that I did not know how

10 to respond to the request for digital format.

11 Q Why would you think that this would be creating a

12 record?

13 A I myself could not create a digital record of that

14 program.

15 Q What would it take as you understand to create a

16 digital record of the program?

17 A I don't know, that's why I referred it to the

18 village attorney.

19 Q You don't know if you're creating a digital record

20 or copying what information is in there; is that

21 correct?

22 A What I know is that I could only create a hard copy

23 of that program. I do not know how to convert it to

24 a digital format.

25 Q Okay. Let me ask you some questions about the --

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Deposition of DIANNE ROBERTSON, 8/11/2004 11

1 Q And who is it that -- if you have a question

2 concerning it, who do you go to in Ozaukee County to

3 ask that?

4 A John Buhler.

5 Q Can you spell that, please?

6 A B-u-h-l-e-r.

7 Q And what office is he in?

8 A He's in technical resources.

9 Q For the County?

10 A Yes.

11 Q So the data on the property computer is backed up

12 once a day you believe?

13 A I don't know if that would be -- if the property

14 information would be backed up by that system. I

15 don't believe so. I don't know.

16 Q Well, so part of that computer's backed up once a

17 day you believe?

18 A I believe so.

19 Q Okay. Is that computer running on Windows?

20 A It's Windows 98. But I think in order to be backed

21 up by the county system you have to send it to their

22 server.

23 Q So you send then a copy of the data file every day,

24 is that it?

25 A No. See, we had an employee that handled the tax

BEYER REPORTING, INC. 414-529-8826

Deposition of DIANNE ROBERTSON, 8/11/2004 10

1 about your computer knowledge. Do you use a

2 computer in work -- at work?

3 A Yes.

4 Q And the particular program that you're talking

5 about, does that reside on one particular computer?

6 A Yes.

7 Q And whose computer is that?

8 A It's the computer we use for tax collections and for

9 this program.

10 Q What do you mean by tax selections?

11 A Collections.

12 Q So that you keep track of who pays what information?

13 A Correct.

14 Q Do you ever make a backup of what's on that

15 computer?

16 A No.

17 Q So that if something happened to that computer your

18 entire tax collection system would die?

19 A No, it's also supported by Ozaukee County.

20 Q So does Ozaukee County make a backup as you

21 understand?

22 A Yes, they make a daily backup of their system. The

23 computer -- that computer is attached to or shall I

24 say not networked, but the e-mail system and our

25 system is supported by Ozaukee County.

BEYER REPORTING, INC. 414-529-8826

Deposition of DIANNE ROBERTSON, 8/11/2004 12

1 collection system that is no longer with us, so I

2 don't believe that she sent it to their server.

3 Q What was her name?

4 A Geraldine Sherry.

5 Q Can you spell that, please?

6 A S-h-e-r-r-y.

7 Q And when was she with you?

8 A Through May of 2004.

9 Q And when did she start?

10 A About 21 years before that.

11 Q Been there a long time.

12 A Uh-huh.

13 Q Do you know where she lives?

14 A She lived in West Bend where she left our employment.

15 Q Has she moved do you believe?

16 A I do not know.

17 Q What would you need to do to get her address in West

18 Bend?

19 A We have it on our records, our payroll records.

20 MR. DEUTCH: Counsel, would you agree to

21 get that information?

22 MR. CAIN: Sure.

23 BY MR. DEUTCH:

24 Q Now, you said you believed that she would have to

25 send that file by e-mail or something to the server;

BEYER REPORTING, INC. 414-529-8826

Deposition of DIANNE ROBERTSON, 8/11/2004 17

1 A Yes.

2 Q Do you know whether it -- and does it have different

3 programs on it?

4 A Yes.

5 Q And does it also have different data files on it?

6 A I would imagine.

7 Q Do you know if your assessment data is kept in a

8 separate data file?

9 A Yes.

10 Q Did you at any time try to make a copy of that

11 assessment data file?

12 A No.

13 Q Did you ever instruct anyone to make a copy of that

14 assessment data file?

15 A I when this -- we got the letter from WIREDATA, I

16 asked the village attorney how we could proceed to

17 provide that information.

18 Q And did you then attempt to provide that

19 information?

20 A I waited for the village attorney's response.

21 Q Did you get a response?

22 A No written response, no.

23 Q Did you get a verbal response?

24 A He told me he was looking into it.

25 Q So that he never gave you a response?

BEYER REPORTING, INC. 414-529-8826

Deposition of DIANNE ROBERTSON, 8/11/2004 19

1 A Robert Feind.

2 Q I'm going to show you a -- do you know whether the

3 Village has any -- Strike that.

4 Do you know whether the Village has any

5 objection to giving the data to WIREDATA?

6 A No.

7 Q Does the Village have any objection?

8 A No.

9 Q So as far as the Village is concerned, to the best

10 of your knowledge, the data as requested by WIREDATA

11 could and should be released to it?

12 A It could and should if it can be provided.

13 Q Is there any reason that you know of why it could

14 not be provided?

15 A I do not know how a digital format could be given to

16 WIREDATA.

17 Q You don't know?

18 A I do not know.

19 Q Did you take any steps to find out how information

20 could have been provided to WIREDATA?

21 A Yes, I told you before that I asked the village

22 attorney what we could do to provide that

23 information.

24 Q All right. Do you call the village attorney if you

25 have a problem on your desk top computer?

BEYER REPORTING, INC. 414-529-8826

Deposition of DIANNE ROBERTSON, 8/11/2004 18

1 A Not that I recall.

2 Q So that the matter just dropped there as far as you

3 were concerned?

4 A No. I believe that we were shortly thereafter

5 served with a lawsuit from WIREDATA, and I continued

6 to understand that it was in the village attorney's

7 hands.

8 Q You sent it to the village attorney?

9 A Yes.

10 Q As a result of your sending it to the village

11 attorney, after that point in time did you take any

12 action concerning trying to get the information to

13 WIREDATA?

14 A No.

15 Q Did you know if anybody attempted to get information

16 to WIREDATA?

17 A Not that I recall. I don't know whether the village

18 attorney did or not.

19 Q Did anyone ever tell you not to take action to give

20 that information to WIREDATA?

21 A No.

22 Q So you didn't receive instructions one way or the

23 other?

24 A Right, I was waiting for the village attorney.

25 Q And by the village attorney you mean?

BEYER REPORTING, INC. 414-529-8826

Deposition of DIANNE ROBERTSON, 8/11/2004 20

1 A No.

2 Q You have technical research you call; right?

3 A Just if my system crashes. I mean if I have a

4 problem with Word, I do not call any technical

5 service, no.

6 Q Who do you call?

7 A I try to work it out myself.

8 Q Have you ever had a time where you or any other

9 employee of the Village has had a problem to the

10 best of your knowledge with the computers that they

11 work on?

12 A There could be a problem for example with a payroll

13 program and you call the payroll service provider.

14 Q All right. What I'm asking you, do you see the

15 village attorney as a technical assistance for how

16 to do things from a computer standpoint?

17 A No, I see him as telling me how to provide -- how to

18 comply with an open records request.

19 Q Let me ask a question. If you knew you had a data

20 file on your computer, on your desk top computer

21 that somebody requested a digital copy of and you

22 desired to give them a digital copy, is there a

23 technical resource that you would call as to how you

24 go about giving them that digital copy?

25 A I have no digital records that I would want to make

BEYER REPORTING, INC. 414-529-8826

Deposition of DIANNE ROBERTSON, 8/11/2004 21

1 a record of, so no.

2 Q Well, where are the various electronic records that

3 the City kept, that the Village kept?

4 A Our -- explain that to me.

5 Q As a Village administrator, do you keep e-mail?

6 A Yes.

7 Q Where is that e-mail kept?

8 A The e-mail's kept on the Ozaukee County server.

9 Q Do you keep any of that e-mail on your own personal

10 computer?

11 A It's on there until it's deleted, yes.

12 Q And if you had received an instruction not to delete

13 that but give a copy of that e-mail to somebody, who

14 would you call to find out how to get a copy of that

15 information electronically to somebody?

16 A Honestly I'd print it out and give them a hard copy.

17 Q But I'm asking if you wanted to do a digital,

18 electronic, who would you call?

19 A Honestly I don't know. We do buy our computer

20 programs through -- or computers through a company

21 called TSR in Germantown, but I've never had to or

22 never desired to provide a digital copy until this

23 request came from WIREdata.

24 Q I understand. But I'm not asking you just a digital

25 copy of this. Let me ask a different question. If

BEYER REPORTING, INC. 414-529-8826

Deposition of DIANNE ROBERTSON, 8/11/2004 23

1 Q Did you in any way try to just make a backup copy of

2 information to give it to WIREdata?

3 A You know, I was thinking yesterday I -- it's so long

4 ago I believe that I did try to back it up on a

5 diskette and I could not provide that information,

6 either the system didn't back up or it did not have

7 a backup capability on a diskette though.

8 Q All right. Did you try to contact anybody to find

9 out how to do it?

10 A It must not have had the backup capability because

11 if in fact I tried and it failed I would have tried

12 to find out how, so it probably didn't have the

13 compatibility. I do not recall.

14 Q Do you consider yourself a computer technician?

15 A No.

16 Q So that it may have had that ability but you didn't

17 know it?

18 A Or couldn't find it, yes.

19 Q Other than the village attorney, did you consult

20 with anyone else or attempt to consult with anyone

21 else about how to make a backup copy?

22 A No.

23 Q Of the -- and backup copy of the assessment

24 information?

25 A No.

BEYER REPORTING, INC. 414-529-8826

Deposition of DIANNE ROBERTSON, 8/11/2004 22

1 your computers need service who do you call?

2 A I call TSR.

3 Q Did you call TSR to find out how to comply with this

4 electronic request?

5 A No.

6 Q If you have a -- do you back up any of the

7 information that you have on your laptop that

8 relates to the Village in any way?

9 A No.

10 Q Does the Village have any system that backs up any

11 of the computers that support the Village?

12 A Any accounts payable or payroll system has an

13 automatic backup before you would post any

14 information.

15 Q And where does it back it up to?

16 A To the hard drive.

17 Q And when it backs it up to the hard drive, does it

18 create a separate data file?

19 A I would imagine it would.

20 Q Do you know -- so that you do know under certain

21 occasions you can take a data file and make a backup

22 or separate electronic copy of it; correct?

23 A Yes.

24 Q You knew that in 2001; is that correct?

25 A Yes.

BEYER REPORTING, INC. 414-529-8826

Deposition of DIANNE ROBERTSON, 8/11/2004 24

1 Q Is there anyone else who you could have consulted

2 with relative to the City --

3 A At the time --

4 Q -- relative to the backing up this information?

5 A At the time it was in the hands of the village

6 attorney, so no.

7 Q So basically you took the request and all matters

8 stopped as far as you were concerned until you got a

9 response from the city attorney; is that fair?

10 A Yes.

11 Q And you never got a written, verbal or any other

12 sort of response or instruction from the village

13 attorney?

14 A He would keep me updated to say that he had not had

15 an answer for me at that time. So I was --

16 Q Have you ever been in a situation where he gave you

17 an answer to this particular question?

18 A Not that I recall.

19 Q I'm going to show you what's been marked for

20 identification as Exhibit 2. Have you seen that

21 letter before?

22 A Yes.

23 Q And what did you do when you received that letter?

24 A I gave a copy of it to the village attorney.

25 Q Did he ever get you any information concerning it?

BEYER REPORTING, INC. 414-529-8826

1 A I don't believe that they have been updated to
2 2004.

3 Q What records are there?

4 A I believe to the best of my knowledge 2003.

5 Q Did they likewise have the, when you say the 2003
6 records, that's because they're in a data base that
7 they have there?

8 A That's because they're within the Market Drive
9 program that's installed on a machine, yes.

10 Q Okay. That Market --

11 MR. JOHNSON: I just want to state
12 something. Alan, you've received an electronic
13 copy of the Village of Thiensville data; correct?

14 MR. DEUTCH: No, I don't think I have.

15 MR. JOHNSON: One second please.

16 (Short recess.)

17 THE WITNESS: What was the question?

18 MR. JOHNSON: Do you want to read it
19 back? I just want to make, you know, ask, Alan, I
20 thought that your clients received electronic data
21 for the Village of Thiensville, the Village of
22 Sussex, and the Village of Port Washington. You
23 haven't received that?

24 MR. DEUTCH: And what do you base the
25 fact that I received it?

STATE OF WISCONSIN CIRCUIT COURT OZAUKEE COUNTY

WIREDATA, INC.,

Plaintiff,

COPY

-vs-

Case No. 01-CV-198

VILLAGE OF THIENSVILLE, GROTA
APPRAISALS, LLC, MICHAEL L.
GROTA, ASSESSMENT TECHNOLOGIES
OF WISCONSIN, LLC,

DEPOSITION OF:
ERNIE MATTHIES

August 18, 2004

Defendants.

STATE OF WISCONSIN CIRCUIT COURT WAUKESHA COUNTY

WIREDATA, INC.,

Plaintiff,

-vs-

Case No. 01-CV-1403

VILLAGE OF SUSSEX, GROTA
APPRAISALS, LLC, and
MICHAEL L. GROTA,

Defendants.

STATE OF WISCONSIN CIRCUIT COURT OZAUKEE COUNTY

WIREDATA, INC.,

Plaintiff,

-vs-

Case No. 01-CV-216-B2

CITY OF PORT WASHINGTON and

1 format?

2 A. Engaged by the city to put it in a different
3 format? No.

4 Q. Did there come a time when you put it in a
5 different format?

6 A. Yes.

7 Q. And what was that time?

8 A. 1997, the city was revalued, and to revalue the
9 city at that time it was our decision, Matthies'
10 decision, to place Port Washington on a
11 computerized system for the first time.

12 Q. Why did you do that?

13 A. For our mutual benefit. We deal in data, and the
14 understanding of the data, the sales base, and
15 the ability to make adjustments and corrections
16 is something that is much more effective,
17 efficient, in a computerized -- using a
18 computerized system than it was previously using
19 the manual system.

20 Q. Okay. Any other reasons for going to a
21 computerized system?

22 A. Accuracy was the utmost reason.

23 Q. Okay.

24 A. Ease of access.

25 Q. Okay. Any other reasons?

- 1 A. I couldn't provide data with such a vague
2 request.
- 3 Q. Did you -- upon receipt of that request, did you
4 look to see if you could make a copy of the
5 database, physically look to see if you could
6 make a copy?
- 7 A. Physically look? No.
- 8 Q. So that -- when you said that you preferred --
9 strike that. Earlier I asked you about why the
10 property record cards were computerized, and you
11 said accuracy, correct?
- 12 A. Yes.
- 13 Q. Can you amplify that? What do you mean by
14 accuracy?
- 15 A. It's not open to a stroke of a pen, penmanship.
16 It's very clear and easy to read for anybody.
- 17 Q. Is that the same reason why you now maintain the
18 records in an electronic fashion?
- 19 A. Yes.
- 20 Q. And that same problem of having to deal with hard
21 copy or paper copy versus electronic would still
22 be true today, correct?
- 23 A. No. Not at all.
- 24 Q. Why not?
- 25 A. Because the paper copy today would be -- would

1 emanate from the assessment program and would not
2 be handwritten as the old PA-500s were. But they
3 would be clear, easy to read and easy to
4 understand.

5 Q. They'd still be more difficult to compare if you
6 were trying to compare across properties if
7 you're using paper copy versus electronic copy,
8 correct?

9 A. I don't think so.

10 Q. You think it's just as easy to sort through --
11 how many records are -- how many parcels are in
12 Port Washington?

13 A. Approximately 3,500.

14 Q. Do you think it's just as easy to sort through
15 3,500 cards to look for all of a certain
16 characteristic as it would be to look through a
17 database, an electronic database?

18 A. No. I don't think it would be easier to do that,
19 no.

20 Q. So it's more difficult to use the -- the data is
21 more difficult to use when it's in a paper or
22 hard copy fashion than it is electronically, is
23 that correct?

24 A. That's correct.

25 Q. Have you computerized the other municipalities

IN THE CIRCUIT COURT OF WAUKESHA COUNTY

STATE OF WISCONSIN

COPY

WIREDATA, Inc.,

Plaintiff,

vs.

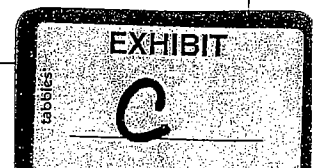
Case No. 01-CV-1403

VILLAGE OF SUSSEX,
VILLAGE OF SUSSEX CUSTODIAN
OF RECORDS, GROTA APPRAISALS, LLC
IN ITS CAPACITY AS ASSESSOR FOR
THE VILLAGE OF SUSSEX, and
MICHAEL L. GROTA,

Defendants.

* ATTORNEYS' EYES ONLY *

EXAMINATION of MICHAEL L. GROTA taken at
the instance of the Plaintiff, under and pursuant to
Section 804.05 of the Wisconsin Statutes, pursuant to
Notice, before LAURELL L. BRESLOW, Court Reporter and
Notary Public in and for the State of Wisconsin, at
DEUTCH & WEISS, 7670 North Port Washington Road,
Suite 102, Glendale, Wisconsin, on the 7th day of
September, 2001, commencing at 10:07 a.m. and concluding
at 12:49 p.m.



1 businesses for two separate reasons, and two
2 separate functions. Assessment Technologies
3 believed it was in their best interests to provide
4 that output of the software to its entire client
5 list, not just Grota Appraisals, and not just this
6 lawsuit.

7 MR. JOHNSON: Can we hold on a second,
8 Alan? I need a bathroom break.

9 (Short recess.)

10 MR. DEUTCH:

11 Q Now, sir, I'd like for you to tell me each and
12 every reason that you told WIREdata why you were
13 not producing the records as demanded?

14 MR. JOHNSON: Again, same objection to
15 the point that it seeks attorney-client privileged
16 information.

17 MR. DEUTCH:

18 Q I'm asking each and every thing he told WIREdata.

19 A I'm not sure that I had conversation with WIREdata.

20 Q Did you give any communications to WIREdata as to
21 your reasons for not producing the records?

22 A Myself? Or Grota Appraisals, or Assessment
23 Technologies? Who are we talking about?

24 Q Any of the entities that you own, or control?

25 A I believe a contractor may have had dialogue with

- 1 WIREdata on behalf of Assessment Technologies.
- 2 Q Okay. And who is that contractor?
- 3 A Andy Pelkey.
- 4 Q Okay. Does Mr. Pelkey own any part of Grota
- 5 Appraisals?
- 6 A No.
- 7 Q Does he have any, is he just a contractor, or does
- 8 he have any other relationship to Grota Appraisals?
- 9 A No other relationship.
- 10 Q Okay. And were you aware of whatever communication
- 11 Mr. Pelkey sent to WIREdata?
- 12 A I believe I've heard the feedback of those
- 13 conversations.
- 14 Q And what was the feedback that you thought you
- 15 heard?
- 16 A That WIREdata requested information in a specific
- 17 format, requesting, you know, some items on the
- 18 property record card, and that what, I believe Mr.
- 19 Pelkey relayed what the cost of providing that
- 20 information would be.
- 21 Q Have you -- you been involved in both the federal
- 22 and state lawsuits; is that correct?
- 23 A That is correct.
- 24 Q You heard several times WIREdata say that it would
- 25 have taken the data in any format, in any digital

1 Q And in point of fact, it was not cost, but the,
2 what you call the retail value. You used a term.
3 I can't remember.

4 MR. JOHNSON: Well, you can look at the
5 transcript again.

6 MR. DEUTCH:

7 Q Do you remember what the term was, sir?

8 A To which question?

9 Q As to the rate that you would, that you were using
10 the 50 cent rate per record.

11 A That that was a cost that was passed by Assessment
12 Technologies in respect to programming.

13 Q Okay. That was the current market rate I believe
14 you used?

15 A That was a rate that was put out there by
16 Assessment Technologies.

17 Q Did that include both cost and profit to Assessment
18 Technologies?

19 A It certainly was intended to cover the costs.

20 Q And intended to provide some profit to Assessment
21 Technologies?

22 A I believe that there was some profit built into
23 that fee.

24 Q You said that you --

25 (Exhibit No. 2 & 3 marked

1 Q And same thing is true through today; correct?

2 A Yes.

3 Q In 2001 the data was really kept in an Access
4 database; is that correct?

5 A Yes.

6 Q Is that same thing also correct now?

7 A No.

8 Q You no longer use Access?

9 A We do.

10 Q But the data's not kept in an Access database?

11 A Sometimes.

12 Q Okay. Since I want to know what it takes to make a
13 copy of it, how do you know when it's kept in an
14 Access database and when it's not?

15 A The user configures which database they -- if they
16 want it in Access or not, the user decides.

17 Q So the user can decide to use a non Microsoft Access
18 database?

19 A That's correct.

20 Q And what database is usually then used?

21 A Microsoft SQL Server.

22 MR. JOHNSON: I'm sorry, could you spell
23 SQL for her?

24 THE WITNESS: S-Q-L.

25 BY MR. DEUTCH:

- 1 Q Any other database that they can select?
- 2 A No.
- 3 Q So the data is now kept in either a SQL Server
4 database or an Access database; is that correct?
- 5 A Yes.
- 6 Q And both of those are Microsoft products?
- 7 A Yeah.
- 8 Q Unfortunately sometimes things get a little slurred,
9 so if you can, use yes rather than yeah. In either
10 case, if you wanted to make a copy of certain parts
11 of the data and the data only as is exists in either
12 SQL Server or Access, are you familiar with the
13 export functions?
- 14 A No.
- 15 Q Have you ever made a copy of the database?
- 16 A Yes.
- 17 Q What did you do to use -- to make a copy?
- 18 A I used Windows Explorer.
- 19 Q You used Windows Explorer just to copy the file?
- 20 A Yes.
- 21 Q So that if you wanted to make a copy of -- in
22 2000 -- Strike that. When did you add the option of
23 having a SQL database?
- 24 A 2002.
- 25 Q So in 2001 the only database that was then being

- 1 A I guess in that sense.
- 2 Q Pardon?
- 3 A Yes.
- 4 Q Isn't it a fact that you chose that because you knew
5 that would be the most difficult for WIREdata to
6 use?
- 7 A No.
- 8 Q Who asked you about the reverse engineering of the
9 information?
- 10 A I don't know.
- 11 Q Did you volunteer it or was that asked of you?
- 12 A I'm not sure.
- 13 Q You said that in the current version of Market Drive
14 the user decides whether he wants to use SQL Server
15 or Access database; is that correct?
- 16 A Yes.
- 17 Q Is that a decision once made that can be changed so
18 the data each year can be changed back and forth?
- 19 A No.
- 20 Q So it's a permanent decision once you make it?
- 21 A There is a conversion in one case if you went to
22 Access from SQL Server, there's no conversion back,
23 and you wouldn't change every year.
- 24 Q I understand that. I'm just asking if it's a
25 permanent decision basically?

1 MR. DEUTCH: I have a follow-up one. Go
2 ahead.

3 MS. FAY: I don't have anything at this
4 point.

5 EXAMINATION

6 BY MR. DEUTCH:

7 Q You said you've never been out to any of the
8 municipalities?

9 A No, that's not what I said.

10 Q Some of the municipalities have only read only
11 versions, right, of Market Drive?

12 A They have something called the viewer version.

13 Q The viewer version you didn't go out to install?

14 A No.

15 Q If you have a viewer version or any other version,
16 that's information that's in Market Drive that
17 doesn't affect Access; right?

18 A I'm not sure I understand your question.

19 Q Remember how we talked about you can use Windows
20 Explorer to make a copy of what version you have?

21 A Yes.

22 Q Of the information you have?

23 A Yes.

24 Q You could use Windows to do that regardless if you
25 had a viewer version or what version you had of

1 Market Drive; correct?

2 A That's correct.

3 Q So if somebody had just a read-only version, they
4 could still use Windows to make a copy of the
5 database?

6 A That's correct.

7 MR. DEUTCH: Thank you. I have nothing
8 else. Any follow-up of the follow-up?

9 MR. CAIN: No.

10 MR. DEUTCH: Thank you.

11 (Deposition concluded at 2:28 p.m.)

12 * * *

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RYAN KROMHOLZ & MANION, S.C.

ATTORNEYS AT LAW

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Brookfield, WI 53045

Arnold J. Ericson (Of Counsel)

July 12, 2001

Alan H. Deutch
7670 North Port Washington Road
Suite 102
Glendale, WI 53217

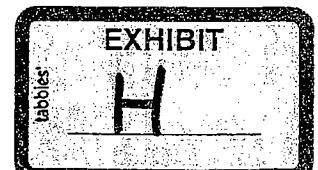
Re: WIREdata, Inc. v. Village of Sussex et al, Waukesha County Case No. 01CV1403
WIREdata, Inc. v. Village of Thiensville et al, Ozaukee County Case No. 01CV198B1

Dear Mr. Deutch:

We represent Grota Appraisals, LLC, and Michael L. Grota in certain intellectual property matters. We respond to your "open records" request and subsequent lawsuits.

It appears to us that at the time the present suits were filed that you were unaware of all the facts surrounding this matter. This letter is intended to provide those missing facts. Grota Appraisals, LLC uses Market Drive™ software, under a very limited license granted from Assessment Technologies of WI, LLC. Market Drive™ software is a copyrighted computer program developed by Assessment Technologies of WI, LLC. Although we are not authorized to divulge most of the confidential aspects of a contractual relationship between Assessment Technologies of WI, LLC and Grota Appraisals, LLC, we are authorized to inform you that Grota Appraisals, LLC contractually cannot disseminate Market Drive™ software data compilation without prior consent from Assessment Technologies of WI, LLC. Assessment Technologies of WI, LLC has not consented to any dissemination of Market Drive™ software data compilation to your clients.

Grota Appraisals, LLC has sublicensed the Village of Sussex and the Village of Thiensville (collectively the "respective villages") certain read-only capabilities of Market Drive™ software. Among the read-only capabilities that the Village of Sussex and the Village of Thiensville have acquired through sublicense is the ability to read and print data that was once "property record cards" in raw analog format. The Market Drive™ software selects, coordinates, and arranges the data input from the raw analog property record cards in such a way that the resulting digital data compilation, as a whole, constitutes an original work of authorship that did not exist prior to the manipulation of the data by Market Drive™ software. The copyright for this digital data compilation is owned by Assessment Technologies of Wisconsin, LLC.



Alan H. Deutch

July 12, 2001

Page 2 of 3

The sublicenses to the respective villages do not include the right to enter data into the copyrighted Market Drive™ software, do not include the right to have Market Drive™ software perform data manipulation, and do not include the right to disseminate the copyrighted digital data compilation produced by Market Drive™ software.

The data produced by Market Drive™ software is copyrighted, in part due to Market Drive™ software's actions upon the raw assessment data as a compiler. See, e.g., ProCD v. Zeidenberg, 86 F.3d 1447 (7th Cir. 1996) (data compiled by copyrighted program "within the subject matter of copyright.") The data produced by Market Drive™ software is a work, fixed in a tangible medium of expression, formed by the collection and assembly of preexisting data that are selected, coordinated, or arranged in such a way that the resulting work, as a whole, constitutes an original work of authorship. Assessment Technologies of WI, LLC chooses which facts to include, in what order to place them, and how to arrange the collected data so that the data may be used effectively by readers. If Grota Appraisals, LLC were to provide the Market Drive™ software data compilation, Grota Appraisals, LLC would impermissibly copy, without authority or license from Assessment Technologies of WI, LLC, the manner in which the compiler has selected and arranged the raw data. For this reason, Grota Appraisals, LLC will not breach its contractual obligations to Assessment Technologies of WI, LLC by disseminating the Market Drive™ software data compilation in digital format, and Grota Appraisals, LLC will not infringe copyrights held by Assessment Technologies of WI.

That digital data produced by Market Drive™ software also contains trade secrets regarding many aspects of the mechanics and operation of the Market Drive™ software program that are over and above the copyright protection afforded to the Market Drive™ software itself. The data compilations produced by Market Drive™ software clearly derives independent economic value, actual or potential, from not being generally known to, and not being readily ascertainable by proper means by, other persons who can obtain economic value from its disclosure or use. Peter Shuttleworth, an agent of your client, acknowledged as much in the October 25, 1999 issue of "Realty Times" when he stated "[t]here should be some consideration, because the data does have value and it brings value to the web sites who display it. That's why there's all this fighting over who's got the data and who doesn't." Grota Appraisals, LLC will not misappropriate Assessment Technologies of WI, LLC's trade secrets by providing the Market Drive™ software data compilation.

The data compilation from Market Drive™ software will not be provided because it is copyrighted, because Grota Appraisals, LLC is contractually precluded from doing so, and because the data contains trade secrets. Complying with your "open records" request would infringe these rights that are exclusive to Assessment Technologies of WI, LLC.

In contrast to the data that is data compilation by Market Drive™ software, Grota Appraisals, LLC can provide copies of analog property record cards that existed prior to the manipulation of the data by Market Drive™ software. From our understanding of the correspondence to date, both Grota Appraisals, LLC and the Village of Sussex have offered to provide for copying or inspection of the property record cards themselves, the raw data prior to manipulation. The raw facts, prior to input into Market Drive™ software, may be copied at will, subject to the copy costs outlined in previous correspondence. To date, your client has refused this offer to access the property record cards. Grota Appraisals, LLC does not have any responsive "electronic/digital copy of the detailed real

Alan H. Deutch
July 12, 2001
Page 3 of 3

estate property records" besides the copyrighted and trade secret Market Drive™ software data compilation, which we have already indicated will not and cannot be provided.

In order to avoid copyright infringement and trade secret misappropriation by either the respective villages or your client, we urge you to reconsider the appropriate business resolutions that Assessment Technologies of WI, LLC has presented to date. The proposed business resolution would also avoid tortious interference with the contract between Assessment Technologies of WI, LLC and Grota Appraisals, LLC, as well as the contracts between Grota Appraisals, LLC and the respective villages, and avoid contributory or inducing copyright infringement by the respective Villages.

In view of the facts, it is our position that no reasonable basis exists for continuation of these suits. The records that your client desires can be obtained, they simply cannot be provided in the format your client requested without the infringement of Assessment Technologies of WI, LLC's copyrights and the risk of trade secret misappropriation. The law explicitly excludes copyrighted information from open records requests. There is no reasonable basis for pursuing the present lawsuit, and for this reason we request that you dismiss the present lawsuits. If the lawsuits continue without reasonable basis after this date, we remind you of the sanctions that may be applied in such a situation. See, e.g., Jandrt v. Jerome Foods, Inc., 227 Wis. 2d 531, 597 N.W.2d 744 (1999).

Sincerely,

RYAN KROMHOLZ & MANION, S.C.

By:

Joseph A. Kromholz

JAK/pjp

Enc: Jandrt v. Jerome Foods, Inc., 227 Wis. 2d 531, 597 N.W.2d 744 (1999)
Cc: Mr. John Macy, Arenz, Molter, Macy & Riffle, S.C. (w/o enclosure)
Mr. Robert Feind, Houseman & Feind (w/o enclosure)

DEPOSITION OF ERNIE MATTHIES - 8/18/04

1

STATE OF WISCONSIN CIRCUIT COURT OZAUCKEE COUNTY

WIREDATA, INC.,

Plaintiff,

COPY

-vs-

Case No. 01-CV-198

VILLAGE OF THIENSVILLE, GROTA
APPRAISALS, LLC, MICHAEL L.
GROTA, ASSESSMENT TECHNOLOGIES
OF WISCONSIN, LLC,

DEPOSITION OF:
ERNIE MATTHIES

August 18, 2004

Defendants.

STATE OF WISCONSIN CIRCUIT COURT WAUKESHA COUNTY

WIREDATA, INC.,

Plaintiff,

-vs-

Case No. 01-CV-1403

VILLAGE OF SUSSEX, GROTA
APPRAISALS, LLC, and
MICHAEL L. GROTA,

Defendants.

STATE OF WISCONSIN CIRCUIT COURT OZAUCKEE COUNTY

WIREDATA, INC.,

Plaintiff,

-vs-

Case No. 01-CV-216-B2

CITY OF PORT WASHINGTON and

BEYER REPORTING INC (414) 529-8826

R-App. 435

EXHIBIT

C

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17 database, an electronic database?

18 A. No. I don't think it would be easier to do that,
19 no.

20 Q. So it's more difficult to use the -- the data is
21 more difficult to use when it's in a paper or
22 hard copy fashion than it is electronically, is
23 that correct?

24 A. That's correct.

25 Q. Have you computerized the other municipalities

3. Attached hereto as Exhibit B is a true and correct copy of correspondence from Mr. Andrew Pelkey to Mr. Thomas Curtis as Exhibit 4 at the deposition of Thomas Curtis conducted on July 27, 2004.
4. Attached hereto as Exhibit C is a true and correct copy of a letter from Mr. Alan Deutch to Mr. Eric Larson of the Village of Sussex, dated May 21, 2001.
5. Attached hereto collectively as Exhibit D are true and correct copies of pages from Michael Grota's deposition, conducted on June 22, 2004.
6. Attached hereto collectively as Exhibit E are true and correct copies of pages of Mr. Andrew Pelkey's deposition conducted on September 22, 2004.
7. Attached hereto collectively as Exhibit G are true and correct copies of pages from Thomas Curtis' deposition, conducted on July 27, 2004.
8. Attached hereto as Exhibit H is a true and correct copy of a letter from Mr. Joseph Kromholz to Mr. Alan Deutch, dated July 12, 2001.
9. Attached hereto collectively as Exhibit I are true and correct copies of pages from Michael Grota's deposition, conducted on September 7, 2001.

Executed this 29th day of November, 2004.

Emily C. Canedo
Emily C. Canedo

SUBSCRIBED AND SWORN to before
me this 29th day of November, 2004.

Amy Wenger
Notary Public, State of Wisconsin
My commission expires: 1-7-07

EXHIBITS A-D and G-I

DELETED FOR
BREVITY

(SEE R-S 67)

IN THE CIRCUIT COURT OF OZAUKEE COUNTY

STATE OF WISCONSIN

WIREDATA, INC.,

Plaintiff,

vs.

Case No. 01-CV-198

VILLAGE OF THIENSVILLE, VILLAGE
OF THIENSVILLE CUSTODIAN OF RECORDS,
GROTA APPRAISALS, LLC IN ITS CAPACITY
AS THE ASSESSOR FOR THE VILLAGE OF
THIENSVILLE, MICHAEL L. GROTA, and
ASSESSMENT TECHNOLOGIES OF WI, LLC,

COPY

Defendants.

WIREDATA, INC.,

Plaintiff,

vs.

Case No. 01-CV-000216

VILLAGE OF PORT WASHINGTON
and MATTHIES ASSESSMENTS,

Defendants,

and

AMERICAN FAMILY INSURANCE,

Intervenor.

EXAMINATION of ANDREW PELKEY taken at
the instance of the Plaintiff, under and pursuant to
Section 804.05 of the Wisconsin Statutes, pursuant to
Notice, before LAURELL L. BRESLOW-COLLIEN, Court Reporter
and Notary Public in and for the State of Wisconsin, at
RYAN KROMHOLZ & MANION, S.C., 3360 Gateway Road,
Brookfield, Wisconsin, on the 22nd day of September, 2004,
commencing at 1:13 p.m. and concluding at 2:28 p.m.

1 Q And same thing is true through today; correct?

2 A Yes.

3 Q In 2001 the data was really kept in an Access
4 database; is that correct?

5 A Yes.

6 Q Is that same thing also correct now?

7 A No.

8 Q You no longer use Access?

9 A We do.

10 Q But the data's not kept in an Access database?

11 A Sometimes.

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13 copy of it, how do you know when it's kept in an
14 Access database and when it's not?

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16 want it in Access or not, the user decides.

17 Q So the user can decide to use a non Microsoft Access
18 database?

19 A That's correct.

20 Q And what database is usually then used?

21 A Microsoft SQL Server.

22 MR. JOHNSON: I'm sorry, could you spell
23 SQL for her?

24 THE WITNESS: S-Q-L.

25 BY MR. DEUTCH:

1 Q Any other database that they can select?

2 A No.

3 Q So the data is now kept in either a SQL Server
4 database or an Access database; is that correct?

5 A Yes.

6 Q And both of those are Microsoft products?

7 A Yeah.

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9 so if you can, use yes rather than yeah. In either
10 case, if you wanted to make a copy of certain parts
11 of the data and the data only as is exists in either
12 SQL Server or Access, are you familiar with the
13 export functions?

14 A No.

15 Q Have you ever made a copy of the database?

16 A Yes.

17 Q What did you do to use -- to make a copy?

18 A I used Windows Explorer.

19 Q You used Windows Explorer just to copy the file?

20 A Yes.

21 Q So that if you wanted to make a copy of -- in
22 2000 -- Strike that. When did you add the option of
23 having a SQL database?

24 A 2002.

25 Q So in 2001 the only database that was then being

1 used was Access; correct?

2 A Yes.

3 Q Okay. And if you wanted to make a copy of the data
4 that was in the Access database, could you do it by
5 just using windows Explorer to copy the file?

6 A No.

7 Q What would you need to do to do that?

8 A You would need something to take the data out of the
9 database if you just want to copy the data.

10 Q And what would you need to take it out?

11 A Well, I'm a programmer so I use programs.

12 Q Okay. Could you use the Access program itself?

13 A Yes.

14 Q And you could take it out simply by making -- by
15 asking it to export a copy; correct?

16 A Yes.

17 Q On the typical file that you dealt with, how long
18 would it take you to give the commands to export a
19 copy of the database?

20 A All tables?

21 Q Yes. If you just did it as -- the fastest way you
22 could do it, not all cities just one city.

23 A One database, all tables, one at a time, export each
24 table one at a time using Access?

25 Q You can export them faster than one at a time, can't

1 would be less obvious to determine what all that
2 stuff is.

3 Q But in any event if you gave somebody that entire
4 database, they would then have all the property
5 record card information plus other information;
6 right?

7 A Most of it.

8 Q What percent of it would they have?

9 A They have everything but pictures and sketches.

10 Q And the second way you said to do it would be to use
11 the -- to create a property record card report; is
12 that correct?

13 A To use the property record card report that already
14 exists.

15 Q And then to export that?

16 A Yes.

17 Q How would you do that?

18 A You'd run it and then there's -- we use Crystal
19 Reports to create the report and then Crystal Report
20 as an export tool which exports in a variety of
21 formats.

22 Q Do you know the formats it exports it into?

23 A I know some of them.

24 Q Can you tell me?

25 A Excel, Word, CSV.

1 A No.

2 Q Why not?

3 A It's -- the export is very poor.

4 Q Okay. Presuming that the export were not very poor,
5 if you were using Crystal Reports to prepare a
6 report on a database -- Strike that. The last time
7 that you used Crystal Reports then to try this was
8 in 2001?

9 A Yes.

10 Q So you don't know how Crystal Reports works at the
11 current time doing it?

12 A We haven't changed the version that we're using of
13 Crystal, so the one that we're using, I know how it
14 works.

15 Q Do you know whether Crystal Reports has been updated
16 since then?

17 A It has.

18 Q And you've elected not to get a new version of it?

19 A Not yet.

20 Q Okay. You said it also -- Crystal Reports also
21 exports to Word?

22 A Yes.

23 Q And to a comma-delimited?

24 A Yes.

25 Q What is a comma-delimited file?

- 1 A It's a file that has text in it with commas between
2 values.
- 3 Q And it's easier to translate -- would you agree it's
4 easier to translate a comma-delimited file into
5 another database than it would be to translate a
6 PDF?
- 7 A Yes.
- 8 Q Have you ever tried making a -- or exporting the
9 property record card information using a
10 comma-delimited file?
- 11 A Yes.
- 12 Q And what happened?
- 13 A It's awful.
- 14 Q By whose definition?
- 15 A Me as a programmer.
- 16 Q Do you have any samples of that?
- 17 A Not with me.
- 18 Q Did you ever discuss giving any of the Excel or
19 comma-delimited formats to WIREdata?
- 20 A Yes.
- 21 Q And who did you discuss that with?
- 22 A Bob Grota.
- 23 Q And when did you discuss that?
- 24 A Must have been 2001 or something.
- 25 Q And what was your decision at that point?

1 A That the formats were so awful that you wouldn't
2 want them.

3 Q Did you ever contact WIREdata?

4 A About?

5 Q About doing that, about giving them a
6 comma-delimited file?

7 A I did not contact them, no.

8 Q Now, if you were using Crystal Reports and the
9 property record report to do it, you would be
10 getting only the property record card data; is that
11 correct?

12 A When you say to do it, you mean?

13 Q Let me back up. I'm talking about if I came to you
14 and said I want a copy of the 2001 and I had the
15 database that I handed you or you had Sussex data
16 and I want a copy of just the information that is on
17 the property record card --

18 A Yes.

19 Q -- one way I can get that we talked about and I
20 would get that data and more would be just making a
21 copy of the database; correct?

22 A Yes.

23 Q Second way I can get it is you said by running the
24 property record card report and exporting it using
25 Crystal Reports; correct?

1 A Yes.

2 Q Okay. If I were using the second method, I'd be
3 getting only the property record card information;
4 correct?

5 A Yes.

6 Q Then I wouldn't be getting any other information?

7 A That's correct.

8 Q Would I be getting it in a coded fashion or in a
9 English fashion?

10 A English.

11 Q And how long would it take to make -- to run this
12 and to -- run either in Excel or comma-delimited
13 Crystal Report if I wanted that?

14 A It depends on the number of properties. It's quite
15 lengthy to run it because each property can take
16 five to 10 pages, four to 10 pages, I mean it can be
17 long. So it might take, depending on the speed of
18 the computer, how big the database is, it might take
19 an hour, two.

20 Q But that's just the computer chunking away, it
21 doesn't need a person sitting there?

22 A During the middle of the process, that's correct.
23 It might take an hour to run, but you don't have to
24 sit there. You do have to -- a human does have to
25 intervene in the middle because once it previews on

1 A I don't know.

2 Q Did you ever look it up? Did you ever try it?

3 A It's hard to measure because the space is used up
4 and then immediately discarded. You don't really
5 have a stopping point where you can say stop, okay,
6 how much was used up. It's hard to tell.

7 Q Have you ever used the export function in Access or
8 in SQL Server?

9 A Access, yes, SQL Server, no.

10 Q If I want to use the export function in Access, I
11 can simply tell it what columns or what fields I
12 want and it will export only those fields; is that
13 correct?

14 A I don't recall if it gives you the ability to do it
15 field by field.

16 Q How do you believe it works?

17 A I don't recall. I mean I know you click -- you
18 right mouse click on the table, you choose export,
19 and then there's a bunch of dialogue boxes of which
20 are fuzzy to me because I don't do it very often and
21 I don't know the exact steps.

22 Q Do you know if you can memorize the transaction so
23 that you can repeat it over and over for different
24 databases?

25 A I don't think so. I think you have to do them one

1 Q Did you ever ask him would he just like the entire
2 database?

3 A No.

4 Q So how do you know that that's not what he wanted?

5 A I gave him what he asked for. That's not what he
6 asked for. He wanted very specific I want the data
7 in this particular format, I want these particular
8 fields presumably to make it easy for him to bring
9 the data in. He did, as I recall, say that he
10 wanted something very simple, he didn't want to make
11 it complicated. Obviously that wasn't going to be
12 simple for him.

13 Q Why in 2002 did you add a password protection to the
14 Access database?

15 A Two reasons, the biggest one was to protect our
16 design, and the second one is we sometimes have
17 problems with users monkeying with the data which we
18 have to fix later, which is a big pain.

19 Q Is it the same password for all of them?

20 A Yes.

21 Q Have you ever been asked by any municipality for
22 that password?

23 A No.

24 Q How difficult would it be to take the Access
25 database or the SQL Server database and make a copy

1 of that database that was not password protected?

2 A I can't speak for SQL Server. Access is relatively
3 easy.

4 Q By relatively, within minutes?

5 A Yes.

6 Q So if I wanted to take a copy of a 2004 Access
7 database, strip out the password, and give somebody
8 just the unprotected information, now we're maybe
9 looking at a total of four minutes, I'm adding two
10 minutes for the password, two minutes for the copy?

11 A Yes.

12 Q And how much time -- Well, strike that. You are
13 aware -- Strike that.

14 Were you asked in 2003 or 2004 to make a
15 copy of the data at any time?

16 A I'm not sure what you're asking.

17 Q Okay. At any time in 2003 or 2004 did anybody ask
18 you to make a copy of the Sussex, Thiensville or
19 Port Washington data? By the data I'll call it the
20 property record card data.

21 A Yes.

22 Q And who asked you to do that?

23 A It might have been Mike or it might have been Bob.
24 I'm not sure.

25 Q And what did they ask you to do?

1 A To export the property record card information to a
2 PDF so I could give it to them.

3 Q Give it to who?

4 A To whoever they were going to give it to.

5 Q Did you have a discussion with them about whether
6 you'd use PDF versus any other of the exports
7 available?

8 A Yes.

9 Q And what was said during that discussion?

10 A Well, they wanted an export of the thing, and I told
11 them that the formats other than PDF weren't worth
12 anything so the PDF was the best copy reproduction
13 of the property records report by far, so that's
14 what we gave them.

15 Q Did you tell either of the Mr. Grotas that by using
16 PDF it would also make it more difficult for the
17 person who's getting it to put it into a database?

18 A We didn't discuss necessarily what the person
19 getting it was going to do, but it is -- we did say
20 that it would be more difficult to reverse engineer.

21 Q And who asked you about whether that would be more
22 difficult to reverse engineer?

23 A I don't know if anybody asked me or whether I
24 offered it.

25 Q Isn't it a fact that the reason you selected PDF is

1 because you knew of all of the formats available
2 that would be the most difficult to reverse
3 engineer?

4 A No.

5 Q Is there any of those formats other than PDF --
6 Strike that. Of all the formats that you're
7 familiar with with Crystal Reports, which one would
8 be the most difficult to reverse engineer the data?

9 A I can't say.

10 Q Of the ones you know.

11 A They're all difficult because they're not -- the
12 other ones, the format on the PDF is very nice, it
13 lays out just as it is really exactly what the thing
14 looks like, it does a really good job. The other
15 ones are so awful I couldn't tell you which one was
16 the worst to deal with. I know that the other ones
17 not all the data appears to export.

18 Q Then why would you say it makes it more difficult to
19 reverse engineer a PDF?

20 A Because you don't have -- a slight distinction, you
21 don't have -- it doesn't appear like commas and text
22 values and stuff like that. It has a special format
23 which gives it the ability to look exact.

24 Q So that of all of them the one that would be the
25 most difficult to reverse engineer would be a PDF?

1 A I guess in that sense.

2 Q Pardon?

3 A Yes.

4 Q Isn't it a fact that you chose that because you knew
5 that would be the most difficult for WIREdata to
6 use?

7 A No.

8 Q Who asked you about the reverse engineering of the
9 information?

10 A I don't know.

11 Q Did you volunteer it or was that asked of you?

12 A I'm not sure.

13 Q You said that in the current version of Market Drive
14 the user decides whether he wants to use SQL Server
15 or Access database; is that correct?

16 A Yes.

17 Q Is that a decision once made that can be changed so
18 the data each year can be changed back and forth?

19 A No.

20 Q So it's a permanent decision once you make it?

21 A There is a conversion in one case if you went to
22 Access from SQL Server, there's no conversion back,
23 and you wouldn't change every year.

24 Q I understand that. I'm just asking if it's a
25 permanent decision basically?

1 A No.

2 Q Did you try to export it to a comma-delimited file?

3 A No.

4 Q You just went right to PDF?

5 A Yes.

6 Q Okay. Other than the conversations that you say you
7 had with WIREdata in 2001 concerning making a copy,
8 have you had any subsequent conversations with
9 anybody from WIREdata?

10 A No.

11 Q Now, if you wanted to -- we've gone through three of
12 the four ways of making a copy. You said the fourth
13 way would be exporting the tables?

14 A Yes.

15 Q And how would that differ from giving somebody
16 the -- a copy of the entire database?

17 A Well, the database you get one file and everything
18 would still be in the original structure as I
19 designed it. The export would be in individual
20 files, although still would have a representation of
21 the format that it was originally stored in.

22 Q Have you ever experienced -- Strike that. How long
23 would it take you to export any particular table of
24 Access?

25 A That depends on the size of the table. It would be

1 relatively short, a couple minutes, more if it's
2 really big.

3 Q Do you know how many tables were involved -- Strike
4 that. Do you know how many tables would be involved
5 in obtaining the property record card information?

6 A No, not off the top of my head.

7 Q What's your best estimate?

8 A Not code -- not concerning -- coding is okay?

9 Q Yes.

10 A Having code is okay?

11 Q Right.

12 A Twenty.

13 Q If it were 20 tables, how long does an export -- and
14 if somebody asked you just give me an export of
15 those 20 tables, would you agree that you could
16 probably do that human time in under 10 or 15
17 minutes?

18 A No.

19 Q How long do you think it would take?

20 A Well, if it's a couple minutes apiece and it's two
21 minutes apiece, that's 20 tables, that's 40 minutes
22 not counting getting the thing and wrapping that up
23 and getting that off to them, so you know --

24 Q So about 40 minutes you think?

25 A Forty minutes to an hour.

1 Q That would give you the entire copy?

2 A No, that will give you just the tables that are
3 involved with the property record card.

4 Q All right. And in that hour you've included the
5 time to go get the file; is that correct?

6 A Yeah.

7 Q Is there any other way that you know of to make a
8 copy of either the data or the database than what
9 you've said?

10 A No. Not that I can think of.

11 Q Do you have any authority -- have you ever run into
12 any problems using Crystal Reports?

13 A Yes.

14 Q Who do you consult with when you have problems with
15 Crystal Reports?

16 A The manufacturer.

17 Q And you call them on a general line?

18 A Yes.

19 Q General help line?

20 A Uh-huh, yes.

21 Q You don't have any other outside authority that you
22 use?

23 A No.

24 Q What version of Crystal Reports do you currently
25 have?

1 e-mail it to me.

2 Q Do they do it by using that same Windows Explorer
3 function that we talked about?

4 A They might.

5 Q What other ways do you know of that they might do
6 it?

7 A They might use the backup function inside of Market
8 Drive.

9 Q And if they use the backup function inside of Market
10 Drive, that just creates another database?

11 A Creates a zipped up database.

12 Q A zipped up database is basically a database that
13 uses a program called Zip to compress or uncompress;
14 is that right?

15 A Yes.

16 Q And it gives it a different name?

17 A Yes.

18 Q Is there anything other than the database that's
19 sent on that when you make that backup?

20 A There are -- yes.

21 Q What else is sent?

22 A There are -- you can back up pictures, you can back
23 up sketches which aren't part of the database but
24 stored outside. You can back up letters that they
25 have set up.

1 Q You say they can so it's not automatic that they
2 automatically do that?

3 A There are some options in the backup to say, you
4 know, don't back this part up.

5 Q So a user of Market Drive would be able to just
6 click backup --

7 A Uh-huh.

8 Q -- and only database --

9 A Uh-huh.

10 Q -- and not have the letters, not have the pictures,
11 and have on a CD the entire backup of the database;
12 is that correct?

13 A No.

14 Q What would they have?

15 A They would have a backup of the main database. They
16 can back that up, but it's not going to put it on a
17 CD.

18 Q How do they get it on a CD?

19 A You have to use a burner to do that.

20 Q And that's not part of the Market Drive program?

21 A No. No.

22 Q So that they then have it in a file; is that
23 correct?

24 A Yes.

25 Q What's the name of that file usually called?

- 1 A The name of the town dot zip.
- 2 Q So that -- and is that placed by the programming of
- 3 something into a specific folder?
- 4 A The user decides where it goes.
- 5 Q The user decides where it goes?
- 6 A Uh-huh.
- 7 Q So the user could just -- and how long does that
- 8 typically take to make a zipped up copy of the
- 9 program?
- 10 A Depends how big it is.
- 11 Q Say one of about 5,000 properties?
- 12 A A couple minutes maybe.
- 13 Q Okay.
- 14 A Five minutes. I don't know.
- 15 Q Then how long would it take to put that onto a CD?
- 16 A Today's CD-ROM burners, a couple minutes.
- 17 Q How about a CD-ROM burner in 2004 -- in 2001,
- 18 rather?
- 19 A Ten minutes, 15 minutes, something like that.
- 20 Q It would depend on what equipment the user has?
- 21 A And how big the file is, yeah.
- 22 Q They could do all of that without going to you; is
- 23 that correct?
- 24 A Yes.
- 25 Q All right. Now let's go back to that a minute. In

1 2001 if somebody used either the backup or Windows
2 to create a copy and put it on a CD, you'd agree
3 with me that that whole process using either
4 function could be done in under five minutes?

5 A No.

6 Q How long would you say?

7 A I'm sorry, did you say including burning it to a CD?

8 Q Right.

9 A Probably take them 15 minutes to a half an hour.

10 Q To burn it to a CD?

11 A No, to get the thing, to make the copy, and burn it
12 to a CD, yeah, somewhere in there.

13 Q Okay. Now, the resultant that they would have, the
14 thing that's on the CD, first of all if it's zipped
15 you have to simply run it through a program
16 called -- it was originally called PK Zip to unzip
17 it; right?

18 A Yes.

19 Q And all it means is to compress or uncompress;
20 correct?

21 A Right.

22 Q Now, once I had that file, I can use Microsoft
23 Access, that program, to open that file; correct?

24 A Yes.

25 Q All right. I don't need anything else? I don't

1 need Market Drive to open that?

2 A That's correct.

3 Q And then it would be up to me what I'd want to take
4 out of it or use it, right?

5 A Yes.

6 Q So that in fact there's a fifth way to make a backup
7 of the data, you went through four before but
8 there's also -- I'm sorry, a fifth way to make a
9 copy. That fifth way is backing up using Market
10 Drive?

11 A Yes.

12 Q And of that half an hour that you estimated, you had
13 originally said in two minutes we could do it using
14 Windows.

15 A That was just copying the file, you didn't count
16 burning.

17 Q That's what I'm saying. I want to be clear that two
18 minutes of that 30 minutes is copying the file, the
19 rest is burning it?

20 A Yes.

21 Q Okay. Given the CDs that are typically available
22 running at four to eight and greater times speed
23 today, would you agree that you could make that in
24 probably under two to three minutes?

25 A The actual burn time would only be five minutes,

1 yes.

2 Q So that may be seven minutes total today. Depends
3 on the equipment; right?

4 A Yeah, but -- if you had to -- if you only do one and
5 not a whole series of them, there's time to find a
6 CD, open the software, there's a lot of little steps
7 that go along and, you know, it's a -- so slight
8 difference like two minutes versus five minutes
9 versus 15 is a little ridiculous. It's 15 to 30
10 minutes, somewhere in there, for a person to say out
11 of the blue go burn this thing for me, back it up
12 and burn it.

13 Q Where are your offices located?

14 A I work out of my home.

15 Q Do you maintain any offices at the location of
16 Assessment Technologies?

17 A No.

18 Q So if somebody from Assessment Technologies said you
19 have all of the databases, they'd be wrong; right?

20 A That's correct.

21 Q If you wanted to access a particular city's
22 database, you have to go to the assessor that's got
23 that to ask him for it; right?

24 A That's correct.

25 Q Regardless of -- Strike that. Presuming you were

1 going to use Windows to make that copy, what rate do
2 you charge to make those copies? What's your
3 billing rate?

4 A To whom?

5 Q To Assessment Technologies.

6 A \$90 an hour.

7 Q Do you have -- do you do work for other people?

8 A Yes.

9 Q What percentage of your work is Assessment
10 Technologies?

11 A I don't know, 30 percent maybe.

12 Q What do your billing rates range for for your other
13 clients?

14 A It's none of your concern.

15 Q Pardon?

16 A That's none of your concern. I'm not telling you.
17 That's private information between them, it has
18 nothing to do with this. Move on.

19 Q Let me just ask you this. There's some greater and
20 some less than what you --

21 A I'm not going to answer that.

22 Q Why not?

23 A It's none of your concern.

24 Q Well, somebody's hiring you to do work, you don't
25 publish what your rates are, you don't tell people

1 MR. DEUTCH: I have a follow-up one. Go
2 ahead.

3 MS. FAY: I don't have anything at this
4 point.

5 E X A M I N A T I O N

6 BY MR. DEUTCH:

7 Q You said you've never been out to any of the
8 municipalities?

9 A No, that's not what I said.

10 Q Some of the municipalities have only read only
11 versions, right, of Market Drive?

12 A They have something called the viewer version.

13 Q The viewer version you didn't go out to install?

14 A No.

15 Q If you have a viewer version or any other version,
16 that's information that's in Market Drive that
17 doesn't affect Access; right?

18 A I'm not sure I understand your question.

19 Q Remember how we talked about you can use Windows
20 Explorer to make a copy of what version you have?

21 A Yes.

22 Q Of the information you have?

23 A Yes.

24 Q You could use Windows to do that regardless if you
25 had a viewer version or what version you had of

1 Market Drive; correct?

2 A That's correct.

3 Q So if somebody had just a read-only version, they
4 could still use Windows to make a copy of the
5 database?

6 A That's correct.

7 MR. DEUTCH: Thank you. I have nothing
8 else. Any follow-up of the follow-up?

9 MR. CAIN: No.

10 MR. DEUTCH: Thank you.

11 (Deposition concluded at 2:28 p.m.)

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STATE OF WISCONSIN	CIRCUIT COURT	OZAUKEE COUNTY
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WIREdata, Inc.

Plaintiff,

v.

Case No. 01-CV-198_B1

Case Code 30707

Village of Thiensville,
Grotz Appraisals, LLC,
Michael L. Grotz, and
Assessment Technologies of WI, LLC

Defendants.

AFFIDAVIT OF THOMAS CURTIS

STATE OF WISCONSIN)
) ss.
MILWAUKEE COUNTY)

Thomas Curtis, being first duly sworn on oath, deposes and states that:

1. During my telephone conversation with Mr. Andrew Pelkey, on or about May 4, 2001, I understood from Mr. Pelkey that he was going to help us get the data.

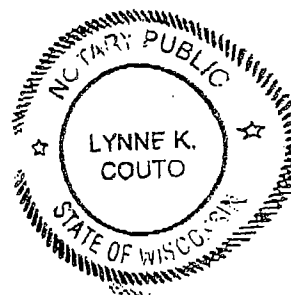
2. It was further my understanding that Mr. Pelkey was inquiring about what typical data WIREdata would be examining and/or utilizing. I responded with a listing of the fields that we commonly receive from other municipalities in response to our request. It was to this question that I responded with my e-mail, marked as Exhibit 4 at my deposition conducted on July 27, 2004.

Executed this 14th day of December, 2004.

Thomas Curtis
Thomas Curtis

SUBSCRIBED AND SWORN to before
me this 14 day of December, 2004.

Lynne K. Couto
Notary Public, State of Wisconsin
My commission expires: 3/16/08



STATE OF WISCONSIN	CIRCUIT COURT	OZAUKEE COUNTY
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WIREDdata, Inc.

Plaintiff,

v.

Case No. 01-CV-198_B1
Case Code 30707

Village of Thiensville,
Grotta Appraisals, LLC,
Michael L. Grotta, and
Assessment Technologies of WI, LLC

Defendants.

SECOND AFFIDAVIT OF EMILY C. CANEDO

STATE OF WISCONSIN)
) ss.
MILWAUKEE COUNTY)

Emily C. Canedo, being first duly sworn on oath, deposes and states that:

1. I am one of the attorneys for plaintiff, WIREDdata, Inc. and make this affidavit on its behalf.
2. Attached hereto collectively as Exhibit A are true and correct copies of pages from Thomas Curtis' deposition, conducted on July 27, 2004.
3. Attached hereto collectively as Exhibit B are true and correct copies of pages from Peter Shuttleworth's deposition, conducted on July 28, 2004.
4. Attached hereto collectively as Exhibit C are true and correct copies of pages from Michael L. Grotta's deposition, conducted on June 22, 2004.
5. Attached hereto collectively as Exhibit D are true and correct copies of pages from Andrew Pelkey's deposition, conducted on September 22, 2004.
6. Attached hereto collectively as Exhibit E are true and correct copies of pages from Andrew Pelkey's deposition, conducted on September 7, 2001.
7. Attached hereto collectively as Exhibit F are true and correct copies of pages from Ernest Matthies' deposition, conducted on August 18, 2004.

8. Attached hereto as Exhibit G is a true and correct copy of Assessment Technologies of WI, LLC's Complaint against WIREdata, Inc., filed on August 3, 2001 in the United States District Court for the Eastern District of Wisconsin, Case No. 01-C-0789.

Executed this 14th day of December, 2004.

Emily C. Canedo
Emily C. Canedo

SUBSCRIBED AND SWORN to before
me this 14th day of December, 2004.

N. GENOVESI
Notary Public, State of Wisconsin
My commission expires: 11/27/05



MR. JOHNSON:

Q. Do you have the data?

A. Not in the format I expected it.

Q. What format did you expect it in?

A. I expected it in a comma-quote delimited ASCII file.

Q. When you made your initial request back in April of 2001, did you ask for it in comma delimited ASCII file?

A. I would have to review my letter to answer the question.

Q. I will just give you one of them. This is for the Village of Thiensville.

(Exhibit No. 1 marked for identification by the court reporter.)

MR. JOHNSON:

Q. Let me know when you have had a chance to review that.

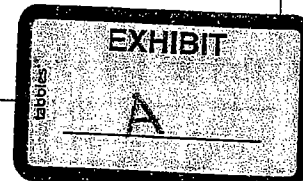
A. Okay.

Q. Does it say anything about comma delimited ASCII files?

A. No.

Q. What are you asking for in this document? Does it say an electronic digital copy; is that correct?

A. Yes.



1 Q. Have you received an electronic digital copy?

2 A. Yes.

3 Q. So when you asked for an electronic digital copy,
4 you were in fact expecting something else?

5 A. Yes.

6 Q. So why did you ask for an electronic digital copy
7 if you were, in fact, expecting something else?

8 A. I was expecting it in a different format.

9 Q. You were expecting it in a different format than
10 what you actually asked for?

11 MR. DEUTCH: Objection. I don't think
12 that -- that is not the fact as to whether the
13 electronic digital copy matches what he asked for.
14 Subject to that.

15 THE WITNESS: If you could rephrase the
16 question.

17 MR. JOHNSON:

18 Q. You asked for an electronic digital copy; correct?

19 A. Correct.

20 Q. You have now received an electronic digital copy;
21 correct?

22 A. Yes.

23 Q. However, you said that what you have received is
24 not what you expected; correct?

25 A. Yes.

1 Q. Do you know how much was spent on each specific
2 case?

3 A. I do not.

4 Q. Do you know how much was spent on Thiensville?

5 A. I don't know.

6 Q. Do you know how much was spent on Port Washington?

7 A. I do not.

8 Q. Do you know how much of that was spent since the
9 moment that you received the data?

10 A. I do not.

11 Q. Is there any way you could find that out?

12 A. I suppose there might be. I don't know.

13 Q. You don't know how you could determine that?

14 MR. DEUTCH: Objection.

15 THE WITNESS: I received invoices like
16 any business, and I could review invoices and look
17 at dates in time. I don't know the answer to your
18 question.

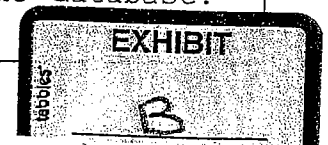
19 MR. JOHNSON:

20 Q. Do you contend that you're entitled to data that
21 is different than electronic files that you
22 already received?

23 A. Yes, I do.

24 Q. Why is that?

25 A. I did not get an electronic copy of the database.



1 I got a constructed document file that was
2 extracted from any database that exists. I did
3 not get a copy of a database or manipulable data.

4 Q. What was that word?

5 A. Manipulable. Data that can be manipulated, how
6 about that?

7 Q. Did the open records request that WIREdata filed
8 require the data to be manipulable?

9 A. I thought our request was very clear.

10 Q. I didn't ask that. I asked whether it required
11 the data to be manipulable?

12 A. We made a request of all municipalities, I felt,
13 by industry standards and understandings of the
14 dealings we have with many municipalities and data
15 processing that our request was clear for a copy
16 of the database, that we could use the database.

17 Q. Does the word manipulate appear in any of those
18 requests at all?

19 A. Probably not.

20 Q. So you have received an electronic copy of the
21 data; correct?

22 A. I received a PDF file, correct.

23 Q. Your request is for an electronic copy of the
24 data, correct, and somehow you think you're
25 entitled to something different than what you have

1 already received?

2 A. That is correct.

3 Q. I guess that you indicate that your request was
4 that the data must be manipulable?

5 A. That is what I said, yes.

6 Q. But your request does not refer to any
7 manipulation of the data; correct?

8 A. We are in the business of requesting data. We
9 asked for data in a file that we can use, and by
10 industry standards our request was clear. I am
11 sorry that is not clear to you.

12 Q. Well, it didn't refer to any data manipulation;
13 did it?

14 A. Not specifically. Go back to my previous
15 response.

16 Q. Let's talk about the factual data for instance
17 whether a house has three bedrooms and the number
18 of square footage in the house. And we will just
19 talk about the facts as the assessor finds them.
20 Do you have any reason to believe that any of the
21 factual data, for instance, whether a house has
22 three bedrooms, do you have any reason to believe
23 any of those facts have been withheld from you?

24 A. I don't know.

25 MR. DEUTCH: Objection, the word

1 MR. JOHNSON: Because haven't you
2 received a PDF file with all that information?

3 MR. DEUTCH: I'm not, not to my
4 knowledge. I don't know.

5 Q Have you taken any actions to send a PDF file of
6 the Village of Thiensville, or City of Port
7 Washington data to WIREdata?

8 A PDF files were sent for the City of Port, the
9 Village of Thiensville, and the Village of Sussex
10 many weeks ago.

11 Q And who were they sent to?

12 A WIREdata corporate offices on North Avenue. I
13 believe.

14 Q And who sent them?

15 A I believe that they were sent out of my office.

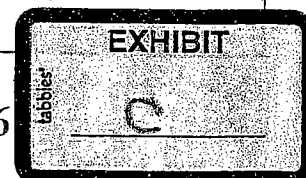
16 Q Who in your office did it?

17 A The exactly, I know our programmer copied them
18 over, sent, I believe he sent those to us, where we
19 burned them to CD, and they were mailed out. So
20 they, they would have touched three hands, two of
21 which inside our office, and one from a contractual
22 programmer.

23 Q And who's the contractual programmer?

24 A Andy Pelkey. P E L K E Y.

25 Q Okay. Do you know if these PDF files contain any



1 A I'm not sure what good that would have done them,
2 but yes.

3 Q You're aware of the fact, sir, that you have the
4 program Market Drive, and then Market Drive
5 operates on a variety of different data bases;
6 right?

7 A That's correct.

8 Q Okay. And if Assessment Technologies wanted to, it
9 could have made a, just a straight up copy of that
10 data base and given it to the municipalities;
11 correct?

12 A Correct.

13 Q Okay. And the cost and time of doing that would
14 have been under an hour?

15 A I'm not sure of that, but they could have done
16 that.

17 Q All right. Do you have any reason to believe that
18 it would have been longer than an hour to copy
19 that, a data base onto a CD and mail it?

20 A I don't know the answer to that question.

21 Q Who would know the answer to that question?

22 A Andrew Pelkey.

23 Q Okay. Are those data bases password protected at
24 the current time?

25 A To the best of my knowledge, yes.

- 1 A Yes.
- 2 Q Did you assist in any of those open records
3 responses?
- 4 A Andy Pelkey performed a, you know, the making of a
5 PDF file containing the City of Port Washington, I
6 believe 2003 assessment data.
- 7 Q Okay. All right. Now Assessment Technologies
8 itself does not have a contract with the Village of
9 Sussex; correct?
- 10 A They do not have a written contract with the
11 Village of Sussex, correct.
- 12 Q Okay. Who is the assessor for the Village of
13 Sussex?
- 14 A Grota Appraisals.
- 15 Q And Grota Appraisals is a limited liability
16 corporation?
- 17 A Correct.
- 18 Q And then Grota Appraisals has a contract with
19 Assessment Technologies?
- 20 A That is correct.
- 21 Q Now are you aware of any other open records
22 requests for the Village of Sussex?
- 23 A There was I believe David Broadfoot, on behalf of a
24 different company, that now ceases to exist, made a
25 request several years, well, prior to the WIREdata

1 A Well, no, you have to -- that just creates files.
2 You have to burn the CD.

3 Q And how long do you think it would take you to put
4 those files on the CD? Five minutes?

5 A No, it takes longer to burn a CD than that. Depends
6 on how much data there is of course. A CD can
7 take -- you fill a CD up entirely it could take over
8 an hour. One municipality isn't going to fill up a
9 whole CD. A whole bunch of them would fill up a CD.

10 Q I'm just saying one.

11 A Just one. Yeah, it's 15 minutes, a half an hour
12 type of thing probably to do one, if you did them
13 one at a time.

14 Q So that you could -- once the program is written --

15 A Yes.

16 Q -- you could click on it?

17 A Yes.

18 Q You can click on it and it would execute, you'd come
19 back and it may take you another 10 or 15 minutes
20 and to take the results and put them onto a CD?

21 A 15 to 30, yeah.

22 Q What's the cost of a CD?

23 A A buck and a quarter.

24 Q So on what basis did you determine 50 cents here?

25 A I didn't determine 50 cents.



1 Q I'm sorry, it's in your letter; right?

2 A Yes.

3 Q Who determined 50 cents?

4 A Assessment Technologies did.

5 Q What would Assessment Technologies pay to you --

6 A Uh-huh.

7 Q -- to generate the program and to run it?

8 A \$6,600 plus the time it takes me to do it. It was
9 time and materials. It wasn't a fixed amount. They
10 just hired me on a time and materials basis, so
11 however long it takes is however long it takes. You
12 know, 15 to 30 minutes per municipality if that's
13 what you want to know.

14 Q All right.

15 A To create the CD. I don't know how long it takes to
16 run it. I generally don't charge them to run a long
17 process and I can do other things, you know, I don't
18 charge them to run a long process.

19 Q So that typically you might charge them another \$25?
20 If you had already written the program and they said
21 go run it on Erin, Town of Erin, it might be \$25
22 additional?

23 A Not necessarily. It depends on -- I mean, if it's
24 during the daytime and I can't do anything, I have
25 to wait for that thing to finish, then I'm charging

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AREA CODE 262

May 29, 2001

ATTORNEY ALAN H. DEUTCH
SUITE 102
7670 N. PORT WASHINGTON RD.
GLENDALE, WI 53217

Re: Village of Sussex
Wire Data Public Records Request
Your Letter Dated May 21, 2001
Status

Dear Mr. Deutch:

I am writing to advise you of the status of this matter, and to assure you that every effort is being made to promptly respond to your request. Upon receipt of your letter dated May 21, 2001, I forwarded that updated request to Mr. Grotz. I had an opportunity to discuss the matter personally with Mr. Grotz by telephone conference on May 24, 2001. Mr. Grotz continues to have some concerns as to the technical aspects of the request, which he indicates he will be discussing with his computer programmer in the very near future. Mr. Grotz indicates that he will be providing me with the results of his further inquiries, and I will keep you advised of the status as well.

I am beginning to think that there are really two issues involved in this matter. One is a public records request and that is my only concern. The second issue is more of a business transaction, and as to that issue the Village of Sussex does not intend to become involved. Apparently, there is some programming that could be done, and perhaps you would be willing to pay for, which would allow this data to be organized in a comprehensible form. That, I believe, is outside the scope of the public records laws and is merely a private matter between you and Mr. Grotz. As to the public records issue, I am endeavoring to ascertain whether the information you have requested can be provided, even if none of the computer programming is done. If it can be provided, upon the information I have received to date I believe that it must be provided upon payment of actual, necessary, and



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Attorney Alan Deutch
May 25, 2001
Page 2

direct costs involved. There is some question in my mind based upon the conversations that I have had, however, of whether providing that information in that form would really give you what you want.

I mention this not because I think it impacts upon the legal issues, but because it may impact upon the practical matter, particularly if I am correct that there is an independent issue that is essentially a business transaction that may take place. I want to assure you, and by copy of this letter I am emphasizing with Mr. Grota, that the Village of Sussex is not involved and will not become involved in any aspect of this issue that might involve a business transaction or private interests of the parties, as the Village's interest is only in ensuring that the public records laws are followed with regard to the public records request.

If you should have any questions regarding these matters, please do not hesitate to contact me. Again, I expect that we will be providing you with the final response to your request in the very near future. Regrettably, this issue arises right during Board of Review procedures which necessarily requires a significant amount of the Assessor's time. Nevertheless, we will continue to treat this matter with the highest priority.

Yours very truly,

ARENZ, MOLTER, MACY & RIFFLE, S.C.


John P. Macy

JPM/mr

cc: Mike Knapp, Village President
Chris Swartz, Village Administrator
Mike Grota, Village Assessor

MF/O/E/LETTERS/ATTNY ALAN DEUTCH SX

GROTA APPRAISALS, LLC

Phone: (262) 253-
Fax: (262) 253-
www.AssessorDat
Email: astech@exer

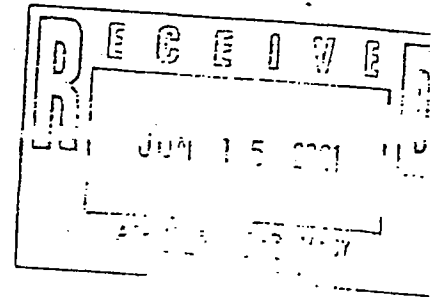
Assessment Specialists • Annual Maintenance • Revaluations

N89 W16800 Appleton Avenue • Menomonee Falls, WI 53051

June 12, 2001

Village of Sussex
Chris Schwartz
N64W23760 Main St.
Sussex, WI 53089

Re: Open records request by Wiredata



Dear Chris,

Assessment Technologies of Wisconsin LLC owns the Market Drive PC assessment software used under a licensing agreement by Grota Appraisals LLC that acts as the Assessor for your Village.

Enclosed is a copy sent to attorney John Macy on behalf of the Village of Sussex. The conclusion of this letter, digital assessment information is available within the limitations as stated.

Grota Appraisals could export digital information on a time and material basis if requested to do so. The cost of this process may be comparable to receiving paper copies of the property record card.

The Village should notify Wiredata of records availability. This should remove the Village from this open records request. Should Wiredata choose to order copies of assessment information they should contact Grota Appraisals.

The Market Drive PC software contains valuable proprietary databases and is the intellectual property of Assessment Technologies of Wisconsin LLC. Furthermore these databases cannot be disseminated to anyone without the prior written consent of Assessment Technologies.

I would be happy to discuss any questions you may have.

Respectfully,

Michael L. Grota
Grota Appraisals LLC

R-App. 484



GROTA APPRAISALS, LLC

Phone: (262) 253-1142
Fax: (262) 253-4098
www.AssessorData.com
Email: astech@execpc.com

Assessment Specialists • Annual Maintenance • Revaluations

N89 W16800 Appleton Avenue • Menomonee Falls, WI 53051

June 20, 2001

Village of Sussex
Chris Schwartz
N64 W23760 Main St.
Sussex, WI 53089

Re: Wire Data open records request

Dear Chris,

Per our conversation yesterday we did a trial run to determine an estimate to provide digital property record card information for Wire Data.

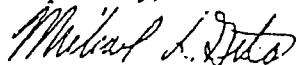
The process needed to process each record takes approximately 2 minutes to complete. The Village of Sussex currently has 2685 parcels on the assessment roll. By our closest estimate it would take 5,370 minutes or 89.5 hours to complete this process.

Our billing rate for someone capable with the proper training to complete this function is \$35.00 per hour. Therefore it would cost approximately \$3,132 for completion of this task. This estimate includes all media necessary for distribution.

Enclosed is a sample record of what would be digitally produced. Each and every record will vary in length due to information contained.

Please let me know of Wire Data's decision to proceed so we can schedule the time necessary for completion.

Respectfully,



Michael L. Grota
Grota Appraisals

cc. John Macy

R-App. 485



Property file: Contains one record for each parcel (tax key number) in the municipality. Named something like "Village of Sussex properties.txt". This file will contain the following fields:

Field	Example	Note
Tax key number	413-9989-002	
County	Washington	
Street number	3500	
Street direction	S	
Street name	76 th street, #7	Will include the property unit number at the end.
Owner name	Andrew Pelkey	
Secondary owner name	Lisa Pelkey	
Owner address line 1	2400 W Bluemound Rd	
Owner address line 2	Suite 120	
Owner city	Badger	
Owner state	WI	
Owner zip	99123	
Zoning	R1	
School district	5323	The current version of Market Drive does not distinguish between elementary and high school district. The next release will.
Zoning		This data is maintained at the county level. I don't know of many assessors (especially in smaller communities) that fill it in.

Land file: Contains one record for each land parcel in the municipality. If property has more than one land parcel (e.g. a farm), there will be multiple records for the same tax key number. Named something like "Village of Sussex land.txt". This file will contain the following fields:

Field	Example	Note
Tax key number	413-9989-002	
Class	Residential	
Width	380	
Depth	3818	
Acres	3.331	Not always width * depth (lot may be irregularly shaped).
Land value		

Residential buildings file: Contains one record for each residential building in the municipality. If property has more than one residential building (rare but it happens), there will be multiple records for the same tax key number. Named something like "Village of Sussex residential buildings.txt". This file will contain the following fields:

Field	Example	Note
Tax key number	413-9989-002	
Class	Washington	
Story height	1 story w/attic	1 story, 1 story w/attic, 1.5 story, 2 story, 2 story w/attic, 2.5 story
Style	Colonial	Defined by assessor (ranch, by-level, tri-level, cape code, colonial, old style, etc)
Occupancy (Use)	Single family	Defined by assessor (single family, mother-in-law, condo, 2 family, apartment, etc)
Exterior wall	Alum/vinyl	Defined by assessor (wood, block, stucco, alum/vinyl metal, brick, stone, msnry/frame, etc)
Roof type	Asphalt shingles	Defined by assessor
Year built	1973	
Year remodeled	1993	
Basement type	Full	None, crawl, partial, full

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June 25, 2001

MR M CHRIS SWARTZ
VILLAGE ADMINISTRATOR
VILLAGE OF SUSSEX
N64 W23760 MAIN STREET
SUSSEX WI 53089

Re: Wiredata Records Request
Draft Response

Dear Mr. Swartz:

We have received a response from the Village Assessor regarding the records request submitted by Wiredata, by his more recent letter dated June 20, 2001. As you know, this follows upon the several inquiries and discussions that have been made regarding whether the documents that have been requested actually exist in the form that has been requested.

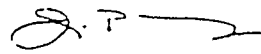
Based upon the inquiries made by the Village Assessor and his correspondence of June 12, 2001, I have prepared a records request response for your consideration, which is enclosed. Please contact me with any questions or concerns you may have regarding this matter. If you find that the enclosed is acceptable, you may transcribe the correspondence on to Village letterhead and send the document to the requestor. If I hear nothing from you, I will assume that you are responding to the requestor in this regard.

If you should have any questions regarding these matters, please do not hesitate to contact me.

Thank you for referring this matter to me. I was happy to be of service to the Village of Sussex in this regard.

Yours very truly,

ARENZ, MOLTER, MACY & RIFFLE, S.C.


John P. Macy

JPM/bes
Enclosure
cc: Mike Grota, Village Assessor
Attorney Alan Deutch
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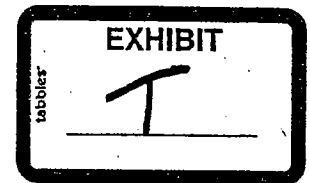
R-App. 487



[date]

Attorney Alan H. Deutch
Suite 102
7670 N. Port Washington Rd.
Glendale, WI 53217

Re: Wiredata Public Records Request



Dear Attorney Deutch:

My office and the office of the Village Assessor each received a records request from Thomas F. Curtis of Wiredata Corporation, dated April 20, 2001. I note that we have no address for Wiredata Corporation on the request, and further that since receiving the request our communications have been conducted through you. I, therefore, am directed this response to the request to you, who I understand to be counsel for Wiredata Corporation. If my understanding is incorrect, please advise and I will further consider whether I can respond to Wiredata Corporation directly.

First, let me note that as the Village Administrator/Clerk, I have carefully reviewed the records that are in my custody and have concluded that I am not the custodian of any records that would satisfy your request. Our inquiry has focused, therefore, upon the request that you provided to the Village Assessor and the public records of which the Village Assessor is the custodian.

After carefully considering your request and researching the Assessor's computerized data, and after further considering whether your request might seek protected information or computer programs which might not be subject to disclosure, I have now been advised by the Village Assessor that the records you have requested are available from the Assessor. Enclosed please find a correspondence dated June 12, 2001 from Grota Appraisals, LLC and an enclosure to that letter, in which the Village Assessor states that I should notify you of the records availability and I am doing so by this correspondence.

I have had an opportunity to further inquire of the Assessor of the actual, necessary and direct costs of responding to your request, and the Village Assessor has estimated this amount to be \$3,132.00, as described in the attached correspondence dated June 20, 2001. Pursuant to Wisconsin Statutes Section 19.35(3)(f), we will require prepayment of this estimated cost of producing the record. If the actual, necessary, and direct cost exceeds this estimate, then we will require additional payment upon completion of the work; or if the actual, necessary, and direct cost is less than this estimate, we will refund the difference.

Attorney Alan H. Deutch
June 25, 2001
Page 2

Your request states that we should advise you of these costs before incurring the same. Therefore, I will need to know from you whether you wish us to go forward with this matter at this time. We will not begin compiling the records you have requested without your further authorization to do so, and your pre-payment.

Finally, I am hopeful that this will resolve this issue. I know that there was some disagreement between Wiredata and Grota Appraisals, LLC as to what information was public, what information might be protected by trade secret, what information might not be disclosed due to it being licensed computer programming, and related difficult legal and policy considerations. Because the Assessor has concluded that the records are available, as described in his correspondence, I have not addressed those difficult issues at this time. If disputes resurface between Wiredata and Grota Appraisals, LLC over these issues, I wish to reserve the right to further consider these legal and policy issues in order to ultimately determine whether the requested information is in fact a public record, whether it can or must lawfully be released, and also whether the greater weight of competing public policies may favor either disclosure or non-disclosure of the information. Should any such further disputes arise, I would also like to reserve the opportunity to seek an interpretation by the Attorney General pursuant to Wisconsin Statutes Section 19.39, and therefore advise me of any such disputes at your earliest convenience. Having said that, I want to emphasize that it is my sincere hope that the matter will now be resolved.

Very truly yours, .

VILLAGE OF SUSSEX

M. Chris Swartz
Village Administrator/Clerk

Enclosures
cc: Mike Grota, Village Assessor
John Macy, Village Attorney

CERTIFICATION OF APPENDIX

I hereby certify that filed with this brief, either as a separate document or as a part of this brief, is an appendix that complies with Wis. Stats. § 809.19(2)(a) and that contains: (1) a table of contents titled as an index and (2) portions of the record essential to an understanding of the issues raised.

I further certify that if the record is required by law to be confidential, the portions of the record included in the appendix are reproduced using first names and last initials instead of full names of persons, specifically including juveniles and parents of juveniles, with a notation that the portions of the record have been so reproduced to preserve confidentiality and with appropriate references to the record.

Respectfully Submitted, August 3, 2007:

By: 

Alan H. Deutch, State Bar No. 1013249
Deutch Law Offices, SC
A Division of Deutch & Weiss, LLC
7670 North Port Washington Rd., Suite 200
Fox Point, WI 53217
Attorneys For WIREDATA, INC.

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(414) 247-9959 Fax

SUPREME COURT
STATE OF WISCONSIN

Appeal Nos.: 2005AP1473; 2006AP174; 2006AP175

WIREDATA, Inc.,
Plaintiff-Respondent,
v.

Village of Sussex and
Village of Sussex Custodian,
Defendants-Co-Appellants-Cross Petitioners,

Grota Appraisals, LLC, Michael L. Grota, and
Assessment Technologies of WI, LLC,
Defendants-Appellants-Petitioners.

WIREDATA, Inc.,
Plaintiff-Appellant,
v.

Village of Thiensville,
Defendant-Respondent,

Grota Appraisals, LLC and Michael L. Grota,
Assessment Technologies of WI, LLC,
Defendants-Respondents-Petitioners.

WIREDATA, Inc.,
Plaintiff-Appellant,
v.

City of Port Washington,
Defendant-Respondent-Cross Petitioner,

Matthies Assessments, Inc.,
Defendant-Respondent,

American Family Insurance Company,
Intervenor.

**BRIEF OF DEFENDANT-RESPONDENT,
MATTHIES ASSESSMENTS, INC.**

Appeal from Waukesha County Circuit Court,
The Honorable Mark S. Gempeler, Presiding,
Case No. 2001 CV 001403, and
Appeal from Ozaukee County Circuit Court,
The Honorable Thomas R. Wolfgram, Presiding,
Circuit Court Case Nos. 2001 CV 000198 and 2001 CV 00216

BORGELT, POWELL, PETERSON & FRAUEN, S.C.
Attorneys for Defendant-Respondent, Matthies
Assessments, Inc.

By: *Maile E. Beres*
Maile E. Beres (S.B.N. 1023015)

P. O. ADDRESS

735 North Water Street, Suite 1500
Milwaukee, WI 53202
Ph: (414) 287-9144
Fax: (414) 276-0172

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STATEMENT ON ORAL ARGUMENT

Because the Court already has scheduled oral argument, Matthies Assessments does not submit a statement regarding same.

STATEMENT OF THE CASE AND STATEMENT OF FACTS

This appeal arises out of purported requests for records by WIREData to the City of Port Washington (“Port Washington”) and its independent contractor property assessor, Matthies Assessments, Inc. (“Matthies”). The assessment contract between the two parties reflects their mutual understanding that Matthies’ limited role was “to perform everything required to be performed and to complete in a professional manner all of the work required to value the real and personal property of the Municipality . . .” (R.11, Art. I, § 1.) The contract also provides, “The Assessor shall be an independent contractor pursuant to Sec. 60.307(4) Wis. Statutes.” (R.11, Art. III, ¶ 14.)

Matthies used the software Market Drive in performing its assessment duties for Port Washington. (R.84, Ex. 12.) Matthies was permitted to use Market Drive through a license agreement with Assessment Technologies of Wisconsin, LLC (“Assessment Technologies”). (R.57, Ex. 5.)

The license agreement precludes the disclosure of the actual database that was used to compile the assessor data. The agreement contains a provision that reads as follows:

8. Data Dissemination: The Database and data entered into the program shall not be sold, given or in any way distributed to un-licensed individuals or organizations, in whole or in part, without prior written approval by Assessment Technologies. The sole source for data distribution shall be from Assessment Technologies Internet site. Any infraction of this agreement shall result in immediate termination of this License.

(Id.)

On May 9, 2001, WIREdata sent a letter to Matthies' president, Ernest Matthies, asking for property assessment information. (R.42, Ex. 1.) The letter reads:

Wiredata Corporation is requesting the assessor information or detailed property information for the City of Port Washington.

Per my conversation with Pat, who directed me to Mary Bley at the City of Port Washington, we obtained the written approval, enclosed, to acquire the detailed property information for the City of Port Washington.

Wiredata Corporation is requesting the detailed property information or assessor information such as square footage, age, number of bedrooms, number of baths, property class, etc. Please include the

number of parcels, a current record layout, 10 printed data sheets, selected at random, code list for each field, and a copy of the property record card you are currently using.

Please give me a call at 414-778-6154 with any questions you might have and to discuss what the estimated cost will be to reproduce the detailed property information, to determine the fields to be reproduced and what type of media the data will be reproduced on. We anticipate receiving the data by June 15, 2001. If the data will be delayed for any reason, please call me at the above-mentioned number. I can also be reached by email at dradley@wiredata.com

Wiredata Corporation appreciates your cooperation and I look forward to hearing from you at your earliest convenience.

(Id.)

Mr. Matthies sent WIREdata a response on May 22, 2001, which reads:

I have received your request for “detailed property information” in your letter dated May 9th. I assume that by detailed property information, you are requesting a copy of the assessment data base [sic] used to store assessment data for the City of Port Washington.

Our firm just completed placing Port Washington on on [sic] a new assessment software system called ‘Market Drive’, which we purchased from:

Assessment Technologies
N89 W16790 Appleton Av.
Menomonee Falls, WI 53051
Ph: (262) 253-1142

I spoke with Robert Grotta, one of the principles [sic] at Assessment Technologies regarding your request for a copy of the Port Washington database. He informed me that my license/purchase agreement with his firm precludes me from complying with your request. This contract specifies that the 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”. According to Mr. Grotta, this means that I do not have the right to provide your firm with a copy of the Port Washington database.

If you wish to pursue this matter further, I would suggest that you contact Robert Grotta at Assessment Technologies directly. He will be better able than I to explain the licensing agreements that accompany the use of the Market Drive assessment system.

(R.42, Ex. 2.) Mr. Matthies included a post script, which reads:
“Assessment data printouts of individual parcels are available upon request for a reasonable fee. Access to assessment data in this format is available to the public upon request.” (Id.)

There is no dispute that WIREdata did not communicate directly with or make any request directly to Matthies after its May 9,

2001 letter. WIREdata filed this mandamus action on June 12, 2001.
(First R.1, 2.)

After suit was filed, WIREdata provided specific information about the record it sought. It wanted a database that was unencrypted and not password protected and was capable of data manipulation. (R.57, Ex. 6; R.75, Ex. 9.) Further, the data needed to be arranged in a “comma-quote delimited ASCII file.” (R.42, Ex. 4.) Matthies does not have the ability to create a comma-quote delimited ASCII file. (R.42.) Further, the Market Drive software produces a database that is encrypted. (R.58.) As a result, Matthies cannot access the tables and other fields used to format the assessor data. (Id.) All Matthies can do is enter data into the program. (Id.) It cannot reformat the database or make it capable of manipulation by another party. (Id.) In sum, it does not possess the record WIREdata belatedly specified.

On December 8, 2005, the Ozaukee County Circuit Court ordered that the mandamus action against Matthies be dismissed. (R.112.) The circuit court ruled that Port Washington, not Matthies, was the authority under Wis. Stat. § 19.32(1). (R.128, pp. 22-23.) The court also held that WIREdata’s request to Port Washington and Matthies was not sufficient under the open records law and that WIREdata already received the requested record in the form of a

“pdf” file. (R.128, pp. 23-27.) As a result, the action against Port Washington also was dismissed. (R.128.)

WIREData appealed the dismissal of both Port Washington and Matthies. On January 3, 2007, the Court of Appeals, District II, issued its ruling. WIREData, Inc. v. Village of Sussex, 2007 WI App 22, 729 N.W.2d 757. After a thorough examination of the law, the court determined that Matthies is not responsible under the open records law because it is not an “authority,” as defined by Wis. Stat. § 19.32(1), that must respond to an open records request. Id. at ¶ 48. The court further ruled that an independent contractor assessor is not a “local public official” who qualifies as an authority under § 19.31(1) because Wis. Stat. § 19.42(7w) defines “local public office” and specifically excludes independent contractors. Id. The court further explained that there is no “support in either case law or the statute for the position that the assessors bear responsibility for open records obligations” and reiterated that “the responsibility for upholding the letter and spirit of the open records law travels to the governmental or quasi-governmental entity enumerated in Wis. Stat. § 19.32(1).” Id. at ¶¶ 45, 46.

ARGUMENT

I. STANDARD OF REVIEW.

The question of law presented by a circuit court's application of the open records law to undisputed facts is reviewed *de novo*. State ex rel. Blum v. Board of Education, 209 Wis. 2d 377, 565 N.W.2d 140 (Ct. App. 1997) (citation omitted). Consequently, that standard should be applied here.

II. THE COURT OF APPEALS' RULING THAT PRIVATE INDEPENDENT CONTRACTORS ARE NOT AUTHORITIES UNDER THE OPEN RECORDS LAW SHOULD BE AFFIRMED BECAUSE IT IS CONSISTENT WITH STATUTORY AND CASE LAW INTERPRETING AND APPLYING THE OPEN RECORDS LAW.

The court of appeals refused to absolve Port Washington of its responsibilities under the open records law. In reaching that determination, it performed a thorough analysis of the relevant statutory provisions and prior cases in which it had an opportunity to apply the law. Its decision in this case comports with the statutes and existing case law and should be affirmed.

This Court has clarified the “general framework for statutory interpretation:”

It is, of course, a solemn obligation of the judiciary to faithfully give effect to the laws enacted by the legislature, and to do so requires a determination of the statutory

meaning. Judicial deference to the policy choices enacted into law by the legislature requires that statutory interpretation focus primarily on the language of the statute. We assume that the legislature's intent is expressed in the statutory language. . . .

Thus, we have repeatedly held that statutory interpretation “begins with the language of the statute. If the meaning of the statute is plain, we ordinarily stop the inquiry.” Seider[v. O’Connell], 2000 WI 76], 236 Wis. 2d [211] at 232, 612 N.W.2d 659

Context is important to meaning. So, too, is the structure of the statute in which the operative language appears. Therefore, statutory language is interpreted in the context in which it is used; not in isolation but as part of a whole; in relation to the language of surrounding or closely-related statutes; and reasonably, to avoid absurd or unreasonable results. . . . Statutory language is read where possible to give reasonable effect to every word, in order to avoid surplusage. . . . “In construing or interpreting a statute the court is not at liberty to disregard the plain, clear words of the statute.” State v. Pratt, 36 Wis. 2d 312, 317, 153 N.W.2d 18 (1967).

State ex rel. Kalal v. Circuit Court for Dane County, 2004 WI 58,

¶¶ 44-46, 271 Wis. 2d 633, 681 N.W.2d 110 (citations omitted).

Wis. Stat. § 19.31 sets forth the legislative intent underlying the open records law:

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.

Providing public access to information has long been held a public duty. For example, the court of appeals has explained that “the legislature enacted the law to provide Wisconsin citizens ‘the greatest possible information regarding the affairs of government and the official acts of [public] officers’” Building and Construction Trades Council of South Central Wisconsin v. Waunakee Community School District, 221 Wis. 2d 575, 579, 585 N.W.2d 726 (Ct. App. 1998) (citing Wis. Stat. § 19.31 (bracketed language supplied)).

The language of the open records statutes and the evident legislative intent to hold governmental entities responsible to their public require dismissal of the mandamus action against Matthies. First, Wis. Stat. § 19.35(4) requires the “authority” to respond to a

request for public records. Wis. Stat. § 19.32(1)¹ defines “authority.” The court of appeals correctly determined that Matthies is not an authority under Wis. Stat. § 19.32(1), because it does not qualify as one of the entities exclusively listed as constituting an authority. WIREdata, 2007 WI App at ¶ 48.

Next, the court appropriately rejected Port Washington’s argument that Matthies qualifies as a “local public official” or a “state or local office,” and therefore falls within the definition of authority. Id. In reaching this conclusion, the court noted that “local public office” already is defined by statute. Wis. Stat. § 19.42(7w) enumerates several entities that constitute a local public office, but it explicitly excludes independent contractors. Id.; § 19.42(7w)(c), (d).²

¹ Section 19.32(1) reads:

“Authority” means any of the following having custody of a record: a state or local office, elected official, agency, board, commission, committee, council, department or public body corporate and politic created by constitution, law, ordinance, rule or order; a governmental or quasi-governmental corporation except for the Bradley center sports and entertainment corporation; a local exposition district under subch. II of ch. 229; a family care district under s. 46.2895; any court of law; the assembly or senate; a nonprofit corporation which receives more than 50% of its funds from a county or a municipality, as defined in s. 59.001(3), and which provides services related to public health or safety to the county or municipality; a nonprofit corporation operating the Olympic ice training center under s. 42.11(3); or a formally constituted subunit of any of the foregoing.

² Section 19.42(7w) reads, in pertinent part:

“Local public office” means any of the following offices, except an office specified in sub. (13):

(c) An appointive office or position of a local governmental unit in which an individual serves for a specified term, except a position limited to the exercise of ministerial action or a position filled by an independent contractor.

This definition of local public office specifically was incorporated into the open records law through § 19.32(1dm)³ and thus applies to the definition of authority.

Under the rule of *expressio unius est exclusio alterius*, where the legislature specifically enumerates items in a statute, it must be concluded that the legislature therefore intended to exclude any other items. State v. Delaney, 2003 WI 9, ¶ 22, 259 Wis. 2d 77, 658 N.W.2d 416. If the legislature had wanted to classify private contractors as authorities under the open records law, it easily could have incorporated such language into § 19.32(1). Instead, it expressly excluded contractors from open records law obligations. Secs. 19.32(1dm); 19.42(7w).⁴ In defining the parties responsible under the open records law and taking special care to exclude private independent contracting parties from the law's obligations, the

(d) An appointive office or position of a local government which is filled by the governing body of the local government or the executive or administrative head of the local government and in which the incumbent serves at the pleasure of the appointing authority, except a clerical position, a position limited to the exercise of ministerial action or a position filled by an independent contractor.

(Emphasis added.)

³ Section 19.32(1dm) reads:

“Local public office” has the meaning given in s. 19.42(7w), and also includes any appointive office or position of a local governmental unit in which an individual serves as the head of a department, agency, or division of the local governmental unit, but does not include any office or position filled by a municipal employee, as defined in s. 111.70(1)(i).

⁴ Port Washington has not identified any other entities enumerated in § 19.32(1) that it believes could even possibly describe Matthies. In fact, there can be no dispute that none of the other bodies set forth therein applies to Matthies.

legislature made clear that accountability rests only with the governmental entities charged with such public duties. Only by affirming the court of appeals' decision can this Court give full meaning to this legislative goal.

Port Washington asserts that the court of appeals erred in relying upon the definition of "local public office" in § 19.42(7w) because that statute is located in a different subsection of Chapter 19. While acknowledging that Wis. Stat. § 19.32(1dm), which indisputably is part of the open records law, specifically references § 19.42(7w) in defining "local public office," Port Washington nonetheless argues that § 19.42(7w) does not help define "authority" because it is not expressly mentioned in § 19.32(1). This tortured reading of the statutes cannot be sustained under any logical approach. Section 19.32 defines authority to include "local office." Sec. 19.32(1). It then defines that term. Sec. 19.32(1dm). Thus, the legislature made an explicit connection between the definition of an authority and the exclusion of independent contractors from that definition.

Perhaps ultimately recognizing that it cannot escape the fact that § 19.42(7w) must be incorporated into § 19.32, Port Washington makes the inventive, yet untenable, argument that § 19.32(1dm) both excludes and includes independent contractors. (Port Washington's

Brief, pp. 33-34.) As a result, Port Washington advocates a reading by which some statutory language would nullify other language contained within the very same sentence. Such a result contradicts the principles that “every word, clause and sentence” in a statute must be given meaning and that a reading that renders a part of the statute superfluous should be avoided. Kollasch v. Adamany, 104 Wis. 2d 552, 563, 313 N.W.2d 47 (1981) (citation omitted). Within the context of the open records law, the only reading of §§ 19.32(1) and 19.32(1dm) that makes sense and gives meaning to both sections is the one that excludes independent contractors from the definition of authority.

Oddly, despite its objection to the court of appeals’ reference to § 19.42(7w) in defining authority, Port Washington asserts that the court instead should have considered Wis. Stats. §§ 62.09(1)(c), which addresses city “officers,” and 70.055, which discusses “expert assessment help.” However, unlike § 19.42(7w), those statutes are not referenced by or otherwise integrated into § 19.32(1). Further, they do not even discuss responsibility under the open records law. If the legislature had wanted to make an exception to the independent contractor exclusion under § 19.42(7w) for contractors performing assessment functions, it could have done so in the open records statutes. Instead, it deemed it appropriate to exempt private parties

from open records liability. The statutes specifically designed to govern public record requests – those located in Chapter 19 – provide the better rule for determining responsibility under the open records law. Applying §§ 62.09 and 70.055 would not only nullify § 19.42(7w)(c) and (d) and the portion of § 19.32(1dm) incorporating those sections; it would contravene the legislative objective of holding the representative government accountable to its electorate.

Nonetheless, even if § 62.09(1)(c) were deemed applicable, it would not warrant reversal. Section 62.09(1)(c) still must be considered within the framework of the open records statutes and the definition of authority in § 19.32. Inevitably, the statutory analysis must return to § 19.32(1dm) and the ultimate exclusion, *via* § 19.42(7w), of independent contractors from the exhaustive list of entities that may be held liable for open records violations. Whereas § 62.09(1)(c) permits a municipality to retain an independent contractor to perform assessment functions, §§ 19.32 and 19.42(7w) prohibit the municipality from also shifting open records responsibility to the independent contractor.

Furthermore, Port Washington should not be heard to assert now that Matthies is really “expert help” under § 70.055, because it contractually stipulated that Matthies’ status is that of an independent contractor under § 60.307(4). As the court of appeals recognized, the

parties' contract made § 70.055 inapplicable and irrelevant. WIREDATA, 2007 WI App at ¶ 48 n.3. Port Washington has cited no authority for voiding its contract.

However, even if § 70.055 were found to be applicable, the statute would not shift responsibility under the open records law from public bodies to private expert help. Section 70.055(1) provides that a governing body may “employ expert help to aid in making an assessment in order that the assessment may be equitably made in compliance with law.” (Emphasis added.) Thus, the expert’s responsibility is properly limited to that function for which it was hired, namely, the performance of property assessments. In contrast, the governmental entity retains its obligation to its elective public.

The court of appeals also rejected Port Washington’s contention that by indicating it was an “authority” in its answer to WIREDATA’s complaint, Matthies actually became an authority under the open records law. The court recognized that “[t]he assessors may have accepted the label ‘authority’ to describe their official capacity as contract assessors for the municipalities, but they have steadfastly denied having any responsibility under the open records law.” Id. at ¶ 45 n.2. Any other conclusion would be unsustainable from a practical point of view. A party cannot define its own legal status. It is the designation afforded by the legislature, as evidenced by the

statutory language it specifically has chosen, that dictates whether a party is an authority under the open records law.

The only reasonable conclusion to draw from the open records statutes is that public entities, such as Port Washington, alone must bear the burden of complying with the open records law. This Court need look no further than the statutes themselves to affirm the lower court's ruling.

The plain, clear language of the open records statutes and their underlying legislative intent lead to the singular reasonable conclusion that the obligations of the government are not to be imposed upon private independent contractors. For this reason, the court of appeals' decision must be affirmed.

**III. THE COURT OF APPEALS' DETERMINATION
THAT PORT WASHINGTON IS THE SOLE
AUTHORITY AND REFUSAL TO CONDITION
AN AUTHORITY'S LIABILITY UPON
PHYSICAL CUSTODY OF THE RECORDS
WERE BASED UPON THE LAW AND SHOULD
BE AFFIRMED.**

**A. The Court Of Appeals' Decision To Hold Only
Port Washington Responsible Under The
Open Records Law Was In Harmony With
Existing Case Law.**

Port Washington does not deny that it is an authority under § 19.32(1). However, it contends that it should not be held liable in this instance because it did not have physical possession of the digital

record created by Matthies using the Market Drive software. Again, the open records statutes provide a response to such an argument. Wis. Stat. § 19.36(3), the “contractors’ records” provision, requires the authority to make available any record produced or collected pursuant to a contract, as though it maintained the record itself. The result is that custody of the record is not a prerequisite for municipality liability under the open records law. Section 19.36(3) demonstrates that a governmental entity may not transfer its legal status as an authority to an independent contractor by outsourcing the collection of assessment data.

As the court of appeals noted, the issue of whether a public body is exempt from liability if it does not have custody of the record has been resolved. WIREData, 2007 WI App at ¶¶ 42-43. In Journal/Sentinel, Inc. v. School Board of School District of Shorewood, 186 Wis. 2d 443, 452, 521 N.W.2d 165 (Ct. App. 1994), the court determined that an authority may not hide behind § 19.36(3) to “avoid the public access demanded by the open records law by delegating both the record’s creation and custody to a contractor.” WIREData, 2007 WI App at ¶ 42 (citing Journal/Sentinel, 186 Wis. 2d at 452-3). Section 19.36(3) creates “an exception to the general rule that a public body need only provide information which it has either created and/or has in its custody.” Id. (citing Journal/Sentinel, 186

Wis. 2d at 453). Attempts by municipalities and other authorities to dodge responsibility under the open records law by assigning record creation and record keeping functions to private parties are “the precise type of evil the contractors’ records exception is designed to overcome.” *Id.* at ¶ 43 (citing Machotka v. Village of West Salem, 2000 WI App 43, ¶ 8, 233 Wis. 2d 106).

Port Washington’s contention that Journal/Sentinel does not apply because it involved a law firm and not a property assessor disregards the ruling’s driving principle that must be applied in cases involving contractors, namely, that a public body always retains its duties under the open records law, even when it engages an independent contractor to create a record. Journal/Sentinel and the court of appeals’ decision in this case carry out the clear legislative intent not to shift the obligations of governmental entities to independent contractors.

Other decisions involving the open records law also support the court of appeals’ application of the law to this case. For example, contrary to Port Washington’s assertions, Building and Construction Trades Council of South Central Wisconsin v. Waunakee Community School District, 221 Wis. 2d 575, 585 N.W.2d 726 (Ct. App. 1998), does not relieve a municipality from liability under the open records law. In that case, the Waunakee School District denied a request for

payroll records on the grounds that it did not create or possess such records. Id. at 578. The court reaffirmed that authorities must respond to open records requests and that they may not avoid responsibility “by delegating the record’s creation and custody to an agent.” Id. at 585 n.3 (quoting Journal/Sentinel, 186 Wis. 2d at 452-53). However, the district was not required to produce the requested records under § 19.36(3) because the records were not created pursuant to its contract with the contractor. Id. at 580-81. In contrast, Matthies produced the property assessment database as part of its contractual work for Port Washington. WIREData, 2007 WI App at ¶ 44. Therefore, Port Washington is bound by § 19.36(3).

Similarly, in Machotka v. Village of West Salem, 2000 WI App 43, 233 Wis. 2d 106, 607 N.W.2d 319, there was no dispute that the authority was obligated to provide a contractor’s records that it did not possess, under § 19.36(3). See id. at ¶ 6. Rather, the court held that this duty did not extend to documents created outside the scope of the contract. Id. at ¶ 9. In that case, a municipality contracted with a private firm to underwrite a bond issue. Id. A request was made for names of the ultimate purchasers of the municipal bonds issued by the municipality. Id. at ¶ 2. As in Building and Construction Trades Council, the mandamus action was dismissed, not because the municipality did not possess the requested records, but because the

records were not created pursuant to the contract with the private contractor. Id. at ¶ 9.

It is significant to note that there appeared to be no dispute in the above cases that the public body was the authority under §19.32(1), regardless of the fact that it did not have custody of the records sought. See Journal/Sentinel, 186 Wis. 2d at 451-53; Building and Construction Trades Council, 221 Wis. 2d at 578-80; Machotka, 2000 WI App at ¶ 6. Likewise, Port Washington's lack of possession of the records is irrelevant and not a sufficient basis for evading its open records responsibilities.⁵

As in Journal/Sentinel, Matthies created and maintained the electronic database for the purpose of performing its property assessment functions under its contract with Port Washington. Therefore, the court of appeals was correct to follow that case and to hold Port Washington to its duty to provide contractor's records under § 19.36(3). Affirming the lower court's decision would provide continued consistent application of the open records statutes.

⁵ Under Port Washington's argument that it should not be held liable under the open records law because it does not have the data in the form sought by WIREdata, Matthies likewise should not be found to be the authority and should not be held responsible because it also does not have the data in the format WIREdata desires. Further, as Port Washington asserts that it was not required to create a new record, Wis. Stat. § 19.35(1)(L), Matthies also did not have such an obligation.

B. A Comprehensive Reading Of The Open Records Statutes Underscores The Legislative Intent To Hold Only Public Bodies Responsible Under The Law.

Further evidence of the legislature's intent not to shield from liability a public body that is not in possession of records is found at Wis. Stat. § 19.35(6), which reads, "No elected official is responsible for the record of any other elected official unless he or she has possession of the record of that other official." If the legislature had intended to condition a municipality's liability upon its possession of records, it could have drafted such a provision. Instead, it carved out a narrow exception that applies only to individual elected officials. Further, there is no dispute that Matthies is not an elected official. Therefore, § 19.35(6) cannot be used to impose liability upon Matthies.

Port Washington's argument that the definition of a "record," under Wis. Stat. § 19.32(2), as material that "has been created or is being kept by an authority" signals a legislative intent to insulate governmental bodies that do not possess records also is flawed. Were that the case, then § 19.36(3) would be rendered meaningless, as that statute imposes upon an authority a duty to produce a record that it does not possess. The statutes cannot be read to produce such a result. See Kalal, 2004 WI at ¶ 46 (citations omitted).

The court of appeals also appropriately found that Wis. Stat. § 19.37(2), the damages statute, supports its determination that Port Washington is the intended authority. WIREData, 2007 WI App at ¶ 49. That statute provides that costs and fees awarded to the requester “shall be paid by the authority affected or the unit of government of which it is a part, or by the unit of government by which the legal custodian under s. 19.33 is employed” The court found that the statute plainly imposes the penalty for failing to comply with the open records law upon the governmental entity, not a private citizen or corporation or even an individual public official. Id. The court of appeals thus remained true to prior judicial pronouncements concerning the nature and scope of liability under the open records law.

Further, the term “authority” contained in § 19.37(2) must be defined according to §§ 19.32 and 19.42(7w), and therefore must exclude independent contractors from its scope. Section 19.37(2) does not expand the class of entities that may be penalized to include independent contractors.

Port Washington incorrectly cites Wis. Stat. §§ 19.35(1)(b), (c), (d), (e) and (f) and 19.36(6) for the proposition that it has no obligation regarding records maintained by its assessor. Those statutes set forth the rules for disclosure when an authority possesses

records in particular formats, such as on audiotape, or has a record that contains information not subject to disclosure. They do not provide that an authority has no obligation regarding records it does not possess. Further, these statutes must be read in conjunction with the contractors' records provision at § 19.36(3). As a result, Port Washington may not transfer its obligations to an independent contractor.

The court of appeals properly determined that Port Washington is the responsible authority under the open records law and may not relieve itself of responsibility by contracting out the collection and maintenance of assessment information. WIREData, 2007 WI App at ¶ 43. Because the ruling comports with the language and intent of the open records statutes, it should be affirmed.

C. Port Washington Could Have Taken Reasonable Steps To Meet Its Open Records Law Obligations, But Failed To Do So.

Matthies was precluded by its licensing agreement with Assessment Technologies from providing WIREData a copy of the database from the Market Drive software. Nothing in the statutes evidences a legislative intent to make a party violate a contract or otherwise break the law.

Port Washington does not deny that it has a duty to comply with the open records law as a general rule, nor does it contend that it

was unaware of its open records law obligations at the time it contracted with Matthies. As the more sizeable party with the superior bargaining power, Port Washington could have protected its interests by requiring that all electronic records prepared by Matthies be submitted to it for the purpose of complying with the open records law. Contrary to Port Washington's assertions, small private assessors like Matthies would have a distinct incentive to agree to such terms because they would set the parameters for agreements with other parties, such as Assessment Technologies. In this manner, private assessors also would be protected against claims under the open records law, as well as claims by licensors. Further, only once contractors are fully aware of the obligations they are expected to assume are they able to make essential decisions about the type of insurance coverage to procure. In the event envisioned by Port Washington that the assessor fails to provide records to the municipality, the authority then might have the remedy of a claim for breach of contract.

The court of appeals recommended that municipalities consider addressing open records law compliance in future contracts for outsourcing services such as property assessment. WIREData, 2007 WI App at ¶ 49 n.4. Port Washington must bear the consequences for its failure to ensure that it could meet its obligations.

Another way in which Port Washington could have complied with the open records law was to pay the license fee to Assessment Technologies for access to the electronic database. It chose not to take either of these simple steps. The fact that Port Washington may not have considered these options, or might have deemed them unpalatable, does not alter its obligations under the law.

Port Washington curiously invokes statutes requiring confidentiality of information unrelated to the assessment data at issue in this case in arguing that it could not have obtained its own assessment information. (Port Washington's Brief, pp. 44-45.) However, it has not been contended by any party that the assessment data for Port Washington was confidential. Further, Port Washington does not explain how confidentiality of information would have precluded it from obtaining the data through any of the means discussed above.

Port Washington complains that the court of appeals' decision frustrates the policy of open government. In reality, no public interest is served by absolving the "representative government" of its "essential function" to inform its electorate. Wis. Stat. § 19.31. The court of appeals' ruling ensures that the government will fulfill its promise to its public and will not use its contracts as a means of

circumventing it. This Court should affirm the ruling to advance that objective.

IV. A MANDAMUS ACTION IS PROPERLY COMMENCED ONLY AGAINST THE MUNICIPALITY, WHICH IS THE STATUTORY “AUTHORITY.”

Throughout this case, Matthies has agreed with Port Washington that offering WIREdata paper records of the assessment data satisfied the open records law, thereby making mandamus improper. (See, e.g., R.41.) Matthies also shared Port Washington’s position that mandamus was not an available remedy because WIREdata did not submit a legally sufficient request under the open records law. (See, e.g., *id.*) Matthies denies, however, that Port Washington fulfilled its duty under the open records law by directing WIREdata to Matthies, for the reasons discussed above. If compliance with the open records law means providing an electronic copy of the assessment database, then Port Washington, as the statutory authority, has the obligation to make sure that one is provided. Therefore, the mandamus action is appropriate only against Port Washington.

Two cases cited by Port Washington on this issue, State ex rel. Ward v. Assessors of the Town of Delavan, 1 Wis. 345 (1853) and Neu v. Voegel, 96 Wis. 489, 71 N.W. 880 (1897), are significantly

distinguishable and do not warrant reversal of the court of appeals' decision. In those cases, writs of mandamus were granted to compel the assessors to perform their statutory assessment functions.

In Ward, the court found mandamus proper to compel the assessor to reduce the owner's property valuation, in accordance with the property assessment statutes. Ward, 1 Wis. at 348-51. In Neu, the court determined that the plaintiff was entitled to file a mandamus action to compel the assessor to perform its statutory duty of assessing lots separately, instead of collectively. Neu, 96 Wis. at 492. Ward and Neu do not authorize a writ of mandamus against an assessor to perform municipal functions, such as those set forth by the open records law.

Moreover, Port Washington is misguided in its interpretation of § 19.37(1). The right of mandamus extended under that statute is not premised upon the custody of a record. If the legislature had intended to exclude from liability municipalities that do not physically possess the requested records, it would not have created an express requirement that authorities provide records maintained by independent contractors, under § 19.36(3). Insulating municipalities from liability because the records are in the possession of their contractors would nullify § 19.36(3). Statutory language must be interpreted "not in isolation but as part of a whole; in relation to the

language of surrounding or closely-related statutes; and reasonably, to avoid absurd or unreasonable results.” Kalal, 2004 WI at ¶ 46 (citations omitted).

The court of appeals correctly affirmed the dismissal of the mandamus action against Matthies because “where the open records law is concerned, the buck stops with the municipalities.” WIREData, 2007 WI App at ¶ 55. Affirming the court of appeals’ decision would prevent municipalities from sidestepping their public duties.

V. UNDER THE OPEN RECORDS STATUTES, DAMAGES ARE APPROPRIATELY ASSESSED AGAINST THE PUBLIC ENTITY CHARGED WITH THE DUTY OF PROVIDING OPEN ACCESS.

Wis. Stat. § 19.37(2) only permits a requester to recover costs and fees from the authority:

Costs and fees shall be paid by the authority affected or the unit of government of which it is a part, or by the unit of government by which the legal custodian under s. 19.33 is employed and may not become a personal liability of any public official.

Because Matthies is not an authority, it may not be held liable for costs or fees.

Furthermore, custody of records is not a condition precedent for liability under § 19.37(2). The requesting party may recover fees and costs from the unit of government of which the authority is a part.

Therefore, even if Matthies somehow were deemed to be an authority, costs, fees and damages still may be assessed against Port Washington.

Permitting municipalities to divest themselves of their responsibilities by engaging independent contractors would invite them to create a government of private companies and persons unchosen by the public. Further, imposing burdensome financial penalties upon small, private contractors would eliminate any incentive for them to take on roles that benefit the government from a practical and economic standpoint, such as the valuation of property.

The open records statutes make clear that responsibility for complying with records requests remains with governmental entities and may not be reassigned to private contractors. This goal cannot be achieved if public bodies are not also held financially accountable for violations of the open records law. Therefore, it is necessary to affirm the decision of the court of appeals.

CONCLUSION

The law consistently supports the conclusion that a public authority may not dodge its obligations to its public under the open records law by engaging a private independent contractor. The open records statutes recognize that a municipality may delegate assessment functions to an independent contractor, but that it may not

use such delegation to avoid its duty to inform its public of governmental affairs. The court of appeals' decision was premised upon the long-standing principle that the government has a non-transferable obligation under the open records law. Affirming the lower court's ruling would carry out the spirit of the policy underlying the open records law, namely, to hold the representative government responsible to its electorate.

Therefore, Defendant-Respondent Matthies Assessments, Inc. respectfully urges this Court to affirm the ruling of the Court of Appeals, District II, which affirmed the Ozaukee County Circuit Court's dismissal of the mandamus action against Matthies Assessments.

Respectfully submitted this 6th day of July, 2007.

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CERTIFICATION AS TO FORM

I certify that this brief conforms to the rules contained in section 809.19(8)(b) and (c), STATS., for a brief produced using the following font:

- ☐ Monospaced font: 10 characters per inch; double spaced; 1.5 inch margin on left side, and 1 inch margins on the other 3 sides. The length of this brief is pages.
- ☒ Proportional serif font: Minimum printing resolution of 200 dots per inch, 13 point body text, 11 point for quotes and footnotes, leading of minimum 2 points, maximum of 60 characters per full line of body text. The length of this brief is 6,551 words.

Dated this 6th day of July, 2007.

BORGELT, POWELL, PETERSON & FRAUEN, S.C.
Attorneys for Defendant-Respondent,
Matthies Assessments, Inc.

By: Maile E. Beres
Maile E. Beres (SBN 1023015)

SUPREME COURT
STATE OF WISCONSIN

Appeal Nos.: 2005AP1473; 2006AP174; 2006AP175

WIREDdata, Inc.,
Plaintiff-Respondent,
v.

Village of Sussex and
Village of Sussex Custodian,
Defendants-Co-Appellants-Cross Petitioners,

Grota Appraisals, LLC, Michael L. Grota, and
Assessment Technologies of WI, LLC,
Defendants-Appellants-Petitioners.

WIREDdata, Inc.,
Plaintiff-Appellant,
v.

Village of Thiensville,
Defendant-Respondent,

Grota Appraisals, LLC and Michael L. Grota,
Assessment Technologies of WI, LLC,
Defendants-Respondents-Petitioners.

WIREDdata, Inc.,
Plaintiff-Appellant,
v.

City of Port Washington,
Defendant-Respondent-Cross Petitioner,

Matthies Assessments, Inc.,
Defendant-Respondent,

American Family Insurance Company,
Intervenor.

**SUPPLEMENTAL BRIEF AND APPENDIX
OF DEFENDANT-RESPONDENT,
MATTHIES ASSESSMENTS, INC.**

Appeal from Waukesha County Circuit Court,
The Honorable Mark S. Gempeler, Presiding,
Case No. 2001 CV 001403, and
Appeal from Ozaukee County Circuit Court,
The Honorable Thomas R. Wolfgram, Presiding,
Circuit Court Case Nos. 2001 CV 000198 and 2001 CV 00216

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STATEMENT OF FACTS

There is no dispute that WIREdata first contacted Andrew Pelkey of Impact Consultants regarding its record requests on May 4, 2001, five days before its sole communication to Matthies on May 9, 2001. (R-S.8, 21;¹ R.42) Matthies did not designate either Assessment Technologies or Andrew Pelkey as its agent or representative. (R.58; R-App 102.) Further, Matthies had only extremely limited contact with Mr. Pelkey, which was completely unrelated to WIREdata's request. (Id.) The Ozaukee County Circuit Court correctly determined that Mr. Pelkey was not Matthies' agent. (R.128.) The court of appeals did not address this issue.

It was not until the stay in the circuit court was lifted and WIREdata officers were deposed in July of 2004 that WIREdata attempted to clarify its request to Matthies. Thomas Curtis, WIREdata's vice president, testified about some of the categories of "assessor information" WIREdata specifically wanted, but did not include in its request to Matthies.² He acknowledged, however, that the term "assessor information" "varies by municipality." (R.42, Ex. 4; R-App 104.)

¹ "R-S" refers to the record in the Sussex case. All other references to the record are from the Port Washington case.

² WIREdata has not asserted that this testimony constituted a new or enhanced request, and Matthies agrees that it does not.

Mr. Curtis also testified that WIREdata wanted the Port Washington data specifically in a format that was not encrypted or password protected and arranged in a “comma-quote delimited ASCII file.” (R.57, Ex. 6; R-App 106; R.42, Ex. 4; R-App 105.) Peter Shuttleworth, WIREdata’s president, disclosed for the first time in his deposition that WIREdata actually wanted a database that would allow it to manipulate the data. (R.75, Ex. 9; R-App 107-08.)

Matthies does not have the ability to create a comma-quote delimited ASCII file. (R.42; R-App 110.) Requiring Matthies to learn and to implement a program that would allow it to create a comma-quote delimited ASCII file in order to meet WIREdata’s unique demand would interfere with the normal functioning of its business. (Id.) Further, the Market Drive software produces a database that is encrypted. (R.58; R-App 102.) As a result, Matthies cannot access the tables and other fields used to format the assessor data. (Id.) All Matthies can do is enter data into the program. (Id.) It cannot reformat the database or make it capable of manipulation by another party. (Id.) Matthies would have to hire a computer programmer to bypass the encryption to produce such a database. (Id.)

The court of appeals held that the enhanced request provided to Mr. Pelkey did not impose an unreasonable burden on him.

WIREData, Inc. v. Village of Sussex, 2007 WI App 22, ¶ 51, 298 Wis. 2d 743, 729 N.W.2d 757. However, because the court already had determined that Matthies is not an “authority” under the open records law, it did not determine whether WIREData’s request would unreasonably burden Matthies.

ARGUMENT

I. ANDREW PELKEY WAS NOT ACTING AS MATTHIES’ AGENT.³

The facts contradict WIREData’s argument that Mr. Pelkey was acting as Matthies’ agent in communicating with WIREData or in producing an electronic database. As its May 22, 2001 letter clearly shows, Matthies specifically referred WIREData to Assessment Technologies only with regard to any questions WIREData might have had concerning the Market Drive license. Matthies did not direct Assessment Technologies to turn over an electronic database to WIREData on its behalf or to discuss the options for providing the data. In addition, Matthies did not even mention Mr. Pelkey to WIREData or give any indication that Mr. Pelkey would be acting as its agent. Matthies had no communication with Mr. Pelkey regarding WIREData’s request. In fact, even before it made its request to

³ This issue was not addressed by the court of appeals or raised in either of the Petitions for Review, and WIREData did not file its own Petition for Review. Therefore, it is not properly before this Court and should not be considered on this appeal. This argument is presented solely for the purpose of providing necessary facts and rebuttal, in the event that the Court decides to consider the issue.

Matthies, WIREdata had been in communication with Mr. Pelkey. WIREdata failed to provide any proof that Mr. Pelkey was Matthies' agent.

Further, WIREdata did not establish the requisite elements of an apparent agency between Matthies and Mr. Pelkey: (1) acts by the purported principal or agent justifying a belief in an agency relationship; (2) knowledge of the acts by the party sought to be held; and (3) reliance thereupon consistent with ordinary care and prudence. Schaefer v. Dudarenke, 89 Wis. 2d 483, 489-90, 278 N.W.2d 844 (1979) (citations omitted). The burden of proving the existence of an agency rests with the party asserting it. The opposing party has no burden to disprove the existence of such a relationship. See Boehck Construction Equipment Corporation v. Voigt, 17 Wis. 2d 62, 71, 115 N.W.2d 627 (1962).

WIREdata produced no facts to prove that an agency relationship existed between Matthies and Mr. Pelkey, or that Matthies even knew that Mr. Pelkey was involved in responding to WIREdata's request. Instead, WIREdata relies only upon improper insinuations in a vain attempt to connect Matthies to Mr. Pelkey. For example, WIREdata points to the close timing of its separate communications with Matthies and with Mr. Pelkey and asks this Court to assume that somehow a plan was orchestrated behind the

scenes between the two. However, mere intimation is insufficient to meet WIREdata's burden of proof. Further, the temporal proximity of WIREdata's communications with Matthies and with Mr. Pelkey is neither surprising nor suspicious, because all of WIREdata's requests to the various municipalities were made at about the same time, and WIREdata already was communicating with Mr. Pelkey by the time in contacted Matthies.

The circuit court properly determined that WIREdata failed to meet its burden of proving that Matthies designated Mr. Pelkey as its agent or was even aware that Mr. Pelkey was involved in responding to WIREdata's request. There is no basis upon which to find Mr. Pelkey to be Matthies' agent. As a necessary result, any enhanced request to Mr. Pelkey should not be attributed to Matthies.

II. COMPELLING PRODUCTION OF THE DATABASE WOULD IMPOSE AN UNREASONABLE BURDEN ON MATTHIES.⁴

Requiring Matthies to create and to produce the specific electronic database WIREdata seeks would impose a great burden upon Matthies. In Schopper v. Gehring, 210 Wis. 2d 208, 565 N.W.2d 187 (Ct. App. 1997), the court of appeals dismissed the plaintiff's complaint because the request failed to meet the sufficiency requirement of § 19.35(1)(h). In so doing, the court noted:

⁴ See n.3.

While this state favors the opening of public records to public scrutiny, we may not in furtherance of this policy create a system that would so burden the records custodian⁵ that the normal functioning of the office would be severely impaired. . . . Because he could reasonably have limited his request but failed to do so, and because the request placed an unreasonable burden upon the custodian in preparation of the documents necessary to fulfill the request, we conclude that the court did not err by finding the request to be so over broad as to be inadequate under the open records law. We therefore conclude the trial court properly ordered the dismissal of Schopper's open record complaint.

Id. at 213.

Likewise, WIREdata's request is unreasonably burdensome. For Matthies to acquire the capability to do what was necessary to satisfy WIREdata's unique demands would interrupt its normal business operations. Matthies does not have the ability to create a comma-quote delimited ASCII file that is unencrypted and therefore capable of manipulation. Further, because Mr. Pelkey is not Matthies' agent, Matthies cannot direct him to create such a database for WIREdata. The burden of creation would be solely on Matthies. He would have to hire a programmer to perform that work. Therefore, even if Matthies were able to provide a copy of the electronic database, it would not satisfy WIREdata's requirements. What Mr. Pelkey, a computer programmer, could do is very different from what Matthies could do. Therefore, the burden imposed upon

⁵ The "custodian" was the Outagamie County Sheriff, a public official, who also would be the "authority" under Chapter 19.

Matthies by WIREdata's request is distinguishable from that imposed upon Mr. Pelkey. Mr. Pelkey's technological expertise and capabilities should not be imputed to Matthies.

It would work an undue hardship on Matthies to require it to obtain the knowledge and technology base necessary to comply with WIREdata's demand. The law does not allow the imposition of such an extreme burden. Dismissal of the action against Matthies would be appropriate.

CONCLUSION

For the reasons set forth above, Defendant-Respondent, Matthies Assessments, Inc., respectfully urges this Court to affirm the ruling of the Court of Appeals, District II, which affirmed the Ozaukee County Circuit Court's dismissal of the mandamus action against Matthies Assessments.

Respectfully submitted this 14th day of August, 2007.

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Matthies Assessments, Inc.

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Dated this 14th day of August, 2007.

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Attorneys for Defendant-Respondent,
Matthies Assessments, Inc.

By: Maile E. Beres
Maile E. Beres (SBN 1023015)

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103-106	Transcript of July 27, 2004 Deposition of Thomas Curtis (Excerpt)
107-108	Transcript of July 28, 2004 Deposition of Peter Shuttleworth (Excerpt)
109-110	Affidavit of Ernest T. Matthies, dated October 29, 2004

STATE OF WISCONSIN :: CIRCUIT COURT :: OZAUKEE COUNTY

WIREDATA, INC.,

Plaintiff,

-VS-

Case No: 01-CV-198

VILLAGE OF THIENSVILLE,
GROTA APPRAISALS, LLC.
MICHAEL L. GROTA and
ASSESSMENT TECHNOLOGIES OF WI, LLC,

Case Code: 30707

Defendants.

WIREDATA, INC.,

Plaintiff,

-VS-

Case No: 01-CV-216

CITY OF PORT WASHINGTON and
MATTHIES ASSESSMENTS, INC.
in its capacity as the Assessor for
the City of Port Washington,

Case Code: 30707

Defendants.

SECOND AFFIDAVIT OF ERNEST T. MATTHIES

STATE OF WISCONSIN)
) ss.
OZAUKEE COUNTY)

ERNEST T. MATTHIES, being first duly sworn upon oath, deposes and states as follows:

1. I am the President of Matthies Assessments, Inc., one of the defendants in the above-captioned matter. As such, I am competent to testify to the matters stated herein.

R-App 101

2. Neither Grotz Appraisals, Assessment Technologies nor Andrew Pelkey is an agent or representative of Matthies Assessments.

3. Matthies Assessments has had extremely limited contact with Andrew Pelkey. The contact was completely unrelated to plaintiff's request.

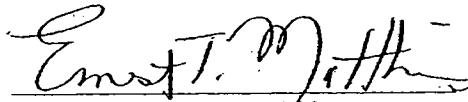
4. The database produced by Market Drive software is encrypted. As a result, Matthies Assessments cannot access the tables and other fields used to format assessor data.

5. Matthies Assessments can only enter data into the program and cannot reformat the database or make it capable of manipulation by another party.

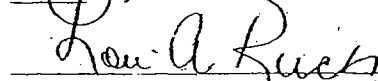
6. The only thing that Matthies Assessments can produce without assistance from a computer programmer in response to plaintiff's request is a paper record for each property.

7. Matthies Assessments uses a "canned" program that exports only sales data from Market Drive and assembles it into a spreadsheet. Exporting other types of data into a spreadsheet would require a special program, which Matthies Assessments cannot create on its own.

8. Matthies Assessments does not have the technological capability to create the electronic/digital file that plaintiff has indicted would satisfy its request. Such a task would require the expertise of a computer programmer to bypass the program encryption.


ERNEST T. MATTHIES

Subscribed and sworn to before me this
24 day of November, 2004.


Notary Public, State of Wisconsin
My Commission June 25, 2006

RECEIVED AUG 27 2004

Page: 1

STATE OF WISCONSIN
OZAUKEE COUNTY

WIREDATA, INC.,

Plaintiff,

Case No. 01-CV-198

VS

VILLAGE OF THIENSVILLE,
GROTA APPRAISALS, LLC,
MICHAEL L. GROTA, ASSESSMENT
TECHNOLOGIES OF WISCONSIN, LLC,

Defendants.

STATE OF WISCONSIN
WAUKESHA COUNTY

WIREDATA, INC.,

Plaintiff,

Case No. 01-CV-1403

VS

VILLAGE OF SUSSEX,
GROTA APPRAISALS, LLC,
and MICHAEL L. GROTA,

Defendants.

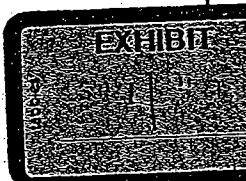
Deposition of:
Thomas Curtis

July 27, 2004

9:00 a.m.

Taken at:
Deutch & Weiss
7670 North Port Washington Road
Suite 102
Milwaukee, Wisconsin 53217

Barbara Dassow Court Reporter 262-367-5205
Post Office Box 180411 Delafield, Wisconsin 53018



R-App 103

MR. JOHNSON:

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Q. I am sorry. Could you repeat your answer?

A. I asked them for their assessor information.

Q. What is their assessor information?

A. The data that they collect about the properties in Thiensville.

Q. What data is that?

A. Varies by municipality but it's generally the number of bedrooms, number of bathrooms, condition of the exterior, age of the house, size of the house, whether there is a garage, whether there is an attic, whether there is a basement, whether there is a swimming pool, whether there is a fireplace and so on.

Q. Is there any other data that is involved with the assessor information that you are looking for?

A. There is some things that are filled in occasionally such as census tract, the lot, not the lot and block, but the section and township. I imagine there might be one or two other fields that slip my mind at the moment.

Q. Did you make a similar request for Port Washington?

A. Yes, I did.

Q. Was that also on the 20th of April of 2001?

R. App104

MR. JOHNSON:

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Q. Do you have the data?

A. Not in the format I expected it.

Q. What format did you expect it in?

A. I expected it in a comma-quote delimited ASCII file.

Q. When you made your initial request back in April of 2001, did you ask for it in comma delimited ASCII file?

A. I would have to review my letter to answer the question.

Q. I will just give you one of them. This is for the Village of Thiensville.

(Exhibit No. 1 marked for identification by the court reporter.)

MR. JOHNSON:

Q. Let me know when you have had a chance to review that.

A. Okay.

Q. Does it say anything about comma delimited ASCII files?

A. No.

Q. What are you asking for in this document? Does it say an electronic digital copy; is that correct?

A. Yes.

1 machine so it's my copy of Microsoft Access, not
2 his that we are talking about.

3 Q. A 1997 version of Microsoft Access?

4 A. Yes.

5 Q. Just to make sure this proverbial horse is really
6 dead, what would be acceptable to WIREdata to
7 satisfy their open records request of Matthies
8 Assessments would be a Microsoft Access database
9 accessible using a 1997, a 2000 or 2004 version of
10 Microsoft Access containing tables, the
11 description of the tables, as well as the data
12 from the tables which would be the property record
13 card information and the database that is neither
14 encrypted or password protected; is that correct?

15 A. Again, I want to add in my part that I had that
16 I'm sure you left out inadvertently that I can
17 read the data and the description of the data.

18 Q. My last question plus being readable, that would
19 satisfy --

20 A. Yes, it would.

21 Q. -- WIREdata's open records request of Matthies
22 Assessments?

23 A. Yes, ma'am.

24 Q. Now with regard to the fields, what you would be
25 -- what WIREdata would be requesting of Matthies

EXHIBIT

1 I got a constructed document file that was
2 extracted from any database that exists. I did
3 not get a copy of a database or manipulable data.

4 Q. What was that word?

5 A. Manipulable. Data that can be manipulated, how
6 about that?

7 Q. Did the open records request that WIREdata filed
8 require the data to be manipulable?

9 A. I thought our request was very clear.

10 Q. I didn't ask that. I asked whether it required
11 the data to be manipulable?

12 A. We made a request of all municipalities, I felt,
13 by industry standards and understandings of the
14 dealings we have with many municipalities and data
15 processing that our request was clear for a copy
16 of the database, that we could use the database.

17 Q. Does the word manipulate appear in any of those
18 requests at all?

19 A. Probably not.

20 Q. So you have received an electronic copy of the
21 data; correct?

22 A. I received a PDF file, correct.

23 Q. Your request is for an electronic copy of the
24 data, correct, and somehow you think you're
25 entitled to something different than what you have

1 already received?

2 A. That is correct.

3 Q. I guess that you indicate that your request was
4 that the data must be manipulable?

5 A. That is what I said, yes.

6 Q. But your request does not refer to any
7 manipulation of the data; correct?

8 A. We are in the business of requesting data. We
9 asked for data in a file that we can use, and by
10 industry standards our request was clear. I am
11 sorry that is not clear to you.

12 Q. Well, it didn't refer to any data manipulation;
13 did it?

14 A. Not specifically. Go back to my previous
15 response.

16 Q. Let's talk about the factual data for instance
17 whether a house has three bedrooms and the number
18 of square footage in the house. And we will just
19 talk about the facts as the assessor finds them.
20 Do you have any reason to believe that any of the
21 factual data, for instance, whether a house has
22 three bedrooms, do you have any reason to believe
23 any of those facts have been withheld from you?

24 A. I don't know.

25 MR. DEUTCH: Objection, the word

STATE OF WISCONSIN :: CIRCUIT COURT :: OZAUKEE COUNTY

WIREDATA, Inc.,

Plaintiff,

-vs-

Case No: 01-CV-198

VILLAGE OF THIENSVILLE,
GROTA APPRAISALS, LLC.
MICHAEL L. GROTA and
ASSESSMENT TECHNOLOGIES OF WI, LLC,

Case Code: 30707

Defendants.

WIREDATA, Inc.,

Plaintiff,

-vs-

Case No: 01-CV-216

CITY OF PORT WASHINGTON and
MATTHIES ASSESSMENTS, INC.
in its capacity as the Assessor for
the City of Port Washington,

Case Code: 30707

Defendants.

AFFIDAVIT OF ERNEST T. MATTHIES

STATE OF WISCONSIN)
) ss.
MILWAUKEE COUNTY)

ERNEST T. MATTHIES, being first duly sworn upon oath, deposes and states as follows:

I. I am the President of Matthies Assessments, Inc., one of the defendants in the above-captioned matter. As such, I am competent to testify to the matters stated herein.

R- App 109


2. — Matthies Assessments, Inc. does not possess the ability to create a comma-quote delimited ASCII file from the database containing assessor data for the City of Port Washington.

3. Matthies Assessments, Inc. has never received a request for a comma-quote delimited ASCII file from anyone other than WIREdata.

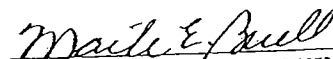
4. Matthies Assessments, Inc. is operated by two individuals, Ernest and Pat Matthies. Neither of us has a background in computer technology.

5. Requiring Matthies Assessments, Inc. to learn and to implement a program that would allow it to create a comma-quote delimited ASCII file in order to meet WIREdata's unique demand would interfere with the normal functioning of this business.

6. WIREdata has never made a request to photograph any assessor data or records from Matthies Assessment, Inc.'s computer regarding the City of Port Washington.


ERNEST T. MATTHIES

Subscribed and sworn to before me this
29th day of October, 2004.


Notary Public, State of Wisconsin
My Commission is permanent

CERTIFICATION TO SUPPLEMENTAL APPENDIX

I hereby certify that filed with this brief, either as a separate document or as part of this brief, is a supplemental appendix that complies with s. 809.19(2)(a) and that contains:

- (1) a table of contents;
- (2) relevant trial court record entries;
- (3) the findings or opinion of the trial court; and
- (4) portions of the record essential to an understanding of the issues raised, including oral or written rulings or decisions showing the trial court's reasoning regarding those issues.

I further certify that if the record is required by law to be confidential, the portions of the record included in the appendix are reproduced using first names and last initials instead of full names of persons, specifically including juveniles and parents of juveniles, with a notation that the portions of the record have been so reproduced to preserve confidentiality and with appropriate references to the record.

Dated this 14th day of August, 2007.

BORGELT, POWELL, PETERSON & FRAUEN, S.C.
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By: Maile E. Beres
Maile E. Beres (SBN 1023015)

**SUPREME COURT
STATE OF WISCONSIN**

Appeal Nos.: 2005AP1473; 2006AP174; 2006AP175

WIREDATA, Inc.,

Plaintiff-Respondent

v.

Village of Sussex, and

Village of Sussex Custodian

Defendants-Co-Appellants-Cross Petitioners

**Grota Appraisals, LLC, Michael L. Grota, and Assessment
Technologies of WI, LLC,**

Defendants-Appellants-Petitioners

WIREDATA, Inc.,

Plaintiff-Appellant,

v.

Village Of Thiensville, Defendant-Respondent,

**Grota Appraisals, LLC, Michael L. Grota, And Assessment
Technologies Of WI, LLC,**

Defendants-Respondents-Petitioners

WIREDATA, Inc.,

Plaintiff-Appellant,

v.

City Of Port Washington

Defendant-Respondent-Cross Petitioner,

Matthies Assessments, Inc.,

Defendant-Respondent,

American Family Insurance Company,

Intervenor.

**BRIEF OF DEFENDANTS-APPELLANTS-PETITIONERS IN REPLY
TO BRIEF OF PLAINTIFF-APPELLANTS**

**APPEAL FROM WAUKESHA COUNTY CIRCUIT COURT, THE
HONORABLE MARK S. GEMPELER, PRESIDING, CASE NO.
2001CV001403, AND APPEAL FROM OZAUKEE COUNTY CIRCUIT
COURT, THE HONORABLE THOMAS R. WOLFGRAM, PRESIDING,
CIRCUIT COURT CASE NOS. 2001CV000198 AND 2001CV00216**

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ARGUMENT

A. WIREDATA'S BRIEF CONTAINS NUMEROUS FACTUAL INACCURACIES

Rhetoric and hyperbole aside, WireData makes numerous factual misstatements in its response brief. The most notable are discussed here.

WireData states that Grota Appraisals attempted to charge fees for Village of Sussex documents that amounted to \$6,600 + \$3,132 + an undetermined license fee. This is false. WireData Brief, pp. 32, 73. There were two separate cost estimates, each standing individually.

The \$6,600 was a proposed business transaction that would have had Mr. Andrew Pelkey of Impact Consultants performing computer programming and verification to determine that the output was acceptable. Mr. Pelkey's stated cost for Impact

Consultants to do this programming was \$6600.¹

Indeed, what was taking place was characterized by the Village of Sussex as a "business transaction" precisely because it was not within the realm of an open records response.

On June 20, 2001, in a separate response that would have generated a separate output, Grotta Appraisals informed the Village of Sussex that it could provide data to WIREdata for an estimated cost of \$3,132. This estimate was based on a trial run that Grotta Appraisals did to process the data into a text format. Grotta Appraisals estimated that it would take 2 minutes per parcel, so 5,370 minutes to process the 2,685 individual parcels that the Village of Sussex had

¹ Other branches of government, including this Court, routinely provide value-added services to the public for data extraction and manipulation tasks. For instance, access to CCAP is provided for free to the public via the internet, but is single query based and ordinarily generates only results on the single query. See <http://wcca.wicourts.gov/index.xsl>. Access to the full database that the CCAP web site queries; however, is provided at the rate of \$5,000.00 per year, or \$500 monthly, on a subscription basis. See http://wcca.wicourts.gov/download/SOAP_Agreement_Dec06.pdf.

on the assessment roll. (55:53-54). This response was entirely separate from and not in addition to, the proposed business transaction that Mr. Pelkey had earlier proposed.

The next factual misstatement is that Grota admitted that he chose a PDF because that would be hard for the requester to use. In fact, Grota testified that a PDF "was the cleanest representation of that property" available.

The next factual misstatement is that Grota testified that Mr. Andrew Pelkey was speaking on behalf of Grota Appraisals. This never happened. In fact Grota testified that "a contractor may have had dialogue with WIREdata on behalf of **Assessment Technologies.**" (WireData R-App. 228-229, emphasis added). Mr. Pelkey's company, Impact Consultants had no contractual relationship with Grota Appraisals, only with Assessment Technologies.

WireData also repeatedly ignores the distinction between the corporate entities of Assessment Technologies and Grota Appraisals, implying that they

were all equivalent to Michael Grota individually. This implication ignores Wisconsin's long adherence and this Court's edict that "the fiction of the corporate entity is not to be lightly regarded." Milwaukee Toy Co. v. Industrial Comm'n of Wis., 203 Wis. 493, 496 (1931).

This Court must view WireData's factual background against the actual record in this case.

**B. MR. ANDREW PELKEY - AS THE OWNER OF AN
INDEPENDENT CONTRACTOR TO A CONTRACTOR TO A
MUNICIPALITY - IS NOT AN AGENT OF ANY
AUTHORITY**

The appropriate entity to respond to an open records request is a municipality, who is an "authority." See, e.g., Wis.Stat. § 19.37 (1) ("If an authority withholds a record or a part of a record or delays granting access to a record or part of a record after a written request for disclosure is made...") There is no serious argument that Mr. Pelkey was himself an "authority," only that he was an apparent agent of an "authority."

WireData's argument is that Mr. Andrew Pelkey – owner of Impact Consultants, was an agent of Grota Appraisals. And, by WireData's logic, Grota Appraisals was an agent of the municipality. Therefore, by this chain of logic, an agent of an agent becomes an agent to the second agent's principal. This entirely convolutes common agency notions.

Even if Grota Appraisals is ultimately deemed an "authority," which it is not, Pelkey was never an agent of Grota Appraisals, only arguably of Assessment Technologies, itself in contract with Grota Appraisals.

WireData identifies absolutely no facts on which to base its argument, or to support the Court of Appeals' holding that Andrew Pelkey was an agent acting on behalf of the municipalities.² The decision of the appeals court goes so far as to hold that even unknown

² "However, for purposes of the open records law, their actions must be attributed to the municipalities. They were all acting at the behest of the respective municipalities." January 3, 2007 Decision, ¶ 55.

third parties engaged in business-to-business communications can bind appropriate open records respondents.³ Indeed, at least the Village of Thiensville in the present case did not even know who Andrew Pelkey was, let alone know what he was saying, or how his statements would bind the village.

Andrew Pelkey is an individual who owns Impact Consultants, Inc. Impact Consultants, Inc. is a private computer programming firm that Assessment Technologies of WI, LLC, a private software development firm, contracted with to program the Market Drive™ software. There is no dispute that Pelkey and Impact are not in contractual privity with any municipality, or any assessor. There is absolutely no factual support presented for the trial court's legal conclusion. The

³“We also note that WIREdata could have reasonably construed its communications with Pelkey and both of the assessors as denials of its requests. The municipalities decry any responsibility for the effects of these communications. However, for purposes of the open records law, their actions must be attributed to the municipalities. They were all acting at the behest of the respective municipalities.” January 3, 2007 Decision, ¶ 55.

trial court failed to mention any facts to support its conclusion that Mr. Pelkey was acting as anyone's agent, and never presented any legal analysis of how Mr. Pelkey could be acting as anyone's agent.

Even if the communications with Pelkey, as an agent of an agent of a principal, are considered open records responses, there is not, and should not be, a requirement imposed on the municipalities to contract with someone of Mr. Pelkey's expertise in order to respond to or satisfy an open records request.

The evidence shows that Mr. Matthies didn't have the computer expertise to lodge an appropriate response. (R.58; R-App. 102). Neither did Grota. To prove this point, at the time, Mr. Grota thought the best way to meet Wiredata's demands was to process each parcel individually. Grota Appraisals proceeded to perform a trial run to process the data into a text format, and estimated that it would take 2 minutes per parcel, so 5,370 minutes to process the 2,685 individual parcels that the Village of Sussex had on the assessment roll. (55:53-54).

The individual assessors here, Mr. Grota and Mr. Matthies, are not computer programmers. It is doubtful that any communities the size of the municipalities in this case employ their own computer programmers. Certainly there is no statutory requirement that every municipality in the state employ their own computer programmers for the purpose of responding to open records requests. It is entirely unreasonable and unduly burdensome to require the municipalities or their assessors here to extraneously employ a computer programmer to perform Wiredata's data cleansing for them. Mr. Pelkey's capabilities at data extraction are far more advanced than has been shown with respect to the municipalities or assessors involved in this case.

The facts of this case demonstrate that the municipalities and their independent contractors may not possess the technological aptitude required to respond to complex requests and comply with the appeals court decision on their own. For instance, in this case, although trained computer experts, including the independent computer programmer and the requester

themselves *could* deal with the technological aspects of responding to the requests, the facts demonstrated that the municipalities and their contract assessors probably did not possess that aptitude.

The facts of this case show an overt attempt by a private data collector and reseller to have the tasks of data extraction and exportation performed by an entirely independent computer programming firm who was two contracts removed from any governmental entity. To find that Mr. Pelkey was an agent of any governmental entity would require this Court to create an entirely new line of agency law.

He was not an agent of any municipality, and the Court of Appeals' holding that Pelkey was "acting at the behest of the respective municipalities." January 3, 2007 Decision, ¶ 55 is incorrect.

**C. AN OPEN RECORDS RESPONDENT IS NOT REQUIRED TO
CONDUCT AN EVALUATION OF DIFFERENT FORMATS OF
DOCUMENTS TO JUDGE SUPERIORITY BETWEEN
DIFFERENT FORMATS**

WireData asserts that somehow a comma-quote

delimited file is superior to a PDF file, and that the open records respondents in this case should have, on their own initiative, judged which file format WireData would deem superior. WireData also argues that Grota admitted that he chose a PDF because it would be hard for the requester to use. There is no such testimony in the record.

WireData ignores the Open Records law when it argues that “extracting data [into a comma-quote format] is a form of copying to which the requester is entitled.” There are several flaws to this reasoning. First, the records do not exist in a comma-quote format. A new record would have to be created, beyond open records obligations. See, e.g., Wis.Stat. § 19.35(1)(L). The Open Records law is directly on-point with this. (“[T]his subsection does not require an authority to create a new record by extracting information from existing records and compiling the information in a new format.”) *Id.*

The request was for electronic/digital data, and there is absolutely nothing of record to indicated

that a PDF does not satisfy this aspect of the request. Clearly, open records respondents cannot be mind readers to guess at format superiority. Indeed the SAME DATA would exist in the PDF and the newly created comma-quote format.

Further, WireData's argument that it cannot effectively process the data is contrary to the facts of this case. WireData could open the PDF file, hit the "Edit/Select button," hit the "copy" button, and go to some other software and hit the "paste" button. But WireData wants the government to do the hard work for them. This is not about keeping the citizenry informed, it is about pure profit to data resellers such as WireData. It is about private data resellers forcing either the government, or their contractors to do work for them.

D. THE REQUESTS WERE INSUFFICIENT

It is noted that if WireData's original request were sufficient, they would have had no reason to correspond with Mr. Pelkey regarding their alleged supplemental request. Further, if the municipalities

understood the request so clearly, then not even a PDF would have been produced. At the time the PDF was produced, it was thought that a PDF would be compliant with WireData's requests, because a PDF is undisputably "electronic/digital."


The statutory burden of framing a proper request lies on the requester. The request must contain temporal limitations, none of which were present in this request. The request must contain subject matter limitations within reason. None are present in this case. WireData even acknowledges that different assessors have different data sets. Thus, a request for everything that every assessor has is the antithesis to a closed ended, reasonably limited request regarding subject matter.

The response of "we'll give the data that we have" does not equate to "I know exactly what data you are referring to." The statutory burden of framing a proper request lies on the requester, and nothing that a respondent does changes this burden.

CONCLUSION

Wiredata, and indeed the public, is not being precluded from accessing information regarding the affairs of the government, which is a valid open records concern. Instead, Wiredata's motivation is to increase their profit margin by shifting burdensome data extraction and manipulation tasks to the communities or their contractors, or third parties. It is not the function of the government or of private contract assessors to perform this function for them.


Respectfully submitted: Date: August 23, 2007

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FORM AND LENGTH CERTIFICATION

I certify that this brief conforms to the rules contained in Wis. Stat. § (Rule) 809.19(8)(b) and (c) for a brief produced using monospaced font: The length of this brief is 2017 words inclusive of footnotes, and 13 pages. The font is Monospac821 BT, used on Microsoft Word 2003, 13 point.

Respectfully submitted: Date: August 23, 2007.

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CERTIFICATE OF SERVICE

I hereby certify that three copies of BRIEF OF DEFENDANTS-APPELLANTS-PETITIONERS IN REPLY TO BRIEF OF PLAINTIFF-APPELLANTS has been served on the following attorneys by US Mail as follows:

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SUPREME COURT
STATE OF WISCONSIN

Appeal Nos.: 2005AP1473; 2006AP174; 2006AP175

WIREDATA, Inc.,

Plaintiff-Respondent

v.

Village of Sussex, and

Village of Sussex Custodian

Defendants-Co-Appellants-Cross Petitioners

Grota Appraisals, LLC, Michael L. Grota, and Assessment
Technologies of WI, LLC,

Defendants-Appellants-Petitioners

WIREDATA, Inc.,

Plaintiff-Appellant,

v.

Village Of Thiensville, Defendant-Respondent,

Grota Appraisals, LLC, Michael L. Grota, And Assessment
Technologies Of WI, LLC,

Defendants-Respondents-Petitioners

WIREDATA, Inc.,

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v.

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Defendant-Respondent-Cross Petitioner,

Matthies Assessments, Inc.,

Defendant-Respondent,

American Family Insurance Company,

Intervenor.

**BRIEF OF DEFENDANTS-APPELLANTS-PETITIONERS IN
RESPONSE TO BRIEF OF DEFENDANTS-RESPONDENTS-CROSS
PETITIONERS**

**APPEAL FROM WAUKESHA COUNTY CIRCUIT COURT, THE
HONORABLE MARK S. GEMPELER, PRESIDING, CASE NO.
2001CV001403, AND APPEAL FROM OZAUKEE COUNTY CIRCUIT
COURT, THE HONORABLE THOMAS R. WOLFGRAM, PRESIDING,
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STATEMENT OF THE CASE

The village of Sussex and the City of Port Washington never disputed that mandamus was improper, or that all defendants in the trial court should have been dismissed.

First, these parties have always agreed that WIREdata's request were insufficient as a matter of law, because they did not have reasonable temporal or subject matter limitations.

Second, these parties have always agreed that the open records respondent would have had to create a new record in a new format, beyond what the open records law required.

Third, these parties have always agreed that a third-party, namely Andrew Pelkey at Impact Consultants, is not an appropriate recipient of an open records request. The parties further agree that Andrew Pelkey, Impact Consultants, and Assessment Technologies are not agents of the village of Sussex or Grota Appraisals. Therefore, no communications with Andrew Pelkey at Impact Consultants can cure the defects in WIREdata's initial requests, and Andrew Pelkey's communications with WIREdata should in no way have been considered a denial of WIREdata's initial

open records requests.

Fourth, these parties have always agreed that nobody ever denied WIREDATA's open records request, and therefore this action was entirely premature.

Last, these parties have always agreed that the trial court had zero factual basis to conclude that defendants have not already fulfilled WIREDATA's open records request, if they were required to do so in the first instance.

In summary, the village of Sussex and Michael Grotta, Grotta Appraisals, or Assessment Technologies have always agreed that mandamus was improper, and that all defendants in the trial court should have been dismissed.

The only apparent disagreement between the village of Sussex, the City of Port Washington and Grotta Appraisals is a legal one: who is the statutory "authority." The only correct conclusion is that the village of Sussex and the City of Port Washington are the only statutory "authorities" under Wis.Stat. § 19.32(1). This court does not even have to reach this issue should it correctly conclude that mandamus was improper. This issue is only necessary to determine who should be required to pay costs and fees, if the Court determines that they are appropriate in this

case, which they are not because mandamus itself was improper.

ARGUMENT

A. The Municipalities are the only Statutory "Authorities" in this Case

Wis.Stat. § 19.32(1) reads in full:

"Authority" means any of the following having custody of a record: a state or local office, elected official, agency, board, commission, committee, council, department or public body corporate and politic created by constitution, law, ordinance, rule or order; a governmental or quasi-governmental corporation except for the Bradley center sports and entertainment corporation; a local exposition district under subch. ii of ch. 229; any court of law; the assembly or senate; a nonprofit corporation which receives more than 50% of its funds from a county or a municipality, as defined in s. 59.001 (3), and which provides services related to public health or safety to the county or municipality; a nonprofit corporation operating the Olympic ice training center under s.42.11 (3); or a formally constituted subunit of any of the foregoing.

Michael Grota, Grota Appraisals, and Assessment Technologies are none of the above. The municipalities did not even argue in the Court of Appeals that Michael Grota and Assessment Technologies were "authorities", conceding this issue as to those parties. The only remaining dispute is whether Grota Appraisals is an "authority," which it is not.

The village of Sussex and the City of Port Washington argue that they properly delegated their assessment functions under Wis.Stat. § 70.055 by contract, and because they have delegated this function, they can no longer be considered authorities. Grotta Appraisals does not dispute that the municipalities can properly contract with private assessors to fulfill their assessment duties.

A privately contracted assessor does not become an authority because of a contractual relationship with an authority. Just because the municipalities can properly contract away their assessment duties does not mean that the municipalities are no longer an "authority," divested of their responsibility as an "authority." That also does not mean, as the municipalities argue, that Grotta Appraisals somehow became an authority by entering into a contract with the municipalities.

"Absent a constitutional infirmity, courts must apply statutes as they are written, unless to do so would lead to an absurd result that did not reflect the legislature's intent." State v. Young, 180 Wis.2d 700, 704, 511 N.W.2d 309, 311 (Ct. App. 1993); *see also* DNR v. Wisconsin Power & Light Co., 108 Wis.2d 403, 408, 321 N.W.2d 286, 288 (1982) ("when statutory language is

clear and unambiguous, no judicial rule of construction is permitted, and the court must implement the express intention of the legislature by giving the language its ordinary and accepted meaning."). Stated another way, this Court may neither add nor subtract words to or from a statute. See Fond du Lac County v. Town of Rosendale, 149 Wis.2d 326, 334, 440 N.W.2d 818, 821 (Ct. App. 1989).

On its surface, the definition of "authority" in Wis.Stat. § 19.32(1) does not include Grota Appraisals, a private, for-profit, independent contractor that has contracted with municipalities. To define Grota Appraisals in this way would require this Court to impermissibly add words to the statute - namely the words "a state or local office *and anyone who contracts with any of the foregoing*" to the definition provided by Wis.Stat. § 19.32(1) of who is actually an "authority." See Fond du Lac County, 149 Wis.2d at 334.

The village and the City argue that a private assessor becomes a "local public office" because the municipalities contracted a private assessor. The municipalities argue that Wis.Stat. §§ 61.197(1)(f) and 62.09(1)(c), which govern the selection of officers for municipalities, therefore define contract

assessors as officers. However, "local public office" is explicitly defined to exclude independent contractors such as Grotta Appraisals. Wis.Stat. § 19.42 (7w)(d) ("Local public office' means ... an appointive office or position ... except a ... position filled by an independent contractor.")

In an attempt to cure the clear statutory definition excluding independent contractors from the definition of a "local public office," the municipalities propose that Wis.Stat. § 19.32(1dm) removes the independent contractor exception by augmenting the definition of "local public office" of Wis.Stat. § 19.42 (7w)(d) to include "any appointive office or position of a local governmental unit in which an individual serves as the head of a department, agency, or division of the local governmental unit." Wis.Stat. § 19.32(1dm). Thus, the municipalities argue, the complete definition of "local public office" would include:

An appointive office ... except a ... position filled by an independent contractor, *and also any appointive office or position of a local governmental unit in which an individual serves as the head of a department, agency, or division of the local governmental unit.*

Combining the definitions from Wis.Stat. § 19.42

(7w)(d) and Wis.Stat. § 19.32(1dm) in this way still does not remove the independent contractor exception. Further, combining the definitions in this way still does not include Grota Appraisals, because Grota Appraisals does not further qualify as an appointive office **in which an individual serves as the head of a department, agency, or division of the local governmental unit.** Wis.Stat. § 19.32(1dm). Therefore, regardless of the municipalities' tortured statutory construction, "local public office" still cannot be interpreted to include Grota Appraisals because Grota Appraisals is not an independent contractor, and no individual serves as the head of any local governmental unit.

That Grota Appraisals cannot appropriately be considered an "authority" is further supported by Wis.Stat. § 19.37(2), the open records law's penalty provision. This statute provides that:

the court shall award reasonable attorney fees, damages of not less than \$100, and other actual costs to the requester if the requester prevails Costs and fees shall be paid by the authority affected or the unit of government of which it is a part, or by the unit of government by which the legal custodian under s. 19.33 is employed and may not become a personal liability of any public official.

The penalty provision refers only to governmental entities. Assuming *arguendo* that Grota Appraisals is a "public official" or any statutory classification that would result in Grota Appraisals being considered an "authority," costs and fees would become a personal liability of that corporation, in this case owned solely by Michael L. Grota. Thus, the clause "and may not become a personal liability of any public official" would be read out of the statute entirely.

The municipalities cannot argue that Grota Appraisals is an "authority" because there is absolutely zero statutory support in the definition of "authority" to conclude that Grota Appraisals is an "authority."

B. Possession of a Record Does Not Convert a Non-Authority to an Authority

Next, the municipalities argue that an authority must be defined as a person having custody of a record. However, a "legal custodian," as defined by Wis.Stat. § 19.33 still includes the municipalities, regardless of possession of any record. Furthermore, despite the municipalities' arguments to the contrary, they do not dispute that at the least, they possessed

PDF copies of the data, and read only copies of assessment data, and they cannot dispute that they possess data going back historically further in time than any of the contract assessors.

Further, the "contractors' records" provisions of Wis.Stat. § 19.36(3), provides that "[e]ach authority shall make available for inspection .. 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..." See also Building and Construction Trades Council v. Waunakee Community Sch. Dist., 221 Wis. 2d 575, 581, 585 N.W.2d 726, 72829 (Ct. App. 1998) (open records law does not apply to subcontractors of a contractor if the subcontractor does not contract with an authority).

In this case, the only true "authorities" are the municipalities, and the "person other than an authority" is Grotta Appraisals, with whom the municipalities contracted with. Grotta Appraisals is the only other entity in this case with a contractual relationship with the village, and as such, Building and Construction Trades supports the proposition that Grotta Appraisals is not an "authority", just a person other than an authority with whom the authority has

contracted. *Id.*

The municipalities themselves note that a contract existed between “*two authorities.*” Village of Sussex brief, p. 45.

Further, physical as opposed to legal custody is not determinative of status as an “authority.” See Journal/Sentinel, Inc. v. School Bd. of the Sch. Dist. of Shorewood, 186 Wis. 2d 443, 452, 521 N.W.2d 165 (Ct. App. 1994) (holding that private law firm under contract with an authority was not authority, but that the school board was an authority even absent possession of any record). See also, Machotka v. Village of West Salem, 2000 WI App 43, ¶8, 233 Wis. 2d 106, 607 N.W.2d 319 (Ct.App. 2000) (“a governmental entity cannot evade its responsibilities under the open records law by ‘shifting’ a record’s creation or custody to an agent.”)

In Machotka, the Village of West Salem was not required to obtain and provide records to a claimant that were under a contractor’s control – *but neither were the contractors required to provide the data.* *Id.* 233 Wis.2d at 112. The contractor did not somehow become an authority by virtue of the contract. *Id.*

The municipalities point to Machotka for the further proposition that the municipalities were

pointing WIREdata in the right direction and trying to comply with their requests, and did nothing to prevent the release of any data. The municipalities produced nothing to WIREdata however, and have followed in parallel argument to Grota Appraisals on nearly every topic in this case. Further, the municipalities never offered to assist monetarily in ensuring that the data would be produced. The municipalities now just appear to wave their hands as if there was nothing they could do. Although Grota Appraisals agree that attempts were being made to comply, and that the mandamus action was premature, the municipalities remain the true "authorities."

Further, "[e]ach and every officer of the state, or of any county, town, city, village, school district, or other municipality or district, is the legal custodian..." Wis.Stat. § 19.21(1). Further, the municipalities meets the statutory definition of a legal custodian pursuant to Wis.Stat. § 19.33.

A legal custodian is not to be confused with possession. The village confuses custody (possession) with a custodian. Just because Grota Appraisals may *possess* assessment data does not make them an "authority."

The municipalities argue that because Grota


Appraisals possesses assessment data, they must become an authority, citing Woznicki v. Erickson, 202 Wis.2d 178, 184 (1996). Woznicki held that the term authority, as defined by Wis.Stat. § 19.32(1) is "a 'state or local office, elected official, agency [or] board' who has 'custody of a record.'" *Id.* The municipalities' reasoning that one who has possession of a record becomes an "authority" misses the point: in order to be an "authority", the custodian still must be "a 'state or local office, elected official, agency [or] board'" or any of the other statutory authorities. *Id.* Grota Appraisals is none of those governmental entities.

Even if Grota Appraisals may possess assessment data, that does not make them an "authority."

CONCLUSION

Even if this Court affirms the Court of Appeals' erroneous decision to grant mandamus, only authorities or units of government have exposure to any award of attorney's fees. Grota Appraisals cannot possibly be considered an "[a]uthority" because it does not meet the statutory definition provided in Wis.stat § 19.32(1).


Respectfully submitted: Date: July 11, 2007

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FORM AND LENGTH CERTIFICATION

I certify that this brief conforms to the rules contained in Wis. Stat. § (Rule) 809.19(8)(b) and (c) for a brief produced using monospaced font: The length of this brief is 2307 words inclusive of footnotes, and 14 pages. The font is Monospac821 BT, used on Microsoft Word 2003, 13 point.

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CERTIFICATE OF SERVICE

I hereby certify that three copies of Grota Appraisal, LLC. Michael L. Grota and Assessment Technologies of WI, LLC's Defendants-Appellants-Petitioners' Brief of Defendants-Appellants-Petitioners has been served on the following attorneys by US Mail as follows:

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Daniel R. Johnson

**SUPREME COURT
STATE OF WISCONSIN
APPEAL NOS. 2005AP1473; 2006AP174; 2006AP175**

WIREDATA, INC.,
Plaintiff-Respondent,

v.

VILLAGE OF SUSSEX and
VILLAGE OF SUSSEX CUSTODIAN,
Defendants-Co-Appellants-Cross Petitioners,

GROTA APPRAISALS, LLC,
MICHAEL L. GROTA, and
ASSESSMENT TECHNOLOGIES OF WI, LLC,
Defendants-Appellants-Petitioners.

WIREDATA, INC.,
Plaintiff-Appellant,

v.

VILLAGE OF THIENSVILLE,
Defendant-Respondent,

GROTA APPRAISALS, LLC,
MICHAEL L. GROTA and
ASSESSMENT TECHNOLOGIES OF WI, LLC,
Defendants-Respondents-Petitioners.

WIREDATA, INC.,
Plaintiff-Appellant,

v.

CITY OF PORT WASHINGTON,
Defendant-Respondent-Cross Petitioner,
MATTHIES ASSESSMENTS, INC.
Defendant-Respondent,
AMERICAN FAMILY INSURANCE COMPANY,
Intervenor.

REPLY BRIEF OF THE VILLAGE OF SUSSEX
AND THE CITY OF PORT WASHINGTON TO BRIEF OF
RESPONDENT WIREDATA, INC.

APPEAL FROM WAUKESHA COUNTY CIRCUIT
COURT, THE HONORABLE MARK S. GEMPELER,
PRESIDING, CASE NO. 2001CV001403, AND APPEAL
FROM OZAUKEE COUNTY CIRCUIT COURT, THE
HONORABLE THOMAS R. WOLFGRAM, PRESIDING,
CIRCUIT COURT CASE NOS. 2001CV000198 AND
2001CV00216

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I. ASSESSORS HOLDING LOCAL PUBLIC OFFICE ARE “AUTHORITIES” UNDER THE OPEN RECORDS LAW.

WIREData does not contest that the Open Records Law should be interpreted to include the assessors as “authorities.” Although WIREData contends the municipalities should be fully responsible for the assessors’ denials of records and/or should have done more technologically to circumvent the assessors’ programs and produce the sought-after records, crucially WIREData does not grapple with the municipalities’ position that the assessors should be deemed “authorities” pursuant to § 19.32(1).

Further, WIREData acknowledges that the sought-after electronic/digital data has been maintained by and is in the custody of the assessors exclusively. **Pl. Br. p. 5-6.** WIREData points to nothing in the record demonstrating that the municipalities possessed the sought-after data. Nor could it: two years of litigation between it and Assessment Technologies involved the scope of copyright protection of the database possessed by the assessors, not the municipalities. In a weak attempt to draw such an inference, WIREData maintains that the Access Database could be duplicated

for production to a requestor because the Access Database has no “read-only” limitations. **Pl. Br. p. 13-14, 80.** But, WIREdata cannot show that the municipalities possessed the Access Database in the same format as the assessors. Although WIREdata posits that the Village of Sussex “admitted to possessing this read-only Market Drive program which means they also had a full copy of the database, not merely paper copies,” **Pl. Br. p. 14,** the affidavit cited by WIREdata does not support this proposition. In fact, that affidavit (Village of Sussex Administrator) states that the Village had a limited database and did not have possession of the data or a copy of the Market Drive database that contained the information in the format requested by WIREdata. **R.-App. 153-154** (Aff. of Swartz, ¶ 6). *See also* **R.-App. 430** (Pelkey Depo., p. 60); **432-434** (Kromholz’s letter, p. 1).¹ WIREdata has offered no evidence to dispute these facts other than speculation.

¹ Citations are to WIREdata’s Appendix Volume I and II unless otherwise noted.

II. NO LIABILITY SHOULD ATTACH TO MUNICIPALITIES WHEN THEY CONTRACT WITH INDEPENDENT CONTRACTORS TO FILL A LOCAL PUBLIC OFFICE AND WHEN THEY DIRECT THE REQUESTER OF RECORDS TO THE INDEPENDENT CONTRACTOR WHO HAS SOLE CUSTODY OF THE RECORDS.

WIREdata submits that the assessors as well as Andrew Pelkey were agents of the municipalities and therefore the actions of these individuals were the authorized actions of the municipalities. **Pl. Br. p. 8 n. 4, 19, 57-58, 75-77, 78-79, 81-83.** WIREdata's position does not comport with the record. The assessors were not agents like the law firm in *Journal/Sentinel v. Shorewood School Bd.*, 186 Wis.2d 443, 521 N.W.2d 165 (Ct. App. 1994), or the general contractor in *Building and Constr. Trades Council v. Waunakee Community Sch. Dist.*, 221 Wis.2d 575, 585 N.W.2d 726 (Ct. App. 1998). They were independent contractors who agreed to fill a local public office by statutory appointment. Further, Andrew Pelkey had no principal-agent relationship with the municipalities. The municipalities' contracts existed with Grota Assessments and Matthies Assessments. Pelkey worked for a third-party company called Assessments Technologies, Inc. **Pl. Br. p. 6-**

7, 8. Although Assessments Technologies may have had some relationship with Michael Grotta, and although Pelkey may have been the agent of Assessments Technologies, no agency relationship existed between Pelkey and the municipalities. The municipalities neither contracted with nor controlled nor directed Assessment Technologies or Pelkey. WIREdata cites no authority for the proposition that simply because the municipalities communicated with Pelkey that he became the municipalities' agent. Communications to Grotta, moreover, did not adopt Pelkey's position. **R-App. 211-212, 482-483.**

WIREdata makes the alarmist argument that illogical results would flow from a holding that Pelkey was not an agent of the municipalities since it would require a requester to hold all communications regarding a request with the authority. **Pl. Br. p. 59.** However, the Open Records Law requires requests to be directed to the authority having custody of the sought-after records and for that authority to respond accordingly. **§§ 19.32(1), 19.33, 19.35(1), 19.35(4).** Wisconsin's public records laws speak in terms of whether an entity is an "authority" and whether they are the

“custodians” of records under its purview; there is no requirement for “ownership.” *See* § 19.32(1), 19.36(3). Here, WIREdata immediately received direction from the municipalities as to the identity of the authority who could fill its request. No evidence exists showing this process proved “difficult” for WIREdata. Nor did this process interfere with the legislative mandate that presumes openness of records. Here, the municipalities directed WIREdata to the appropriate “authority” and advised that they had no objections to release of the sought-after records. That a requestor must determine whether a request should be made to a municipal clerk, a judicial clerk, a law enforcement agency, a district attorney’s office or the person holding the office of assessor is not an onerous burden, particularly where the municipalities help the requestor by pointing the requestor to the proper custodian.

Lastly, WIREdata is wrong to argue that the actions and obligations of the assessors, in their official capacity as local public officers, were an extension of the actions and obligations of the municipalities. **Pl. Br. p. 74-79, 83-84.** The assessors filled local public offices. Having custody of the sought-after records, their

statutory position made them the authorities in this case. They were the “authority affected” for purposes of any penalties for noncompliance. § 19.37(2)(a). Their contracts outlined their responsibilities, such as compliance with the directives of the municipalities, procurement of liability insurance, and fulfilling the duties of their office including compliance with Wisconsin’s Property Assessment Manual. **R-App. 275-279** (Grotz’s Assessment Contract at Art. I & Art. III ¶¶ 2, 6, 9); **R-App. 407-411** (Matthies’ Assessment Contract at Art. I & Art. III ¶¶ 4, 7, 9). Under these circumstances, § 19.36(3) does not control like it did in *Journal/Sentinel*.

III. A MANDAMUS ACTION AGAINST THE MUNICIPALITIES IS NOT PROPERLY COMMENCED WHEN THE MUNICIPALITIES HAVE NOT DENIED THE REQUEST FOR RECORDS AND DO NOT HAVE POSSESSION OF THE RECORDS.

In arguing that the municipalities were proper parties to the mandamus action, WIREdata reasons that the municipalities could have produced the sought-after electronic data by pursuing technological and/or other measures to extract and/or obtain the

data. **Pl. Br. p. 69-72, 79-81.** The Court should disregard this argument.

First, WIREdata requested the database as it existed in searchable format in the possession of the assessors. **R-App. 401** (Aff. Shuttleworth ¶ 3-5). The assessors provided the municipalities with a limited database so that the municipalities could not technologically circumvent the Market Drive program. The municipalities offered what they had but this proved insufficient for WIREdata. This case has never been about barring access to property records for individual properties. For WIREdata to argue that the municipalities could have taken technological measures to circumvent technology is not the point. There will always be technological ways to circumvent software, but the Open Records Law does not require a municipality to take such extreme measures when the sought-after information (in the format desired by WIREdata) is in possession of another “authority,” here, the assessors. Nor does the Open Records Law require the creation of a new record by extracting information from existing records and compiling the information in a new format. *See* § 19.35(1)(L). The

only exception to this rule, pertaining to records which are not in a readily comprehensible form, requires the authority to produce “a copy of the information contained in the record assembled and reduced to written form on paper.” § 19.35(1)(e). WIREdata does not want paper records, whether the original property record cards or PDF versions of assessment information, but electronic/digital information.

Second, unlike *State of Wisconsin ex rel. Milwaukee Police Association v. Jones*, 2000 WI App. 146, 237 Wis.2d 840, 615 N.W.2d 190 (Ct. App. 2000), the municipalities did not have the option to produce the sought-after records in the format requested by WIREdata. Whereas the “authority” in *Jones* could itself produce either audio or digital recordings of 911 calls, the municipalities here possessed only limited data, copies of which would not satisfy WIREdata’s request.

Third, the fact that the Seventh Circuit stated that Grota has no right to limit the municipalities to a read-only version of the data does not mean the municipalities should have obtained from Grota the full database. See Pl. Br. p. 80. This case arose in 2001. The

Open Records Law excluded “materials to which access is limited by copyright.” § 19.32(2). The assessors asserted this privilege in response to WIREdata’s request and advised the municipalities that WIREdata’s request sought the electronic/digital information which they possessed in licensed software. WIREdata’s request spoke in terms of electronic/digital information, not traditional paper copies.² A federal district court agreed with the assessors’ position that WIREdata sought electronic/digital information protected by copyright. While the Seventh Circuit disagreed with the district court, WIREdata offers no authority for the proposition that the municipalities should have predicted that federal courts may disagree on these issues. Nor does WIREdata offer any authority for the proposition that the Open Records Law compelled the municipalities to hold the assessors to their burden of proof in proving the legitimacy of their denials. No argument has been made that the municipalities had the capacity to do more than circuit courts armed with the power of mandamus to compel production of

² The original WIREdata request to Grota stated: “an electronic/digital copy of the detailed real estate property records (showing the specific characteristics of each parcel and the improvements thereupon) used and/or maintained by the assessor in determining the proper assessments for each parcel within the Village of Sussex.” **Pl. Br. p. 41.**

these records. Once litigation began, it has been for all practical purposes very difficult for the municipalities to compel another defendant to produce the requested information. Yet, the municipalities have always been clear that they had no objection to the production of the records in the custody of the assessors in the electronic/digital format sought by WIREdata.

WIREdata argues the municipalities could have done more to satisfy their request. For example, WIREdata incorrectly asserts that the Village has “admitted to possessing this read-only market drive program which means that they also had a full copy of the database, not merely paper copies.” **Pl. Br. p. 14.** The Sussex Village Administrator’s Affidavit, however, stated that “the Village had possession of a limited database that contained the zoning, square footage and assessment amount of the residential properties in the Village.” **R-App. 153** (Aff. Swartz ¶ 6)

“The Village did not have possession of all of the Data or a copy of the Market Drive database that contained the information requested by WIREdata.” *Id.* WIREdata acknowledges that the assessors alone have the sought-after database and that the municipalities had

only a limited database (for which the Seventh Circuit subsequently barred Grota from so limiting). **Pl. Br. p. 5-6, 9, 14, 17.** The point remains that at the time WIREdata requested the sought-after records, the municipalities had only a limited database but the records produced from that database did not satisfy WIREdata's request. **R-App. 475-476** (Curtis Dep. pg. 7-8).

WIREdata says "there is nothing in the record to indicate that the Village either asked Grota to comply with the law or attempted to do so themselves." **Pl. Br. p. 14.** WIREdata's own submissions to this Court contradict this statement. **R-App. 351-352, 355-356.** While WIREdata correctly points out that the Village Attorney stood ready to recommend to the Village that it adopt a different approach from Grota in responding to WIREdata's record request, **Pl. Br. p. 12-13,** WIREdata incorrectly states that the "Village was apparently satisfied with [Pelkey's] reasoning and stated as much as it reiterated these terms in owns letters to WIREdata ... " **Pl. Br. p. 13.** To the contrary, counsel questioned how the information could be provided to the Village in a comprehensible format but could not be provided to WIREdata in the same format without additional programming.

R.–App. 355. In responding to counsel for WIREdata, the Village of Sussex’s attorney advised that “every effort is being made to promptly respond to your request.” **R.–App. 482.** He further advised that the Village of Sussex would not become involved in any type of business dispute or business transaction “as the Village’s interest is only in ensuring that the public records laws are followed with regard to the public records request.” **R.–App. 483.**

IV. A MUNICIPALITY SHOULD NOT BE LIABLE FOR DAMAGES WHERE IT DID NOT OPPOSE PRODUCING THE SOUGHT-AFTER RECORDS AND DID NOT HAVE THE ABILITY TO RESPOND.

WIREdata’s reasoning why the municipalities should be held financially accountable under § 19.37 actually underscores the inequity of such a result. WIREdata says “the action of Grota were done at the request and for the benefit of the Municipalities itself,” and further that the municipalities are responsible for Grota’s actions as if they had conducted them. **Pl. Br. p. 83-84.** There is no evidence in the record which shows the municipalities requested that the assessors take the course they have traveled in this case. The municipalities did not request that the records should be withheld on

the grounds of copyright infringement. The municipalities did not request the assessors to respond to the mandamus proceedings with counterclaims. The municipalities did not request that Grota commence the litigation in federal court in an effort to stave off production of the sought-after data. Nor were the municipalities joined in the federal action. Following the Seventh Circuit's decision, the municipalities did not request that the assessors advocate new and different reasons for denying WIREdata's request.

Yet, WIREdata seeks to hold the municipalities fully liable for all these costs, fees and damages. The imposition of such penalties on the municipalities rather than the independent contractors who fill a local public office negates the deterrence aspect of these penalties on the wrongdoer. It also places an unjust burden on taxpayers who lack control over such conduct.

Under the Open Records Law, "costs and fees shall be paid by the *authority affected or the unit of government of which it is a part, or by the unit of government by which the legal custodian under s. 19.33 is employed and may not become a personal liability of any public official.*" § 19.37(2)(a) (emphasis added). The

assessors are authorities in this case. They are the “authority affected.”

That WIREdata believes the municipalities should nonetheless be financially accountable, on the grounds that the assessors are agents, cannot be reconciled with this record. The record in this case contains material differences as compared to *Journal/Sentinel* because an entity holding a local public office has custody of the sought-after records and that entity is an “authority” separate from the municipalities.

Any concern by WIREdata that the assessors, if found responsible, would not satisfy any costs, fees and damages is not the issue before this Court. Although the municipalities’ contracts with the assessors included provisions requiring procurement of insurance policies, the availability of financial coverage for Open Records Law violations under those policies (or under other resources) is not the issue before this Court. Rather, the issue is whether the assessors are authorities, whether the assessors alone were the proper parties to the mandamus proceedings to the exclusion of the municipalities, and whether the plain language of

the penalty provisions of the Open Records Law allows for costs, fees and damages to flow to these entities to the exclusion of the municipalities.

WIREdata states that the municipalities have changed their position in that they take the position in this Court that the records should have been produced and that it was the assessor who acted to thwart the open records law. **Pl. Br. p. 4, 27.**

To the contrary, the municipalities have always maintained this position. Support for this finding may be found in the pleadings, depositions, affidavits, and hearings. The municipalities never denied these requests, but acknowledged that they contracted with assessors who held local public office to be the official authority and custodian of the documents requested by WIREdata. The municipalities directed WIREdata to retrieve the documents from these assessors.

Finally, this case is not about egregious conduct on the part of the municipalities, either by divesting themselves of Open Records Law responsibilities or evading the same. The municipalities offered everything they had but this proved insufficient to WIREdata. They

directed WIREdata to the appropriate authority who had the sought-after records. They had no objection to the release of the records.

CONCLUSION

For these reasons, the Village of Sussex and the City of Port Washington respectfully request that this Court reverse the Court of Appeals decision.

Dated this 14th day of August, 2007.

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REMZY D. BITAR

**SUPREME COURT
STATE OF WISCONSIN
APPEAL NOS. 2005AP1473; 2006AP174; 2006AP175**

WIREDATA, INC.,
Plaintiff-Respondent,

v.

VILLAGE OF SUSSEX and
VILLAGE OF SUSSEX CUSTODIAN,
Defendants-Co-Appellants-Cross Petitioners,

GROTA APPRAISALS, LLC,
MICHAEL L. GROTA, and
ASSESSMENT TECHNOLOGIES OF WI, LLC,
Defendants-Appellants-Petitioners.

WIREDATA, INC.,
Plaintiff-Appellant,

v.

VILLAGE OF THIENSVILLE,
Defendant-Respondent,

GROTA APPRAISALS, LLC,
MICHAEL L. GROTA and
ASSESSMENT TECHNOLOGIES OF WI, LLC,
Defendants-Respondents-Petitioners.

WIREDATA, INC.,
Plaintiff-Appellant,

v.

CITY OF PORT WASHINGTON,
Defendant-Respondent-Cross Petitioner,
MATTHIES ASSESSMENTS, INC.
Defendant-Respondent,
AMERICAN FAMILY INSURANCE COMPANY,
Intervenor.

REPLY BRIEF OF THE VILLAGE OF SUSSEX
AND THE CITY OF PORT WASHINGTON

APPEAL FROM WAUKESHA COUNTY CIRCUIT COURT, THE HONORABLE MARK S. GEMPELER, PRESIDING, CASE NO. 2001CV001403, AND APPEAL FROM OZAUKEE COUNTY CIRCUIT COURT, THE HONORABLE THOMAS R. WOLFGRAM, PRESIDING, CIRCUIT COURT CASE NOS. 2001CV000198 AND 2001CV00216

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**I. AN “AUTHORITY” INCLUDES AN ASSESSOR
HOLDING LOCAL PUBLIC OFFICE.**

Matthies and Grota maintain that the definition of “authority” under § 19.32(1) does not include independent contractors. Even if it did, they argue that § 19.42(7w) and § 19.32(1dm) operate in tandem to exclude independent contractors and that these statutory provisions should be incorporated into the definition of “authority.”

These arguments ignore the record in this case. The municipal assessors, while independent contractors, were fundamentally different than the law firm in *Journal/Sentinel v. Shorewood Sch. Bd.*, 186 Wis.2d 443, 521 N.W.2d 165 (Ct. App. 1994), or the general contractor in *Building and Constr. Trades Council v. Waunakee Community Sch. Dist.*, 221 Wis.2d 575, 585 N.W.2d 726 (Ct. App. 1998). The relationships in this case are not simply governed by the parties’ contracts nor by their legal status as principal and agent. What makes this case unique and legally different is the fact that the office of assessor is a public office and the legislature has created a statutory mechanism for the municipalities to appoint independent contractors to fill the local public office of assessor for the purpose of making property tax

assessments. This authority comes from §§ 61.197(1)(f) and 62.09(1)(c) for cities and villages. The contracts in this case, albeit an important method to create contract-based rights, obligations and remedies, are simply a method of memorializing this arrangement to fill a public office. The statutory framework allowing municipalities to delegate to a private entity the responsibility for performing a function typically performed by the government distinguishes the assessors in this case from the garden-variety relationships with independent contractors in these other cases.

Due to their statutory appointments, the assessors function in the role of a local public office. The assessors fulfill uniquely governmental functions as required by Wisconsin Statutes governing general property taxation, such as ensuring parcels are valued uniformly in their taxation district, preparing tax rolls as the end result of each year's work and reporting to the Department of Revenue. The services provided are undeniably public in nature and all of their records necessarily relate to the important public business of assessing property for the levying of taxes on general property. Moreover, the assessors receive compensation for the work they

perform, and such compensation is financed with public funds. In addition, the assessors agreed to attend board of review hearings, furnish testimony when needed to defend their assessments, file official oaths, and hold the appointed position of statutory assessor, including maintaining office hours and responding to records requests. The assessors acknowledged their obligations under the Open Records Law.¹ However, in this case they took rigid views of their responsibilities when presented with a request for digital information. *See Assessment Technologies of WI, LLC. v. WIREdata Inc.*, 350 F.3d 640, 642 (7th Cir. 2003) (finding it “appalling” the assessors attempted to use copyright law to block access to the sought-after data). Their rigid view culminated in noncompliance to the detriment of the municipalities. Although the municipalities did not have complete control over the assessors, the totality of circumstances demonstrates that they tried to exercise some level of governmental oversight through contractual

¹ Indeed, the Wisconsin Property Assessment Manual, vol. 1, part 2, Legal Reference p. 21.1-2 (rev. 12/04), instructs local assessors as to compliance issues under the Open Records Law. Section 73.03 of the Wisconsin Statutes grants the Department of Revenue the authority to prepare the Assessment Manual, which “shall discuss and illustrate accepted assessment methods, techniques and practices with a view to more nearly uniform and more consistent assessments of property at the local level.”

arrangements (including provisions for maintaining liability insurance policies for the records) and through directives to the assessors to release the sought-after information.

The assessors argue that the definition of “authority” under § 19.32(1) does not integrate §§ 61.197(1)(f) and 62.09(1)(c) for appointing an assessor to a local public office. No legislative draftsmen would be capable of enumerating every possible entity to which the Open Records Law applies, however. In the first codification of the Open Records Law, the statute provided that every officer of a state, county, municipal entity or school district constituted the legal custodian of the records of the body and responsible for their care and control. *See Wis. Stats. § 18.01 (1917)*. The 1981 legislative session created §19.32(1) and § 19.36(3) (“contractor’s records”). *See Act of May 6, 1982, Chapter 335, 1981 Wis. Laws 1385*. The legislature provided an expansive definition of “authority.” While the definition of “authority” included all of the forms of government covered by its predecessor, it also clearly expanded that list. To argue the assessors should not be subject to the law simply because they are not

identified with particularity therein would frustrate this enlargement of the scope of the Open Records Law. Many municipal appointments are made, such as to the board of civil service commission per § 63.18 or to the public utility commission per § 66.0805. Under the assessors' theory, such appointments would be excused from Open Records Law compliance because the statutory framework under which they exist is not directly incorporated into § 19.32(1). This result contradicts the expansive definition of "authority."

Further, § 19.42(7w) does not exclude the assessors in this case from the definition of an authority. First, these independent contractors are appointed to the public office of assessor. Section 19.42(7w) draws a distinction between those holding "[a]n appointive office or position of a local governmental unit in which an individual serves for a specified term" versus those holding a position "limited to the exercise of ministerial action" or "filled by an independent contractor." § 19.42(7w)(c). Here, it is undisputed the assessors held appointive offices. They were not "a position filled by an independent contractor." To adopt the interpretation

that § 19.42(7w) excludes these public officials requires the court to delete “appointive office” out of that section. Second, the assessors have not justified why they do not come under “local public office” as defined in § 19.32(1dm). That section says that a local public office “also includes any appointed office...” Matthies says that “the only reading of §§ 19.32(1) and 19.32(1dm) that makes sense and gives meaning to both sections is the one that excludes independent contractors from the definition of authority.” **Matthies Brief, p. 13.** Matthies’ position is untenable because the words “and also includes” in § 19.32(1dm) signify a legislative intent to expand the application of “local public office” in § 19.32(1dm) beyond the definition given in § 19.42(7w). *See 2003 Wis. Act 47 § 1; State v. James P., 2005 WI 80, ¶ 25, 281 Wis.2d 685, 698 N.W.2d 95* (when utilized in statutory definitions, the word “includes” is a term indicating partiality and expansiveness.”) To ignore the language in § 19.32(1dm) that local public offices “also includes any appointive office” would contradict the principle that every portion in a statute be given meaning. It also contradicts legislative amendments that expand the definition of “authority” and legislative policy mandating

that the public records of *every* public office should be open and available for public inspection and the presumption of complete public access.

To incorporate the provisions of § 19.42(7w) into the definition of “authority” in a way to exclude the assessors from open records compliance in this case would contradict public policy. If a representative government is dependant upon an informed electorate, the public records in the custody of that person holding an appointive office should be open and available for public inspection. In this case, where the municipalities do not have custody of the sought-after records, the position advocated by the municipalities shines the light of open government on all entities that do public work and possess sought-after records.

The results advocated by the municipalities best comport with the major premise underlying Wisconsin’s Open Records Law. If the rationale is that in a self-governing society the electorate must be able to examine the conduct of the affairs of government as contained in documents and records kept by government officials, this accountability should be preserved when independent

contractors serve as the functional and statutory equivalent of a public office. The assessors' argument that the policy of the Open Records Law pertains only to the municipalities allows the non-governmental entity to hinder open government where, as here, the municipalities make every effort to comply but their hands are tied by the actions of the persons that they have appointed to fill local public office. The position advocated by the assessors, who disallowed and forestalled access to digital tax assessments records, is inconsistent with their obligations and the underlying policy of the Open Records Law.

II. NO LIABILITY SHOULD ATTACH TO MUNICIPALITIES WHEN THEY CONTRACT WITH INDEPENDENT CONTRACTORS TO FILL A LOCAL PUBLIC OFFICE AND WHEN THEY DIRECT THE REQUESTER OF RECORDS TO THE INDEPENDENT CONTRACTOR WHO HAS SOLE CUSTODY OF THE RECORDS.

The assessors argue existing case law and legislative intent establish that only public bodies should be responsible under the Open Records Law, even when public bodies do not have physical custody of sought-after records. *Journal/Sentinel*, however, does

not fully answer the issue for the reasons outlined above. That case focused on the nature of the record but provided little attention to the attributes of the entity holding the record. Moreover, the assessors ignore § 19.32(1)'s language that an "authority" means entities "having custody of a record..." The result advocated by the assessors also glosses over the full language in the "contractors' records" provision. Section 19.36(3) states that it applies in circumstances where a record is produced or collected under a contract entered into by the authority "with a person other than an authority...." § 19.36(3). The assessors were not a "person other than an authority." They were an "authority." Because the assessors overlook this language, they overstate *Journal/Sentinel's* "driving principle" that "a public body always retains its duties under the Open Records Law, even when it engages an independent contractor to create a record." See **Matthies Brief p. 18**. If that were the case, the legislature would not have provided the qualifying language "with a person other than an authority...." The legislative intent not to shift the obligations of governmental entities to independent contractors exists only when the municipalities contract "with a

person other than an authority.” While the municipalities agree with the “driving principle” of the *Journal/Sentinel* case, the municipalities disagree that case is outcome dispositive here.

The assessors also argue that § 19.35(6), pertaining to records in possession of elected officials, further supports the legislature’s intent not to shield from liability a public body that is not in possession of records. However, this case is about the responsibilities of appointed officials, not elected officials. WIREdata seeks records in the possession of appointed officials.

The Declaration of Policy contains a statement that providing information to the public is “an integral part of the routine duties of officers and employees.” § 19.31. This statement broadens the responsibilities of various public officials and employees because it provides a clear legislative mandate that they must provide access to public records when a request is made as part of their official duties as public agents. It also underscores the “presumption of complete public access” to records. § 19.31.

Consistent with the Declaration of Policy, § 19.36(3) should be interpreted as bringing records of non-governmental entities under

the coverage of the public records act and to allow members of the public direct access to records. The legislature's insertion of the contractor's records provision suggests that such records may have been previously unavailable.

III. A MANDAMUS ACTION AGAINST THE MUNICIPALITIES IS NOT PROPERLY COMMENCED WHEN THE MUNICIPALITIES HAVE NOT DENIED THE REQUEST FOR RECORDS AND DO NOT HAVE POSSESSION OF THE RECORDS.

The assessors argue that a mandamus action pursuant to § 19.37(1)(a) is appropriate only against the municipalities to the exclusion of the assessors. The definition of an “authority” specifically pertains to entities “having custody of a record ...” § 19.32(1). In turn, the right of mandamus extended under § 19.37(1)(a) is premised at least implicitly upon having custody of sought-after records. “If an authority withholds a record or a part of a record or delays granting access to a record or part of a record after a written request for a disclosure is made,... [t]he requestor may bring an action for mandamus asking a court to order release of the record.” § 19.37(1)(a). The penalty provision allows “a court to

order release of the record.” § 19.37(1)(a). Collectively, the definition of an “authority” and the enforcement and penalty framework under § 19.37(1)(a) show that the proper parties to a mandamus action are the entities who possess and who can actually release the sought-after records.

In this case, there is no dispute that the assessors have custody of the sought-after records. The municipalities could not comply with the request, at least not without exercising some discretion by implementing their own litigation against the assessors. But, mandamus cannot lie where duties are neither clear nor unequivocal nor where they require discretionary decisions. *See Menzel v. Milwaukee*, 32 Wis.2d 266, 276, 145 N.W.2d 198 (1966).

The assessors provide no sound reason as to why § 19.37(1)(a) should apply only to the municipalities. They argue cases like *Ward v. Assessors of the Town of Delavan*, 1 Wis. 345 (1853) and *Neu v. Voegel*, 96 Wis. 489, 71 N.W. 880 (1897) do not provide authority to authorize a mandamus against an assessor to perform municipal functions. **Matthies Brief, p. 26-27.** However, mandamus actions were proper in those cases to compel the assessors

to perform their statutory duties in performing property valuations assessments. If an assessor is subject to mandamus to compel performance of statutory duties of tax assessments, mandamus should also be proper against the assessors for the equally important task of public records compliance. A requestor should be able to obtain through mandamus the records which form “an integral part of the routine duties” of these assessors “whose responsibilities it is to provide such information.” § 19.31. Allowing the enforcement mechanisms contained in § 19.37(1)(a) to flow only to the assessors in this case, as the parties having custody of sought-after records, serves the best interests of § 19.31’s policy.

Matthies incorrectly states that its licensing agreement precluded its compliance with the Open Records Law. **Matthies Brief, p. 23.** The Seventh Circuit decision in *Assessments Technology* made clear to the assessors that they could not avoid providing access to the sought-after records on such grounds.

Finally, the assessors make the unconvincing plea that the municipalities, as the more sizeable parties with superior bargaining power, could have protected their interest by assisting the assessors

monetarily in ensuring the data would be produced or “by requiring that all electronic records prepared by [the assessors] be submitted to it for the purpose of complying with the Open Records Law.” **Matthies Brief. p. 24; Grotz Br. p. 12.** The assessors’ contracts contain provisions requiring them to comply with the directives of the municipalities; however, before the municipalities could request that the records be provided to them for the purpose of complying with the Open Records Law, the assessors unilaterally denied the requests. The mandamus action followed immediately after the assessors’ denials. Further, the assessors were advised by the municipalities that they had no objection to the release of the records. It is also unworkable for the assessors to argue that the municipalities could have paid the license fee to Assessment Technologies for access to the electronic database. Even on payment the municipality would still not have access to the database that the assessors disallowed in the request for records. The assessors, not the municipalities, took the position that the records were not subject to disclosure due to their licenses, a position flatly rejected by the Seventh Circuit. While § 19.35(3) allows municipalities to charge

actual, necessary and reasonable costs, they had no option to respond. In sum, these proposed alternatives still fall beyond the pale of mandamus, making the only appropriate parties to this case the assessors.

IV. A MUNICIPALITY SHOULD NOT BE LIABLE FOR DAMAGES WHERE IT DID NOT OPPOSE PRODUCING THE SOUGHT-AFTER RECORDS AND DID NOT HAVE THE ABILITY TO RESPOND.

The penalty provisions under § 19.37(2) should not be read to exonerate the assessors. The assessors maintain that this statute imposes penalties for non-compliance only upon the governmental entity. However, the statute at issue reads more broadly: costs and fees awarded to the requestor “shall be paid by the authority affected *or* the unit of government of which it is a part, or by the unit of government by which the legal custodian under s. 19.33 is employed....” § 19.37(2) (emphasis added). The plain language under § 19.37(2) signifies legislative intent to expand the class of entities that may be penalized under the Open Records Law. Section 19.37(2) comports with the expansive definition of “authority,” which makes sense if the Open Records Law is to set clear rights,

obligations, and penalties to all persons who fulfill public functions. By contrast, the legislature limited the punitive damages penalties to “an authority or legal custodian under s. 19.33...” § 19.37(3). This limitation shows the legislature intended to restrict the class of entities responsible for such damages.

If the purpose of damages is to punish and deter noncompliant conduct, the imposition of this penalty on a governmental entity that does not have the sought-after records negates the deterrence aspect of damages on the wrongdoer. It also places an unjust burden on taxpayers for the assessors’ noncompliant conduct.

Nor should damages flow to the municipalities by default. The assessors, as authorities, were subject to the penalties under § 19.37. Their contracts included obligations to procure liability insurance policies. Moreover, denials based on the licensing agreement in this case served the *private interests* of the assessors. Indeed, the litigation in the federal courts demonstrates the assessors were not sufficiently actuated by a purpose to serve the public interest. Since they were not acting within the scope of their employment when they denied the requests for private reasons, they

may not be entitled to receive reimbursement under the indemnity provisions of § 895.46(1)(a).

CONCLUSION

For these reasons, the Village of Sussex and the City of Port Washington respectfully request that this Court reverse the Court of Appeals decision.

Dated this 20th day of July, 2007.

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GROTA APPRAISALS, LLC and
MICHAEL L. GROTA,
ASSESSMENT TECHNOLOGIES OF WI, LLC
Defendant - Appellants-Petitioners.**

**WIREDATA, INC.,
Plaintiff-Appellant,**

v.

**VILLAGE OF THIENSVILLE,
Defendant-Respondent,
GROTA APPRAISALS, LLC and
MICHAEL L. GROTA,
ASSESSMENT TECHNOLOGIES OF WI, LLC,
Defendants - Respondents - Petitioners.**

**WIREDATA, INC.,
Plaintiff-Appellant,**

v.

**CITY OF PORT WASHINGTON,
Defendant - Respondent - Cross Petitioner,
MATTHIES ASSESSMENTS, INC.,
Defendant - Respondent,
AMERICAN FAMILY INSURANCE COMPANY,
Intervenor.**

**WIREDATA BRIEF AND SUPPLEMENTAL APPENDIX IN
RESPONSE TO BRIEF OF DEFENDANT-RESPONDENT MATTHIES
ASSESSMENTS, INC.**

Honorable Thomas R. Wolfram
Ozaukee County

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PROCEDURAL STATUS

Although Matthies did not seek review of the decision of the Court of Appeals, he has objected to 2 matters stated in the WIREdata brief in this court:

1. whether Pelkey was acting, in any respect as an agent of Matthies; and
2. whether the request of WIREdata was an unreasonable burden on Matthies.

Relative to these issues, the Court of Appeals found that:

1. “We also note that WIREdata could have reasonably construed its communications with Pelkey and both of the assessors as denials of its requests. The municipalities decry any responsibility for the effects of these communications. However, for purposes of the open records law, their actions must be attributed to the municipalities”. (*WIREdata v. Sussex, et. al*, 2007 WI App 22, Paragraph 55; 298 Wis. 2d 743; 729 N.W.2d 757.)

2. “Port Washington, through Matthies Assessments, flatly denied WIREdata's request”. (*WIREdata*, Paragraph 58, *Supra*)

3. The PDF created by Pelkey and sent to WIREdata did not comply with the open records request. (*WIREdata*, Paragraphs 59-66, *Supra*)

FACTS

As to Matthies, he has admitted receiving the open records request and knew that it was for a copy of the database (Please see pages 17-18 of Respondents WIREdata brief in this court). In his letter response, Matthies also said:

“If you wish to pursue this matter further, I would suggest that you contact Robert Grota at Assessment Technologies directly”. (Matthies Response, R-PW 17:14-15, R. App 339-40)

Based on the communication with Pelkey, WIREdata did have that contact with Assessment Technologies. As shown in page 53 of WIREdata’s brief, Grota specifically admitted that Pelkey contacted WIREdata on behalf of both Grota Appraisals and Assessment Technologies. Further, in 2006, Pelkey on behalf of Matthies sent

PDF's of the Port Washington data to WIREdata. (R-PWTH 78:8, 17, R-APP 475-477 and R-Suppl. App 499)

Although Matthies' counsel now advocates that it would put an unreasonable burden on Matthies to make and produce a copy, that position is not supported by affidavits or evidence as Matthies gave totally different testimony in his own deposition, and specifically admitted:

1. that every week he makes a back up copy of the data on an external device (Deposition of Matthies, R-PWTH 37:25-26, R-Suppl. App. 495); and
2. that the only two reasons why he did not respond to WIREdata's request are the alleged copyright violations (which the federal court disposed of) and because he did not know if the open records law required him to provide a copy. Specifically he said:

MR DEUTCH:

- Q. You're not giving it to them for two reasons; one because your contract with Assessment Technologies, and two, because you don't know if it's covered by open records law, is that correct?
- A. That's correct.

Q. And those are your only reasons?

A. Yes.

(R-PWTH 78:8, 17, R-APP 475-477 and R-Suppl. App
501-502)

Of course, Pelkey has said that copies of the data can be done in a few minutes¹ by anyone who is familiar enough with Market Drive to make back up copies. (R-S 61:46, R App. 200)

ARGUMENT

I. PELKEY, AS AN AGENT OF ASSESSMENT TECHNOLOGIES, WAS AN AGENT OF MATTHIES.

As it relates to Matthies and Port Washington, where there was a clear cut refusal to comply with the open records request, the issue of Pelkey's agency is only tangentially important and only on the two issues of showing the "run around " going on and showing the invalidity of the claim that the PDF satisfied the open record request². On one hand, Matthies tries to get aboard the Pelkey

¹ Please see WIREdata's response brief in this court, pages 10-12 quoting various alternative methods and the time for each.

² As it relates to Grota and Sussex, the Pelkey agency issue is important as it shows the clear enhancement of the request with someone where they are trying to claim they did not understand the request or how to fulfill it

bandwagon and say that Pelkey was acting on his behalf in sending the PDF to WIREdata. On the other hand, he claims that the communication (enhancing the request) between WIREdata and Pelkey had nothing to do with Matthies.

The “Pelkey” importance to this case is also on the concept of “run around”. An examination of the facts shows that in each case, WIREdata made the request to the municipality, who turned it over to the Assessor (Grota in two cases, Matthies in one), who referred it to Assessment Technologies and, on all of the aforesaid’s behalf, had Pelkey contact WIREdata. Now because of the intervening layers, the municipalities (and apparently the appraisers) are disclaiming any knowledge or involvement of Pelkey. In effect, the response to this open records request has been a very expensive multi-level wild goose chase – which is neither in the spirit or the purpose of the open records law.

In point of fact, since the Court of Appeals found that the PDF was not a proper response, that Matthies flatly denied the open records request and since Matthies did not appeal the court’s

determination, the issue of Pelkey's agency vis-à-vis Matthies may well be moot.

However, if this court does consider the PDF issue, then it possibly may become important as Port Washington should not be able to have it both ways (agent for only some of the communications). There are only two possible views that can be taken. First, if Pelkey is not the agent of Port Washington or Matthies, then Matthies response of May 22, 2001 is the denial. Under this view, "Pelkey's denial", "the receipt of enhanced request" and "the supplying of PDF" did not happen, but it becomes immaterial as Matthies' own response denied the open record request for a reason which was eventually decided as inappropriate by the 7th circuit.

This leaves PORT WASHINGTON and Matthies in the position where they should have then delivered the database, but they did not do so and thus there should be an order requiring them to deliver a copy of the database.

The other possible view is that Pelkey was acting on behalf of Matthies and Port Washington. Indeed, Matthies' own letter instructed WIREdata to "directly" contact Assessment Technologies. Under this view, the PDF was provided on behalf of Port Washington and Matthies, but then Port Washington and Matthies are also in receipt of the enhanced request based on the communications between Pelkey and WIREdata. Nonetheless, since the PDF did not meet the requirements of the enhanced request, then once again, the court of Appeals decision should be affirmed and Matthies required to produce the database.

Thus to the extent that it may be an issue as it relates to Matthies and Port Washington, it is only fair that Pelkeys' communications with WIREdata be viewed as being on behalf of the assessors (Grota and Matthies) and the Municipalities.

II. IT WAS NOT UNREASONABLY BURDENSOME TO REQUEST MATTHIES TO MAKE A COPY OF THE DATA BASE WHICH HE ALREADY DOES ON A WEEKLY BASIS

AND SINCE PELKEY TESTIFIED IT CAN BE DONE IN JUST A FEW MINUTES.

The question of Matthies alleged inability to copy the database or otherwise respond to the request for records is moot because he admits he makes backup copies and because that was not the reason given for the failure to respond to the open records request.

First, as the Court of Appeals confirmed, the law is clear that Matthies defense in the mandamus lawsuit is limited to those responses given by him as the reasons why he was not complying with the open records request. (WIREDdata, *supra*, Paragraphs 38 and 50)

Second, Matthies would never have tried to make that claim in writing because Matthies admits that he does make copies – every week. Pelkey’s testimony is clear that it only takes a few minutes to do so.

While Matthies’ brief claims that WIREDdata was making unique demands and also suggests that making an electronic copy would interrupt his normal business operation, the actual testimony

from Matthies shows otherwise – that he routinely makes copies. In light of this evidence, it is clear, contrary to counsel's assertions, Matthies constantly made copies and could have easily given one to WIREdata.

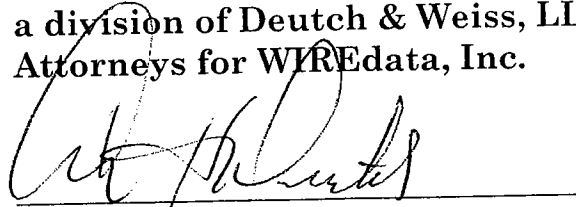
Thus, for both procedural reasons and the actual facts, Matthies should be required to produce a copy of the database as Pelkey confirms he can easily do.

CONCLUSION

For the reasons stated in the original Brief of the Respondent WIREdata and for reasons as stated herein, the decision of the Court of Appeals should be affirmed.

Dated at Milwaukee, Wisconsin this 24th day of October, 2007.

DEUTCH LAW OFFICES, S.C.
a division of Deutch & Weiss, LLC
Attorneys for WIREdata, Inc.

A handwritten signature in black ink, appearing to read 'Alan H. Deutch', is written over a horizontal line.

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FORM AND LENGTH CERTIFICATION

I certify that this brief conforms to the rules contained in Wis. Stat. § (Rule) 809.19(8)(b) and (c) for a brief produced using proportional serif font: The length of this brief is 10 pages. The font is Century Schoolbook, used on Microsoft Word 2002, 13 point.

Respectfully Submitted, October 24, 2007:

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CERTIFICATE OF SERVICE

I hereby certify that three copies of WIREdata, Incorporated's Brief have been served on the following attorneys and/or interested parties by US

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This 24th day of October, 2007

DEUTCH LAW OFFICES, S.C.
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Attorneys for WIREdata, Inc.

By: Alan H. Deutch
State Bar No. 1013249

**SUPREME COURT
STATE OF WISCONSIN
APPEAL NOS. 2005AP1473; 2006AP174; 2006AP175**

**WIREDATA, INC.,
Plaintiff-Respondent,**

v.

**VILLAGE OF SUSSEX and
VILLAGE OF SUSSEX CUSTODIAN
Defendants-Co-Appellants-Cross Petitioners,
GROTA APPRAISALS, LLC and
MICHAEL L. GROTA,
ASSESSMENT TECHNOLOGIES OF WI, LLC
Defendant - Appellants-Petitioners.**

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GROTA APPRAISALS, LLC and
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**WIREDATA, INC.,
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**CITY OF PORT WASHINGTON,
Defendant - Respondent - Cross Petitioner,
MATTHIES ASSESSMENTS, INC.,
Defendant - Respondent,
AMERICAN FAMILY INSURANCE COMPANY,
Intervenor.**

WIREDATA SUPPLEMENTAL APPENDIX

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INDEX TO WIREDATA'S SUPPLEMENTAL APPENDIX

<u>Description</u>	<u>Record</u>	<u>Appendix</u>
Affidavit of Emily C. Canedo in Support Plaintiff's Motion for Summary Judgment	37	R. Suppl. App. 490-492
Deposition of Ernie Matthies	62	R. Suppl. App. 493-502

1. I am one of the attorneys for the plaintiff, WIREdata, Inc., and make this affidavit on their behalf in support of plaintiff's motion for summary judgment.

2. Attached hereto collectively as Exhibit A are true and correct copies of pages from Michael Grota's deposition, conducted on June 22, 2004.

3. Attached hereto collectively as Exhibit B are true and correct copies of pages from Ernest Matthies' deposition, conducted on August 18, 2004.

4. Attached hereto collectively as Exhibit C are true and correct copies of pages from Dianne Robertson's deposition, conducted on August 11, 2004.

5. Attached hereto collectively as Exhibit D are true and correct copies of pages from Andrew Pelkey's deposition, conducted on September 22, 2004.

6. Attached hereto collectively as Exhibit E are true and correct copies of pages from Thomas Curtis' deposition, conducted on July 27, 2004.

7. Attached hereto as Exhibit F are true and correct copies of Exhibit 3 and Exhibit 4 as marked at the deposition of Thomas Curtis, conducted on July 27, 2004.

8. On or about February 6, 2004, I contacted attorneys for the defendants, renewing WIREdata's request for the data in light of the Seventh Circuit decision on the copyright issue. The defendant's attorneys either did not respond or stated that they would not or could not provide the data.

Attached hereto as Exhibit G is a true and correct copy of the letters received from the defendants attorneys in response to my inquiry.

9. Attached hereto as Exhibit H is a true and correct copy of Exhibit 8 as marked at the deposition of Peter Shuttleworth, conducted on July 28, 2004.

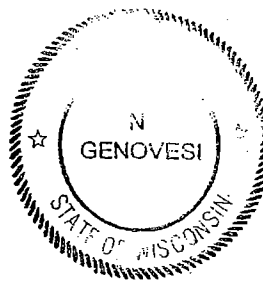
Executed in Milwaukee, Wisconsin, this 1st day of November,

2004.

Emily C. Canedo
Emily C. Canedo

SUBSCRIBED AND SWORN to before
me this 1st day of November, 2004.

[Signature]
Notary Public, State of Wisconsin
My commission expires: 11/1/10



1 format?

2 A. Engaged by the city to put it in a different
3 format? No.

4 Q. Did there come a time when you put it in a
5 different format?

6 A. Yes.

7 Q. And what was that time?

8 A. 1997, the city was revalued, and to revalue the
9 city at that time it was our decision, Matthies'
10 decision, to place Port Washington on a
11 computerized system for the first time.

12 Q. Why did you do that?

13 A. For our mutual benefit. We deal in data, and the
14 understanding of the data, the sales base, and
15 the ability to make adjustments and corrections
16 is something that is much more effective,
17 efficient, in a computerized -- using a
18 computerized system than it was previously using
19 the manual system.

20 Q. Okay. Any other reasons for going to a
21 computerized system?

22 A. Accuracy was the utmost reason.

23 Q. Okay.

24 A. Ease of access.

25 Q. Okay. Any other reasons?

1 A. No. I don't think so.

2 Q. Can you describe the computer system you put it
3 up on?

4 A. In 1996, my firm, Matthies Assessments, worked to
5 develop an assessment prototype, assessment
6 software prototype, and that software was used
7 for the 1997 year for the City of Port
8 Washington.

9 Q. You say a prototype. Was it a specific program,
10 or was it just a layout of a database?

11 A. It was a full-functioning assessment program with
12 the ability to capture sales, to analyze sales,
13 to make mass adjustments, and to create
14 reports.

15 Q. Did that program have a name?

16 A. It was a prototype. We just called it the
17 Matthies Program at the time.

18 Q. Is that program still in existence?

19 A. No, it's not.

20 Q. Okay. Did you -- with the Matthies Program,
21 did you store the data using any particular
22 database?

23 A. Yes, we did. It was -- it wasn't an ACCESS
24 database. I forget the actual brand at the time,
25 but it was a competing --

1 Q. From any source.

2 A. Market Drive has a roll-over feature that
3 captures the data for each year.

4 Q. Okay. And does it give you then an electronic
5 copy of that?

6 A. I've never gone into it. There is -- you can
7 access the data by the year.

8 Q. So your understanding is if I asked you for
9 something based on the 2001 records, you'd be
10 able to give that to me?

11 A. I believe so.

12 MS. BUELL: I'll object. I don't think
13 you were making a question that called for a
14 legal conclusion. I think you meant just what's
15 in his possession versus what legally he would be
16 required to provide you?

17 MR. DEUTCH: Right. Ignoring legally,
18 I'm asking him if he decided that he wanted to
19 and could give me a copy, he'd be able to do so.
20 I just want to know that it exists.

21 Q. And you're saying it does, correct?

22 A. Yes.

23 Q. Does Market Drive allow you to make a backup of
24 the data?

25 A. Yes, it does.

1 Q. And how often do you do that?

2 A. As I use the program, once a week.

3 Q. What do you do with the backups?

4 A. I just store it on a removable hard drive.

5 Q. And then where do you put that removable hard
6 drive?

7 A. I keep it. I keep it in various places. I have
8 a copy -- I have a copy at the assessor's office
9 in the City of Port Washington.

10 Q. How many -- is there any time where you put it on
11 a hard drive or a CD that you then just put aside
12 and keep?

13 A. Well, I do -- I have two hard drives, removable
14 hard drives that I'll rotate from my office to
15 the City of Port Washington so that -- for
16 obvious reasons.

17 Q. When you say removable hard drives, are you
18 talking something like a zip drive, or are you
19 talking an actual hard drive itself?

20 A. It's like a zip drive in principle. It's just a
21 drive D, removable hard drive.

22 Q. Do you ever back it up to a fixed copy, to an
23 electronic fixed copy like a CD or a disk?

24 A. No, I don't.

25 Q. In the year 2001, did you receive a request from

1 A. I couldn't provide data with such a vague
2 request.

3 Q. Did you -- upon receipt of that request, did you
4 look to see if you could make a copy of the
5 database, physically look to see if you could
6 make a copy?

7 A. Physically look? No.

8 Q. So that -- when you said that you preferred --
9 strike that. Earlier I asked you about why the
10 property record cards were computerized, and you
11 said accuracy, correct?

12 A. Yes.

13 Q. Can you amplify that? What do you mean by
14 accuracy?

15 A. It's not open to a stroke of a pen, penmanship.
16 It's very clear and easy to read for anybody.

17 Q. Is that the same reason why you now maintain the
18 records in an electronic fashion?

19 A. Yes.

20 Q. And that same problem of having to deal with hard
21 copy or paper copy versus electronic would still
22 be true today, correct?

23 A. No. Not at all.

24 Q. Why not?

25 A. Because the paper copy today would be -- would

1 emanate from the assessment program and would not
2 be handwritten as the old PA-500s were. But they
3 would be clear, easy to read and easy to
4 understand.

5 Q. They'd still be more difficult to compare if you
6 were trying to compare across properties if
7 you're using paper copy versus electronic copy,
8 correct?

9 A. I don't think so.

10 Q. You think it's just as easy to sort through --
11 how many records are -- how many parcels are in
12 Port Washington?

13 A. Approximately 3,500.

14 Q. Do you think it's just as easy to sort through
15 3,500 cards to look for all of a certain
16 characteristic as it would be to look through a
17 database, an electronic database?

18 A. No. I don't think it would be easier to do that,
19 no.

20 Q. So it's more difficult to use the -- the data is
21 more difficult to use when it's in a paper or
22 hard copy fashion than it is electronically, is
23 that correct?

24 A. That's correct.

25 Q. Have you computerized the other municipalities

DEPOSITION OF ERNIE MATTHIES - 8/18/04

1 Assessment Technologies provide any
2 indemnification to you if you act on their
3 contract and fail to give out information on
4 public records?

5 A. Does my contract with Assessment Technologies
6 indemnify me?

7 Q. Right.

8 MS. BUELL: I'll object as to form.

9 THE WITNESS: I don't understand the
10 question. I'm sorry.

11 MR. DEUTCH:

12 Q. Okay. You've not -- you're still refusing to
13 give the data -- what you assume to be the data
14 to WIREdata, is that correct?

15 MS. BUELL: Object as to form.

16 THE WITNESS:

17 A. I do not refuse to provide the public records for
18 any and all properties in the City of Port
19 Washington to WIREdata nor to anybody else who
20 requests them. It's just the format as I
21 understand it. I offered the printouts, I
22 believe the PDF files were offered, and it
23 doesn't appear that WIREdata is actually looking
24 for property records as I understand the term,
25 but breaking ground into the digital area and

1 trying to broaden the definition of the term
2 "record."

3 And I'm at a point where I would comply
4 with any lawful request, but I have to realize --
5 I have to understand from an authority, the
6 court, the judge, State of Wisconsin, that this
7 is indeed a lawful request and I am to comply.

8 When I'm -- when I'm given my orders
9 from an authority with that ability, I will
10 comply.

11 MR. DEUTCH:

12 Q. You understand that you're in the role of
13 municipality assessor?

14 A. Yes.

15 Q. You understand that as municipality assessor, you
16 have to comply with the open records law, is that
17 correct?

18 A. Yes, I do.

19 Q. You understand that you're an authority as
20 defined by that law?

21 MS. BUELL: Object. Calls for a legal
22 conclusion.

23 MR. DEUTCH: Asking his understanding.

24 MS. BUELL: That's not what the law
25 says. And object as to form. Go ahead and

1 that. You understand that the open records
2 law doesn't cover health records of an
3 individual?

4 MS. BUELL: Calls for a legal
5 conclusion, lacks foundation.

6 MR. DEUTCH:

7 Q. Did you know that?

8 A. I don't know.

9 Q. Presume it doesn't cover health records of an
10 individual. I'm trying to say, is there
11 something like that that's a reason that you're
12 saying well, I'm not giving it to them because it
13 has health records in it?

14 A. No.

15 Q. So you're just not giving it to them because you
16 don't know if it's covered by the open records
17 law, correct?

18 MS. BUELL: Well, that mischaracterizes
19 his prior testimony. He gave several reasons.

20 MR. DEUTCH:

21 Q. You're not giving it to them for two reasons;
22 one, because your contract with Assessment
23 Technologies, and two, because you don't know if
24 it's covered by open records law, is that
25 correct?

1 A. That's correct.

2 Q. And those are your only reasons?

3 A. Yes.

4 Q. Okay. Other than -- does the city have any --
5 strike that. Have you ever made any copies of
6 the assessment database for any part of the city
7 or any division of the city?

8 A. No.

9 Q. Have they ever requested it?

10 A. No.

11 Q. Have you ever made them for any other person
12 other than Assessment Technologies?

13 MS. BUELL: Asked and answered.

14 THE WITNESS:

15 A. No.

16 MR. DEUTCH:

17 Q. Do you agree that one of the ways that you can
18 understand whether assessment data is accurate is
19 by comparing the characteristics of one property
20 to another?

21 A. If assessment data is accurate? Could you define
22 your meaning -- I think the accuracy of each
23 individual parcel depends on its own data. The
24 number of bedrooms for the house next door has
25 nothing to do with the accuracy of another

CERTIFICATION OF APPENDIX

I hereby certify that filed with this brief, either as a separate document or as a part of this brief, is an appendix that complies with Wis. Stats. § 809.19(2)(a) and that contains: (1) a table of contents titled as an index and (2) portions of the record essential to an understanding of the issues raised.

I further certify that if the record is required by law to be confidential, the portions of the record included in the appendix are reproduced using first names and last initials instead of full names of persons, specifically including juveniles and parents of juveniles, with a notation that the portions of the record have been so reproduced to preserve confidentiality and with appropriate references to the record.

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SUPREME COURT
STATE OF WISCONSIN
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WIREDATA, INC.,
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VILLAGE OF SUSSEX and
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ASSESSMENT TECHNOLOGIES OF WISCONSIN, LLC
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VILLAGE OF THIENSVILLE, - Defendant - Respondent
GROTA APPRAISALS, LLC,
MICHAEL L. GROTA and
ASSESSMENT TECHNOLOGIES OF WISCONSIN, LLC
Defendants-Respondents-Petitioners.

WIREDATA, INC.,
Plaintiff-Appellant,

v.

CITY OF PORT WASHINGTON,
Defendant-Respondent-Cross Petitioner,
MATTHIES ASSESSMENTS, INC.,
Defendant-Respondent.
AMERICAN FAMILY INSURANCE COMPANY,
Intervenor.

BRIEF OF *AMICUS CURIAE* WISCONSIN COUNTIES ASSOCIATION

APPEAL FROM WAUKESHA COUNTY CIRCUIT COURT, THE
HONORABLE MARK S. GEMPELER, PRESIDING, CASE NO.
2001CV001403, AND APPEAL FROM OZAUKEE COUNTY CIRCUIT
COURT, THE HONORABLE THOMAS R. WOLFGRAM PRESIDING,
CIRCUIT COURT CASE NOS. 2001CV000198 AND 2001CV000216

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I. INTRODUCTION

All three of the cases currently pending before the Court involve WIREdata submitting a public records request seeking electronic and digital copies of real estate property records. Specifically, WIREdata sought the production of a proprietary electronic database maintained by the municipalities' contract assessors. In response to the requests, the assessors provided the requested records in a "read-only" ".pdf" format. The Court of Appeals found the response sufficient and concluded that "the language of the law itself and the public policy underpinning the open records law require . . . access to the source material – the material as it is both inputted and stored in the database, regardless of its physical form or characteristics." *WIREdata, Inc. v. Village of Sussex*, 2007 WI 22, ¶ 63, 298 Wis.2d 743, 729 N.W.2d 757. The Wisconsin Counties Association ("WCA") respectfully requests that the Supreme Court reverse the Court of Appeals' decision, as it relates to the contours of a records custodian's production burden, based upon the following:

(1) The Court of Appeals' overly expansive interpretation of the public records law will require Wisconsin municipalities to produce

substantial amounts of information that the Legislature clearly intended to exclude from the public records law;

(2) Based upon the precedent established in our sister states interpreting statutes similar to the statutes at issue here, municipalities cannot be compelled to produce records in any particular format that a requester demands; and

(3) The issue of whether the public records law requires the production of electronic data in a particular format is an issue that the Legislature must resolve.

II. ARGUMENT

A. **THE COURT OF APPEALS' INTERPRETATION OF THE PUBLIC RECORDS LAW REQUIRES THE PRODUCTION OF INFORMATION CLEARLY EXCLUDED FROM THE STATUTORY PRODUCTION REQUIREMENT.**

In its opinion, the Court of Appeals addressed the issue of a requester's right to receive requested records in a particular format – in this case, WIREdata's request for “an electronic/digital copy” of the information. *WIREdata, Inc*, 2007 WI 22, ¶ 59-68. Expanding upon the court's holding in *State ex rel. Milwaukee Police Ass'n v. Jones*, 2000 WI App 146, 237 Wis.2d 840, 615 N.W.2d 190, the court held that WIREdata

was entitled to the electronic database because, like *Jones*, the spirit of the open records law requires “access to the source material – the material as it is both inputted and stored in the database, regardless of its physical form or characteristics.” *WIREdata*, 2007 WI App 22, ¶ 63. *WIREdata* echoes the Court of Appeals’ overly simplistic analysis in its brief when it argues that, under *Jones*, it has the right to request information in a particular format “when the requested information is superior to perform a proper analysis of the data.” *WIREdata* Brief, p. 61.

With all due respect to the Court of Appeals and *WIREdata*, their reliance on *Jones* is misplaced given the distinct facts at issue and the potential ramifications related to a municipality’s requirement to produce documents that are created, edited and stored in electronic format. In *Jones*, the Milwaukee Police Association (MPA) requested a digital audio copy of a 911 call. *Jones*, 2000 WI App 146, ¶¶ 1-2. In responding to the request, the City provided an analog copy of the recording, which was as understandable to the human ear as the original digital tape. *Id.* at ¶ 3. The court in *Jones* held that the public records law required the City to produce a copy of the original digital recording, rather than the analog copy, because the statute unambiguously provides access to the source material

input into a computer for processing or produced as the product of the computer program. *Id.* at ¶ 17.

However, the court's holding in *Jones* cannot be applied whole-cloth to the present case, or cases involving the production of electronically maintained documents under the public records law. As WIREdata recognizes, in *Jones*, the court was concerned with the fact that a copy of the original digital tape would allow MPA's expert to extract and detect background voices, which was not possible with the analog tape. *Id.* at ¶ 14; see WIREdata Brief, p. 63. Basically, the court sought to ensure that the format in which the information was produced would provide the requester with the same information and capabilities as the original digital tape.

The Court of Appeals' decision, however, expands the right to access beyond the "same" information as the original record. If municipalities are required to produce electronic records in the "same" electronic format as was used to create the record, the requester will not only be getting the same information in the requested format, but more information, including various types of information the Legislature clearly intended to exclude from the public records law.

An example of the excluded information embedded within an electronic document that, if the Court of Appeals' decision is allowed to stand, would now be subject to a public records request is data commonly referred to as "metadata." Metadata has been defined as:

A description or definition of electronic data, or data about data. Often, metadata can only be accessed in certain viewing modes. Metadata can include descriptive HTML tags and information about when a document was created and what changes have been made on that document.

See <http://technology.findlaw.com/law-technology-dictionary/metadata.html>. Simply put, metadata, which is contained in many electronic documents, including Microsoft Office documents, allows someone to view the various iterations of an electronic document as it moves from draft stage to final stage, including, potentially, the timing and sequence of edits.

The public records law expressly excludes this category of "draft" and "note" information from the definition of "record." Specifically, Wis. Stat. § 19.32 (2) provides:

"Record" does not include drafts, notes, preliminary computations and like materials prepared for the originator's personal use or prepared by the originator in the name of a person for whom the originator is working.

Wis. Stat. § 19.32 (2) (emphasis added). By requiring municipalities to produce the original version of electronic documents, rather than “read-only” copies, the records will contain metadata. As a result, the requester will have access to information far beyond that which is contemplated under the public records law.

The Court of Appeals has previously recognized the public policy rationale behind exempting personal notes and drafts from disclosure. In *State v. Panknin*, 217 Wis.2d 200, 212, 579 N.W.2d 52 (Ct. App. 1998), the Court of Appeals held that a criminal litigant had no right to access a judge’s notes when it reasoned that personal notes are voluntary pieces of work completed for an employee’s own convenience “to facilitate the performance of [her] duties.” *Panknin*, 217 Wis.2d at 212. The court explicitly determined that production of notes and drafts would impede the work habits of employees because fear of disclosure would preclude them from ever committing thoughts to writing. *Id.*

Similarly, “drafts” and “notes” embedded within an electronic record’s metadata should be exempt from disclosure. Quite simply, these materials are not part of an official public record and are not ever intended for public consumption. As the *Panknin* court aptly recognized, disclosure

of such information would impede a public official or employee in the conduct of their business.

Finally, as discussed below, the definition of “record” contained within the public records law has not been amended since 1991. The advance of technology has been rapid, making it difficult for the Legislature and courts to keep up. While it may be difficult, courts must remain true to the Legislature’s intent associated with a particular statute. As the Court of Appeals stated in *Jones*:

As 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. . . . A potent open records law must remain open to technological advances so that its statutory terms remain true to the law's intent.

Jones, 2000 WI App 146, ¶ 19. In this case, the Court will not be disabling the public records law by excluding certain electronic documents from its purview. Rather, the legislative intent is best served by not requiring production of electronic documents which would allow the requester to view information not part of a “record,” namely the “drafts” and “notes” contained in metadata.

B. THE SUPREME COURT MAY LOOK TO OTHER JURISDICTIONS FOR GUIDANCE ON COMPELLING PRODUCTION OF DOCUMENTS IN A PARTICULAR FORMAT.

The Court of Appeals' interpretation of the public records law, which allows a requester to request public records in a particular format, is problematic. Many times, the information sought is not accessible in the particular format requested or obtaining the records in the requested format is costly. The question presented under the public records law is whether a municipality can be required to modify the format in which the information is provided if the requester asks that the information be provided in a specific format. In that respect, the Court of Appeals decision may be read to require municipalities to reformat the information and records to conform to the requester's preferred format.

While the public records law is clear that municipalities are not required to create a new record by extracting and compiling information from existing records into a new format,¹ Wis. Stat. § 19.35 (1) (L), *see*

¹ Assessment Technologies, LLC, Grota Appraisals, LLC and Michael Grota argue that the request at issue would require the creation of a new record. Brief of Assessment Technologies, Grota Appraisals, LLC and Michael Grota, p. 31-33. WIREdata argues that their request merely requires the municipality or its contract assessors to copy a database. Brief of WIREdata, p. 69-71. The Court of Appeals ruled that the request did not require the municipality or its contract assessors to create a new record since they already have the material available in the requested format. *WIREdata*, 2007 WI at ¶ 68.

also George v. Record Custodian, 169 Wis.2d 573, 485 N.W.2d 460 (Ct. App. 1992) the Court of Appeals decision, as it stands, does not preclude the interpretation that a municipality may be required to reformat available documents and information where the reformatting does not create a new record. The following hypothetical addresses this concern.

Suppose that an individual requests copies of certain public documents. However, the documents are organized in a manner that does not benefit the requester and the requester seeks to have the authority reorganize the documents such that certain pages and paragraphs are in a different order, *i.e.*, Paragraph 2 becomes Paragraph 22 or page 5 becomes page 15. In this situation, the requester is not asking that the authority create a new record, but merely reformat existing information. The Court of Appeals' decision could be read to require such reformatting.

While WIREdata argues that it has a right to the requested information in a particular format, precedent from other jurisdictions clearly instructs that public records statutes do not give rise to a right to request records in a particular format when producing the records in the

Regardless of whether the Supreme Court agrees with the contract assessors or WIREdata on that issue, the WCA is concerned that a situation may arise where a requester seeks to have information reorganized and/or reformatted and that a court, relying upon the Court of Appeals' decision in this case, may find that such a task does not constitute creation of a new record.

requested format would require the reformatting of information. In *American Federation of State, County and Mun. Employees (AFSCME), AFL-CIO v. County of Cook*, 182 Ill.App.3d 941, 538 N.E.2d 776 (Ill. App. 1989), the plaintiff requested certain public records be provided on computer tape or diskette rather than in a printed report under the Illinois Freedom of Information Act.² *Id.* at 942. Relying on its analysis of federal precedent, the court adopted an interpretation of the Freedom of Information Act, 5 U.S.C. § 552 (1977), which focused on the “accessibility of the information, not convenience of format to the parties.” *Id.* at 944. The Illinois court held that “the agency need only provide responsive, nonexempt information in a reasonably accessible format” despite the fact that the requested computerized version offered a less expensive and more convenient means of access. *Id.* The court also noted that while the requester does not have a right to designate the format and

²Two types of public records laws exist nationwide: “records-based” statutes and “information-based” statutes. The federal Freedom of Information Act (FOIA), 5 U.S.C. § 552 et seq., and various state laws, refer to the right to access “public information” while other state laws, like Illinois and Wisconsin, refer to the right to access “public records”. A survey of cases involving each type of statute reveals that “information-based” statutes focus on information content rather than the format in which the information is provided. However, where “records-based” statutes are at issue, both the format and the content of the information are relevant. See Holly Piehler Rockwell, *State Freedom of Information Act Requests: Right to Receive Information in a Particular Format*, 86 A.L.R.4th 786, § 2 (b) (1991).

the content under the Illinois statute, neither did the agency have “unfettered discretion” to choose the format. *Id.* at 945.

Moreover, in *State ex rel. Kerner v. State Teachers Retirement Bd.*, 82 Ohio St.3d 273, 274, 695 N.E.2d 256 (Ohio 1998), the court noted an agency “has no duty to create a new document by searching for and compiling information from its existing records.” *Id.* The court held that “a compilation of information must already exist in public records before access to it will be ordered.” *Id.*

Under the accepted approaches set forth above, municipalities clearly cannot be required to provide requested records in a particular format when producing the records in the particular format requires reformatting of the information. First, under the *County of Cook* approach, providing nonexempt information in printed, “read-only” format, rather than electronic format, is a reasonably accessible medium, even if it is not the most convenient medium for the requester. *County of Cook*, 182 Ill.App.3d at 944-45. Second, under the approach in *Kerner*, a municipality cannot be required to produce documents in a format in which they are not already maintained. *State ex re. Kerner*, 82 Ohio St.3d at 274.

Accordingly, a municipality could not be required to reorganize pages or paragraphs in order to comply with the public records law.

In sum, the manner in which our sister states have resolved the extent to which requesters have the right to access public records in a particular format is highly instructive. All cases lend support for the conclusion that public records laws nationwide do not require municipalities to reformat or reorganize public records.

C. THE LEGISLATURE MUST ADDRESS THE AMBIGUITY SURROUNDING COMPUTER-RELATED TERMS CONTAINED WITHIN THE PUBLIC RECORDS LAW.

The definition of the term “record” in effect at the time the public records law was codified – 26 years ago – is almost identical to the definition found within the current statute. L.1981, c. 335, § 14. Today, a “record” is defined as:

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 printout and optical disks.

Wis. Stat. § 19.32 (2).

While the definition of a public record is not without reference to computer-generated records, the Legislature clearly could not have contemplated, in 1981, the advancement of computer technology and enacted policy to govern the production of records created by electronic means.

The fact that the statute is antiquated and vague as it relates to computer-generated materials is no surprise. Since the definition of “record” was first enacted, the statute has been amended only once. The amendment occurred in 1991 and only effectuated a minor change in the statute to provide for the inclusion of “optical disks” in the definition of “record.” 1991 Act 39 § 208.

Given the statute’s failure to address computer-related terms, public officials are now called upon to make decisions related to which computer-generated materials must be produced to comply with the law without any guidance. As the Georgia Supreme Court recognized in *Jersawitz v. Hicks*, 264 Ga. 553, 448 S.E.2d 352 (Ga. 1994), the issue of expansion or limitation of public records laws is an issue best left to the legislature and not the courts. The Court in *Hicks* explained that where a statute does not expressly provide for access to public records via a particular medium,

“subtle or forced constructions of the statute should not be used to limit or extend its scope.” *Hicks*, 264 Ga. at 553; *see also Hawkins v. New Hampshire Dept. of Health and Human Services*, 147 N.H. 376, 380, 788 A.2d 255 (N.H. 2001) (“Unless the legislature addresses the nature of computerized information and the extent to which the public will be provided access to stored data, we will be called upon to establish accessibility on a case by case basis. It is our hope that the legislature will promptly examine the [public records law] in the context of advancing computer technology.”)

Similarly, the Court should not greatly expand the reach of the public records law to require the production of virtually all computer-generated materials in any medium, as the Court of Appeals has in this case. Quite simply, the responsibility to address these issues is not an issue for the courts. Rather, it is the Legislature’s responsibility to bring the public records law in line with modern times and amend the relevant statutes as they relate to the production of computer-generated materials.

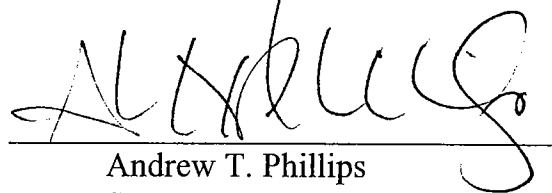
CONCLUSION

Based upon the foregoing argument, the WCA requests the Court reverse the Court of Appeals' decision that the municipalities are required to produce the requested public records in a particular format.

Respectfully submitted this 22nd day of August, 2007.

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By:

A handwritten signature in black ink, appearing to read "Andrew T. Phillips", written over a horizontal line.

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CERTIFICATION

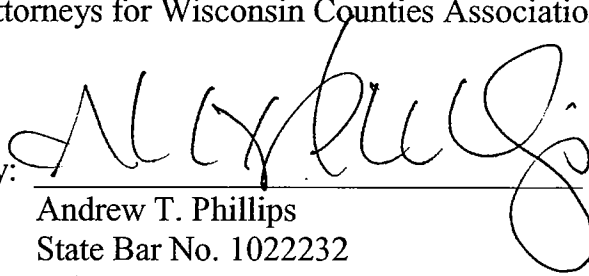
I certify that this Brief conforms to the rules contained in *Rules*
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13 point type and the length of the Brief is 2,969 words.

Dated this 21th day of August, 2007.

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SUPREME COURT
STATE OF WISCONSIN
Appeal Nos. 2005AP1473; 2006AP174; 2006AP175

WIREDATA, INC.,

Plaintiff-Respondent,

v.

VILLAGE OF SUSSEX and

Village of SUSSEX CUSTODIAN,

Defendants-Co-Appellants-Cross Petitioners,

GROTA APPRAISALS, LLC.,

MICHAEL L. GROTA and

ASSESSMENT TECHNOLOGIES OF WI, LLC,

Defendants-Appellants-Petitioners.

WIREDATA, INC.,

Plaintiff-Appellant,

v.

VILLAGE OF THIENSVILLE,

Defendant-Respondent,

GROTA APPRAISALS, LLC,

MICHAEL L. GROTA and

ASSESSMENT TECHNOLOGIES OF WI, LLC,

Defendants-Respondents-Petitioners.

WIREDATA, INC.,

Plaintiff-Appellant,

v.

CITY OF PORT WASHINGTON

Defendant-Respondent-Cross Petitioner,

MATHIES ASSESSMENTS, INC.,

Defendant-Respondent,

AMERICAN FAMILY INSURANCE COMPANY,

Intervenor.

LEAGUE OF WISCONSIN MUNICIPALITIES AMICUS BRIEF

Appeal from the Circuit Court of Waukesha County,
Case No. 01-CV-001403
The Honorable Mark S. Gempeler, Presiding.

Appeal from the Circuit Court of Waukesha County,
Case Nos. 01-CV-000198 and 01-CV-000216
The Honorable Thomas R. Wolfgram, Presiding

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3 McQuillin, MUNICIPAL CORPORATIONS, §12.29 (3d ed.)	4

INTRODUCTION

This case involves the application of the Wisconsin Public Records Law¹ to city and village independent contractor assessors (“contract assessors”). Contract assessors are different than independent contractors who build roads, audit accounts or clean buildings for a municipality. Contract assessors hold a local office, exercise government powers, take an oath of office and are like other appointed city and village officials who must comply with the Public Records Law.

The court of appeals could not “find any support either in case law or the [Public Records Law] for the position that the assessors bear responsibility for open records obligations.”

WIREData, Inc. v Village of Sussex, 2007 WI App 22, ¶ 45, 729 N.W.2d 757. The League of Wisconsin Municipalities respectfully disagrees and on behalf of its 188 city and 391 village members asks that this Court reverse the court of appeals and hold that a contract assessor is an authority under the Public Records Law and must independently comply with its obligations.

¹ The law is part of subchapter II of Wisconsin Statutes Chapter 19, which is titled “Public Records and Property.”

ARGUMENT

I. A CONTRACT ASSESSOR IS AN “AUTHORITY” UNDER THE PUBLIC RECORDS LAW.

A. The Meaning Of “Local Office” In Section 19.32(1) Includes The Officer Appointed To It.

The Public Records Law imposes duties on authorities and states that a “state or local office” which is “created by constitution, law, ordinance, rule or order” and has “custody of a record” is an “authority.” **Wis. Stat. §19.32(1)**. The legislature did not define “local office” and this Court has not determined whether the term is merely a place or includes the officer appointed to it. We think it includes the officer and, as a municipal officer, includes a contract assessor.

Statutory language is given its common, ordinary, and accepted meaning, except that technical or specially-defined words or phrases are given their technical or special definitional meaning. *State ex. rel. Kalal v. Circuit Court for Dane County*, 2004 WI 58, ¶ 45, 271 Wis. 2d 633, 681 N.W.2d 110. This Court often relies upon definitions in a “recognized dictionary to determine the

common and ordinary meaning of the word.” *Mared Industries, Inc. v. Mansfield*, 2005 WI 5, ¶ 32, 277 Wis. 2d 350, 690 N.W.2d 835 (quoting *State v. Polashek*, 2002 WI 74, ¶ 19, 253 Wis. 2d 527, 646 N.W.2d 330). One dictionary definition of “office” is “a room, set of rooms, or building where the business of a commercial or industrial organization or of a professional person is conducted.” *Random House Dictionary of the English Language*, 1344 (2d ed. 1987). An alternative definition is “a position of duty, trust, or authority, esp. in the government, a corporation, a society, or the like.” *Id.* *Black’s Law Dictionary* also defines an “office” as “a place for the regular transaction of business or performance of a particular service” and, alternatively, as “a right, and correspondent duty, to exercise a public trust.” *Black’s Law Dictionary*, 976-977 (5th ed. 1979). Thus, “office” might simply mean a place or it might mean the duties of a person. The latter meaning is most consistent with the Public Records Law.

A leading commentator on municipal law states:

The power and jurisdiction of an officer constitute the office, are of the essence of it, and are inseparable from it. [Emphasis added].

3 McQuillin, MUNICIPAL CORPORATIONS, §12.29 (3d. ed.).

Thus, the general rule is that the powers and duties of a local officer and the local office he holds are equivalent and are not separable.

The Public Records Law provides for legal custodians who are vested with “full legal power to render decisions and carry out the duties” of an authority. **Wis. Stat. §19.33(4)**. This might suggest separation of the duties of a “local office” and its officer. However, plain language of the statute shows otherwise.

For example, Wis. Stat. §19.33(1) expressly makes a local elected official, who holds a local office, the legal custodian of his or her records. Similarly, excluding three types of elective office authorities, §19.33(4) provides that the “highest ranking officer and the chief administrative officer, if any” of an authority is the legal custodian for the authority if it does not designate a legal custodian to fulfill its Public Records Law duties.

The Public Records Law does not separate the duties of an elected official or his elective office. **Wis. Stat. §19.33(1)**.

Likewise, it links the duties of a “local office” to its highest-ranking officer, who is the officer appointed to it, and requires a specific

legal custodian designation to alter that link. The inseparability of the office and its officer reflected in these provisions is consistent with the principle that the duties of a public office and its public officer are equivalent and support interpretation of “local office” to include the officer appointed to it.

The 19.33(4) directive that “[e]very authority shall *designate in writing*” a “legal custodian to fulfill its duties” under the Public Records Law provides additional support. A place cannot designate anything in writing by itself. A place cannot decide who should be a legal custodian or not. A place cannot write a name. A “local office” has no capacity to comply with its 19.33(4) duty unless its meaning includes the local officer appointed to it.²

The liability provisions in Wis. Stat. 19.37(2)(a) also support such interpretation. That section provides for the award of fees and costs to a prevailing requester but states that they “may not become the personal liability of any public official.” **Wis. Stat. §19.37(2)(a).** This limitation is unnecessary if “local office” does not include the officer or public official appointed to it. If “local office” only means

² Unlike other duties charged to an authority under the law, this one cannot be performed by a legal custodian of a “local office” who is not the officer who holds it since the 19.33(4) duty is to appoint the legal custodian.

the *place* for local government business or services, then a court order imposing costs and damages against a “local office” could not become the personal responsibility of the officer appointed to it since an officer is not a place.

Section 19.32(1) must be interpreted to avoid absurd or unreasonable results. *Kalal*, 2004 WI 58, ¶ 46. Interpreting “local office” as excluding the officer appointed to it would vest responsibility for 19.33(4) compliance in a place with no independent capacity to fulfill it. This is an absurd and unreasonable result.

Section 19.33(4) cannot be read to not require an authority to make that written designation. Statutory language “is read where possible to give reasonable effect to every word, to avoid surplusage.” *Id.* Interpreting “local office” to include the officer appointed to it gives effect to every word in 19.33(4).

Statutory language must also be “interpreted in the context in which it is used . . . as part of whole.” *Id.* Interpreting “local office” to include the officer appointed to it does this. It reads 19.32(1) in

conjunction with 19.37(2)(a) and gives reasonable meaning to both provisions.

B. A Contract Assessor For A City Or Village Is A Local Officer Appointed To A Local Office.

Cities and villages are authorized to fill a vacancy in their assessor's office by appointing a corporation or an independent contractor. **Wis. Stat. §§62.09(1)(c) and 61.197(1)(f).** The assessor's office is one of the specifically enumerated statutory offices in city and village government. **Wis. Stat. §§62.09(1)(a) and 61.27.** An appointed assessor, including the designee of a corporation or independent contractor that has been appointed as city or village assessor, must file an official oath. **Wis. Stat. §§62.09(1)(c) and 61.197(1)(f).**

Cities and villages may also appoint contract assessors as expert assessment help. **Wis. Stat. §70.055.** This “expert help, together with the assessor, shall act together as an assessment board in exercising the powers and duties of the assessor during this employment.” **Wis. Stat. §70.055(4)** (emphasis added). The plain language of §70.055 prohibits municipalities from using only expert help with no statutory assessor or operating without an assessment

board. The expert help cannot work “together, with the assessor” if there is no assessor. It cannot “act together as an assessment board” without the board.

The assessment board is vested with the powers and duties of a statutory assessor and appointed contract assessors must serve on the board. **Wis. Stat. §70.055(4)**. This means each contract assessor is a member of a local government body and is authorized to exercise governmental powers. Fittingly, they must file an official oath. *Id.*

In both cases, whether appointed as the statutory municipal assessor or appointed as expert help and a member of the statutory assessment board, contract assessors are vested with the powers of a municipal officer upon appointment. In both cases, they are appointed to fill a local government office, either the office of assessor or the office of assessment board member. In both cases, they must file the official oath, an oath which specifically identifies that they have been appointed to an “office.” *See Wis. Stat. §19.01(1)*.

The statutory status of the city or village assessors' office and the assessment board, the ability to exercise powers of a statutory officer, and the requirement for an oath of office provide compelling reasons to conclude that a contract assessor appointed by a city or village under 61.197(1)(f), 62.09(1)(c) or 70.055 is a local officer who holds a local office. Since the meaning of "local office" in 19.32(1) includes the officer appointed to it, a contract assessor appointed under these provisions is also an authority.

C. The Court Of Appeals Failed To Independently Determine Whether Contract Assessors In This Case Were Appointed To A Local Public Office.

The Public Records Law defines "local public office" in Wis.

Stat. §19.32(1)(dm) which reads:

"Local public office" has the meaning given in s. 19.42(7w), and also includes any appointive office or position of a local governmental unit in which an individual serves as the head of a department, agency, or division of the governmental unit, but does not include any office or position filled by a municipal employee, as defined in s. 111.70(1)(i).

Wis. Stat §19.42(7w) provides in relevant part:

"Local public office" means any of the following offices, except an office specified in sub. (13):

...

(c) An appointive office or position of a local governmental unit in which an individual serves for a specified term, except . . . a position filled by an independent contractor.

. . .

(d) An appointive office or position of a local government which is filled by the governing body of the local government or the executive or administrative head of the local government and in which the incumbent serves at the pleasure of the appointing authority, except . . . a position filled by an independent contractor.

Significantly, the “local public office” definition in 19.32(1)(dm) which incorporates 19.42(7w), was only recently added by the state legislature by 2003 Wisconsin Act 47 when the law was also amended to add provisions that specifically use the term “local public office” not “local office.” *See Wis. Stat. §§19.356(9)(a) and 19.36(11)*. The law distinguishes “local office” and “local public office” and that distinction should be maintained when interpreting the statute since “statutory language is interpreted in the context in which it used.” *Kalal, 2004 WI 58, ¶ 46*.

Nonetheless, it is reasonable to consider whether a proposed interpretation of “local office” is inconsistent with the legislature’s definition of “local public office” given their similarity and the rule which requires that language be interpreted “in relation to the language of surrounding or closely-related statutes.” *Id.*

The court of appeals relied on 19.42(7w) to conclude that the contract assessors in this case “are not ‘local public officials’ who qualify as authorities under Wis. Stat. §19.32(1). *WIREDATA*, 2007 WI App 22, ¶ 48. It accurately observed that “any position filled by an independent contractor” is excluded from the definition of “local public office.” *Id.* However, the rest of its analysis is flawed.

Sections 17.42(7w)(c) and (d) both expressly state that a “local public office” is an “appointive office or position of local government.” §§17.42(7w)(c) and (d) (emphasis added). The plain language creates two separate categories for inclusion: an appointive office of local government and an appointive position of local government.

Significantly, both sections only exclude “a position filled by an independent contractor.” §§17.42(7w)(c) and (d) (emphasis added). Therefore, “local public office” includes an independent contractor who is appointed to a local government office.

Although the court of appeals acknowledged that 19.42(7w) excludes an independent contractor who holds an appointed position, it did not independently examine whether the contract assessors in

this case were appointed to an office or a position. Instead, it looked to their contracts and noted that they “each show that the municipalities designated the assessors as independent contractors hired to fill an appointed statutory position.” *WIREDATA*, ¶ 48. The court’s reliance on the contract language was wrong.

First, the court noted that two contracts stated, “The assessor is to be considered an Independent Contractor hired to fill an Appointed Statutory Position.” *WIREDATA*, fn 3. However, no municipality or independent contractor has been granted authority to define the Public Records Law directly or indirectly by contract. Neither has any power to determine as a matter of law for every other city and village that an independent contract assessor is appointed to a statutory position and is not an authority. It was the duty of the court of appeals to consider the office versus position issue independently.³

Second, the court observed that the third contract stated “The Assessor shall be an independent contractor pursuant to [Wis. Stat.]

³ The contract language in these cases highlights the need for independent analysis. For example, the City of Port Washington contract identifies Wis. Stat §60.307(4) as the legal authority for appointing its contract assessor. However, §60.307(4) only authorizes a town board to select assessors. It provides no authority for a city to make such appointments.

Sec. 60.307(4).” *Id.* But, a contract term that labels a party an independent contractor does not establish appointment to a position, particularly when the legislature only authorized appointment of a contract assessor to a municipal office under 62.09(1)(c), 61.197(1)(f) or 70.055.⁴ That determination requires examination of at least the appointment authority, the duties to be exercised, and the appointment process, not just review of the contract language.

Third, the court refused to give any weight to verbal statements of the contract assessors in which they confessed to being “authorities” under the Public Records Law. *WIREDdata*, 2007 WI App 22, fn 2. At a minimum, the inconsistency between their written contract statements (appointed to a position and not an authority) and their verbal statements (appointed as an authority) triggered the need for an independent analysis, not deference to one source. Instead, the court improperly deferred to the contract.

⁴ These are the only statutes that expressly authorize cities or villages to appoint contract assessors and, as specific authorizations, they control and preclude the use of the general powers granted to cities and villages by Wis. Stat. §§62.11(5) and 61.34(1). See *Clean Wisconsin, Inc. v. Public Service Com’n. of Wis.*, 2005 WI 93, ¶ 175, 282 Wis. 2d 250, 700 N.W.2d 768 (Where two statutes apply to the same subject, the more specific controls). We are unaware of any statute that authorizes a city or village to appoint a contract assessor to a statutory position.

**II. A CONTRACT ASSESSOR, AS AN AUTHORITY,
MUST INDEPENDENTLY FULFILL ITS DUTIES UNDER
THE PUBLIC RECORDS LAW.**

In this case, the court of appeals relied heavily on

Journal/Sentinel, Inc. v. School Bd. Of the Sch. Dist. Of

Shorewood, 186 Wis. 2d 443, 521 N.W.2d 165 (Ct. App. 1994).

The case “teaches that pursuant to Wis. Stat. §19.36, public bodies cannot evade their responsibilities under the Public Records Law by shifting a record’s creation or custody to an independent contractor.”

WIREdata, ¶ 43. However, contract assessors, although independent contractors, are not covered by Wis. Stat. §19.36(3).

Section 19.36(3) provides in relevant part:

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.
.....

Under this section, documents prepared by a non-authority who contracts with an authority are subject to disclosure under the Public Records Law even though the documents are neither prepared directly by the authority nor kept in its custody. *Journal/Sentinel*,

Inc., 186 Wis. 2d at 453. However, 19.36(3) does not apply to all contracts.

The plain language of 19.36(3) shows that it only applies to contracts “entered into by an authority with a person *other than an authority*.” It excludes contracts between two authorities without qualification. Accordingly, 19.36(3) does not obligate a city or village to fulfill the Public Records Law duties for an independent contractor if the independent contractor is also an authority.

A contract assessor appointed by a city or village is an authority. Thus, a contract assessor cannot seek refuge in 19.36(3) and cannot transfer their Public Records Law duties to their appointing city or village under that section. While a contract assessor might be able to designate a legal custodian for it in the city or village under 19.33(4), even that designation does not relieve them of their duties under the Public Records Law. **Wis. Stat. §19.33(7).**

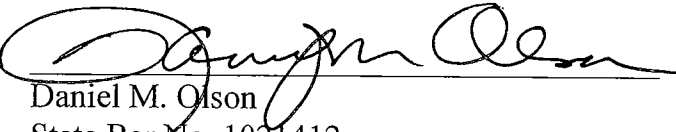
Under the Public Records Law, the buck does not always stop with a municipality. It stops with each authority, including a city or village contract assessor.

CONCLUSION

For the foregoing reasons, the League respectfully requests that this Court reverse the decision of the Court of Appeals and hold that a contract assessor: (a) is an authority; and (b) must independently fulfill its duties under the Public Records Law.

Dated: August 23, 2007.

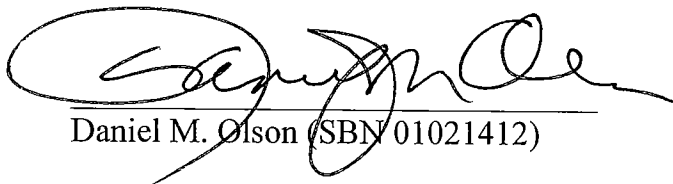
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CERTIFICATION AS TO FORM

I hereby certify that this brief conforms to the rules contained in s. 809.19(8)(b) and (c), Stats. for a brief produced with a proportional serif font: minimum printing resolution of 200 dots per inch, 13 point body text, 11 point for quotes and footnotes, leading of minimum 2 points, maximum of 60 characters per full line of body text. The length of the brief is 2971 words.

Dated: August 23, 2007.



Daniel M. Olson (SBN 01021412)

SUPREME COURT
STATE OF WISCONSIN
APPEAL NOS. 2005AP1473; 2006AP174; 2006AP175

WIREDATA, INC.,
Plaintiff-Respondent,

v.

VILLAGE OF SUSSEX and
VILLAGE OF SUSSEX CUSTODIAN
Defendants-Co-Appellants-Cross Petitioners,
GROTA APPRAISALS, LLC and
MICHAEL L. GROTA,
ASSESSMENT TECHNOLOGIES OF WI, LLC
Defendants-Appellants-Petitioners.

WIREDATA, INC.,
Plaintiff-Appellant,

v.

VILLAGE OF THIENSVILLE,
Defendant-Respondent,
GROTA APPRAISAL, LLC and
MICHAEL L. GROTA,
ASSESSMENT TECHNOLOGIES OF WI, LLC,
Defendants-Respondents-Petitioners

WIREDATE, INC.,
Plaintiff-Appellant,

v.

CITY OF PORT WASHINGTON,
Defendant – Respondent – Cross Petitioner,
MATTHIES ASSESSMENTS, INC.
Defendant- Respondent,
AMERICAN FAMILY INSURANCE COMPANY,
Intervenor.

ON APPEAL FROM THE CIRCUIT COURT OF WAUKESHA COUNTY,
CASE NOS. 01-CV-000198 and 01-CV-000216

THE HONORABLE THOMAS R. WOLFGRAM, PRESIDING; and

ON APPEAL FROM THE CIRCUIT COURT OF WAUKESHA COUNTY,
CASE NO. 01-CV-001403

THE HONORABLE MARK S. GEMPELER, PRESIDING

**THE WISCONSIN ASSOCIATION OF COUNTY CORPORATION
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III. INTRODUCTION

The members of the Wisconsin Association of County Corporation Counsel (WACCC) frequently provide representation to their respective counties on public records issues. In that vein, the WACCC is keenly interested in this court's consideration of the issues presented by the *WIREDdata* case. Of particular interest is the court of appeals' conclusion that the assessment data requested by WIREDdata be provided in the original electronic format.

The lower court's decision on that issue appears to establish a precedent that the electronic formatting of a public record is as accessible as the content of that record. Prior to reaching such a conclusion, the appeals court failed to consider whether the data produced in a PDF format was substantially as readable as the original data requested, pursuant to section 19.95(1)(b) of Wisconsin Statutes. Further, by equating form with content, the court expanded the decision in *State of Wisconsin ex rel. Milwaukee Police Association v. Jones*, 2000 WI App 146, 237 Wis. 2d 840, 615 N.W.2d 190, beyond what is authorized and consistent with public record law.

Finally, the presumption of complete public access under Wis. Stat. § 19.31, must be consistent with the conduct of governmental business. The appellate court's original format requirement, in many instances, creates an undue burden on government. Given the ephemeral lifespan of software applications, electronic storage media and the ever-expanding software options that can accomplish a desired function in a better or more efficient manner, the lower

court's original format requirement creates a mandate for government to maintain redundant systems that preserve the original formatting of an electronic document. Such a result was not intended by the legislature and is inconsistent with the statutes that expressly allow public documents to be preserved as electronic images. Wis. Stat. § 19.21(4)(c).

IV. ARGUMENT

I. REQUIREMENT TO PRODUCE DOCUMENT IN ORIGINAL ELECTRONIC FORMAT GOES BEYOND STATUTORY REQUIREMENT.

A. STATUTORY STANDARD FOR PRODUCTION OF A WRITTEN PUBLIC DOCUMENT IS THAT THE COPY MUST BE SUBSTANTIALLY AS READABLE AS THE ORIGINAL.

The electronic public records requested in this case undoubtedly fall within the definition of “record” under Wis. Stat. § 19.32(2). That statutory section defines a “record” as being “handwritten, typed or printed pages, films, recordings, tapes (including computer tapes), computer printouts and optical disks” for the purposes of the public records law.

Section 19.35(1)(b)-(d) categorizes such records, for the purpose of testing the sufficiency of a custodian's production of a requested record, into three categories: written, audio or video. Irrespective of whether a requested record is held in an electronic or paper format, or analog or digital tape, § 19.35(1)(b)-(d) views the record content as being written, audio or video. The assessment data

requested by WIREdata falls within the realm of a written document, despite the fact that the requested text and numbers were stored within an electronic database.

Given the written nature of the assessment records requested by WIREdata, § 19.35(1)(b) sets forth the relevant standard for production of records by a record custodian. It states:

Except as otherwise provided by law, any requester has a right to inspect a record and to make or receive a copy of a record, which appears in written form. If a requester appears personally to request a copy of a record, the authority having custody of the record may, at its option, permit the requester to photocopy the record or **provide the requester with a copy substantially as readable as the original.**
Wis. Stat. §19.35(1)(b) (emphasis added).

The threshold for acceptable copies of audio and video records is very similar, with audio copies to be “substantially as audible as the original,” and video copies to be substantially as good as the original. Wis. Stat. §19.35(1)(c), (d).

The decision below cited *Jones* as support for requiring the requested assessment data in its original electronic format. *WIREdata, Inc. v. Village of Sussex*, 2007 WI App 22, ¶¶ 64-66, 298 Wis. 2d 743, 729 N.W. 2d 757. The court of appeals’ reliance on and extension of *Jones* is misplaced. The custodians in the case at bar offered the requested data in a PDF format, essentially a digitally created image of the content requested. There appears to be no issue as to whether the PDF contained all of the data requested. WIREdata, objecting to the PDF version, demanded that the requested assessment data be produced in the original electronic format as a means of not only obtaining the data requested, but to also

obtain the formatting of the data. Such formatting allowed for ease of transition and manipulation of the requested data into the requester's database.

Jones, on the other hand, dealt with whether the copy of the record given to requester met the substantiality of content test set forth in § 19.35(1)(c). The record requested in *Jones* was a digitally created audiotape of a 911 call.

Milwaukee Police Chief, Arthur Jones, responded to the request with an analog copy of the 911 call. Chief Jones argued that the analog copy was as substantially audible as the original digital tape. The Milwaukee Police Association argued that background voice data could only be enhanced from the digital version. Further, analysis of the original digital tape could determine whether content was altered or edited. The court correctly found that the analog copy of the original was insufficient and ordered Chief Jones to produce the digital recording for analysis.

Jones is factually and legally distinct from the instant case. The requester in *Jones* was entitled to the audio recording in its original digital format because the analog copy did not meet the requirements of § 19.35(1)(c); the analog copy could not provide content in the recording that was “substantially as audible as the original.”

The original tape, because it was digital, could be enhanced to better reveal voices in the background. In essence, *Jones* was not necessarily a case requiring the production of a record in its original electronic format. *Jones* was, purely and simply, a case where the content of the copy of a public record was not as “substantially like” the original to meet the statutory threshold under § 19.35. The

same result would have occurred had a smudged copy of an original written document been produced that was not substantially as readable as the original.

The threshold for production of an acceptable record under § 19.35(1)(b)-(d) speaks to sufficiency of record content as opposed to format. The requester in *Jones* sought content, which was not as audible in the analog copy as it was in the original digital tape. Here, WIREdata does not seek content; it seeks formatting.

The court in the decision below stated:

The organization and compilation of the data into the Microsoft Access database, done at public expense, allows greater ease of public access to the public assessment information. In keeping with the letter and spirit of the open records law, we will not allow the municipalities to deny WIREdata, and others who seek the information, the value-added benefit of this computerization.

WIREdata, 298 Wis. 2d 743, ¶ 66

The data input into the Access database was produced as a PDF image and offered by the record custodians. What was not produced were the formatting codes that the court explained “allocated the data to hundreds of fields grouped into master categories.... This inputted data, maintained at public expense in the Microsoft Access database, is as much a part of the public record as if it were written on paper property cards and organized and stored in a file cabinet.” *Id.* ¶ 64. The formatting codes are not content based; they are simply instructions on how inputted data is to be organized or arranged. Utilizing the appellate court’s analogy, the property cards contain the content and the file cabinet, organized

through the instructions of the custodian, is the format. If a record request was made of the assessment records of a municipality that kept only “hard” files stored and organized in a filing cabinet, the requester would get copies of the property cards (the content), but not the filing cabinet and its organizational structure (the format). The lower court erred in not utilizing the substantiality test of § 19.35(1)(b) when analyzing the request for original formatting. Subject to the language in § 19.35(1)(b) and *Jones*, the production of the original formatting should only have been required in the event the PDF image of the assessment data was not as substantially readable as the original digital data.

The distinction between content and format is extremely important to record custodians, both in terms of providing standards consistent with the § 19.35 threshold of substantiality, and in keeping with a custodian’s statutory duty to keep and preserve public records.

B. REQUIREMENT TO PRODUCE DOCUMENTS IN ORIGINAL ELECTRONIC FORMAT IS INCONSISTENT WITH § 19.21.

The lower court’s decision in *WIREDATA* creating an obligation for record custodians to produce not only the content of a document, but also its original formatting is inconsistent with the duties and authorities imposed upon and granted to record custodians under Chapter 19 of Wisconsin Statutes. Section 19.21(1) states that officers of the state, various municipalities and school districts are the “legal custodian of and shall keep and preserve all property and things

received from the officer's predecessor or other persons and required by law to be filed, deposited, or kept in the officer's office...."

Section 19.21(4)(c) further states that:

Any local governmental unit or agency may provide for the keeping and preservation of public records kept by that governmental unit through the use of microfilm or another reproductive device, **optical imaging or electronic formatting**. A local governmental unit or agency shall make such provision by ordinance or resolution.... Any photographic reproduction of a record authorized to be reproduced under this paragraph is deemed an original record for all purposes if it meet the applicable standards established in ss. 16.61(7) and 16.612.... (emphasis added).

A requirement of § 16.61(7)(a)(1) is that "any device used to reproduce the record on film or to transfer the record to optical disk or electronic format and generate a copy of the record from optical disk or electronic format **accurately reproduces the content of the original**." (emphasis added).

The above statutory sections demonstrate that the legislature, in framing the public records law, was cognizant of the distinction between content and format, when dealing with imaged or electronic records. The appellate court's ruling that the "value added" benefit of computerization – essentially the convenience generated from a record's formatting – is required of record custodians, imposes a burden not statutorily authorized, either expressly or by intent.

If the Supreme Court were to adopt the lower court's standard, § 19.21(4)(c)'s authorization to store a record as an image, such as a PDF, would be

rendered moot. Further, the requirement under § 16.61(7)(a)(1) that the image accurately reproduce the content of the original is consistent with the threshold of substantiality under § 19.35(1)(b). “[S]tatutory language is interpreted in the context in which it is used; not in isolation but as part of a whole; in relation to the language of surrounding or closely-related statutes; and reasonable to avoid absurd or unreasonable results.” *State ex rel. Kalal v. Circuit Court for Dane County*, 2004 WI 58, ¶ 46, 271 Wis. 2d 633, 681 N.W.2d, 110.

In essence, the statutes presume that a custodian determines the format in which a record is produced pursuant to a request. *Grebner v. Scheibel*, 2001 WI App, 240 Wis. 2d 551, 624 N.W.2d 892. Only if the released record content is not substantially as readable, as audible, or as good as the original written, audio or video record, is there a duty to turn over the original document or format, and then only if the format is helpful in enhancing the content of the record. Wis. Stat. §§ 19.35(1)(b)-(d). In *Jones*, substantiality of content of the copy was a valid issue, therefore, production of a digital tape was appropriate. However, in this case, format for reasons of convenience, not content, is at issue; without a finding as to whether the content of the PDF document was as readable as the information collected and inputted by the assessors, the appellate court erred in ordering that the assessment data be produced in the original electronic format.

C. APPELLATE COURT’S RELIANCE UPON § 19.36(4) IS MISPLACED.

The court of appeals also cited § 19.36(4) as authorization to require production of electronic source material. The court further quotes the *Jones*

discussion of § 19.36(4)'s applicability to, and authorization for, production of public records in their original electronic format. Section 19.36(4) states:

A computer program, as defined in s. 19.971(4)(c), is not subject to examination or copying under s. 19.35(1), but the material used as input for a computer program or the material used as a product of the computer program is subject to the right of examination and copying, except as otherwise provided in s. 19.35 or this section.

Amici agree that § 19.36(4) allows for inputted material and material used as a product of the computer program to be examined or copied. Section 19.36(4) is, however, subject to the requirements of § 19.35. In other words, § 19.36(4) is a permissive statute, subject to the substantiality requirements of § 19.35(1)(b)-(d). The appeals court, in this case, missed a step in its reliance upon § 19.36(4) to order production of the originally formatted assessment records. Before reaching a legal conclusion that an electronic document must be turned over in its original format, § 19.35 requires a factual finding that the proffered document did not meet the substantiality of content test. If or when such a finding is made, § 19.36(4) may allow for material inputted into a database as well as computer end product to be examined or copied. No such finding was referred to in the appellate decision.

II. SUBSTANTIALITY OF CONTENT TEST IS CONSISTENT WITH THE INTENT OF THE WISCONSIN PUBLIC RECORDS LAW.

The cornerstone supporting Wisconsin's public records law is the declared policy that a representative government is dependent upon an informed electorate. Wis. Stat. § 19.31. To that end, § 19.31 states, "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 requirement to meet the §§ 19.35 (1)(b)-(d) threshold of substantiality meets the declared policy of the public records law. The official acts of government and those officers and employees in government are exposed to the light of public scrutiny through a view of the content of public records. The intent and public policy behind public records law is not to pass onto a requester, the "value added" convenience resulting from technological advances. The intent is to provide a requester with a substantial likeness of the content of a requested public record in order to assure transparency in government. Requiring that a public record be produced in its original electronic format, without meeting the law's substantiality test, does nothing to further such a public policy. Whether a document in a certain format can more easily be transitioned from a governmental database to a requester's database has nothing to do with the declared policy of promoting an informed electorate for a representative government.

III. PRACTICAL RAMIFICATIONS OF REQUIREMENT TO PRODUCE ORIGINAL ELECTRONIC FORMAT.

A ruling that electronic public records are, by mere request, to be produced in their original electronic format creates serious ramifications for record custodians. Hardware and software technology is a dynamic field. A document created on a software application several years ago may not even be readable by a custodian's computer today, either because the media on which it is stored is obsolete, or the software currently utilized is from a different company, or is an upgraded version of the same software. Either way, it is important for custodians to convert and update data in order to maintain its accessibility. Documents are often converted from original electronic formats, such as Word documents, into stable formats, such as PDF, through document imaging to enable and ensure future accessibility, irrespective of software and hardware upgrades or changes. Imaged documents are generally more secure as well because they are essentially images or pictures of the original documents and cannot be altered or edited.

Further, imposing a requirement to save not only the content of a document, but also its original formatting, creates a huge financial, labor and technological burden upon county government. Maintaining the original formatting, as noted above, may require record custodians to not only save documents but to keep and maintain software systems that created those documents. If, for example, a custodian were to switch from Groupwise e-mail to Outlook, parallel systems would be necessary to ensure that e-mails created in Groupwise maintained their

original formatting. Generally, the standard practice is to convert the archived e-mails to an Outlook format and merge them into the Outlook program. Given the lengthy retention schedules for some public records, keeping track of software iterations, paying for software maintenance contracts, and archiving records in their original formats would be a nightmare for county government; particularly for less populous counties that do not have internal information technology departments.

The Legislature declared that the presumption of complete public access to records should be “consistent with the conduct of governmental business.” Wis. Stat. § 19.31. Requiring a records custodian to produce a record in whatever format the requester desires often may be inconsistent with governmental business when the time and expense of supplying that format unduly burdens the government. A records custodian should be allowed the discretion to release records in whatever format is consistent with both full disclosure of content and conduct of governmental business.

V. CONCLUSION

For all of the above reasons, WACCC respectfully requests that the Court reverse the appellate court’s decision that requires records custodians to produce records in their original electronic format.

Dated this 22nd day of August, 2007.

Respectfully Submitted on behalf of
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VI. FORM & LENGTH CERTIFICATION

I hereby certify that this brief conforms to the rules contained in Wis.Stat. § 809.19(8)(b) and (c) for a brief produced using proportional serif font. The length of this brief is 2,999 words. The font used is Times New Roman, 13 point.

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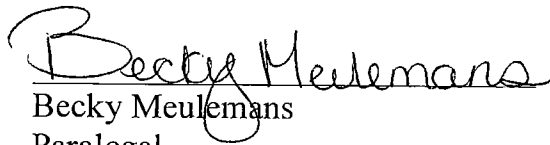


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I certify that this brief was deposited in the United States mail for delivery to the Clerk of the Supreme Court by first class mail on August 23rd, 2007. I further certify that the brief was correctly addressed and postage was pre-paid.

Dated this 23rd day of August, 2007.

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STATE OF WISCONSIN
SUPREME COURT
Appeal Nos. 2005AP1473; 2006AP174; 2006AP175

WIREData, Inc.,
Plaintiff-Respondent,

v.

Village of Sussex and Village of Sussex Custodian,
Defendants-Co-Appellants-Cross Petitioners,
Grotta Appraisals, LLC, Michael L. Grotta and Assessment
Technologies of WI, LLC,
Defendants-Appellants-Petitioners.

WIREData, Inc.,
Plaintiff-Appellant,

v.

Village of Thiensville,
Defendant-Respondent,
Grotta Appraisals, LLC and Michael L. Grotta, Assessment
Technologies of WI, LLC,
Defendants-Respondents-Petitioners.

WIREData, Inc.,
Plaintiff-Appellant,

v.

City of Port Washington,
Defendant-Respondent-Cross Petitioner,
Matthies Assessments, Inc.,
Defendant-Respondent,
American Family Insurance Company,
Intervenor.

On Appeal from Waukesha County Circuit Court, the Honorable
Mark S. Gempeler, Presiding, Case No. 2001CV001403, and on Appeal from
Ozaukee County Circuit Court, The Honorable Thomas R. Wolfgram, Presiding,
Circuit Court Case Nos. 2001CV000198 and 2001CV00216.

**NON-PARTY BRIEF OF FIRST AMERICAN CORELOGIC, INC.,
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First American CoreLogic, Inc., LexisNexis, the Real Estate Information Professionals Association, and the Software and Information Industry Association (collectively “*amici*”) submit the following, pursuant to Wis. Stat. § 809.19(7) and this Court’s August 7, 2007 Order, as their brief *amicus curiae*.

Interest of Amici

Amici or their members are value-added publishers and users of public record information whose business activities depend upon the wide availability of public record information and the application and interpretation of Wisconsin’s Public Records Law (“PRL”)¹ in a manner consistent with the law’s goal of ensuring public access to government information.²

Amici’s interest in this litigation is motivated by (1) its concerns over the increase in the type of delegating by governmental entities of their public records activities to private independent contractors as occurred here,³ (2) the implications

¹ Wis. Stat. §§ 19.21 to 19.39 (2006).

² This objective is set out in Wis. Stat. § 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 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.

³ The trend toward increased privatization of the obligations under state open records or public

[continued on next page]

of such delegating on the ability of *amici* and other value-added publishers of public record information to continue to provide their valuable and diverse products and services to the citizens of Wisconsin, and (3) the importance of ensuring that such delegating does not run counter to the objectives of the PRL by frustrating efforts by requesters to gain access to public records in Wisconsin.

Amici compile public records for an array of important commercial and public purposes including credit checks, tracking down parents who refuse to pay child support, mortgage financing, criminal record screening, as well as providing databases to aid law enforcement and anti-terrorism efforts.⁴ Through the efforts of their employees and the implementation of sophisticated digital technology, *amici* add enormous value to public record data produced and maintained by the State of Wisconsin and other public bodies. These enhancements enable individuals, public authorities, businesses, news agencies, and consumers to save time and money by allowing them to productively and efficiently search through otherwise impenetrable masses of official information.

records laws is evinced, in part, by the fact that courts in at least 34 states have grappled with issues relating to the applicability of the state's law to government entities and their contracting parties. See Craig D. Feiser, *Protecting The Public's Right To Know: The Debate Over Privatization And Access To Government Information Under State Law*, 27 Fla. St. U. L. Rev. 825 (2000).

⁴ For example, the FBI applies powerful search tools to various commercial on-line databases, such as LexisNexis, Dun & Bradstreet, and others, to obtain public source information such as credit records, real property and tax records, and vehicle registrations regarding individuals, businesses, and organizations that are subjects of investigations involving criminal activities such as violent crimes, health care fraud, and terrorism. Reliance on these databases eliminates the need for law enforcement personnel to engage in time consuming, manual searches of multiple sources of information from around the country.

First American CoreLogic, Inc. maintains and continually updates a deep historical archive of real estate transaction data, real property tax and characteristics information, geographic information systems data and maps, and recorded document images (e.g., deeds and mortgages), representing data from more than 3,000 counties in all 50 states, that is instrumental in numerous applications from chain of title searches to modeling of real estate trends. This nationwide, single-source archive of comprehensive real property information is used to drive an ever-expanding array of advanced analytics and solutions, including automated valuation models (AVMs), risk platforms, and fraud detection and prevention tools, that provide comprehensive market insight and increase the overall efficiencies in the mortgage lending, real estate, government, utilities, legal, and insurance industries.

LexisNexis provides access to the public records of Wisconsin and all other states. These records include property title records, liens, and tax assessor records. It affords the ability to search these records to private companies and individuals, as well as to members of the law enforcement community.

LexisNexis supports more than 3.6 million users nationwide. For example, LexisNexis maintains a comprehensive collection of judicial decisions, statutes, regulations, and U.C.C. filings from throughout the United States. Its employees then arrange that information so it can be searched readily and productively by LexisNexis subscribers. As of June 2006, an individual user could use LexisNexis

to access information from thousands of sources of federal, state, city, county, and other public domain information.

The **Real Estate Information Professionals Association** (“REIPA”) is the principal national trade association that represents the interests of businesses and real estate professionals that access and disseminate vital public real property information to the real estate industry. This public real property information, including real estate transaction data, real property tax and characteristics information, geographic information systems data and maps, and recorded document images (e.g., deeds and mortgages), is instrumental in numerous applications provided by REIPA’s members that provide comprehensive market insight and increase the overall efficiencies of the real estate industry, such as chain of title searches, automated valuation models (AVMs), fraud detection and prevention tools, risk platforms, and modeling of real estate trends.

The **Software & Information Industry Association** (“SIIA”), headquartered in Washington, D.C., is a trade association committed to promoting the interests of the software and information industries. SIIA represents over 600 member companies, among them prominent publishers of software and information products, including fact-laden databases for reference, education, business, consumer, and entertainment uses. These databases include information from Wisconsin’s public records.

INTRODUCTION

The fundamental framework of the PRL is simple, yet elegant: the public is to enjoy unfettered access to public records except in exceptional circumstances.⁵

This case presents the Court with an opportunity to help ensure that the legislatively-mandated strong presumption in favor of “complete public access,” Wis. Stat. § 19.31, is not frustrated in instances where government bodies choose to delegate to independent contractors some (or all) of their responsibilities under the PRL. Simply put, the acts or omissions of governmental bodies or their contracting parties cannot be permitted to undermine the goals of the PRL. In that vein, we urge the Court to:

- affirm the Court of Appeals’ determination that public bodies cannot evade their obligations under the PRL by delegating those responsibilities to independent contractors;
- make clear that in such delegating situations, the acts or omissions of an independent contractor pertaining to the governmental entity’s obligations under the PRL be attributed or imputed to that governmental body; and
- treat independent contractors as necessary parties under Wis. Stat. § 803.03 at least in those instances where the contractors are in sole possession of all or part of the requested records or of the records in a particular form, so that requesters of those records are not left remediless.

⁵ *Oshkosh Nw. Co. v. Oshkosh Library Bd.*, 125 Wis. 2d 480, 481-83, 373 N.W.2d 459, 461 (Ct. App. 1985) (quoting Wis. Stat. § 19.31).

ARGUMENT

I. The Court of Appeals Was Correct in Holding That the Municipalities (1) Cannot Evade Their Responsibilities Under the PRL By Contracting With Independent Contractors and (2) Do Not Lose Their Status as Authorities as a Result of Such Contracts.

At the heart of the appeals court's ruling is its conclusion that a public body cannot avoid the public access demanded by the PRL when delegating its statutory responsibilities to independent contractors. As the Court of Appeals properly reasoned, this conclusion is dictated by Wis. Stat. § 19.36(3), which provides in pertinent part that:

Each authority shall make available for inspection and copying under § 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.

In addition to declaring that records subject to disclosure under the PRL include those maintained by independent contractors,⁶ this provision makes clear that the delegation of some or all of a governmental body's responsibilities to private contractors does not affect its obligations under the PRL in the least. Moreover, as the Court of Appeals pointed out, the public records case law supports this conclusion, and in fact suggests that the provision was precisely designed to prevent governmental bodies from evading their PRL obligations "by shifting a record's creation or custody to an independent contractor." *WIREData, Inc. v. Vill. of Sussex*, 2007 WI App 22, ¶ 43, 298 Wis. 2d 743, 767, 729 N.W.2d 757, 769

⁶ See Wisconsin Department of Justice, Office of the Attorney General, *Wisconsin Public Records Law Compliance Outline* 3 (August 2005).

(citing *Journal/Sentinel, Inc. v. Sch. Bd. of the Sch. Dist. of Shorewood*, 186 Wis. 2d 443, 452-53, 521 N.W.2d 165, 170 (Ct. App. 1994)).⁷

II. An Independent Contractor's Acts or Omissions Pertaining to the Public Records Responsibilities Delegated to It by a Governmental Body Should Be Attributed or Imputed to That Body For Purposes of the PRL.

A necessary corollary to the conclusion that a governmental entity cannot delegate away its PRL responsibilities is that acts or omissions of such an entity's independent contractors should be attributed or imputed to the governmental entity. The objectives of the PRL cannot be fully met if governmental entities are not held accountable for the relevant conduct of their contractors. Otherwise, the Court of Appeals' admonition that "the buck stops with the municipalities," *WIREDATA*, 298 Wis. 2d 743, ¶ 55, loses much of its meaning if a governmental entity can turn a blind eye to the contractor's related conduct. That result would be extremely problematic for record requesters who may find their efforts to obtain indisputably open records stymied by indifferent or even antagonistic

⁷ The text of the PRL, particularly § 19.36(3), appears to distinguish it from a number of other jurisdictions. In the absence of legislative guidance, Courts in other states have been compelled to adopt tests designed to resolve the status of records held by independent contractors. See Feiser, *supra* note 3. Wisconsin is among those states whose public records laws expressly make clear that records in the hands of contractors in privity with government bodies are public records subject to production. Wis. Stat. § 19.36(3). See also Mo. Rev. Stat. § 610.010(6), which provides in relevant part:

(6) "Public record", any record, whether written or electronically stored, retained by or of any public governmental body including any report, survey, memorandum, or other document or study prepared for the public governmental body by a consultant or other professional service paid for in whole or in part by public funds, *including records created or maintained by private contractors under an agreement with a public governmental body or on behalf of a public governmental body.*

(Emphasis added).

government authorities and non-complying independent contractors. This is especially true in this situation, where the Court of Appeals found that the municipalities, and not the contractors, are responsible statutory authorities under Wis. Stat. § 19.31 and that they alone are subject to paying actual costs and damages and attorney fees to a prevailing requester. *WIREData*, 298 Wis. 2d 743, ¶ 69.

The Court of Appeals clearly recognized the necessity of strict adherence to an “attribution rule.” *WIREData*, 298 Wis. 2d 743, ¶ 55. It drove this point home during its discussion of whether *WIREData*’s record requests had in fact been denied:

WIREData could have reasonably construed its communications with Pelkey and both of the assessors as denials of its requests. The municipalities decry any responsibility for the effects of these communications. However, *for purposes of the open records law, their actions must be attributed to the municipalities.* They were all acting at the behest of the respective municipalities.

Id. (emphasis added). Second, the Court of Appeals’ conclusions that Sussex and Theinsville improperly denied *WIREData*’s legitimate requests were predicated, in part, on the fact that the fee requested by Pelkey contravened the PRL, and that this excessive fee was properly attributed to the municipalities for purposes of helping determine whether those municipalities had rejected *WIREData*’s record requests. *Id.* *Amici* urge this Court to affirm the correctness of the Court of Appeals’ recognition of the need for, and the existence under the PRL of such an “attribution rule.”

III. An Independent Contractor in Sole Possession of Public Records, or Public Records in a Particular Form Subject to Disclosure Under the PRL, Should Be Treated As a Necessary Party Under Wis. Stat. § 803.03 in a Mandamus Action to Compel Production of Such Records.

Amici are especially concerned that their otherwise valid public records requests could prove fruitless if *the party in sole possession of the requested records* were beyond the reach of a mandamus action brought under Wis. Stat. § 19.37(1) and thus could not be compelled to produce those records. Section 803.03 of the Wisconsin statutes, however, provides that a person subject to service of process shall be joined as a party if “in the person’s absence complete relief cannot be accorded among those already parties.” Wis. Stat. § 803.03(b)(1) (2006). To prevent evasion of PRL obligations, we urge the Court to clarify that when an independent contractor is a sole custodian of a record, or a particular form of a record (e.g., the “native form”), the independent contractor may be properly joined in a mandamus action brought to enforce the PRL and to obtain the requested records.

Support for this result is found in *Wisconsin State Journal v. University of Wisconsin Platteville*, 160 Wis. 2d 31, 465 N.W.2d 266 (Ct. App. 1990), a mandamus action in which the plaintiff sought records created by several university professors but named only the university as a defendant. The Court of Appeals denied the request for joinder of the professors, but it did so only because the university, not the professors, had possession of the records: “Plaintiffs seek only a writ of mandamus to compel disclosure. As such, complete relief can be

afforded without the addition of the [professors] as parties.” *Wis. State Journal*, 160 Wis. 2d at 43, 465 N.W.2d at 271. Conversely, if complete relief could not have been accorded, the court would have reached a different result in that case.

In contrast to *Wisconsin State Journal*, here at least one of the independent contractors is either the sole possessor of the records in question, or the sole possessor of a particular form of the records. As a result, if the independent contractors had not been joined, “complete relief [could] not be accorded” to the record requester because the writ of mandamus would not reach a non-party. Without such a rule, open access to public documents could be stymied simply by exporting documents to a non-governmental independent contractor, thus leaving the requester without a remedy. In short, although they are not subject to penalties as responsible authorities under the language of the statute, independent contractors should be subject to mandamus actions to ensure that courts may vindicate the underlying purpose of the PRL.⁸

⁸ We heartedly endorse the Court of Appeals’ call for governmental entities to take special care in drafting their PRL-related contracts to help ensure compliance with the PRL and make clear that these contractors have obligations and will be required to hold the municipality harmless. *WIREData*, 298 Wis. 2d 743, ¶ 49 n.4. We also agree with the Court of Appeals that if such contracts were to impermissibly interfere with public access to open records, they should be void as contrary to public policy.

While these contractual steps may facilitate practical compliance, they are of no relevance to the fulfilling of a lawful request for public records. Whether or not a governmental body is “held harmless” for an independent contractor’s violation of PRL is irrelevant to whether the governmental entity has complied with a lawful request, much less the duty of either the governmental entity or the contractor to comply with the mandamus writ. The types of contractual provisions suggested by the Court of Appeals (e.g., indemnification and hold harmless clauses) and the breach of contract suits brought to enforce the terms of those agreements, are therefore of little or no direct benefit to members of the public at large requesting records from the government. Such contractual provisions are no substitute for judicial

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CONCLUSION

For the foregoing reasons, *amici* urge affirmance of the decision of the Court of Appeals.

interpretation of the PRL that not only treats independent contractors as properly joined under appropriate circumstances, but also bars governmental entities from contracting away their PRL responsibilities and imputes to governmental entities the PRL-related acts of their independent contractors.

Dated this 23rd day of August, 2007.

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FORM AND LENGTH CERTIFICATION

I hereby certify that this brief conforms to the rules contained in § 809.19(8)(b) and (c) for a brief produced with a proportional serif font. The length of this brief is 2,870 words.

Dated this 23rd day of August, 2007.

A handwritten signature in black ink, reading "David Striffling". The signature is written in a cursive style with a large, stylized "D" and "S".

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CERTIFICATE OF SERVICE

I, David A. Strifling, hereby certify that a copy of this Non-Party Brief of First American CoreLogic, Inc., LexisNexis, the Real Estate Information Professionals Association, and the Software and Information Industry Association was delivered via hand delivery, this 23rd day of August, 2007 to:

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I also certify that this Non-Party Brief of First American CoreLogic, Inc., LexisNexis, the Real Estate Information Professionals Association, and the Software and Information Industry Association was sent via U.S. Mail, first class, postage prepaid, this 23rd day of August, 2007 to all parties and amici listed on the Court's service list in this consolidated appeal, specifically:

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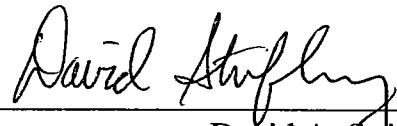
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STATE OF WISCONSIN
IN SUPREME COURT

Nos. 2005AP1473, 2006AP174 and 2006AP175

WIREDATA, INC.,

Plaintiff-Respondent,

v.

VILLAGE OF SUSSEX AND
VILLAGE OF SUSSEX CUSTODIAN,

Defendants-Co-Appellants-
Cross Petitioners,

GROTA APPRAISALS, LLC,
MICHAEL L. GROTA AND
ASSESSMENT TECHNOLOGIES OF
WI, LLC,

Defendants-Appellants-Petitioners.

WIREDATA, INC.,

Plaintiff-Appellant,

v.

VILLAGE OF THIENSVILLE,

Defendant-Respondent,

GROTA APPRAISALS, LLC,
AND MICHAEL L. GROTA,
ASSESSMENT TECHNOLOGIES OF
WI, LLC,

Defendants-Respondents-Petitioners.

WIREDATA, INC.,

Plaintiff-Appellant,

v.

CITY OF PORT WASHINGTON,

Defendant-Respondent-
Cross Petitioner,

MATTHIES ASSESSMENTS, INC.,

Defendant-Respondent,

AMERICAN FAMILY INSURANCE
COMPANY,

Intervenor.

ON REVIEW OF A DECISION OF THE WISCONSIN
COURT OF APPEALS, DISTRICT II,
FILED JANUARY 3, 2007

WISCONSIN DEPARTMENT OF JUSTICE
NON-PARTY BRIEF ON THE MERITS

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ON REVIEW OF A DECISION OF THE WISCONSIN
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FILED JANUARY 3, 2007

WISCONSIN DEPARTMENT OF JUSTICE
NON-PARTY BRIEF ON THE MERITS

INTEREST OF THE WISCONSIN DEPARTMENT OF JUSTICE¹

The Attorney General is authorized to enforce the public records law. Wis. Stat. § 19.37(1)(b). The Attorney General also is authorized to give advice to any person about application of the public records law to any set of circumstances. Wis. Stat. § 19.39. The Attorney General directs and supervises the Wisconsin Department of Justice. Wis. Stat. § 15.25.

The Attorney General's role as the principal statewide interpreter of the public records law gives the Department of Justice a unique, legislatively recognized interest that extends beyond the resolution of individual controversies.

Many persons making public records requests are not legally trained, nor are many record custodians. Even straightforward provisions of the public records law prompt many inquiries to the Department. The court of appeals' decision has prompted repeated requests for advice from state agencies, local governments, and others.

¹Undersigned counsel represents state defendants in the following public records lawsuits: *Practical Political Consulting, Inc., et al. v. Wisconsin State Elections Board, et al.*, Dane County Nos. 06-CV-3089 and 07-CV-2542 (with co-counsel); *Fischer v. Wisconsin Department of Transportation, et al.*, Dane County No. 06-CV-0709; *Balke v. University of Wisconsin-Madison Department of Agronomy, et al.*, Dane County No. 07-CV-2273 (with co-counsel); and *Stone v. Board of Regents of the University of Wisconsin System*, No. 2006AP2537 (Dist. IV). The Department, by other counsel, is litigating public records issues before this Court in *State v. Beaver Dam Area Development Corp.*, No. 2006AP662.

ARGUMENT

I. THE PUBLIC RECORDS LAW BALANCES OPPORTUNITY FOR GOVERNMENT OVERSIGHT WITH THE NECESSARY CONDUCT OF GOVERNMENT BUSINESS.

“[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.” Wis. Stat. § 19.31. This is one of the strongest declarations of policy found in the Wisconsin statutes. *Zellner v. Cedarburg School Dist.*, 2007 WI 53, ¶ 49, ___ Wis. 2d ___, 731 N.W.2d 240.

The public records law serves a specific purpose: to shed light on the workings of government and the acts of public officers and employees. *Building & Constr. Trades Council v. Waunakee Sch. Dist.*, 221 Wis. 2d 575, 582, 585 N.W.2d 726 (Ct. App. 1998). It provides opportunity for public oversight of government. *Linzmeier v. Forcey*, 2002 WI 84, ¶ 15, 254 Wis. 2d 306, 646 N.W.2d 811.

Although the public records law is to “be construed in every instance with a presumption of complete public access,” the Legislature expressly qualified that presumption by adding “consistent with the conduct of governmental business.” Wis. Stat. § 19.31. The public records law may not be interpreted to impose such a burden on a record custodian that normal functioning of the authority would be severely impaired. *Schopper v. Gehring*, 210 Wis. 2d 208, 213, 565 N.W.2d 187 (Ct. App. 1997).

II. THE PUBLIC RECORDS LAW
DOES NOT REQUIRE THAT
REQUESTERS BE PROVIDED
UNLIMITED ACCESS TO EVERY
GOVERNMENT DATABASE.

No responsible custodian would allow a requester into an authority's file room to open file drawers at random, remove file folders, rifle through their contents, and make copies of whatever seemed interesting. Obvious data integrity and business operations concerns spring to mind.

Nor would the public records law require the custodian to permit that mischief. A public records request must be reasonably limited as to time and subject matter, Wis. Stat. § 19.34(1)(h), and a custodian need only produce records responsive to the request. Access to records is not required when otherwise prohibited by law, or when otherwise indicated by the public records balancing test. Wis. Stat. § 19.35(1)(a). Information not subject to disclosure must be separated before providing access to a requester. Wis. Stat. § 19.36(6). A custodian may impose reasonable restrictions on the manner of access to an original record if the record is irreplaceable or easily damaged. Wis. Stat. § 19.35(1)(k). If a requester wants copies of public records, the custodian may decide how the copies are made, and whether the custodian will make the copies or will permit the requester to do so. Wis. Stat. § 19.35(1)(b); *Grebner v. Schiebel*, 2001 WI App 17, ¶¶ 1, 9, 12-13, 240 Wis. 2d 551, 624 N.W.2d 892 (2000). *See also* Wis. Admin. Code § Adm 12.05(6) (state and local agencies must “ensure that only authorized persons create or modify [records stored exclusively in electronic format]”).

The same harm can occur by providing a requester direct access to an authority's electronic records—only, at the touch of a keystroke, more quickly and more extensively. Nevertheless, the decision below repeatedly states that requesters must be given access to authorities'

electronic databases in order to examine them, copy them, and extract information from them. *E.g.*, *WIREData, Inc. v. Village of Sussex*, 2007 WI App 22, ¶¶ 1, 3, 63, 65, 70, ___ Wis. 2d ___, 729 N.W.2d 757. *See also id.* at ¶ 64 (“WIREData . . . may use tools, in the Market Drive program itself or otherwise, to extract and copy the data WIREData desires from the Microsoft Access database and place it in a separate electronic file.”).

If those statements are taken at face value, they expose authorities to all of the problems suggested above. Even if the court of appeals did not really mean that a requester must be allowed *direct* access to an authority’s electronic database, that is not clear in the *WIREData* opinion, and other practical problems are created.

Many databases used by public records authorities contain huge amounts of medical, educational, financial, or other confidential information to which unauthorized access is expressly prohibited by law, or other information to which an authority properly denies access pursuant to the Wis. Stat. § 19.35(1) balancing test. Requesters seeking access pursuant to the public records law must comply with restrictions imposed by law on access to information. Wis. Stat. § 19.35(1)(j). An authority must redact information not subject to disclosure before releasing other portions of a record. Wis. Stat. § 19.36(6). These protections cannot be ensured if direct database access is required.

Nothing in the public records law authorizes its use to externally override other legal commitments made by an authority. The right of public access to records produced as the result of an authority’s business operations does not dictate how that authority must choose to conduct its business. An authority is free to determine—based on its resources, business needs, and other considerations—whether to develop technical resources in-house, to utilize “freeware,” or to contract for use or development of proprietary products. *Cf.* Wis. Stat. § 16.972(2)(f). The public records law does not

extinguish access and use restrictions imposed by software licensing agreements, for example. *Cf. WIREdata*, 2007 WI App 22, ¶ 66 (“we will not allow the municipalities to deny WIREdata, and others who seek the information, the value-added benefit of this computerization”). If that were the case, Wisconsin authorities would find it impossible to locate willing software vendors and consultants.

As in *WIREdata*, it is not uncommon for control of databases to which authorities have some defined use or access rights to be housed or managed elsewhere. For example, regulatory authorities from different jurisdictions may cooperate in use of national databases like the NASD database of securities brokers and agents used by the Department of Financial Institutions and its counterparts in all other states.

WIREdata does acknowledge, citing Wis. Stat. § 19.36(4), that “[a] computer program is not subject to examination or copying, 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.” *Id.*, ¶ 35. “Computer programs” are the processes for the treatment and verbalization of data. Wis. Stat. § 16.971(4)(c).

WIREdata goes beyond the balance struck by Wis. Stat. § 19.36(4) in stating that the public records law requires access to source material as “stored in the database[] regardless of its physical form or characteristics.” *Id.*, ¶ 63. The transformation that must occur for the data stored in a database to be useable by a requester not holding a database software license distinguishes *WIREdata* from *State ex rel. Milwaukee Police Ass’n v. Jones*, 2000 WI App 146, 237 Wis. 2d 840, 615 N.W.2d 190. There were no proprietary licensing issues in *Jones*, and the digital record sought in *Jones* was an audio recording that, as stored, constituted a complete and comprehensible record. In *WIREdata*, unlicensed requester access to proprietary

software—a computer program expressly not subject to disclosure pursuant to Wis. Stat. §§ 19.36(4) and 16.971(4)(c)1.—would have to be allowed in order to give WIREdata access to the “database” or to the source material as “stored in the database.”

The large “relational databases” now used by many authorities are not “flat files” in which a row in a rectangular database grid collects data elements corresponding to a certain person or a certain property. Instead, extraction of information from a relational database requires a query—often performed by proprietary software for which the authority has obtained a limited access license—that obtains information from numerous tables in the database and produces a comprehensible answer in some form of report. The numerous tables themselves can be organized by proprietary software, and, because of the complexity of the queries required to extract data, have no meaning or utility without use of that software or other (often proprietary) informational materials. *See, e.g., Relational database,*

http://en.wikipedia.org/wiki/Relational_database (last visited August 23, 2007); Ian Gilfillan, *Introduction to Relational Databases* (2002), *<http://www.databasejournal.com/sqletc/article.php/1469521>* (last visited August 23, 2007); Tore Bostrup, *15 Seconds: Introduction to Relational Databases – Part 1: Theoretical Foundation* (2002); *<http://www.15seconds.com/issue/020522.htm>* (last visited August 23, 2007).

Even when other concerns could be addressed by providing a requester with access to a duplicate copy of a database, the custom programming and disk storage space necessary to prepare the duplicate quickly become expensive. Some government databases contain millions of records, arranged in dozens or hundreds of tables.

By statute, an authority is not required to create a new record by extracting information from existing

records and compiling the information in a new format, except in a few statutorily specified circumstances. Wis. Stat. § 19.35(1)(L). Those circumstances include when redaction is required (Wis. Stat. § 19.36(6)) and assembly and reduction to written form on paper of information contained in a record that is not in a readily comprehensible form (Wis. Stat. § 19.35(1)(e)).

What ultimately is “the record” when database contents are the subject of a public records request? The applicable definition of “record” includes any material on which electromagnetic information is recorded or preserved, regardless of physical form or characteristics, specifically including “computer tapes” and “computer printouts.” Wis. Stat. § 19.32(2). In the more complex database environment, the answer has to be “it depends” because of the many possible variations in content, structure, licensing, and other factors. Case-by-case analysis is required, not the one-size-fits-all holding of *WIREDATA*.

A final point bears mentioning. An authority may choose to assist a requester more than the public records law requires. For example, an authority may be willing to arrange for production of a particular database extract not required under Wis. Stat. § 19.35(1)(L) upon reaching an agreement with a requester concerning cost and other logistics. The public records law does not require the authority to do so, however.

III. AN AUTHORITY MAY CHARGE A REQUESTER THE COSTS OF COMPUTER PROGRAMMING AND RELATED EXPENSES INCURRED IN PREPARATION OF A PUBLIC RECORDS RESPONSE.

WIREDATA omits any discussion of who must bear the financial burden of complying with its holdings. Implementing those holdings is not possible without

confronting the practical question of who must pay the costs of compliance.

Permissible fees for responding to public records requests are established in Wis. Stat. § 19.35(3). An authority may charge the actual, necessary, and direct cost of reproduction and transcription of a record, unless some other fee is established or authorized by law. Wis. Stat. § 19.35(3)(a). An authority may charge the actual, direct, and necessary cost of locating a record, if the cost is \$50.00 or more. Wis. Stat. § 19.35(3)(c). Other allowable charges include photographic processing (Wis. Stat. § 19.35(3)(b)) and mailing or shipping (Wis. Stat. § 19.35(3)(d)). An authority may request prepayment if charges exceed \$5.00, and may require prepayment of any amount by a prisoner who failed to pay previous public records charges. Wis. Stat. § 19.35(3)(f).

The obvious intent of these statutory provisions is twofold. First, to facilitate record access by limiting the fees an authority may charge to no more than the authority's actual, necessary, and direct costs. Second, and conversely, to limit the financial burden an authority must assume in order to comply with its public records obligations—capping the unreimburseable costs that must be absorbed by an authority at the first \$50.00 of location costs, and allowing the authority to obtain payment up front for costs expected to exceed \$5.00. Like other aspects of the public records law, the resulting balance of responsibilities and expenses is fair to both requesters and authorities. Openness and oversight are facilitated by requester liability only for actual costs, while fiscally responsible conduct of essential government business is maintained by allowing recoupment of actual costs after absorption of a relatively small, legislatively determined expense.

Consequently, a previous attorney general concluded almost twenty-five years ago that the costs of a computer run necessary to print out information not in a readily comprehensible form in order to respond to a

public records request could be imposed on the requester as a copying fee. 72 Op. Att’y Gen. 68, 70 (1983). The opinion assumed that information would not need to be located, just reduced to a readily comprehensible form. The opinion therefore did not find the location fee provisions of Wis. Stat. § 19.35(3)(c) applicable. *Id.*

The 1983 opinion’s discussion of printing out electronic data (*i.e.*, the requester “wish[ing] to obtain *his or her own copy of the printout*” appears to contemplate repetition of a pre-established process—such as running a standard report or executing an existing command—rather than any need for proactive or custom computer programming. *Id.* (emphasis added). “All that needs to be done is to reduce the information contained in the record to a readily comprehensible form on paper.” *Id.*

This Court’s recent decisions have recognized, at least implicitly, and correctly, that technology has evolved quite substantially and with it the cost and complexity of responding to public records requests for information stored in electronic databases. In *Osborn v. Board of Regents*, 2002 WI 83, ¶¶ 46-48, 254 Wis. 2d 266, 647 N.W.2d 158, the Court explained that the University of Wisconsin was not required to bear the cost of redacting personally identifiable information from a huge database. Instead, the Court explained, the university could charge its actual and necessary costs of locating and reproducing the requested information. *Cf. Zellner*, 2007 WI 53, ¶ 55 (compact disc).

Programming, computer time, and other costs associated with preparing non-confidential information in an electronic database for disclosure in response to a public records request can be quite substantial.

It has been difficult for many custodians and requesters to reconcile *Osborn* with advice provided by a previous attorney general in 72 Op. Att’y Gen. 99, 101-02 (1983), that redaction costs—without reference to any specific type of record or redaction activity—must be

borne by the authority. Clarity provided by this Court's decision will assist custodians and requesters alike.

IV. AUTHORITIES MUST BE
ALLOWED A REASONABLE
AMOUNT OF TIME TO COMPLY
WITH PUBLIC RECORDS
REQUESTS.

An authority must respond to a public records request "as soon as practicable and without delay." Wis. Stat. § 19.35(4)(a). What constitutes a reasonable time for response depends on the nature of the request, the staff and other resources available to the authority to process the request, the extent of the request, and other related considerations. While ten working days generally can be considered a reasonable time for response, the reasonableness of that time frame depends on the circumstances of a particular request. *See* Wisconsin Department of Justice, *Wisconsin Public Records Law, §§ 19.31 – 19.39: A Compliance Outline*, 9-10 (August 2005), available at <http://www.doj.state.wi.us/dls/docs/publicrecords805.pdf> (last visited August 23, 2007).

Allowing a reasonable period of time for response comports with the Wis. Stat. § 19.31 mandate that the public records law be construed "consistent with the conduct of governmental business." Stating without qualification that a requester may "immediately" bring a mandamus action if an authority delays granting access to requested records is not. *Cf. WIREdata*, 2007 WI App 22, ¶ 53, citing *WTMJ, Inc. v. Sullivan*, 204 Wis. 2d 452, 461, 555 N.W.2d 140 (Ct. App. 1996).

Unlike *WIREdata*, the *WTMJ* custodian had informed a requester that a file could not be reviewed until an unspecified future time. *WTMJ*, 204 Wis. 2d at 455-56. *WTMJ*, in turn, quoted another distinguishable case for the proposition that a mandamus case

“immediately” could be brought. *Id.* at 461, quoting *State ex rel. Auchinleck v. Town of LaGrange*, 200 Wis. 2d 585, 592-93, 547 N.W.2d 587 (1996) (relevant distinction was between the threshold notice of claim procedure required by Wis. Stat. § 893.80(1) and the lack of any analogous threshold procedural requirement before filing a public records mandamus action).

An authority should not be subjected to the burden and expense of a premature public records lawsuit while it is attempting in good faith to respond, or to determine how to respond, to a public records request. Whether the authority is acting with reasonable and appropriate diligence will depend on the totality of circumstances surrounding a particular request. *WIREdata*’s language about “immediate” filing of a public records lawsuit therefore should be qualified appropriately or abandoned.

CONCLUSION

To assist members of the public seeking to access public records and records authorities seeking to comply with the public records law, the Department respectfully

requests that the Court provide practical guidance on the public records issues discussed above.

Dated August 23, 2007.

Respectfully submitted,

J.B. VAN HOLLEN
Attorney General

A handwritten signature in cursive script, appearing to read "Mary E. Burke".

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CERTIFICATION

I hereby certify that this brief conforms to the rules contained in Wis. Stat. § 809.19(8)(b) and (c) for a brief produced with a proportional serif font. The length of this brief, exclusive of caption and signature block, is 2,993 words.

Dated August 23, 2007.


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Assistant Attorney General

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**SUPREME COURT
STATE OF WISCONSIN**

Appeal Nos. 2005AP1473, 2006AP174, and 2006AP175

WIREDdata, Inc.,
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Cross Petitioners,
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L. Grotta and Assessment
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**NON-PARTY BRIEF OF
WISCONSIN REALTORS® ASSOCIATION,
WISCONSIN FREEDOM OF INFORMATION
COUNCIL, WISCONSIN BROADCASTERS
ASSOCIATION AND WISCONSIN NEWSPAPER
ASSOCIATION**

On Appeal from Waukesha County Circuit Court, the
Honorable Mark A. Gempeler, Presiding, Case No.
2001CV001403, and Appeal from Ozaukee County Circuit
Court, the Honorable Thomas R. Wolfgram, Presiding,
Circuit Court Case Nos. 2001CV000198 and 2001CV00216

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INTRODUCTION

The Open Records Law ensures that Wisconsin citizens have access to “the greatest possible information regarding the affairs of government and the official acts of those officers and employees who represent them.” Wis. Stat. § 19.31 (2005-06). Recognizing this fundamental principle, Wisconsin courts consistently have ruled that any “[e]xceptions [to public disclosure] should be recognized for what they are, instances in derogation of the general legislative intent, and should, therefore, be narrowly construed; and unless the exception is explicit and unequivocal, it will not be held to be an exception.” *Fox v. Bock*, 149 Wis. 2d 403, 411, 438 N.W.2d 589 (1989) (citation omitted).

In this case, the Village of Sussex, the Village of Thiensville, and the City of Port Washington (“the

municipalities’’) ¹ disclaim any responsibility to provide public access to assessment records because each contracted with a private assessor to perform assessments and retain all of the related records. They also assert that providing a Portable Document Format (“PDF”) ² set of records to WIREdata, Inc., sufficiently complied with the public records request.

This case presents two significant questions. First, when a municipality has contracted with a private assessor – and when the contract requires the assessor to produce and maintain the records – must the municipality or the private assessor produce the public records? Second, does a municipality satisfy its obligations by producing records, maintained in an electronic database, in a PDF?

¹ Although the Village of Thiensville is not party to this appeal, the parties address matters concerning, and any decision by this Court will affect the Village of Thiensville.

² A Portable Document Format is an electronic image of a printed document, not the document itself.

The municipalities ask this Court to find exceptions to the well-established principle of public disclosure. Yet, the municipalities have failed to provide “explicit and unequivocal” reasons for the proposed exceptions. Indeed, they cannot.

As governments increase their reliance on independent contractors and computer software, records custodians and requestors alike will face – with growing frequency – questions about public access to records, especially electronic records, maintained by independent contractors. The Wisconsin REALTORS[®] Association (“WRA”), Wisconsin Freedom of Information Council (“WFOIC”), Wisconsin Broadcasters Association (“WBA”) and Wisconsin Newspaper Association (“WNA”), as non-parties, ask the Court to reject the municipalities’ position that they can satisfy the Open Records Law by merely referring requesters to an independent contractor.

The public does not lose its right of access to “information regarding the affairs of government” simply because a municipality enters into a contract with a private entity. In fact, the Open Records Law expressly requires a governmental authority to disclose requested records produced or collected by its private contractor. Wis. Stat. § 19.36(3); *see Journal/Sentinel v. Shorewood Sch. Bd.*, 186 Wis. 2d 443, 452, 521 N.W.2d 165 (Ct. App. 1994). In addition, the Open Records Law authorizes public access to “the material used as input for a computer program.” Wis. Stat. § 19.36(4); *State ex rel. Milwaukee Police Ass’n v. Jones*, 2000 WI App 146, ¶ 17, 237 Wis. 2d 840, 615 N.W.2d 190. Accordingly, the PDF copy produced in this case fails to comply with WIREdata’s request.

ARGUMENT

I. THE MUNICIPALITIES ARE THE ONLY LEGAL AUTHORITIES UNDER THE OPEN RECORDS LAW.

An “authority” with legal custody of a record is required, upon request, to provide public access to that record.³ Wis. Stat. § 19.35. Nonetheless, the municipalities claim they can evade their responsibilities as authorities, asserting that their contract assessors are “authorities” within

³ An authority may appoint a “legal custodian,” who is “vested by the authority with full legal power to render decisions and carry out the authority’s statutory public records responsibilities.” Wis. Dep’t of Justice, *Wisconsin Public Records Law Wis. Stat. §§ 19.31-19.39 Compliance Outline* at 5 (2005) (citing § 19.33(4) (available at <http://www.doj.state.wi.us/dls/docs/publicrecords805.pdf>). This permits the authority to designate an individual (or individuals) who will respond to open records requests.

The contract assessors here are not “legal custodians.” The record contains no support for a finding that the assessors were appointed as legal custodians. In addition, state law does not authorize appointment of a private contractor as legal custodian of public records. Only *officers* or *employees* of an authority may serve as a legal custodian. Wis. Stat. § 19.33(4). A contract assessor is neither an officer nor an employee of the hiring municipality. See *Acuity Mut. Ins. Co. v. Olivas*, 2006 WI App 45, ¶ 16, 289 Wis. 2d 582, 712 N.W.2d 374, *aff’d*, 2007 WI 12, 728 N.W.2d 258 (“The common law has long drawn a distinction between [employees] and independent contractors....”).

the meaning of Wis. Stat. § 19.32(1) because of their appointment and because they have physical custody of the assessment records.

A. An Independent Contractor Is Not An “Authority” Under The Open Records Law.

An “authority” is specifically defined under the Open Records Law: a state or local office, an elected official, and an agency, board, commission, committee, council, department or public body corporate and politic created by constitutional law, ordinance, rule or order. *See* Wis. Stat. § 19.32(1). There is no dispute that each of the municipalities is an “authority.” Each is a “public body corporate and politic created by constitution, law, ordinance, rule or order.” Whether the contract assessors also qualify as an “authority” under the Open Records Law, however, is the subject of this case.

The municipalities suggest that a contract assessor serves in a “local office” and, therefore, falls within the

definition of an “authority.” *See, e.g.*, Opening Brief of Village of Sussex and City of Port Washington, pp. 30-39. A plain reading of the statute does not support the municipalities’ position. Although the term “local office” is not specifically defined under the Open Records Law, each of the entities in the definition of an “authority” is a governmental body or official. A *private* contractor, by definition, is neither a governmental body nor a governmental official. Accordingly, a private contractor cannot qualify as an “authority.” Indeed, the Open Records Law applies to governmental bodies and officials, not private entities.

Related statutes also support the conclusion that an independent contractor is not an authority. When a statute fails to define a critical term, this Court often considers related statutes to determine the intended meaning. *See Orion Flight Servs. v. Basler Flight Serv.*, 2006 WI 51, ¶32, 290

Wis. 2d 421, 714 N.W.2d 130 (citation omitted). It should do so here.

Subchapter III of Chapter 19, which establishes a code of ethics for public officials and employees, expressly defines “local public office” to exclude a position filled by an independent contractor:

An appointive office or position of a local governmental unit (as defined in Wis. Stat. § 19.42(7u)) in which an individual serves for a specified term, *except* a position limited to the exercise of ministerial action or *a position filled by an independent contractor*.

Wis. Stat. § 19.42(7w)(c) (emphasis added); *see also* Wis.

Dep’t of Justice, *Wisconsin Public Records Law Wis. Stat.*

§§ 19.31-19.39 *Compliance Outline* at 6 (2005) (available at

<http://www.doj.state.wi.us/dls/docs/publicrecords805.pdf>).

Moreover, the Open Records Law specifically defines the role of a private contractor in the context of responding to

an open records request. Section 19.36(3), entitled

“Contractors’ Records,” 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.

Wis. Stat. § 19.36(3). The plain language of that provision leads to only one conclusion: only an “authority”—not a private contractor—is responsible for disclosing public records requested by the public.

An authority cannot evade its responsibilities under the Open Records Law “by delegating both the record’s creation and custody to an agent.” *Shorewood*, 186 Wis. 2d at 452-53 (*applying* Wis. Stat. § 19.36(3)). In *Shorewood*, the school board settled a lawsuit brought by the district’s superintendent, relying in part on a “Memorandum of Understanding” prepared by its attorney. *Id.* at 446-47. Two

newspapers sought access to the “Memorandum of Understanding,” and the school board denied their request, claiming the record was not being kept by an “authority” because only the attorney had a copy.

The Court of Appeals easily rejected that argument and held the record subject to public disclosure. Although the school board’s attorney was not an “authority,” he had drafted and maintained custody of the requested record for the school board, which is an authority. The Court applied the “Contractors’ Records” statute, which compels public access “to ‘any record produced or collected under a contract entered into by the authority... to the *same extent as if the record were maintained by the authority.*’” *Id.* at 453-55 (emphasis added).

Through the Contractors’ Records statute, the legislature has mandated that a municipality always retains responsibility to ensure the public’s access to the “greatest

possible information regarding the affairs of government.”

See id. at 448. This conclusion furthers the founding principle of the Open Records Law. It is the only conclusion that does.

B. A Contract Assessor Is Not An “Authority” Under The Open Records Law.

The municipalities contend that the contract assessors were appointed to serve in a local office and, therefore, fall within the definition of an “authority.” The municipalities rely on the statute authorizing cities and villages to appoint a corporation to assess property taxes. Wis. Stat.

§§ 61.197(1)(f),⁴ 62.09(1)(c).⁵ This appointment elevates the contract assessors from independent contractors to

“authorities,” the municipalities argue, rendering Wis. Stat.

§§ 19.42(7w) and 19.36(3) inapplicable.

⁴ “A corporation or an independent contractor may be appointed as the village assessor.” Wis. Stat. § 61.197(1)(f).

⁵ “A corporation or an independent contractor may be appointed as the city assessor.” Wis. Stat. § 62.09(1)(c).

The protracted litigation in this case demonstrates why an independent contractor cannot be the “authority” from which citizens obtain tax assessment data. Without clear direction, municipalities and their contract assessors could send records requestors into a swamp of misdirection and finger-pointing.⁶ Yet, the law provides the requisite clarity. The plain statutory language demonstrates the legislature’s intent to require that governmental entities and officials, including the municipalities involved in this litigation, bear the ultimate responsibility for compliance with the Open Records Law.

Moreover, the contracts themselves between the municipalities and contract assessors confirm that the assessors were hired as independent contractors and *not*

⁶ Instead of shouldering its own responsibility, each municipality here directed the requestor to an independent contract assessor. This constituted an improper denial of the request because the municipalities failed to give valid reasons for withholding the public record. *See Hempel v. City of Baraboo*, 2005 WI 120, ¶¶ 25-26, 284 Wis. 2d 162, 699 N.W.2d 551.

appointed to local office. *WIREDATA, Inc. v. Village of Sussex*, 2007 WI App 22, ¶ 48 n.3, 298 Wis. 2d 743, 729 N.W.2d 757 (“[T]he contracts explicitly provided that the assessors were to be considered independent contractors.”).

Accordingly, only the municipalities are “authorities” under the Open Records Law. The municipalities cannot avoid their legal duties to the public by delegating a record’s creation or custody to an independent contractor. Because the contract assessors are not themselves “authorities,” they can neither share nor assume the municipalities’ obligations under the Open Records Law.

C. Physical Possession Does Not Make A Contractor An “Authority.”

Compliance with the Open Records Law does not turn upon physical possession of records. Regardless of whether any municipality had physical possession of the requested assessment records, they each had the responsibility to make

those records available to the public as if they were maintaining the records.

An authority must make available “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.*”

Wis. Stat. § 19.36(3) (emphasis added). As the Contractor’s Records statute demonstrates, *only* the authority through its designated legal custodian is responsible for ensuring that any records produced and collected under the contract are made public. An authority cannot shift that responsibility to an independent contractor.

Nor can contract assessors thwart the authority’s duty to release assessment records to the public. If a contractor has physical possession of records, the contractor has an obligation to release those records to the municipality and members of the public. As governmental bodies, for better or

for worse, increase their reliance on independent contractors, to conclude otherwise would significantly impede the public's right of access. Just as the Open Records Law must evolve with technological advances, it must also evolve with changes in government practices, ensuring that "the workings of government are open to public scrutiny," and that the enforcement of the Open Records Law remains true to the legislature's intent. *See State ex rel. Milwaukee Police Ass'n. v. Jones*, 237 Wis. 2d 840, ¶ 11; *Shorewood*, 186 Wis. 2d at 447-48.

The municipalities are ultimately responsible for the unlawful denial of public access. Indeed, the Open Records Law itself emphasizes that the authority bears full responsibility to ensure public access to records. Accordingly, a municipality can and should ensure by contract its contractors' prompt and full assistance in complying with the Open Records Law. In fact, the contract

may hold the contractor liable to the municipality for a prevailing requester's costs, attorneys fees and damages if it obstructs public access. Whether or not there is a contractual provision, however, each municipality remains responsible to the public for any non-compliance with its own duties under the Open Records Law. This cannot be delegated.

II. THE PDF DOCUMENT WAS INSUFFICIENT.

The Open Records Law requires that an authority provide public access to its records as they are maintained by the authority or private contractor. While an authority is not required to create a particular record in response to a request, *see* Wis. Stat. § 19.35(1)(L), several provisions ensure that a record produced for public access is comprehensible. For example, many statutes require that, depending on its form, a copy of a record must be “substantially as,” “readable,” “audible,” or “as good as the original.” Wis. Stat.

§§ 19.35(1)(b), (c), and (d). Together, these statutes ensure meaningful public access to government records.

Public access to computer records must also be meaningful. The Open Records law specifically provides for public access to computer data: “*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.” Wis. Stat. § 19.36(4) (emphasis added).

The Court of Appeals has relied on this statute to hold that an authority violated the Open Records Law by providing an analog recording of a “911 call” and denying access to a digital copy. *Jones*, 237 Wis. 2d 840, ¶¶ 16-19. The court held that even though the analog recording was audible, producing only the analog tape was insufficient because the Open Records Law allows for “access to the source ‘material’ and the opportunity for ‘examination and copying.’” *Id.*, ¶ 17. Accordingly, the authority was required

to produce a digital copy of the call because that was how the record was maintained. *Id.* The court also emphasized that the Open Records Law must be considered within the context of continually advancing technology.

As 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.... After all, as modern society rapidly adds to its sophisticated methods of data collection, it inevitably filters "the human mouth, tongue, [and] vocal cords" through computer systems. *A potent open records law must remain open to technological advances so that its statutory terms remain true to the law's intent.*

Id., ¶ 19 (emphasis added).

Applied here, the PDF files the contractors belatedly produced did not satisfy WIREdata's request for electronic or digital copies of the municipalities' tax assessment records. Those records were not maintained as PDF files, but were transformed into that format to frustrate WIREdata's request. Just as an analog file is insufficient when the data is

maintained digitally, so too is a PDF file insufficient when the “source material” for the database is maintained in a different format. To preserve the intent of the Open Records Law—public access to the “greatest possible information regarding the affairs of government”—this Court should conclude that every authority must provide meaningful access to computer records in a format equally comprehensible for the “source material.”

CONCLUSION

The real estate industry relies on municipalities’ tax assessments to verify information -- such as the actual owner, square footage, year built, and parcel number -- about a property. So do home buyers and sellers. Without access to a municipality's electronic tax assessment records, participants in a real estate transaction are left to rely on information provided by the seller or use more expensive means of confirming its accuracy.


The WRA, WFOIC, WBA and WNA ask the Court to ensure that citizens have meaningful access to tax assessment information.⁷ To that end, they request that the Court reject the municipalities' position that municipalities can delegate to an independent contractor their duties to the public under the Open Records Law. The purpose and statutory language of the Open Records Law can only support the conclusion that the municipalities are the sole legal authorities responsible for the requested records. Furthermore, because the authorities maintain tax assessment information in electronic databases, and no statutory or common law exception precludes disclosure of the requested records as an electronic database, the WRA, WFOIC, WBA and WNA ask the Court to

⁷ The Open Records Law makes no distinction between requests by individuals for private use and corporations for commercial use. In fact, subject to certain limited exceptions not at issue here, a requestor need not even identify him or herself nor state the purpose of the request. Wis. Stat. § 19.35(1)(i).

conclude that WIREdata is entitled to the data in the format in which it is maintained.

Dated: August 23, 2007.

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CERTIFICATION

I hereby certify that this brief conforms to the rules contained in section 809.19(8)(b) and (c), Stats., for an amicus brief produced with a proportional font. This brief is filed pursuant to this Court's order, dated August 1, 2007, granting the Wisconsin REALTORS® Association leave to file non-party brief *amicus curiae*. The length of this brief is 2991 words.

Dated: August 23, 2007.

By: 
Rebecca Kathryn Mason

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**STATE OF WISCONSIN
IN THE SUPREME COURT
APPEAL NOS. 2005AP1473; 2006AP174; 2006AP175**

**WIREDATA, INC.,
Plaintiff-Respondent,
vs.**

**VILLAGE OF SUSSEX and
VILLAGE OF SUSSEX CUSTODIAN,
Defendants-Co-Appellants-Cross Petitioners,**

**GROTA APPRAISALS, LLC,
MICHAEL L. GROTA and
ASSESSMENT TECHNOLOGIES OF WI, LLC,
Defendants-Appellants-Petitioners.**

**WIREDATA, INC.,
Plaintiff-Appellant,
vs.**

**VILLAGE OF THIENSVILLE,
Defendant-Respondent,**

**GROTA APPRAISALS, LLC,
MICHAEL L. GROTA and
ASSESSMENT TECHNOLOGIES OF WI, LLC,
Defendants-Respondents-Petitioners.**

**WIREDATA, INC.,
Plaintiff-Appellant,
vs.**

**CITY OF PORT WASHINGTON
Defendant-Respondent-Cross-Petitioner,**

**MATTHIES ASSESSMENTS, INC.,
Defendant-Respondent,**

**AMERICAN FAMILY INSURANCE COMPANY,
Intervenor.**

**BRIEF OF *AMICUS CURIAE*
WISCONSIN LAND TITLE ASSOCIATION, INC.**

**APPEAL FROM WAUKESHA COUNTY CIRCUIT COURT,
THE HONORABLE MARK S. GEMPELER, PRESIDING,
CASE NO. 2001CV001403,
AND APPEAL FROM OZAUKEE COUNTY CIRCUIT COURT,
THE HONORABLE THOMAS R. WOLFGAM, PRESIDING,
CIRCUIT COURT CASE NOS. 2001CV000198 AND 2001CV00216**

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INTRODUCTION

This appeal arises out of requests made by WIREdata, Inc., under the Wisconsin Open Records law, to inspect and copy public records, i.e. municipal assessment records. Public records, i.e., real estate conveyance records maintained by county register of deeds offices, constitute part of the “stock-in-trade” of the members of the Wisconsin Land Title Association (“WLTA”). Its membership relies on access to public records to construct the land title databases essential to their business mission: the efficient and cost-effective examination of land titles, which advances the public interest in the orderly and efficient transfer of title to real property in this State.

Accordingly, because WLTA supports strong, active and consistent enforcement of the Wisconsin Open Records law, consistent with the public interest advanced by the title industry, it sought and obtained leave to file an amicus brief urging this court to affirm the court of appeals’ decision in this case.

ARGUMENT

I. FRAMING THE OPEN RECORDS ISSUES.

More than six years ago, the requester, WIREdata, Inc., commenced the mandamus actions which are the subject of these appeals. Defendant Assessment Technologies of WI, LLC (“AT”) sought to derail the requests by a federal lawsuit, alleging in substance that honoring the requests would violate its rights protected by federal copyright law. The Seventh Circuit

strongly disagreed with AT's copyright claims and dismissed the copyright suit. See Assessment Technologies of WI, LLC v. WIREdata, Inc., 350 F.3d 640 (7th Cir. 2003).

The mandamus cases proceeded to judgment in the circuit courts, with differing results. On appeal, the court of appeals framed the requests as follows, "WIREdata sought the property assessment records in the format created and maintained by the municipalities' independent contractor assessors in a computer database." WIREdata, Inc. v. Village of Sussex, 2007 WI App 22, ¶ 1, 729 N.W.2d 757. The court of appeals held "that the open records law allows WIREdata the opportunity to access that database in order to examine and copy the property assessment records." The court of appeals therefore concluded the defendant municipalities "committed open records law violations when they denied WIREdata such access and instead provided it with a PDF, or portable document file." Id.

The size of the court record, the federal sidetrack and minutia issues raised by defendants¹ should not obscure the fact that this is simply an Open Records case. Wisconsin Stat. § 19.37(1) provides that if an authority withholds a record after a written request for disclosure, the requester "may bring an action for mandamus asking a court to order release of the record."

¹ As correctly noted by respondent WIREdata, Inc., defendants belatedly raised new issues as reasons for denial of the requests, or defenses to liability under Wis. Stat. § 19.37, only after the Seventh Circuit's decision in Assessment Technologies.

The record shows that WIREdata established the elements of its mandamus action. The authorities denied the requests, first by demanding payment of license fees unrelated to the actual cost of reproducing the records, and then by furnishing a PDF file in lieu of a copy of the record in the requested format. Accordingly, this court should affirm the court of appeals' decision holding that WIREdata was entitled to mandamus and other remedies under the Open Records law.

II. IN EACH CASE, WIREDATA REQUESTED A "RECORD."

None of the defendants disputes that WIREdata requested a record. Certain defendants, however, contend that the form of WIREdata's requests was imprecise as to content and time. (See Grota's Brief at 22-25.) These arguments are belied by Grota's agent Pelkey having quoted WIREdata a \$6,600 price (per municipality) to retrieve the requested data on May 18, 2001.² If the requests were clear enough that one of the defendant assessors could quote a price for providing the data, it is clear that the requests were actually understood. In turn, if WIREdata's requests were clear enough to be understood and made the subject of a price quote, certainly the requests were clear enough under the Open Records law.

² See WIREdata's Brief at 9-12 and record citations therein. This matter is before the court on appeals from summary judgments. None of the parties contends there is a "genuine dispute of material fact" which requires a trial. Accordingly, WLTA relies on the statements of fact contained in the parties' briefs and as related in the court of appeals decision.

III. WIREDATA MADE THE REQUESTS TO AN AUTHORITY.

None of the defendants disputes that WIREdata made its requests to an authority. The defendant municipalities and assessors each suggests that the other is the responsible authority, if the requests were wrongly denied. Hence, there is no dispute that WIREdata made its requests to an authority within the meaning of Wis. Stat. § 19.37(1)(a).

IV. THE AUTHORITIES FAILED TO RELEASE THE RECORDS IN COMPLIANCE WITH THE OPEN RECORDS LAW.

While the municipalities and assessors dispute that the requests were denied in violation of the Open Records law, they do so on different bases. None relieves the responsible municipalities from liability.

A. The Open Records Law Must Be Broadly Construed In Favor Of Complete And Unfettered Public Access.

The Wisconsin Legislature has declared it “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.” Wis. Stat. § 19.31. Accordingly, the Open Records law “shall be construed in every instance with a presumption of complete public access, consistent with the conduct of governmental business,” and “denial of public access generally is contrary to the public interest, and only in an exceptional case may access be denied.” *Id.* See also Linzmeier v. Forcey, 2002 WI 84, ¶ 15, 254 Wis.2d 306, 646 N.W.2d 811

(“general presumption of our law is that all public records shall be open to the public”).

B. The Reason For The Request And The Identity Of The Requester Are Immaterial.

The identity of WIREdata, and the reasons for its requests, have no bearing on the authorities’ duties under the Open Records law.³ See, e.g., State ex rel. Ledford v. Turcotte, 195 Wis.2d 244, 252, 536 N.W.2d 130 (Ct.App. 1995) (“Neither the identity of the requester nor the reasons underlying the request are factors that enter into the balance.”)

C. The Municipalities Cannot Delegate Their Duties Under The Open Records Law.

When WIREdata made its requests, the municipalities directed it to its independent contractor assessors. In turn, the assessors deferred to the copyright holder, Assessment Technologies, which quoted a cost of \$6,600 for producing copies, which it admits includes profit. (Grotta’s Brief at 9-10; WIREdata’s Brief at 9-10; WIREdata, 2007 WI App 22, ¶ 11.)

The municipalities evidently took a passive position in regard to the open records requests because (as the Seventh Circuit noted) of concerns that extracting the assessment data might violate license agreements. Assessment Technologies, 350 F.3d at 644. Having directed WIREdata to deal with the independent contractor-assessors relative to its requests, the

³ WLTA refers to the defendants, the municipalities and their independent contractor assessors, collectively as the “authorities.”

municipalities should not be allowed to so disavow their legal duty and hide behind their contractors' skirts. See, e.g., Journal/Sentinel, Inc. v. School Bd. of School Dist. of Shorewood, 186 Wis.2d 443, 521 N.W.2d 165 (Ct.App. 1994) (document kept in exclusive possession of authority's counsel was subject to inspection and copying under the Open Records law, because document was "produced or collected under a contract entered into by the authority," citing Wis. Stat. § 19.36(3)).

The municipalities are responsible for the actions or inactions of the independent contractor assessors in responding to the requests.

D. Electronic And Computer Records Are Not Excepted From The General Rule Of Unfettered Access.

The Open Records law does not distinguish between printed data and electronic or computerized data. Wisconsin Stat. § 19.32(2) defines a "record" to include electromagnetic information "recorded or preserved, regardless of physical form or characteristics, which has been created or is being kept by an authority." Wisconsin Stat. § 19.36(4) also provides that "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."

In State ex rel. Milwaukee Police Ass'n v. Jones, 2000 WI App 146, 237 Wis.2d 840, 615 N.W.2d 190, the Wisconsin Court of Appeals applied these provisions in addressing whether an authority, the Milwaukee Police

Department (“MPD”), complied with the Open Records law by producing an analog copy of a digital audio tape (“DAT”). The requester Milwaukee Police Association (“MPA”) had asked for a copy “in its original [form-] unaltered, unmodified and otherwise uncensored in any fashion,” 2000 WI App 146, ¶ 3, later clarifying its request to indicate that its intent was to have its expert plug in his digital and professional analog recorders into the MPD’s 911 system to create an exact duplicate of the DAT. Given that there was no disagreement as to how the MPD’s recording equipment operated,⁴ the court concluded the “statute allows for exactly what the MPA has requested-access to the source ‘material’ and the opportunity for ‘examination and copying’.” 2000 WI App 146, ¶ 16.

The message of the Jones Court was plain. The authority violated the Open Records law by giving the requester access to something other than original source material, or by providing a copy of the source material in a format (analog) other than the original digital format (DAT).

E. The Authorities Violated The Open Records Law By Producing A New PDF Document Rather Than A Copy of The Original Source Material.

Like the MPD in Jones, the authorities here refused to provide the requester, WIREdata, access to the source material and the opportunity to examine and copy it in its original format, although the record shows that it

⁴ 2000 WI App 146, ¶ 19 n.9.

was feasible to extract the data as WIREdata had requested. Assessment Technologies, 350 F.3d at 647-48 (discussing at least four possible methods by which WIREdata can obtain the data it sought without infringing AT's copyright). Instead, like the MPD in Jones, the authorities produced a copy of something other than the source material as requested.

In Osborn v. Board of Regents of University of Wisconsin System, 2002 WI 83, ¶¶ 41-42, 254 Wis.2d 266, 647 N.W.2d 158, citing Wis. Stat. § 19.35(1)(L), this court held that the Open Records law “does not require an authority to create a new record by extracting information from existing records and compiling the information in a new format.” Here, ironically, this is precisely that the authorities did, but they did so in order to thwart WIREdata's requests, rather than comply with them. Instead of extracting the requested data using one of the four methods suggested by the Seventh Circuit, AT pulled a joker from the deck; it created new data files, the PDF files, instead of giving WIREdata the raw data (not protected by copyright), the source material, in a format in which it was kept by the municipality, and in the format consistent with the requests. The assessors' gambit, in what was apparently an effort to avoid the court's holding in Assessment Technologies, cannot be distinguished from the conduct at issue in Jones, that is, providing a public record in an electronic format different than the original. Such conduct is inconsistent with the letter, the spirit, and the policies supporting the Open Records law.

F. The Public Policy Supporting The Open Records Law Is Stymied By Allowing Private Contractors To Charge The Public A Toll For Obtaining Access To Public Records.

The authorities tiptoe around the proverbial “elephant in the room” in this case – money. For example, Grota attempts to justify the \$6,600 fee it proposed to charge by characterizing it as for “value-added services,” and compares it to special search fees charged for the court’s “CCAP” website. (Grota’s Brief at 8 n.3.) The Wisconsin Attorney General more gingerly suggests (or, more correctly, speculates, as there is no citation to fact) that “Wisconsin authorities are likely to encounter difficulty locating software vendors if the public records law is interpreted to require authorities to provide unlicensed access to and use of proprietary software products.”⁵

The authorities and the Attorney General misapprehend the request, detailed in Assessment Technologies. WIREdata did not seek “unlicensed access to and use of proprietary software products.” As the Seventh Circuit noted, WIREdata “only wants the raw data, the data the assessors inputted into Market Drive,” which the court noted was not created by AT but by the assessors, and consisted of data “that are in the public domain.” 350 F.3d at 644. Directly answering Grota’s “value-added” argument, and noting that the age of computerized records should make records more rather than less accessible, the court of appeals in WIREdata stated that:

⁵ See Non-Party Brief of Wisconsin Department of Justice in Support of Petition for Review, dated February 16, 2007, at 9.

The organization and compilation of the data into the Microsoft Access database, done at public expense, allows greater ease of public access to the public assessment information. In keeping with the letter and spirit of the open records law, we will not allow the municipalities to deny WIREdata, and others who seek the information, the value-added benefit of this computerization. As we wrote in Jones:

As 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.... A potent open records law must remain open to technological advances so that its statutory terms remain true to the law's intent.

2007 WI App, ¶ 22, quoting Jones, 237 Wis.2d 840, ¶ 19, 615 N.W.2d 190.

As recognized by the Seventh Circuit, whether private parties should be allowed property rights in public data, such as the raw assessment data at issue in this case, is an issue for the legislature, not the courts. Assessment Technologies, 350 F.3d at 645-46 (citation omitted) (“We are mindful of pressures, reflected in bills that have been pending in Congress for years, to provide legal protection to the creators of databases, as Europe has already done.”) If the concerns voiced by Attorney General are real, if the citizens of this state are best served by allowing vendors of computer software to charge a toll or a “user fee” to members of the public seeking access to or copies of public records which have no copyright protection, the authorities should take their case to the Wisconsin Legislature, instead of asking this court to weaken the Open Records law to achieve such a result.⁶

⁶ See, e.g., Microdecisions, Inc. v. Skinner, 889 So.2d 871 (Fla.App. 2004) (applying Florida law) (county property appraiser could not impose royalty fees if GIS maps, which were public record and not copyrighted, were used commercially).

CONCLUSION

In this case, sound public policy and sound principles of statutory construction lead to the same conclusion, one consistent with our state's long tradition of open government advanced by this court's consistent and forceful application of the Open Records law. As the court of appeals first noted in Jones and repeated in the underlying decision, "it would be sadly ironic" if this court was to disable the Open Records law and make it more expensive and cumbersome for a requester to have access to public records and deprive the public of the benefits for which it has paid." 2007 WI App, ¶ 22. Construing the Open Records law, as urged by the assessors and municipalities, would be a step backward, a return to the day when citizens had to pay tolls for routine government services, rather than a step forward. Computer programs and computerized records, paid for out of public funds, should ease and enhance, rather than restrict, the public's access to public records.

The Open Records law entitled WIREdata to have the same access to the unprotected source data in the same electronic format as it is possessed by the municipalities. Accordingly, WLTA urges this court to affirm the decision of the Wisconsin Court of Appeals in this matter.

Dated this 22nd day of August 2007.

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A handwritten signature in black ink, appearing to read "Paul W. Schwarzenbart", is written over a horizontal line.

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CERTIFICATION

I certify that this brief conforms to the rules contained in sec. 809.19(8)(b), (c) and (d), for a non-party brief.

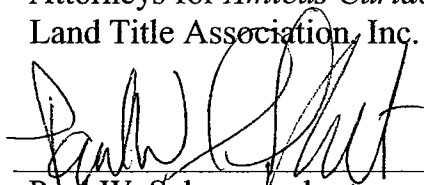
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Dated this 24th day of August, 2007.

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