

**COURT OF APPEALS
DECISION
DATED AND FILED**

January 27, 2011

A. John Voelker
Acting 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. 2010AP221

Cir. Ct. No. 2007CV654

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT IV**

THOMAS KRIEGL,

PETITIONER-APPELLANT-CROSS-RESPONDENT,

V.

RANDY STAMMEN,

RESPONDENT-RESPONDENT-CROSS-APPELLANT.

APPEAL and CROSS-APPEAL from a judgment of the circuit court for Sauk County: JAMES MILLER, Judge. *Affirmed in part, reversed in part, and cause remanded.*

Before Vergeront, P.J., Lundsten and Sherman, JJ.

¶1 PER CURIAM. Thomas Kriegl appeals from the judgment that dismissed his petition for a writ of mandamus. Kriegl argues that Randy Stammen violated the open records law by not providing him with information he sought

and by not posting a sign that complies with the statutory requirements. WIS. STAT. §§ 19.34(1), 19.35 (2007-08).¹ Stammen cross-appeals from that portion of the judgment that denied costs or fees to either party, arguing that the circuit court did not explain its reasons for denying him attorney fees and costs as a sanction under WIS. STAT. § 802.05(3). We conclude that Stammen was not required to produce the information Kriegl sought, and we affirm the portion of the judgment granting summary judgment to Stammen and denying summary judgment to Kriegl. Because the circuit court did not make any findings or explain its reasons for denying Stammen's motion for sanctions, we reverse that portion of the judgment and remand the matter to the circuit court for further consideration of Stammen's motion for sanctions under WIS. STAT. § 802.05(3).

¶2 The facts of this case are as follows. Kriegl, as a member of the Sauk County Board, made a written open records request to Stammen, as Sauk County Sheriff. Kriegl asked for the production of "complete, fully legible hard copies of records of ... work release/Huber inmate counts and reports." Kriegl further asked for specific data relating to inmates on work release.² After some correspondence between the parties, Stammen's office responded to this request stating that what Kriegl was seeking was not records but information, and

¹ All references to the Wisconsin Statutes are to the 2007-08 version unless otherwise noted.

² The request specified nine types of data: (1) the daily number of work release inmates by gender; (2) the total daily number of work release inmates; (3) the number of hours the inmates worked for compensation; (4) the number of hours they worked for community service; (5) the number of inmates who were working when they began their sentence; (6) the number who were working when their sentence ended; (7) the number of inmates who were working when they began their sentence who lost employment before their sentence ended; (8) the number of inmates who were not working when they began their sentence in the previous calendar year; and (9) the number of inmates who were not working when they began their sentence who gained employment while in the work release program.

explaining that there was no particular document that provided the information Kriegl sought. The response determined that the request was overly broad and burdensome.

¶3 Kriegl filed a petition for a writ of mandamus in the circuit court, alleging that Stammen had violated the open records law, WIS. STAT. § 19.35. Both parties moved for summary judgment. At Stammen's request, the circuit court entered a protective order holding discovery in abeyance pending the resolution of the summary judgment motions. In a memorandum decision, the circuit court granted summary judgment to Stammen and denied Kriegl's motion. After the memorandum decision was entered but before the final judgment, Stammen filed a motion for attorney fees as a sanction under WIS. STAT. § 802.05(3), alleging that certain of Kriegl's claims were frivolous. The judgment denied attorney fees and costs to both parties but did not explain why the court was denying Stammen's motion for sanctions.

¶4 Kriegl's arguments that the circuit court erred in granting summary judgment raise two issues: (1) whether Stammen was required to produce the information Kriegl sought, and (2) whether Stammen violated the open records law by not having the statutorily required "signage" in the lobby of the Sheriff's Department.

¶5 We begin with the issue of whether Stammen was required to provide Kriegl with the information he sought. Kriegl argues that Stammen violated the open records law when Stammen denied his request on the ground that Kriegl was seeking information, not records. As a corollary to this argument, Kriegl argues that the circuit court erred when it granted the protective order limiting discovery during the pendency of the motions for summary judgment.

¶6 The decision whether to grant mandamus in an open records case is within the circuit court's discretion. See *George v. Record Custodian*, 169 Wis. 2d 573, 578, 485 N.W.2d 460 (Ct. App. 1992). "The open records law affords the right to inspect or make or receive a copy of a 'record.'" *Id.* at 579. "A nonexistent record cannot be inspected or copied. The open records law does not require the custodian to collect or compile statistics or create a record for the benefit of the requester." *Id.*

¶7 In denying Kriegl's mandamus petition, the court stated that the Sheriff's Department had explained to Kriegl that the information Kriegl sought would have to be extracted from voluminous records, and that there were no specific documents that provided the information on the nine points sought by Kriegl. The court also noted that the Department was not required to create such a document upon request. The court found that Stammen and his Department had consistently denied Kriegl's request because "the information sought does not exist in the form requested." The court further found that the Sheriff's Department denied the request on the basis that the request was overly broad, burdensome, and indefinite. The court stated:

With the information Mr. Kriegl seeks not being available in any single record, based upon the undisputed record before the court, the custodian would need to review months of individual inmate records consisting of over 100,000 pages in an effort to accommodate Mr. Kriegl's request. The Court finds that such a request is over burdensome and over broad and finds therefore that petitioner's request for such information is inadequate.

¶8 We agree with the circuit court that Kriegl was seeking information, not existing records. The record supports the circuit court's conclusion that providing this information would have required the Sheriff's Department to cull its records and create new documents and also supports its conclusion that Kriegl's

request was overly broad and burdensome. The law is clear that Stammen did not have a statutory duty to require his Department to create the records that Kriegl sought. *See* WIS. STAT. § 19.35(1)(L).

¶9 We also conclude that the circuit court did not err when it limited discovery during the pendency of the summary judgment motions. A circuit court has broad discretion to limit discovery through a protective order. *Paige K.B. v. Steven G.B.*, 226 Wis. 2d 210, 232, 594 N.W.2d 370 (1999). The circuit court granted the protective order because it determined that the issue in the case at that point was whether there had been an appropriate open records request. The court also said that it might later determine that discovery was appropriate. We conclude that the circuit court properly exercised its discretion when it limited discovery.

¶10 The second issue is whether the Sheriff's Department had a sign posted as required by WIS. STAT. § 19.34(1). The circuit denied this claim on the ground that § 19.37 does not provide a right to a mandamus action for a violation of § 19.34. We agree with the circuit court that the statute does not provide for mandamus against a records custodian for a violation of this portion of the statute. We affirm that portion of the judgment that dismissed Kriegl's petition for a writ of mandamus.

¶11 On the cross-appeal, Stammen argues that the circuit court did not address his motion for attorney fees and costs as a sanction under WIS. STAT. § 802.05(3). As we have noted, the circuit court did not explain why it rejected Stammen's argument that certain of Kriegl's claims were frivolous. A motion for attorney fees under § 802.05(3) may involve issues that call for an exercise of the circuit court's discretion. *See Donohoo v. Action Wisconsin, Inc.*, 2008 WI 56,

¶34 & ¶35 n.7, 309 Wis. 2d 704, 750 N.W.2d 739. We conclude the appropriate course of action is to remand this issue to the circuit court for a decision on Stammen's motion for sanctions. When the court considers the motion on remand, Kriegl is free to raise any issues regarding timeliness or other procedural challenges to this motion.

By the Court.—Judgment affirmed in part, reversed in part, and cause remanded.

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

