

**COURT OF APPEALS
DECISION
DATED AND FILED**

June 16, 2009

David R. Schanker
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 No. 2008AP2649

Cir. Ct. No. 2008CV13001

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT I**

STATE OF WISCONSIN EX REL. EMMETT EZRA WHITE,

PETITIONER-APPELLANT,

v.

**JOHN T. CHISHOLM, DISTRICT ATTORNEY AND JAMES J.
MARTIN, DEPUTY DISTRICT ATTORNEY,**

RESPONDENTS-RESPONDENTS.

APPEAL from an order of the circuit court for Milwaukee County:
DENNIS P. MORONEY, Judge. *Affirmed.*

Before Fine, Kessler and Brennan, JJ.

¶1 PER CURIAM. Emmett Ezra White appeals from an order of the circuit court dismissing his petition for a writ of mandamus. Because we conclude that the circuit court did not err, we affirm.

¶2 White was convicted of four counts of first-degree intentional homicide, party to a crime, and one count of attempted first-degree intentional homicide, stemming from a 1992 shooting at a Milwaukee drug house.¹ In 2008, White filed an open records request with the Milwaukee County District Attorney seeking documents relating to potential deals offered by the State to witnesses who testified in his case or the trials of two co-defendants. White went on to name eighteen “witnesses of interest” for whom he sought the information.

¶3 White’s request was denied by the Record Custodian for the Milwaukee County District Attorney’s office, relying primarily on *State ex rel. Richards v. Foust*, 165 Wis. 2d 429, 477 N.W.2d 608 (1991).² White then filed a petition for mandamus in the circuit court. See WIS. STAT. § 19.37(1)(a) (2007-08).³ The circuit court dismissed White’s petition, agreeing with the reasons set forth by the Record Custodian. White appeals.

¶4 WISCONSIN STAT. § 19.31 creates a presumption of public access to government records. The law presumes that public records are open to the public unless there is a clear statutory exception, a limitation under common law, or an

¹ The facts underlying White’s criminal conviction are taken from this court’s opinion affirming the conviction. *State v. White*, No. 96-0628-CR, unpublished slip op. (Wis. Ct. App. Sept. 16, 1997).

² In addition to *State ex rel. Richards v. Foust*, 165 Wis. 2d 429, 477 N.W.2d 608 (1991), the Record Custodian also relied on WIS. STAT. § 19.23(3) (2007-08) as a reason to deny White access to documents in a co-defendant’s file. To the extent that White was making a criminal discovery request under WIS. STAT. § 971.23 (2007-08), the Record Custodian advised White that § 971.23 applied only to pretrial and trial proceedings and since White was already convicted, he had no right to discovery. Because *Foust* is dispositive, we need not address these alternative rationales.

³ All references to the Wisconsin Statutes are to the 2007-08 version unless otherwise noted.

overriding public interest in keeping the public record confidential. *Hathaway v. Green Bay Sch. Dist.*, 116 Wis. 2d 388, 397, 342 N.W.2d 682 (1984). Under the common law, an accused did not have a general right of access to a prosecutor's file, either before or after trial. See *State ex rel. Lynch v. County Court*, 82 Wis. 2d 454, 464, 262 N.W.2d 773 (1978). That common law limitation, and the public policy need to protect the confidentiality of statements obtained by police during criminal investigations, led the supreme court to hold that a prosecutor's file is not subject to disclosure under the open records law. *Foust*, 165 Wis. 2d at 434-35.

¶5 *Foust* does not, however, create a bright-line rule which exempts from disclosure all documents in a prosecutor's file. *Nichols v. Bennett*, 199 Wis. 2d 268, 274-75, 544 N.W.2d 428 (1996). "A prosecutor cannot shield documents subject to the open records law simply by placing them into a 'prosecutorial file.' It is the nature of the documents and not their location which determines their status under [WIS. STAT.] §§ 19.31 to 19.37." *Nichols*, 199 Wis. 2d at 275. In *Nichols*, the supreme court reaffirmed the vitality of the *Foust* exception for "documents integral to the criminal investigation and prosecution process." *Id.* at 275, n.4.

¶6 White is seeking information relating to "immunity, leniency, deals of no prosecution, delayed prosecution, reduction in charges, reduced sentences or any incentives" pertaining to eighteen witnesses who presumably testified at his trial, or the trial of his co-defendants. Such information, contained in the file of the district attorney who prosecuted him for several serious felonies, certainly is an integral part of the State's prosecution of White. Accordingly, the Record

Custodian had no duty to disclose the records, and the circuit court properly dismissed White's petition for a writ of mandamus.

By the Court.—Order affirmed.

This opinion will not be published. *See* WIS. STAT. RULE 809.23(1)(b)5.

