COURT OF APPEALS
DECISION
DATED AND RELEASED

September 12, 1996

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

NOTICE

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

No. 95-2295

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

LAVERNE MCCOY,

Petitioner-Respondent,

v.

BOARD OF FIRE AND POLICE COMMISSIONER FOR THE CITY OF MILWAUKEE,

Respondent-Appellant,

M. NICOL PADWAY and KENNETH MUNSON,

Respondents-(In T.Ct.).

APPEAL from an order of the circuit court for Milwaukee County: JACQUELINE D. SCHELLINGER, Judge.[1] *Affirmed in part; reversed in part and cause remanded with directions.*

[1] The Hon. Jacqueline D. Schellinger entered the written order that is the subject of this appeal. The order memorialized the earlier oral decision made by the Hon. Frank T. Crivello.

Before Fine and Schudson, JJ., and Michael T. Sullivan, Reserve Judge.

PER CURIAM. The City of Milwaukee Board of Fire and Police Commissioners appeals from an order granting Police Officer Laverne McCoy's open records request for testing materials from a written examination she took for sergeant rank. In a detailed order, the trial court granted McCoy access to, *inter alia*, the test's written questions, and the answers and converted test scores of all those who took the examination with McCoy with their names redacted. We affirm in part, reverse in part, and remand the matter to the trial court with directions to enter a new order consistent with this opinion.

I. BACKGROUND.

In 1993, McCoy had been a police officer for the City of Milwaukee for approximately thirteen years. On August 1, 1993, the Board of Fire and Police Commissioners announced a promotional examination for police sergeant within the Milwaukee Police Department. McCoy applied for this position and took the written job knowledge test that is forty-five percent of the final grade for promotion to sergeant. The Board informed McCoy that she had not passed the examination.

McCoy then requested to copy or inspect her test materials, scores and answers. The Milwaukee Fire and Police Commission's Executive Director, Kenneth Munson, responded and denied inspection of the record, citing specific public policy reasons—namely, that:

> Access to the requested materials would seriously compromise the fairness and reliability of the promotional process by permitting those with access the opportunity to tailor preparation and responses, thereby giving those individuals an unfair advantage. This, in turn, would impose an insurmountable burden upon staff by requiring that an entirely new test and testing process, valid in terms of content and applicability, be developed. Given the fact that the statutes, rules

> and regulations, standard operating procedures and other information which should serve as a knowledge base for a position are limited, available areas of inquiry would become increasingly obscure as time passed and examinations were conducted. This result is unacceptable in that it would frustrate any attempt by the Commission to provide for a timely and reliable promotional process which relates "to those matters which fairly test the relative capacity of the candidates to discharge the duties of the positions in which they seek employment or to which they seek to be appointed...."

(Citation omitted.) He then offered to have McCoy meet with the Board's supervisor of examinations for test feedback, to which McCoy did not respond. McCoy then requested the test materials from M. Nicol Padway, the Chairman of the Commission. Padway reviewed Munson's letter and agreed that it was "consistent with Commission policy."

On March 18, 1994, McCoy filed a summons and petition for a writ of mandamus requesting an opportunity to inspect and/or copy the examination and scoring materials for the sergeant's promotion examination. McCoy later amended this complaint to add that she is an African-American female.

At the first court appearance on January 23, 1995, the trial court orally ordered that the Commission allow only McCoy's counsel to see McCoy's tests, the correct answers, the scoring materials, and any other related materials used to arrive at her test score. The Commission could remove any identifying material of other participants except for race and gender. This oral order allowed a member of the city attorney's office and a member of the Board to be present, but forbade McCoy's counsel from copying any of the materials, which he could then later discuss with only McCoy.

On the report-back date to the trial court, McCoy informed the trial court that the Commission had not allowed her counsel to write down test

information and therefore the inspection had not taken place. The trial court then ordered that information could be written or copied by McCoy's counsel.

The trial court orally granted summary judgment to McCoy, stating that there was not an overriding public interest in keeping all the examination materials confidential, and that the limited access given in the previous orders would remain in effect. The trial court later filed a written order on August 18, 1995, memorializing the oral ruling:

IT IS ORDERED as follows.

(1) The Court's oral decision and opinion of July 14, 1995 is hereby expressly incorporated by reference in this ORDER.

(2) The Respondents' motion for summary judgment is denied.

(3) The Petitioner is granted summary judgment requiring access to the respondents' testing records for the September, 1993 Milwaukee Police Department sergeant's promotional examination written test to the following extent:

(A) Petitioner's counsel shall be allowed access to all the written test questions, answers, and converted test scores of those who took the September, 1993 sergeant's promotional examination written test.

(B) The names and any other information that specifically identifies other test takers shall be redacted.

(C) An official of the respondent Commission shall be available to answer any questions the Petitioner's counsel may have, and the Commission must answer all such questions in good faith, consistent with this Court's decision of July 14, 1995 and this ORDER.

(D) Petitioner's counsel may write down or copy any questions or other information from the test materials, but he may not discuss them with anyone except Petitioner.

(E) Neither Petitioner nor her counsel shall discuss or disclose any information obtained from the foregoing access with anyone except an official from the respondent Commission and the Court.

(F) Upon completion of his review Petitioner's counsel shall deliver his written notes and copies to this Court where they should be sealed and placed in the file of this case.

The Board now appeals from this written order.

II. ANALYSIS.

This case involves the application of the open records law to a set of undisputed facts.[2] *See* §§ 19.31 through 19.39, STATS. It presents a question of law which we approach without deference to the conclusions of the trial court. ***Nichols v. Bennett***, 199 Wis.2d 268, 273, 544 N.W.2d 428, 430 (1996). While the open records law provides for public oversight of the workings of government, the general presumption of the law that public records shall be open to the public does not extend to records where "there is a clear statutory exception, ...

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[2] Section 19.31, STATS., provides:

Declaration of policy. 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 employes 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 employes 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.

there exists a limitation under the common law, or ... there is an overriding public interest in keeping the public record confidential." ***Hathaway v. Green Bay School Dist.***, 116 Wis.2d 388, 397, 342 N.W.2d 682, 687 (1984). In keeping with the presumption of accessibility to public records, we must narrowly construe any exceptions to the "general rule of disclosure." ***Nichols***, 199 Wis.2d at 273, 544 N.W.2d at 430.

When a records custodian is faced with a demand for inspection as we have here, the custodian must balance the public's right of inspection against the public interest in nondisclosure. ***Village of Butler v. Cohen***, 163 Wis.2d 819, 825, 472 N.W.2d 579, 581 (Ct. App. 1991). In determining the propriety of the trial court's ruling, we use a two-fold inquiry. ***Id.*** at 827, 472 N.W.2d at 582. First, we determine whether the custodian's denial was made with the requisite specificity required by case law and § 19.35, STATS. ***Id.*** To meet this specificity requirement, the custodian must give a public policy reason that the record warrants confidentiality. ***Journal/Sentinel, Inc. v. Aagerup***, 145 Wis.2d 818, 823, 429 N.W.2d 772, 774 (Ct. App. 1988). This does not require the custodian to provide a detailed analysis of the record and why public policy directs that it must be withheld. ***Id.*** If the requisite showing of specificity is made, our second step is to determine whether the reasons given for withholding are sufficient to outweigh the strong public policy favoring disclosure. ***Village of Butler***, 163 Wis.2d at 827, 472 N.W.2d at 582.

There is no question that the Commission gave a public policy reason with sufficient specificity; Munson's letter discussed in detail the burden that releasing the test questions and materials would place on the Commission and its ability to test potential sergeant candidates. In short, the Commission identified a specific public interest—the integrity of a police promotional system—to withhold the test questions and answers from McCoy. Section 103.13, STATS., permits the state to prevent state employees from accessing their entire personnel file. Section 103.13(6)(c), STATS., specifies that an employee's right to inspect personnel records does not apply to "[a]ny portion of a test document" except the accumulated test score for a test or a section thereof.

We do note the trial court attempted to balance the general public interest in open records with the Commission's interest in the integrity of its testing and promotional process. Nonetheless, we conclude the trial court went

too far in providing McCoy with access to all of the materials she requested. The exam was multiple choice and graded by a computer optical scanner—thus, it was an objective test—an answer was either correct or incorrect. To judge that her test was graded accurately and its scoring was correct, McCoy need only access her answer sheets and the answer sheets of the other applicants. Further, access to the computer grading program would likely ensure that the optical scanner accurately recorded her answers. The test questions themselves are not required to ensure that her answers were *graded* accurately.

Accordingly, we affirm those portions of the trial court's order that granted McCoy access to her graded answer sheet, and the graded answer sheet of the applicants with all identifying information except race and sex redacted. We reverse those portions of the order that granted McCoy access to the test questions and the requirement that the Commission answer all questions regarding them. Further, we remand the matter to the trial court with directions to enter a new order consistent with this opinion.

By the Court.—Order affirmed in part; reversed in part and cause remanded with directions.

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