COURT OF APPEALS
DECISION
DATED AND FILED

April 17, 2012

Diane M. Fremgen
Clerk of Court of Appeals

Appeal No. 2011AP61 **Cir. Ct. No. 2010CV912**

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

STATE OF WISCONSIN EX REL. JEFFREY D. LEISER,

PETITIONER-APPELLANT,

V.

STATE OF WISCONSIN, DEBORAH E. LEWIS,
MILWAUKEE POLICE DEPARTMENT INFO SYSTEMS DIRECTOR
AND EDWARD A. FLYNN, POLICE CHIEF,

RESPONDENTS-RESPONDENTS.

APPEAL from an order of the circuit court for Milwaukee County: CHARLES F. KAHN, JR., Judge. *Affirmed*.

Before Curley, P.J., Fine and Brennan, JJ.

¶1 CURLEY, P.J. Jeffrey D. Leiser, *pro se*, appeals the order dismissing his petitions for a writ of mandamus seeking Milwaukee Police Department (MPD) records.[1] The trial court's order dismissing Leiser's petition found that: (1) the statute of limitations had run on his second of two petitions; (2) the MPD was not a suable entity; and (3) Leiser's petitions must be dismissed on the merits because Leiser did not have a clear legal right to the relief sought; specifically, the public's interest in non-disclosure outweighed Leiser's individual interest in reviewing the records at issue. Leiser argues that the trial court erred in dismissing his case because the dismissal was based in part on a clerical error. Leiser also argues that the trial court misconstrued the parties' names in dismissing the MPD from the case, as he never intended the MPD to be a defendant in the case. Leiser finally argues that the trial court erred in dismissing his case on the merits, because he has a clear legal right to the records at issue. We affirm the trial court's dismissal, but on slightly different grounds than the trial court. We conclude that Leiser is not entitled to a writ of mandamus because he does not have a clear legal right to the records he seeks by virtue of the statutory exceptions to access described in WIS. STAT. § 19.35(1)(am)1. & 2. (2009-10);[2] consequently, we need not perform the balancing test discussed by the trial court, and we need not reach the clerical issues Leiser raises or the issue of whether the MPD was a properly-named defendant in this case. Leiser's petition is denied.

[1] The trial court's order construes Leiser's petitions as one—an initial petition and an amended petition. Because the record does not indicate that the second petition is amended, and because the second petition names different defendants than the first, we will refer to them as "petitions." However, as the subject matter of the two petitions is the same—records concerning Leiser's alleged sexual assault of two of his girlfriend's granddaughters—our analysis applies to both petitions.

[2] All references to the Wisconsin Statutes are to the 2009-10 version unless otherwise noted.

I. BACKGROUND.

¶2 Leiser was arrested and charged with sexually assaulting two of his girlfriend's granddaughters, who were ages eight and nine at the time of the alleged assaults. He was convicted after a jury trial of first-degree sexual assault of the eight-year-old, and acquitted on the charges regarding the nine-year-old. *See* ***State v. Leiser***, No. 2006AP2149, unpublished slip op. (WI App May 22, 2007). Leiser's criminal case is not at issue before us in this appeal.

¶3 The case before us began when Leiser requested, pursuant to Wisconsin's public records law, all police reports and other documents pertaining to him—including those documents concerning the aforementioned criminal charges—from the MPD in January 2009. The MPD denied Leiser's request, explaining that access to the responsive records was prohibited under WIS. STAT. §§ 48.981(7), 938.396(1), and 19.35(1)(am)1. & 2.

¶4 After the MPD denied his public records request, Leiser filed two petitions for a writ of mandamus with the trial court. The first petition, filed February 16, 2010, named the State, the MPD, Police Information Systems Director Deborah E. Lewis, and Police Chief Edward A. Flynn as defendants. The second petition, filed March 25, 2010, named the State and Deputy District Attorney James J. Martin as defendants. Both petitions pertained to Leiser's January 2009 public records request. The named parties filed a motion to quash or dismiss the writs, which the trial court granted. Specifically, the trial court found that: (1) the statute of limitations had run on the March 25 petition; (2) the MPD was not a suable entity; and (3) Leiser's petitions must be dismissed on the merits because Leiser did not have a clear legal right to the relief sought; specifically,

because the public's interest in non-disclosure outweighed Leiser's individual interest in reviewing the records at issue. Leiser now appeals.

II. ANALYSIS.

Standard of Review

¶5 On appeal, Leiser challenges the trial court's order denying his petition for a writ of mandamus. Mandamus is an "exceptional remedy," "'only to be applied in extraordinary cases where there is no other adequate remedy.'" ***Moore v. Stahowiak***, 212 Wis. 2d 744, 747, 569 N.W.2d 711 (Ct. App. 1997) (citation and emphasis omitted). A party petitioning for a writ of mandamus must show:

> (1) the writ is based on a clear, specific legal right which is free from substantial doubt; (2) the duty sought to be enforced is positive and plain; (3) substantial damage will result if the duty is not performed; and (4) there is no other adequate remedy at law.

Hearst-Argyle Stations, Inc. v. Board of Zoning Appeals of the City of Milwaukee, 2003 WI App 48, ¶14, 260 Wis. 2d 494, 659 N.W.2d 424 (citation and one set of quotation marks omitted).

¶6 "A writ of mandamus is a discretionary writ," and, generally, whether to grant or deny a party's petition "'lies within the sound discretion of the trial court.'" *See* ***Moore***, 212 Wis. 2d at 747 (citation omitted). Where a trial court determines whether to grant a writ of mandamus under the Wisconsin Public Records Law—WIS. STAT. §§ 19.31–19.39—however, we review the trial court's decision *de novo*. ***ECO, Inc. v. City of Elkhorn***, 2002 WI App 302, ¶15, 259 Wis. 2d 276, 655 N.W.2d 510. "We do so ever mindful of the legislature's declaration of policy that open records law must be construed 'in every instance

with a presumption of complete public access, consistent with the conduct of governmental business.'" ***Id.*** (citation omitted).

Leiser's petition for a writ of mandamus must be denied because he has no clear legal right to the records he requested.

¶7 At the outset, we note that while Leiser requested the documents at issue pursuant to "[WIS. STAT. §] 19.35(1), et. seq.," he did not specify whether he sought them pursuant to § 19.35(1)(a), which governs general records requests, or § 19.35(1)(am), which governs an individual's request(s) "for records containing personally identifiable information."[3] *See* ***Hempel v. City of Baraboo***, 2005 WI 120, ¶¶27-28, 284 Wis. 2d 162, 699 N.W.2d 551.

¶8 The distinction is important because our analysis differs considerably depending on the nature of the request. For example, if a person makes a general request under WIS. STAT. § 19.35(1)(a), two general types of exceptions may apply to preclude access to the document: statutory exceptions and common law exceptions. *See* ***Hempel***, 284 Wis. 2d 162, ¶28. Additionally, if neither a statute nor common law creates an exception to access under § 19.35(1)(a), the custodian of the record may still preclude access if "the strong presumption favoring access and disclosure is overcome by some even stronger public policy favoring limited access or nondisclosure." *See* ***Hempel***, 284 Wis. 2d

[3] The second paragraph of Leiser's public records request states in part, "If you determine pursuant to sec. 19.35(am) that some or all of the requested police reports may or may not be made public, I request that you provide me with those documents which may be made public and an itemized listing of any being released." This lends support to an argument that Leiser did in fact request the records pursuant to WIS. STAT. § 19.35(1)(am) specifically. However, as Leiser mentions the entire statute, "sec. 19.35(1), et. seq." in the paragraph requesting the records at issue, we decline to make any assumptions about the specific section under which Leiser, *pro se*, sought to request the records at issue.

162, ¶28; *see also* ***Linzmeyer v. Forcey***, 2002 WI 84, ¶25, 254 Wis. 2d 306, 646 N.W.2d 811. On the other hand, "[w]hen a person makes an open records request for records containing personally identifiable information under WIS. STAT. § 19.35(1)(am), the person is entitled to inspect the records unless the surrounding factual circumstances reasonably fall within one or more of the statutory exceptions to (am)." *See* ***Hempel***, 284 Wis. 2d 162, ¶27. In other words, no common law exceptions apply. *See* ***id.***, ¶52. Furthermore, requests made pursuant to § 19.35(1)(am) "are not subject to any balancing test; the legislature has done the balancing by enacting statutory exceptions to the disclosure requirements." *See* ***Hempel***, 284 Wis. 2d 162, ¶¶27, 52, 56.

¶9 Our supreme court explained the reasoning behind these differences in ***Hempel***:

> An "individual" requester who asks to inspect records pertaining to himself is substantially different from a requester, be it a private citizen or a news reporter, who asks to inspect records about any of a wide variety of government activities or a wide array of other people. The right to inspect under paragraph (am) is clearly limited to personally identifiable information about the requester. When a request is made within that narrow scope, the right is more unqualified than a right under paragraph (a), first, because paragraph (am) does not recognize common law exceptions and, second, because paragraph (am) is not subject to a balancing test. Paragraph (am) recognizes only statutory exceptions. When these statutory exceptions are present, however, paragraph (am) "does not apply."

See ***id.***, ¶34.

¶10 Fortunately, Leiser's lack of specificity is of no consequence in this case because the substance of his request, as well as the constraints imposed by WIS. STAT. § 19.32(3), require that we interpret his request as an individual request for records pursuant to WIS. STAT. § 19.35(1)(am). First, Leiser's request

explains, "I am requesting any Police reports or documents and/or other papers which refer to me or any of my activities." This strongly suggests that the request is an individual request made pursuant to § 19.35(1)(am). Second, § 19.32(3), which defines who may request records under the public records law, limits Leiser's ability to request documents solely to documents referring to his person because he is incarcerated:

> *"Requester" means any person* who requests inspection or copies of a record, *except a committed or incarcerated person, unless the person requests inspection or copies of a record that contains specific references to that person* or his or her minor children for whom he or she has not been denied physical placement under ch. 767, and the record is otherwise accessible to the person by law.

(Emphasis added.)

¶11 Therefore, as pertinent to the circumstances in this case, under WIS. STAT. § 19.32(3) the only kind of request Leiser, an incarcerated person, is permitted to make as a "requester" of records is one pertaining to himself; this is exactly the kind of request defined and governed by WIS. STAT. § 19.35(1)(am). Consequently, in considering whether Leiser has a clear legal right to the documents requested, *see* ***Hearst-Argyle Stations***, 260 Wis. 2d 494, ¶14, we must conclude that Leiser "is entitled to inspect the records unless the surrounding factual circumstances reasonably fall within one or more of the statutory exceptions to (am)," *see* ***Hempel***, 284 Wis. 2d 162, ¶27.

¶12 Turning to WIS. STAT. § 19.35(1)(am), we find three exceptions to the general rule that an individual has a right to inspect any record containing personally identifiable information pertaining to that individual:

> 1. Any record containing personally identifiable information that is collected or maintained in connection with a complaint, investigation or other circumstances that

> may lead to an enforcement action, administrative proceeding, arbitration proceeding or court proceeding, or any such record that is collected or maintained in connection with such an action or proceeding.
>
> 2. Any record containing personally identifiable information that, if disclosed, would do any of the following:
>
> a. Endanger an individual's life or safety.
>
> b. Identify a confidential informant.
>
> c. Endanger the security, including the security of the population or staff, of any state prison under s. 302.01, jail, as defined in s. 165.85(2)(bg), juvenile correctional facility, as defined in s. 938.02 (10p), secured residential care center for children and youth, as defined in s. 938.02(15g), mental health institute, as defined in s. 51.01(12), center for the developmentally disabled, as defined in s. 51.01(3), or facility, specified under s. 980.065, for the institutional care of sexually violent persons.
>
> d. Compromise the rehabilitation of a person in the custody of the department of corrections or detained in a jail or facility identified in subd. 2. c.
>
> 3. Any record that is part of a records series, as defined in s. 19.62(7), that is not indexed, arranged or automated in a way that the record can be retrieved by the authority maintaining the records series by use of an individual's name, address or other identifier.

¶13 We conclude that the first exception precludes access in Leiser's case. It is undisputed that the information sought is "personally identifiable information" that was "collected or maintained in connection with a complaint, investigation or other circumstances" that led "to an enforcement action." *See* ***id.*** The records were collected in connection to the investigation regarding the alleged sexual assaults of his girlfriend's granddaughters, and they have since been maintained in connection with the proceedings that resulted from the investigation.

Therefore, Leiser has no right to the records pursuant to WIS. STAT. § 19.35(1)(am)1.

¶14 Additionally, to the extent that the records mention either the eight-year-old or nine-year-old sexual assault victims, we conclude they are inaccessible under WIS. STAT. § 19.35(1)(am)2. because of the serious likelihood that their disclosure would endanger the victims' lives or safety. As the State correctly points out, the records responsive to Leiser's request include personally identifiable information. As noted, the victims in this case were extremely young during the time of the assault—ages eight and nine—and disclosure of their identifying information could, unfortunately, expose them to further predation. Furthermore, we agree with the State that, if disclosed, the identifying information could also endanger the juvenile victims' families' lives or safety. Finally, we do not construe the statutory exceptions found in § 19.35(1)(am) narrowly. *See* ***Hempel***, 284 Wis. 2d 162, ¶56.

¶15 Because Leiser has no clear legal right to the records sought, we must deny his petitions for a writ of mandamus. *See* ***Hearst-Argyle Stations***, 260 Wis. 2d 494, ¶14 (petition for writ of mandamus must prove each of four criteria). We need not address whether: the duty sought to be enforced is positive and plain, substantial damage will result if the duty is not performed, or there is no other adequate remedy at law—because Leiser's claim fails as to the first element required to obtain the writ. *See* ***id.*** For this same reason, we also need not address Leiser's arguments regarding whether the trial court improperly denied the writ due to a clerical misrepresentation or due to a misunderstanding regarding which entities Leiser named as defendants.

¶16 As a final matter, we conclude that, to the extent Leiser has argued that the prosecution in his criminal case improperly withheld documents during discovery in his criminal cases, those arguments must be rejected because they pertain to his criminal appeal, and not the instant civil action before us. *Cf.* ***State v. Schaefer***, 2008 WI 25, ¶120, 308 Wis. 2d 279, 746 N.W.2d 457 (Abrahamson, J., concurring) ("In our system of government, law enforcement and the district attorney's office are two separate entities, with separate functions and subject to different codes of conduct, although the two often work together. TV's *Law & Order* gets it right: 'In the criminal justice system, the people are represented by two separate yet equally important groups: the police, who investigate crime, and the district attorneys, who prosecute the offenders.'") (footnote omitted). Furthermore, to the extent that we do not address a particular argument in either Leiser's brief in chief or his reply, we reject it because it is undeveloped or inadequate. *See* ***League of Women Voters v. Madison Cmty. Found.***, 2005 WI App 239, ¶19, 288 Wis. 2d 128, 707 N.W.2d 285 (we do not decide undeveloped arguments); ***Vesely v. Security First Nat'l Bank of Sheboygan Trust Dep't***, 128 Wis. 2d 246, 255 n.5, 381 N.W.2d 593 (Ct. App. 1985) (we do not decide inadequately briefed arguments).

By the Court.—Order affirmed.

Not recommended for publication in the official reports.