COURT OF APPEALS
DECISION
DATED AND FILED

May 7, 2019

Sheila T. Reiff
Clerk of Court of Appeals

Appeal No. 2018AP373 **Cir. Ct. No. 2014CV41**

STATE OF WISCONSIN **IN COURT OF APPEALS**
DISTRICT III

ALBERT D. MOUSTAKIS,

PLAINTIFF-APPELLANT,

V.

STATE OF WISCONSIN DEPARTMENT OF JUSTICE,

DEFENDANT-RESPONDENT,

STEVEN M. LUCARELI,

INTERVENOR.

APPEAL from a judgment of the circuit court for Lincoln County: JAY R. TLUSTY, Judge. *Affirmed*.

Before Stark, P.J., Hruz and Seidl, JJ.

¶1 HRUZ, J. Albert Moustakis appeals a judgment dismissing his claims seeking a common law writ of mandamus and a declaration that part of the

Wisconsin public records law, WIS. STAT. § 19.356 (2017-18),[1] is unconstitutional as applied to him. The Wisconsin Department of Justice (DOJ) planned to release the records of a closed investigation concerning Moustakis's conduct while he was serving as an elected district attorney. Moustakis asserts that in deciding to release the records, the DOJ's records custodian performed an arbitrary public interest balancing test. He also claims that § 19.356 denies him equal protection of the law by excluding him from the class of government workers entitled to maintain an action for prerelease judicial review of the record custodian's decision to release records.

¶2 We conclude the circuit court properly dismissed both of Moustakis's claims. Moustakis is not entitled to a writ of mandamus because the legal authorities he marshals in support of his claim fail to establish that he has a clear legal right to the relief he seeks or that the DOJ has a positive and plain legal duty to withhold the records. Consequently, Moustakis is not permitted to have the public interest balancing applied in the manner he desires or to reach a result in favor of nondisclosure. Moustakis is also not entitled to a judgment declaring WIS. STAT. § 19.356 unconstitutional as applied to him on equal protection grounds. The statute does not violate any fundamental right of his so as to warrant the application of strict scrutiny, and the classification scheme established by the statute easily satisfies rational basis review. Accordingly, we affirm.

[1] All references to the Wisconsin Statutes are to the 2017-18 version unless otherwise noted.

BACKGROUND

¶3 The basic facts regarding this matter have been addressed by this court and the Wisconsin Supreme Court previously, and we will briefly summarize them here. In 2013, The Lakeland Times sent the DOJ a request for public records concerning Moustakis, who was at the time the Vilas County District Attorney. ***Moustakis v. DOJ***, 2016 WI 42, ¶9, 368 Wis. 2d 677, 880 N.W.2d 142 (hereinafter, ***Moustakis I***). After internal department deliberations, the DOJ's records custodian ultimately approved a proposed response that contained records relating to complaints about Moustakis that the DOJ had found to be unsubstantiated. ***Id.***, ¶10. The DOJ compiled the records for release and redacted some information in the records it determined was not suitable for release. ***Id.***, ¶12. Notably, Moustakis has conceded throughout the proceedings related to this litigation that in reaching its decision to release the records, the DOJ performed a weighing of interests to determine whether disclosure was in the public interest. ***Id.***, ¶23 n.12.

¶4 Moustakis received a copy of the proposed records response prior to its release. ***Id.***, ¶12. He then commenced an action under WIS. STAT. § 19.356(2)(a) and (4) seeking to enjoin the DOJ from releasing the records. ***Id.***, ¶13. Together, those provisions operate as an exception to the general rules under § 19.356(1) that an authority need not notify a record subject to the impending release of records and that no person is entitled to judicial review of a decision to provide a requester with access to a record. The circuit court dismissed Moustakis's claim for judicial review of the DOJ's release decision, concluding that Moustakis was not an "employee" as that term is defined in WIS. STAT. § 19.32(1bg) and used in § 19.356(2)(a), and, therefore, he could not maintain an

action under § 19.356(4) to prevent the release of the redacted records. ***Id.***, ¶15. We affirmed that determination, as did our supreme court. ***Id.***, ¶¶15, 19-20.

¶5 Prior to the dismissal of his claim seeking to enjoin release of the redacted records, Moustakis had filed an amended complaint in the circuit court adding two claims. Count 2 of the amended complaint sought a common law writ of mandamus requiring the DOJ's records custodian to "properly apply the balancing test to deny or significantly further redact any response to the request of the Lakeland Times." Count 3 sought a declaration that WIS. STAT. § 19.356, as applied by the DOJ to Moustakis, infringed upon his fundamental rights to access the court system and to privacy, and therefore denied him equal protection of the law under the Fourteenth Amendment. After initially dismissing Counts 2 and 3 on competency grounds, the circuit court granted Moustakis's motion for reconsideration, reinstated those claims, and stayed further litigation during the pendency of the appeal related to Count 1.

¶6 Following remittitur from the Wisconsin Supreme Court, the DOJ filed a motion to dismiss Counts 2 and 3 of the amended complaint. The DOJ argued Moustakis's request for a writ of mandamus must be denied "because he does not have a clear legal right to the relief he seeks and because the DOJ does not have a positive and plain duty to conduct the public policy balancing test in the manner Moustakis wishes, nor reach the result he desires." With respect to Moustakis's constitutional claim, the DOJ asserted that rational basis review applied and the legislature could rationally conclude that elected officials should be treated differently than typical government employees, including those in the civil service. The DOJ also filed a motion to stay discovery pending a decision on the DOJ's motion to dismiss.

¶7 Construing the DOJ's motion to stay discovery as a motion for a protective order under WIS. STAT. § 804.01(3), the circuit court concluded that permitting discovery to occur prior to deciding the motion to dismiss would result in undue burden and expense. The court then entered a new scheduling order setting briefing deadlines on the motion to dismiss. Following the initial briefing, the court held two nonevidentiary hearings and requested supplemental briefing from the parties regarding relevant legal authority for their positions.

¶8 The circuit court granted the DOJ's motion to dismiss Counts 2 and 3 after receiving the supplemental materials. As to Count 2, the court concluded Moustakis desired a writ of mandamus merely to require the DOJ to "redo the balancing test" in a fashion that precluded the records' release. Under these circumstances, the court concluded Moustakis had failed to sufficiently allege that he possessed a clear legal right to have the balancing test applied in the manner he desired, nor had Moustakis sufficiently demonstrated that the DOJ's duty to withhold the records was "positive and plain," given the discretionary nature of the balancing test.

¶9 As to Count 3, the circuit court concluded Moustakis was not entitled to a declaration that WIS. STAT. § 19.356 was unconstitutional as applied to him. It determined the statute did not infringe upon either Moustakis's right to access the courts or his right to privacy. The court therefore applied rational basis review to decide whether the statute violated equal protection. While acknowledging that the statutory scheme provided different rights to elected officials than it did to some other public employees, the court nonetheless concluded that any such treatment was a rational legislative choice based upon the "public platform or public access" that elected officials may enjoy.

¶10 In its concluding remarks, the circuit court emphasized the legislative presumption that government records are public. The court noted that while the legislature had made remedies available to certain parties when a government authority withholds a record or denies access to a record, no law requires the authority to explain its decision to release a record. The court memorialized its decision with a written order granting the DOJ's motion to dismiss. Moustakis now appeals.

DISCUSSION

¶11 Moustakis challenges the dismissal of his claims seeking a common law writ of mandamus and a declaration that WIS. STAT. § 19.356 is unconstitutional as applied to him. A motion to dismiss tests the legal sufficiency of the complaint. ***Data Key Partners v. Permira Advisers LLC***, 2014 WI 86, ¶19, 356 Wis. 2d 665, 849 N.W.2d 693. We accept the facts alleged in the complaint as true for purposes of our review. ***Id.***, ¶18. Mere legal conclusions, however, are insufficient to withstand a motion to dismiss and are not accepted for purposes of our review. ***Id.*** Whether a complaint states a claim upon which relief can be granted is a question of law that we review independently. ***Id.***, ¶17.

¶12 Moustakis also challenges the circuit court's decision to grant the DOJ's motion to stay discovery, which the court treated as a motion for a protective order. Moustakis critiques the DOJ's motion for failing to include citations to statutory or case law establishing its entitlement to such a stay. Moustakis concedes, however, that a protective order may issue for reasons of undue burden or expense. *See* WIS. STAT. § 804.01(3)(a); *see also* ***Earl v. Gulf & W. Mfg. Co.***, 123 Wis. 2d 200, 208, 366 N.W.2d 160 (Ct. App. 1985). We review a circuit court's discovery ruling using the erroneous exercise of discretion

standard, *see* ***Konle v. Page***, 205 Wis. 2d 389, 393, 556 N.W.2d 380 (Ct. App. 1996), but "[t]he question whether the burden and expense of producing information in a particular case is excessive in light of the information's value is a question of law which we determine independently," ***Earl***, 123 Wis. 2d at 206-07.

¶13 Here, the circuit court could reasonably conclude that discovery was unnecessary given the DOJ's pending motion to dismiss Counts 2 and 3 for failure to state a claim. As just noted, the focus of a motion to dismiss is the sufficiency of the complaint's factual allegations; a court cannot add facts in the process of construing a complaint. ***Data Key Partners***, 356 Wis. 2d 665, ¶19. Because of this limitation, the discovery Moustakis sought could have no bearing on the pending motion to dismiss, and it was therefore irrelevant to that motion. As such, *any* expense on the DOJ's part in providing discovery could be viewed as unwarranted, and it was reasonable for the court to stay discovery until after it had addressed the DOJ's potentially dispositive motion. The court's reasoning holds regardless of any deficiencies present in the DOJ's motion to stay.[2]

¶14 Having addressed the discovery issue, we now turn to the two counts the circuit court dismissed. We conclude that the court properly dismissed Counts 2 and 3 for failure to state a claim upon which relief can be granted. Based upon the facts alleged in the complaint, Moustakis is neither entitled to a common

[2] Moustakis notes in his reply brief that a circuit court may convert a motion to dismiss to a motion for summary judgment if matters outside of the pleadings are presented to, and not excluded by, the court. *See* WIS. STAT. § 802.06(2)(b). From this rule, he reasons the circuit court erred in refusing to permit further discovery. His conclusion, however, does not necessarily follow from his premise. Whether a court must convert a motion to dismiss when presented with materials outside the pleadings is a different question from whether a court must allow the parties to continue with discovery in the first instance, despite a pending motion to dismiss for failure to state a claim.

law writ of mandamus directing the DOJ to "redo" its balancing test nor to a declaration that WIS. STAT. § 19.356 is an unconstitutional violation of Moustakis's equal protection rights.

I. Common Law Writ of Mandamus

¶15 A writ of mandamus is a remedy used to compel a public officer to perform a duty of his or her office presently due to be performed. ***Voces De La Frontera, Inc. v. Clarke***, 2017 WI 16, ¶11, 373 Wis. 2d 348, 891 N.W.2d 803. Mandamus is an exceptional remedy, only to be applied in extraordinary circumstances where there is no other adequate remedy. ***State ex rel. Harris v. Milwaukee City Fire & Police Comm'n***, 2012 WI App 23, ¶8, 339 Wis. 2d 434, 810 N.W.2d 488. A petitioner for a writ of mandamus must satisfy four prerequisites: (1) a clear legal right; (2) a positive and plain duty; (3) substantial damages; and (4) no other adequate remedy at law. ***Voces De La Frontera***, 373 Wis. 2d 348, ¶11.

¶16 In this instance, Moustakis seeks a writ of mandamus directing the DOJ's records custodian to perform certain tasks pursuant to the authority conferred by the Wisconsin public records law, WIS. STAT. §§ 19.21-19.39. That legislation declares that, to the greatest extent possible, "all persons are entitled to … information regarding the affairs of government and the official acts of those officers and employees who represent them." Sec. 19.31. Accordingly, "[t]he denial of public access generally is contrary to the public interest, and only in an exceptional case may access be denied." ***Id.***

¶17 The strong presumption of public access may give way to three types of exceptions: (1) statutory exceptions; (2) common law exceptions; and (3) public policy exceptions. ***Democratic Party of Wis. v. DOJ***, 2016 WI 100,

¶10, 372 Wis. 2d 460, 888 N.W.2d 584. The task for determining whether a record should be disclosed is initially one for the records custodian, a position that all government authorities must designate to fulfill the authority's disclosure responsibilities under the public records law. *See generally* WIS. STAT. § 19.33. "When a public records request is made, the record custodian must determine whether the Public Records Law applies. If the law applies, the presumption favors disclosure of the record. The next step is to determine whether any exceptions operate to overcome the general presumption of openness." ***Democratic Party of Wis.***, 372 Wis. 2d 460, ¶10 (citations omitted).

¶18 The records custodian must conduct the open records disclosure analysis on a case-by-case basis, and our legislature has entrusted the custodian with "substantial discretion" in determining whether the records are to be released. ***Id.***, ¶¶10-11. The custodian initially determines whether any statutory or common law exception applies. ***Id.***, ¶11. "If neither applies, the custodian proceeds to the public policy balancing test, which requires a consideration of all relevant factors to determine whether the public interest in nondisclosure outweighs the public interest in favor of disclosure." ***Id.***; *Cf.* ***Woznicki v. Erickson***, 202 Wis. 2d 178, 191, 549 N.W.2d 699 (1996), *superseded by statute on other grounds as recognized in* ***Moustakis I***, 368 Wis. 2d 677, ¶27 (noting the records custodian's consideration of relevant factors can include the record subject's private interests). In other words, this balancing test considers whether disclosure would cause public harm to such a degree that the presumption of openness is overcome. ***Democratic Party of Wis.***, 372 Wis. 2d 460, ¶11.

¶19 Moustakis does not contend that any statutory or common law exception to disclosure exists. In addition, and importantly, he has conceded (both in our supreme court and in the proceedings following remittitur) that the DOJ's

records custodian has complied with his duty to perform a balancing of interests to determine whether the records should be released. *See* ***Moustakis I***, 368 Wis. 2d 677, ¶23 n.12. As a result, it is undisputed that this balancing of interests ultimately led the records custodian to conclude that release was warranted subject to various redactions in the released records. Moustakis, however, challenges the manner and result of the DOJ custodian's weighing of interests.[3] Specifically, he asserts that the custodian failed to consider factors that Moustakis—the subject of the records request—considers relevant. Based on this assertion, Moustakis further argues the custodian "acted outside of his authority in not considering all factors under the balancing test" and reached an arbitrary result. Essentially, Moustakis argues the DOJ records custodian's balancing of interests was simply wrong as a matter of law because any such balancing clearly favored withholding the records, or at a minimum the balancing was incomplete.

¶20 We reject Moustakis's arguments. As an initial matter, he cannot show he has a clear legal right to the relief he seeks, which is necessary for mandamus to issue. Again, he essentially accuses the DOJ records custodian of abdicating his statutory duty to properly apply the public interest balancing test when determining whether to release the records. As we explain, however, Moustakis has provided no authority demonstrating that a records custodian must perform the balancing in a particular manner—including his or her reaching out to

[3] We note that this is not a case in which a records requester has been denied access to a public record and seeks review of the records custodian's reasons for doing so. In those circumstances, application of the balancing test presents a question of law to be decided by the courts. ***Democratic Party of Wis. v. DOJ***, 2016 WI 100, ¶9, 372 Wis. 2d 460, 888 N.W.2d 584. Here, we are solely concerned with Moustakis's efforts to prevent the release of the records by having the records custodian conduct the balancing test in a particular way, which, as we explain, is not a proper subject for a writ of mandamus.

the records subject for input on the release decision—or to reach a particular result. Indeed, Moustakis's arguments run counter to the very purpose of the public records law.

¶21 As Moustakis readily notes in his brief-in-chief, "[u]nder ordinary circumstances, [application of] the balancing test is a discretionary act, and is not subject to review under a writ of mandamus." This concession is well taken, as our supreme court has long held that a circuit court erroneously exercises its discretion by granting mandamus relief when the duty is not clear and unequivocal but instead requires the exercise of discretion. ***Law Enf't Standards Bd. v. Village of Lyndon Station***, 101 Wis. 2d 472, 494, 305 N.W.2d 89 (1981). Here, the mandated public interest balancing test is inherently such a discretionary exercise.

¶22 Moustakis attempts to argue around the general unavailability of mandamus relief in this context by asserting that the DOJ's records custodian reached an arbitrary decision. In his view, the custodian conducted an "arbitrary" balancing test because the custodian redacted some, but not all, "untrue" statements about Moustakis in the records planned for release.[4] Moustakis provides no authority or cogent rationale for the proposition that only matters within public records that are verifiably true or corroborated are suitable for release.[5]

[4] Moustakis does not explain what untrue statements remained in the redacted records, and the redacted records are not present in the appellate file. However, even assuming some "untrue" statements went unredacted, this fact is immaterial to our analysis.

[5] Indeed, in the context of public actors within the criminal justice system, our courts have expressly recognized "[t]he public interest in being informed both of the potential misconduct by law enforcement officers *and of the extent to which such misconduct was properly* (continued)

¶23 To the contrary, the public records law does not contain any blanket exception to disclosure for employee disciplinary or personnel records. ***Woznicki***, 202 Wis. 2d at 183. Disclosure is the norm regardless of whether the accusations of misconduct have been substantiated. WISCONSIN STAT. § 19.36(10)(b) is the only exception to disclosure relating to the investigation of possible employee misconduct, and once the investigation has "achieved its disposition," those records are not exempt from disclosure unless the records custodian or a court finds that the potential for public harm exceeds the public interest in favor of nondisclosure under the traditional balancing test. ***Kroeplin v. DNR***, 2006 WI App 227, ¶32, 297 Wis. 2d 254, 725 N.W.2d 286.

¶24 As to that particular balancing, we have noted that law enforcement officers should expect close public scrutiny—including the possibility that disciplinary records may be released to the public—and that "[t]he public interest in being informed both of the potential misconduct by law enforcement officers and of the extent to which such misconduct was properly investigated is particularly compelling." ***Id.***, ¶¶44, 46. Notably, Moustakis has already presented the argument that public policy does not favor the release of uncorroborated or untrue accusations against a public official, including a district attorney. *See* ***Moustakis I***, 368 Wis. 2d 677, ¶23 n.12. Our supreme court considered and rejected that argument in favor of the general rule of disclosure. ***Id.***

¶25 Given this analysis of the statutory framework, we find Moustakis's legal argument concerning the "arbitrariness" of the DOJ's balancing test to lack

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investigated is particularly compelling." ***Kroeplin v. DNR***, 2006 WI App 227, ¶46, 297 Wis. 2d 254, 725 N.W.2d 286 (emphasis added). Plainly, the public's interest in having investigations of alleged public misconduct done correctly exists even if such allegations are ultimately not substantiated. Moustakis's argument largely gainsays this important interest.

merit as it pertains to his request for a writ of mandamus. "Where the legislature has conferred discretionary power on a legislative body or administrative officer, a court will not set aside an exercise of that power unless it is clear that the power has been abused or exercised beyond the limits conferred by the legislature." ***State ex rel. Knudsen v. Board of Ed., Elmbrook Sch., Joint Common Sch. Dist. No. 21***, 43 Wis. 2d 58, 67, 168 N.W.2d 295 (1969). All of the following are true in this case: (1) the legislature has prescribed a presumption in favor of disclosure; (2) the fact that an allegation has been found to be unsubstantiated is not a recognized categorical exception to disclosure; and (3) it is undisputed the DOJ's records custodian has, in fact, applied the public interest balancing test to determine whether to release the records and whether to do so with certain redactions, all consistent with his statutory authority. Under these circumstances, there is no basis to conclude a writ of mandamus should issue to require further action by the DOJ.

¶26 Moustakis's next argument for avoiding the general prohibition on mandamus relief in the context of the public records law again relies on his claims as to the falsity of some of the information contained in the partially redacted records. Moustakis contends that the case law concerning the public records law requires a records custodian to "seek perspectives outside his or her own" and, specifically, "to communicate with [the records subject] prior to deciding to release the records." Moustakis divines that such communications between a records subject and the records custodian are required for a proper balancing to occur in instances where the records purportedly contain unsubstantiated allegations of wrongdoing. In this regard, Moustakis views the question of whether he is entitled to prerelease judicial review of a release decision as being separate from the question of whether the records custodian has properly carried

out his or her duties under the balancing test. Moustakis then argues that "[a]bsent some form of proof the records custodian considered those factors Moustakis would have presented," the circuit court was required to conclude the DOJ and its records custodian failed to perform their obligations under the balancing test.

¶27 Moustakis's arguments are plainly insufficient to warrant mandamus relief. Notably, Moustakis never explains what "factors" he would have presented that were pertinent to his potential request for further redactions, nor what relevant considerations he believes the records custodian ignored when determining disclosure was warranted. Moreover, there are two major defects concerning the legal authority Moustakis cites in support of his argument that a records custodian must actively seek input from the records subject, at least when the records include information that the record-holding authority deems unsubstantiated.

¶28 First, the case Moustakis relies upon merely held that public employees were entitled to prerelease de novo judicial review when a records custodian decided to release information implicating the employees' privacy or reputational interests. *See* ***Milwaukee Teachers' Educ. Ass'n v. Milwaukee Bd. of Sch. Dirs.***, 227 Wis. 2d 779, 782, 596 N.W.2d 403 (1999), *superseded by statute as recognized in* ***Moustakis I***, 368 Wis. 2d 677, ¶27. Our supreme court recognized that providing a judicial forum for review of a release decision would allow public employees to "present arguments in favor of nondisclosure that the records custodian did not consider in evaluating the disclosure request." *See* ***id.*** at 794. However, the court certainly did not mandate that records custodians consult with subjects prior to deciding to release a record.

¶29 Second, and most importantly for Moustakis, ***Milwaukee Teachers' Education Association*** is no longer good law. The prerelease judicial review

adopted by our supreme court in that decision was curtailed by the legislature's subsequent adoption of WIS. STAT. § 19.356, which limits the rights afforded by that line of cases only to a defined set of records pertaining to employees residing in Wisconsin. ***Moustakis I***, 368 Wis. 2d 677, ¶27. ***Moustakis I*** concluded that Moustakis did not fall within the class of persons entitled to prerelease judicial review. ***Id.***, ¶¶36, 48, 63. Thus, to put it bluntly, Moustakis has no right to seek to enjoin the release of the records under the circumstances here. The authority's obligation is to release the records if its consideration of the balancing test leads it to that conclusion, and Moustakis has not demonstrated he is entitled to any form of judicial review or relief prior to that occurring, including review by mandamus.

II. Declaratory Judgment / Equal Protection Violation

¶30 Moustakis also asserts his complaint adequately states a claim for a declaratory judgment regarding the constitutionality of 2003 Wis. Act 47, which significantly revised the public records law and created WIS. STAT. § 19.356. Moustakis contends that in enacting § 19.356, the legislature impermissibly distinguished between publicly employed records subjects by permitting some to maintain an action for prerelease judicial review of the release decision, *see* subsecs. (2) and (4), while others are merely allowed to augment the record with written comments and documentation selected by the records subject, *see* subsec. (9).[6] Moustakis contends this classification violates his constitutional right to equal protection of the laws.

[6] Moustakis proposes that he falls into a third class of records subjects that have "neither the rights set forth under WIS. STAT. § 19.356(2) nor the remedy contained within subsection … (9)." No court has determined that any such "third" class exists, nor that Moustakis was not entitled to supplement the records under subsec. (9) had he sought such relief. Indeed, as our supreme court recognized, Moustakis has never claimed he is entitled to supplement the records;

(continued)

¶31 The real fight in this case, however, is over the standard of review applicable to Moustakis's equal protection claim. Generally, Wisconsin courts use two levels of scrutiny when addressing equal protection challenges. *See* ***Mayo v. Wisconsin Injured Patients & Families Comp. Fund***, 2018 WI 78, ¶28, 383 Wis. 2d 1, 914 N.W.2d 678. We apply strict scrutiny to statutes that interfere with the exercise of a fundamental right or that operate to the disadvantage of protected classes. ***Id.*** "When strict scrutiny is applied, the statute must serve a compelling state interest; the statute must be necessary to serving that interest; and the statute must be narrowly tailored toward furthering that compelling state interest." ***Id.***

¶32 "The more common level of statutory scrutiny is rational basis scrutiny, where statutes are upheld if there is any rational basis for the legislation." ***Id.***, ¶29. This standard, which generally applies in all instances other than strict scrutiny, tests "not whether some inequality results from the classification, but whether there exists any reasonable basis to justify the classification." ***Id.*** (citation omitted). The State argues rational basis scrutiny applies to Moustakis's constitutional challenge, whereas Moustakis asserts strict scrutiny is applicable. Moustakis apparently believes that if WIS. STAT. § 19.356 were deemed to be unconstitutional, he would once again enjoy the right to prerelease judicial review established in ***Milwaukee Teachers' Education Association***.

¶33 Moustakis concludes that strict scrutiny review is applicable to his equal protection challenge to WIS. STAT. § 19.356 because, in his view, that statute

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rather, he has consistently sought to prohibit the records' release. *See* ***Moustakis v. DOJ***, 2016 WI 42, ¶¶54, 61, 368 Wis. 2d 677, 880 N.W.2d 142. For purposes of our constitutional analysis here, it makes no difference whether Moustakis is entitled to supplement the records under subsec. (9); his equal protection challenge rests on the fact that some public employees may seek prerelease judicial review, while state and local elected officials may not do so.

impedes two of his fundamental rights. First, he argues § 19.356 curbs his fundamental right to access the courts. Second, he argues the statute restricts his fundamental right to privacy. We reject both of these arguments and, consequently, conclude rational basis scrutiny is appropriate.

¶34 The fundamental rights with which we are concerned for equal protection purposes are those "which are, objectively, 'deeply rooted in this Nation's history and tradition.'" ***Black v. City of Milwaukee***, 2016 WI 47, ¶47, 369 Wis. 2d 272, 882 N.W.2d 333 (quoting ***Washington v. Glucksberg***, 521 U.S. 702, 721 (1997)).[7] The fundamental rights so far recognized by the United States Supreme Court include the specific freedoms contained in the Bill of Rights, as well as "liberty" rights, including the right to marry, to have and parent children, and to marital privacy. ***Glucksberg***, 521 U.S. at 720.

¶35 Moustakis correctly observes that the right to access the courts to obtain adequate, effective, and meaningful review is guaranteed by the First and the Fourteenth Amendments. *See* ***Penterman v. Wisconsin Elec. Power Co.***, 211 Wis. 2d 458, 474, 565 N.W.2d 521 (1997). However, this right exists only "where the claim has a 'reasonable basis in fact or law.'" ***Id.*** (quoting ***Bell v. City of Milwaukee***, 746 F.2d 1205, 1261 (7th Cir. 1984), *overruled on other grounds by* ***Russ v. Watts***, 414 F.3d 783 (7th Cir. 2005)). Our supreme court has already concluded that Moustakis does not have a viable statutory claim for prerelease judicial review of the records the DOJ has compiled for release. ***Moustakis I***, 368

[7] Generally speaking, the due process and equal protection clauses of the Wisconsin Constitution and the United States Constitution are given "essentially the same" interpretation insofar as the scope of their protections is concerned. ***County of Kenosha v. C & S Mgmt., Inc.***, 223 Wis. 2d 373, 393, 588 N.W.2d 236 (1999).

Wis. 2d 677, ¶63. Because the "right" Moustakis seeks to vindicate is not recognized at law, WIS. STAT. § 19.356 does not impede his right to access the courts.

¶36 For the most part, Moustakis does not appear to quarrel with the foregoing analysis. Instead, Moustakis proposes that he should be permitted to access the courts because his pre-existing right to prerelease judicial review under ***Milwaukee Teachers' Education Association*** was "stripped from him" by WIS. STAT. § 19.356. However, none of the cases Moustakis cites provide support for the general rule he advances: that when the legislature extinguishes a once-recognized right, a person formerly entitled to maintain an action seeking to vindicate that right has been denied a fundamental right to access the courts.

¶37 Indeed, one of the primary cases Moustakis relies upon demonstrates that his argument lacks merit. In ***Bowman v. Niagara Machine & Tool Works, Inc.***, 832 F.2d 1052 (7th Cir. 1987), the court considered an argument that an Indiana statute violated equal protection because it created two classes of potential product liability plaintiffs. ***Id.*** at 1053-54. In rejecting an argument for applying strict scrutiny similar to the one Moustakis presents here, the court stated:

> Bowman cannot claim that he has been denied access to court simply because the Indiana legislature has restricted a particular cause of action in a way that makes it unavailable to him. Such an approach confuses "access" with "success," and Bowman is not constitutionally entitled to the latter. The concept of constitutionally protected access to courts revolves around whether an individual is able to make use of the courts' processes to vindicate *such rights as he may have*, as opposed to the extent to which rights actually are extended to protect or compensate him. Claims of violation of the right of access to courts have thus focused on the availability of suitable court processes to vindicate existing rights or, more commonly, the ability of an individual to make use of those processes. In contrast, Bowman's claim concerns specific substantive rights that

> the legislature has declined to extend to a group of persons that includes him. Bowman has not alleged that he has been denied access to either state or federal courts to enforce any right that *has* accrued to him.

Id. at 1054-55 (citations omitted). We adopt the same reasoning as the ***Bowman*** court in rejecting the application of strict scrutiny to WIS. STAT. § 19.356 based on an alleged impediment to Moustakis's right of court access.

¶38 According to Moustakis, WIS. STAT. § 19.356 also impacts his fundamental right to privacy. Moustakis contends the statute affects two aspects of his privacy interests: his "individual interest in avoiding disclosure of personal matters," ***Whalen v. Roe***, 429 U.S. 589, 598-99 (1977), and his "right to be free, except in very limited circumstances, from unwanted governmental intrusions into one's privacy," ***Stanley v. Georgia***, 394 U.S. 557, 564 (1969). In Moustakis's view, although the DOJ's investigation into his conduct did not violate these constitutional structures, "the subsequent decision to release the [unsubstantiated] allegations made against [him] … [is] an act of defamatory harm to Moustakis, contrary to his right to be let alone."

¶39 The generalized notions of privacy that Moustakis invokes do nothing to aid him in procuring strict scrutiny of the classification that the legislature created in WIS. STAT. § 19.356. Circumscribing prerelease judicial review of the DOJ's decision to release public records regarding its investigation of an elected official does not inherently place unnecessary or unwarranted public attention on recognized liberty interests like the rights to marry, to parent, or to

prevent governmental intrusion into one's intimate relationships.[8] *Cf.* ***In re Kading***, 70 Wis. 2d 508, 526, 235 N.W.2d 409 (1975) (holding that the scope of the right to privacy is limited to intimate personal and familial matters, and does not include the right to freedom from disclosure of an elected official's economic interests).

¶40 In invoking the phrase "an act of defamatory harm," Moustakis again appears to be appealing to the notion that the records should not be released because of their purported falsity, suggesting that their release could damage his standing in the community. However, any harm or injury to a person's reputational interest, even when inflicted by an officer of the State, "does not result in a deprivation of any 'liberty' or 'property' recognized by state or federal law." ***Paul v. Davis***, 424 U.S. 693, 711-12 (1976). Moustakis's resort is to tort law if he believes he has been damaged as a result of one or more false allegations, assuming he could prove the elements of any such cause of action. *See* ***id.*** at 712.[9]

¶41 Because WIS. STAT. § 19.356 does not implicate the fundamental liberty interests suggested by Moustakis, our task is merely to determine whether there exists any reasonable basis to justify the government's classification. ***Mayo***,

[8] Despite the continuing litigation in this matter, the records about which Moustakis complains have not been made available to this court. Moustakis does not claim the allegations against him relate to anything other than his conduct while acting in his official capacity as a district attorney. His focus has been on the professed falsity of the allegations, and he has not argued that the allegations pertain to personal matters unrelated to his elected position.

[9] In his reply brief, Moustakis for the first time suggests that because his reputational interests are at stake, due process requires that he receive notice and an opportunity to be heard. Presumably, he believes WIS. STAT. § 19.356 does not extend him such procedural protections. Moustakis, however, has not advanced a procedural due process claim, and we will not manufacture one on his behalf based upon the underdeveloped theory proposed for the first time in his reply brief.

383 Wis. 2d 1, ¶29. "When neither a fundamental right has been interfered with nor a suspect class been disadvantaged as a result of the classification, 'the legislative enactment "must be sustained unless it is 'patently arbitrary' and bears no rational relationship to a legitimate government interest."'" ***State v. Smith***, 2010 WI 16, ¶12, 323 Wis. 2d 377, 780 N.W.2d 90 (quoting ***State v. McManus***, 152 Wis. 2d 113, 131, 447 N.W.2d 654 (1989) (quoting ***Frontiero v. Richardson***, 411 U.S. 677, 683 (1973))). Moustakis does not attempt to argue that the statute would fail rational basis scrutiny.

¶42 In any event, we agree with the DOJ that "the analysis would not be a close call." As we have explained, WIS. STAT. § 19.356(1) establishes a general rule that no person is entitled to judicial review of an authority's decision to release a record to a requester. The statute then provides three narrow exceptions from this general rule. *See* § 19.356(2)(a)1.-3. Moustakis previously litigated the applicability of subd. 1., but now that it has been determined not to apply to him, he contends that excluding elected state officials such as him violated equal protection.

¶43 To the contrary, there are ample rational reasons why the legislature may have desired to exclude elected public officials from the scope of the exceptions to prerelease judicial review identified in WIS. STAT. § 19.356(2)(a)1.-3. As the DOJ notes, excluding such officials is consistent with the general purpose of the public records law, which is to provide the public with "the greatest possible information regarding the affairs of government and the official acts of those officers and employees who represent them." *See* WIS. STAT. § 19.31. Our case law recognizes that "[o]ne who willingly puts himself [or herself] forward into the public arena, and accepts publicly conferred benefits after election to public office, is legitimately much more subject to reasonable scrutiny

and exposure than a purely private individual." ***In re Kading***, 70 Wis. 2d at 526. Additionally, given their platform, elected public officials are better able to defend their conduct to the public than a typical government employee.

CONCLUSION

¶44 We conclude the circuit court properly dismissed Counts 2 and 3 of Moustakis's amended complaint. Moustakis is not entitled a writ of mandamus because he has failed to demonstrate he has a clear legal right to have the records withheld, or of a positive and plain legal duty on the DOJ's part do anything more than weigh the various public interests when deciding whether a record should be released. Consequently, Moustakis is not permitted to have the public interest balancing applied in the manner he desires or to reach a result in favor of nondisclosure. Moustakis is also not entitled to a declaratory judgment that WIS. STAT. § 19.356 is unconstitutional as applied to him on equal protection grounds. He has failed to sufficiently show that the statute violates a fundamental right so as to warrant strict scrutiny, and the statute's distinguishing between elected public officials and other governmental employees easily satisfies rational basis review.

By the Court.—Judgment affirmed.

Not recommended for publication in the official reports.