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May 19, 2020

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You are hereby notified that the Court has entered the following opinion and order:

2018AP1251-AC Kerry Keen v. Elizabeth Frueh (L. C. No. 2018CV89)

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

Summary disposition orders may not be cited in any court of this state as precedent or authority, except for the limited purposes specified in WIS. STAT. RULE 809.23(3).

Kerry Keen, a publicly employed professor, sought to prevent release of, or in the alternative, sought further redaction of identifying information from a public record that is the subject of a public records request from the Milwaukee Journal Sentinel. The public record consists of partially redacted documents from a closed disciplinary action conducted by Keen's

employer related to a student's complaints of sexual harassment.[1] The circuit court denied relief and ordered release of the partially redacted records containing Keen's name. Based upon our review of the briefs and record, we conclude at conference that this case is appropriate for summary disposition, and we affirm. *See* WIS. STAT. RULE 809.21.

Following the newspaper's open records request, the employer issued a notice to Keen under the public records law. *See* WIS. STAT. § 19.356(2)(a)1. The notice attached the records in question, and it also explained that the names of students and their identifying information were redacted, and that some redactions were made of Keen's personal medical information.[2]

Having received notice of the impending release of the records, Keen filed an emergency petition for a declaratory judgment and an injunction. He asserted that the records of the closed investigation, although partially redacted, still contained information that should not be made public. He sought a restraining order to prevent the release of the records or, in the alternative,

[1] This appeal was advanced for decision under WIS. STAT. RULE 809.20 (2017-18). All references to the Wisconsin Statutes are to the 2017-18 version unless otherwise noted.

[2] WISCONSIN STAT. § 19.356(2)(a)1., when applicable, requires an authority to provide prerelease notice to a record subject—here, Keen—that certain records related to employee discipline will be released to a requester. If a record subject believes there are grounds to challenge that release, the statute provides a mechanism for judicial review. Sec. 19.356(2)(a), (3). When review is invoked, the court then "appl[ies] substantive common law principles construing the right to inspect, copy, or receive copies of records" to decide whether to restrain release. Sec. 19.356(6).

As relevant here, the procedure applies to:

> a record containing information relating to an employee that is created or kept by the authority and that is the result of an investigation into a disciplinary matter involving the employee or possible employment-related violation by the employee of a statute, ordinance, rule, regulation, or policy of the employee's employer.

WIS. STAT. § 19.356(2)(a)1.

for a restraining order "barring release of the information at issue for a brief period of time allowing the parties to appropriately redact the information and protect the parties involved."

After hearing argument, the circuit court denied Keen's petition and ordered release of the records, as redacted. The court first noted that no party asserted that any statutory or common law authority prevented disclosure of the records. Under the applicable public policy balancing test, the court found the public's strong interest in release of information was not outweighed by the grounds Keen argued as providing the basis for further redaction of his personal identifying information. The court further found there was a strong public interest in protecting the complainant's identity, and it approved Keen's employer's redactions in that regard. The court concluded Keen's request for further redactions "goes too far." However, the court stayed the effect of its order pending this appeal.

The interpretation and application of the public records law to undisputed facts is a question of law that appellate courts review independently, but with the benefit of the circuit court's analysis. *See* ***Hagen v. Board of Regents***, 2018 WI App 43, ¶5, 383 Wis. 2d 567, 916 N.W.2d 198. Absent a clear statutory exception, a limitation under the common law, or an overriding public interest in keeping a public record confidential, Wisconsin's public records law shall be construed in every instance with a presumption of complete public access. ***Id.*** As the denial of public access generally is contrary to the public interest, access must be denied only in an exceptional case. ***Id.*** The party seeking nondisclosure has the burden to show that public interests favoring secrecy outweigh those favoring disclosure. ***Id.***

Keen argues "[p]ublic policy interests favoring additional redactions overcome the interests of the public to receive the documents in their present form." Keen couches his

argument for nondisclosure in several ways—most of which boil down to asserting that disclosure of the documents will result in reputational harm and will damage the privacy interests of himself and other "public professors." However, regardless of the specific legal basis for Keen's arguments, the principal relief he seeks is the removal of his personal identifying information from the closed investigatory documents. This court recently rejected a similar attempt in ***Hagen***, which is binding here and requires rejection of Keen's arguments.

In ***Hagen***, a reporter sought closed investigatory documents about a public university professor. And, like here, the documents disclosed Hagen's identity and the nature of the investigation, but the complainant's identity was redacted. *See* ***id.***, ¶¶2-3, 9 n.5. We concluded in ***Hagen*** that "no statutory exception exists for records of closed misconduct investigations," as opposed to "current" investigations. ***Id.***, ¶6. Thus, once the investigation is closed, properly disclosed documents are those that relate to "notices of a complaint and related investigations; a summary of a meeting about that investigation; the resulting report on the complaint, investigation, and findings; the complaint itself; responses by [the subject of the complaint] to the complaint and findings; and recommendations and sanctions stemming from the investigation." ***Id.***

Moreover, we held the public records balancing test does not bar release. We noted the public has a particularly strong interest in being informed about public officials who have been "derelict in [their] duty, even at the cost of possible reputational harm." ***Id.***, ¶8 (citation omitted). We also noted "the public has a strong interest in monitoring the disciplinary operations of a public institution." ***Id.***, ¶9. Indeed, we have repeatedly stated that when individuals become public employees, they necessarily give up certain privacy rights and are subject to a degree of public scrutiny. *See* ***Local 2489, AFSCME, AFL-CIO v. Rock Cty.***, 2004

WI App 210, ¶26, 277 Wis. 2d 208, 689 N.W.2d 644. Given these strong interests, we also rejected Hagen's argument that release of records regarding closed investigations would have a chilling effect on attracting qualified candidates for future employment because we concluded "[r]eleasing records relating to misconduct investigations is unlikely to discourage recruitment of good teachers." ***Hagen***, 383 Wis. 2d 567, ¶9.

We reject Keen's attempts to distinguish his case from ***Hagen***. Keen argues his investigation lacked due process in various regards. For instance, he claims he was not given a copy of the complaint until well after his employer had made its final decision and imposed discipline. This argument, however, misses the point, as the only question here is whether the investigatory documents should be released because they are public records. Litigation about access to public documents is not the proper forum for Keen to collaterally attack whether he received due process during the investigative process itself. Keen's avenue for redress in that regard was to pursue his due process concerns through a timely filed WIS. STAT. ch. 227 petition for judicial review, which he apparently did not seek to do.

Further, we note that Keen's complaints about process actually support disclosure as "the public has a strong interest in monitoring the disciplinary operations of a public institution." ***Id.*** Keen's complaint over the denial of due process is exactly the type of complaint in which the public has an interest—the public has a right to know how his employer conducted the harassment investigation.

Keen also argues that unlike in ***Hagen***, there was a "promise of confidentiality" from his employer, and he relied upon that promise in fully cooperating with the investigation. However, in support of his confidentiality claim, Keen merely cites a sentence in a letter from a

representative of his employer sent at the beginning of the investigatory process stating, "I ask that this matter be considered confidential." This statement was no binding pledge of confidentiality used to obtain Keen's cooperation. Moreover, even if we could somehow consider this statement a "pledge of confidentiality," it would be unenforceable because an employer may not simply agree to exempt from disclosure otherwise-covered public records, as such an agreement would allow an end-run around the openness mandated by the public records law. *See* ***Hempel v. City of Baraboo***, 2005 WI 120, ¶71, 284 Wis. 2d 162, 699 N.W.2d 551.

Further, Keen's attempt to rely upon ***Mayfair Chrysler-Plymouth, Inc. v. Baldarotta***, 162 Wis. 2d 142, 469 N.W.2d 638 (1991), in support of his claimed promise of confidentiality is unavailing. ***Mayfair*** involved the limited "confidential informant doctrine" recognized under WIS. STAT. § 19.36(8) to shield individuals who have provided information about another person whom police suspect has violated the law. Keen is no informant, confidential or otherwise. In ***Mayfair,*** Department of Revenue auditors promised an informant anonymity in exchange for information. ***Id.*** at 149. The audit in that case was akin to "a law enforcement function." ***Id.*** at 167. Keen's employment-based investigation was about work rules, not a law-enforcement function. To the extent Keen provided information as part of the investigation in this case, it was to defend himself.

In further support of his cause, Keen attempts to argue the records should be redacted to protect his accuser's privacy rights, but he develops no argument explaining why he has the standing to do so. In any event, redactions to protect the privacy rights of his accuser were made: the complainant's name as well as certain dates and locations were redacted. A records custodian is entrusted with "substantial discretion" when deciding what is released under a balancing test. ***Democratic Party v. DOJ***, 2016 WI 100, ¶10, 372 Wis. 2d 460, 888 N.W.2d 584.

The circuit court specifically approved the existing redactions as a proper exercise of discretion under the public records balancing test, and we affirm that exercise of discretion.

Finally, Keen argues "[t]he documents, as they stand, contain more information than he could himself obtain under the Open Records Statute." Keen contends "[a]n open records request from the public is analyzed under WIS. STAT. § 19.35(1)(a) while an open records request from an individual regarding personally identifiable information is analyzed under … § 19.35(1)(am)." That statute provides:

> *In addition* to any right under par. (a), any *requester* who is an individual or person authorized by the individual has a right to inspect any personally identifiable information pertaining to the individual in a record containing personally identifiable information that is maintained by an authority and to make or receive a copy of any such information. The right to inspect or copy information in a record under this paragraph does not apply to any of the following[.]

(Emphases added.)

Keen asserts that someone cannot use subsection (1)(am) to gain additional access to a record "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." *See* WIS. STAT. § 19.35(1)(am)1. Keen contends that because of the alleged due process violations tainting his investigative process, "it is entirely possible that the underlying documents and investigation *may* lead to an administrative or a court proceeding." Thus, Keen perceives that personally identifiable documents may be the subject of a future administrative or court proceeding and "would not be available pursuant to an open records request under § 19.35(1)(am)." Keen asserts that § 19.35(1)(a) "cannot be interpreted to release

more records than the individual requester could themselves obtain under … § 19.35(1)(am)," as such "would render the exceptions outlined in § 19.35(1)(am) meaningless …."

Access to documents in the present case, however, is not "in addition" to WIS. STAT. § 19.35(1)(a)—it is governed by § 19.35(1)(a), and our decision is dictated by ***Hagen***'s binding precedent, which defeats Keen's claims. Subsection (1)(am) is an alternative path that a qualified requester may take to obtain personally identifiable information pertaining to the individual when that person otherwise would be barred from access. For example, general access under subsection (1)(a) is not allowed for records of a "current investigation" of "possible misconduct connected with employment." *See* WIS. STAT. § 19.36(10)(b). Thus, a requester would have been denied access to Keen's investigation while it was "current." Keen also would have been denied those records under subsection (1)(a), but Keen may have qualified under subsection (1)(am)'s special access, if no exception otherwise applied. None of this matters here, however, because the investigation is closed, which enables anyone to therefore access the records through the normal channels under subsection (1)(a). Quite simply, subsection (1)(am) never comes into play.[3]

Therefore,

IT IS ORDERED that the order is summarily affirmed pursuant to WIS. STAT. RULE 809.21.

[3] The records will remain sealed for thirty (30) days after the date of our decision in the event Keen should wish to petition our supreme court for review. If Keen wishes to keep the records sealed past this time period, motion shall be made to the supreme court.

IT IS FURTHER ORDERED that the records will remain sealed for thirty (30) days after the date of our decision.

IT IS FURTHER ORDERED that this summary disposition order will not be published.

Sheila T. Reiff
Clerk of Court of Appeals