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DISTRICT II

July 6, 2022

To:

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Circuit Court Judge
Electronic Notice

Samuel A. Christensen
Clerk of Circuit Court
Racine County Courthouse
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You are hereby notified that the Court has entered the following opinion and order:

2021AP329 Sandra J. Weidner v. City of Racine (L.C. #2017CV1644)

Before Gundrum, P.J., Grogan and Kornblum, 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).

Sandra J. Weidner appeals from an order granting summary judgment to the City of Racine ("the City") dismissing her action with prejudice. She contends that the circuit court erred in denying her request for public records of a power point developed by the city attorney (the "power point") presented in a closed meeting, based on the court's conclusion that it was protected under attorney-client privilege.[1] Based upon our review of the briefs and record, we

[1] Weidner presents a second argument that the circuit court erred in ordering the disclosure for examination of the power point "for Attorneys' Eyes Only" (AEO). However, because we reverse on the main issue, we do not address this issue.

conclude at conference that this case is appropriate for summary disposition. *See* WIS. STAT. RULE 809.21 (2019-20).[2] We reverse the order and remand for further proceedings consistent with this opinion.

This appeal has its genesis in a longstanding public records dispute, with accompanying litigation, between Sandra Weidner, an alderperson,[3] and the City. The current dispute revolves around release of the power point to Weidner. The city attorney had prepared the power point to present to the City's executive committee in a closed meeting in August 2017 ("the meeting"). The purpose of the meeting was to seek an advisory opinion from the City's Ethics Committee about a potential response to allegations against one or more members of the common council, including Weidner. Weidner, as a member of the Common Council, was present at the meeting and viewed the power point presentation.

After the meeting, Weidner requested a copy of the power point under the open records law, WIS. STAT. §§ 19.31 through 19.37. The city attorney denied the request, citing attorney-client privilege, and also because Weidner had already seen the power point. Weidner then filed a Petition for Writ of Mandamus. The case reached this court for the first time after the circuit

[2] All references to the Wisconsin Statutes are to the 2019-20 version unless otherwise noted.

[3] Weidner, as an alderperson, was a Common Council member from approximately 2000 until April 2020. Weidner decided not to run for reelection in the Spring 2020 election, and her tenure as an alderperson ended in or around April 2020 while this case was still pending. The events in this case took place while she was an alderperson.

court rejected Weidner's Amended Petition and dismissed the case. We reversed the judgment and remanded the case.[4]

The present dispute arises out of litigation after remand. In the Amended Complaint, Weidner had narrowed her request from obtaining a broad range of material to obtaining the power point. As the case proceeded, the circuit court in July 2020 ordered that the power point be released for *in camera* inspection under an AEO order.[5] On October 7, 2020, the court held a hearing on whether the City appropriately withheld the power point under attorney-client privilege. The court found as a fact that the power point was privileged communication, and not subject to disclosure under the public records law. The court stated that the City did not need to disclose the power point to Weidner, as she had an opportunity to see it in August 2017. The court entered a final order and judgment dismissing the Amended Complaint on October 30, 2020.

On November 6, 2020, Weidner's counsel sent an email to one of the attorneys representing the City, raising concerns regarding whether the power point contained in the record was actually the power point shown at the meeting. After some investigation, the attorney was advised by the city attorney that there was a "slightly different" version of the power point than the one provided to him, and it "may have been the version that was presented to the Executive Committee" during the meeting. The filed power point was saved at 4:15 p.m. on

[4] ***Sandra J. Weidner v. City of Racine***, No. 2018AP1189, unpublished op. and order (WI App April 22, 2020).

[5] The order, dated July 7, 2020, sealed the power point, but provided that the attorneys for the parties could view it. Under this order, the attorneys could not reveal the documents to anyone other than specifically enumerated persons. Those persons did not include Weidner or others similarly situated.

August 22, 2017, and the revised power point was last saved at 6:14 p.m. on the same date. The meeting took place after 6:14 p.m. on the same date that both power points were saved. The city attorney "cannot confirm for certain which version of the PowerPoint was definitely presented during" the meeting.

On November 13, 2020, the City filed a motion with the circuit court disclosing this information and requesting the court to reopen and supplement the final order dismissing Weidner's amended complaint based on this information.

Over Weidner's objection, which was filed after the court had extended a deadline for response and Weidner missed the deadline, the court affirmed its prior ruling dismissing the complaint. The court found that "Weidner failed to come close to responding to the City's assertion that the Revised PowerPoint Presentation would not impact the Court's ruling, and Weidner failed to prove up her representation of 'significant issues of serious import' involving the Revised PowerPoint Presentation."

Weidner now appeals. She contends that the circuit court erred in granting summary judgment to the City for two reasons. First, she argues that the court's "for attorney eyes only" designation for the power point was an erroneous exercise of discretion, and second, she contends that, the power point is not privileged under attorney-client privilege.

Because the underlying claim was a petition for writ of mandamus for open records, the standard of review is de novo. The standard of review is also de novo regarding the question of whether the circuit court erred in granting summary judgment for the City; and in applying an exception for attorney-client privilege *See* ***Green Spring Farms v. Kersten***, 136 Wis. 2d 304, 315, 401 N.W.2d 816 (1987) (summary judgment); ***State ex rel. Milwaukee Police Ass'n v.***

Jones, 2000 WI App 146, ¶11, 237 Wis. 2d 840, 615 N.W.2d 190 (petition for mandamus for open records); and ***Harold Sampson Children's Tr. v. The Linda Gale Sampson 1979 Tr.***, 2004 WI 57, ¶¶15-16, 271 Wis. 2d 610, 679 N.W.2d 794 (attorney-client privilege).

We examine a denial of access to open records within the context of the broad legislative policy in favor of disclosure, that "[WIS. STAT. §§] 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." *See* WIS. STAT. § 19.31 (emphasis added); *see also* ***Jones***, 237 Wis. 2d 840, ¶11. The presumption of the public records statute is complete openness. ***Journal/Sentinel, Inc. v. School Bd. of Sch. Dist. of Shorewood***, 186 Wis. 2d 443, 449, 521 N.W.2d 165 (Ct. App. 1994). Subject to only very narrow exceptions, the workings of government are subject to public scrutiny. ***Id.*** at 447-48.

In this case, both the City and Weidner agree that the power point presented at the meeting would be an open record if it did not fall within an exception. One of the few exceptions to disclosure of open records is for documents that fall within attorney-client privilege, which the City argues applies to the power point.[6] The attorney-client privilege protects confidential communications between attorneys and their clients. WIS. STAT. § 905.03. "Section 905.03(1)(d) defines 'confidential communication' as a communication 'not intended to be disclosed to 3rd persons other than those to whom disclosure is in furtherance of the rendition of professional legal services to the client or those reasonably necessary for the transmission of

[6] For ease of reading, we discuss "the power point" as the power point presented at the meeting, without knowing which of the two was actually presented. We will come to that issue later.

the communication.'" ***Lane v. Sharp Packaging Sys., Inc.***, 2002 WI 28, ¶21, 251 Wis. 2d 68, 640 N.W.2d 788.

The attorney-client privilege is narrowly construed. ***Id.*** A "mere showing that the communication was from a client to his attorney is insufficient to warrant a finding that the communication is privileged." ***Jax v. Jax***, 73 Wis. 2d 572, 581, 243 N.W.2d 831 (1976) (holding that "[b]ecause the attorney-client privilege is 'an obstacle to the investigation of the truth' it should be 'strictly confined within the narrowest possible limits consistent with the logic of the principle"). Moreover, "[w]hen determining whether a privilege exists, the trial court must inquire into the existence of the relationship upon which the privilege is based *and* the nature of the information sought." ***Franzen v. Children's Hosp. of Wis., Inc.***, 169 Wis. 2d 366, 386, 485 N.W.2d 603 (Ct. App. 1992); *see also* ***State v. Meeks***, 2003 WI 104, ¶20, 263 Wis. 2d 794, 666 N.W.2d 859.

This case involves a relationship between a collective governmental agency, the City, and its legal representatives. In cases involving governmental relationships, the attorney-client privilege is construed even more narrowly:

> The privilege applies only to confidential communications from the client to the lawyer; it does not protect communications from the lawyer to the client unless disclosure of the lawyer-to-client communications would directly or indirectly reveal the substance of the client's confidential communications to the lawyer. 2 Jack Weinstein & Margaret Berger, WEINSTEIN'S EVIDENCE, ¶503(b)[03] n.5 at 503-56 to 503-57 (1991); *In re Sealed Case*, 737 F.2d 94, 98-99 (D.C.Cir.1984); ***United States v. United Shoe Mach. Corp.***, 89 F.Supp. 357, 358-359 (D.Mass.1950).

Journal/Sentinel, Inc., 186 Wis. 2d at 460.

The City argues that the entire power point is privileged. However, we need not reach that issue because assuming the entire power point is privileged, the City waived the privilege by its voluntary actions in showing the power point at the meeting where Weidner was present. WIS. STAT. § 905.11.

> Determining whether a person has voluntarily disclosed confidential communications to a third party typically requires a finding of the historical facts, which we review using the clearly erroneous standard. However, where, as here, the facts are undisputed, the question of whether a person has waived a privilege is a question of law.

State v. Schmidt, 2016 WI App 45, ¶41, 370 Wis. 2d 139, 884 N.W.2d 510 (citations omitted).

The historical facts show that Weidner was present for the meeting, and viewed the power point presentation as it was presented. The city attorney created the power point specifically for this meeting. The power point was prepared for the city's "client representatives," which included the alderpersons. Any member of the Common Council could attend the meeting and those who attended viewed the power point. Weidner's attendance would not have been a surprise, considering that she was a part of the client group as an alderperson and did in fact attend the meeting. Showing the power point was deliberate, not inadvertent. Given these facts, and the fact that Weidner actually attended the meeting without objection, we determine that the City waived any claim to attorney-client privilege for the power point with respect to Weidner.

The City, in its brief, argues that because the attorney-client privilege belongs to the City, only the entire Common Council can waive attorney-client privilege. Any individual member of city government cannot do so. We need not rule on whether the City's argument is correct,

because in this case, the power point was presented to an audience that could have included the entire common council, had all wished to attend. Thus, we conclude there was a waiver in fact.

The City further argues that even though Weidner saw the power point, the actual physical or digital copy of it is protected by attorney-client privilege. The City provides no case law ratifying the view that once attorney-client privilege is waived as to a particular document regarding a particular viewer, the City can then reclaim the privilege when the viewer asks for a copy of the same document. Wisconsin law provides the opposite. When a person, or in this case an entity, has voluntarily disclosed a substantial part of the privileged communication, it has waived the privilege as to all of it. *See* ***Schmidt***, 370 Wis. 2d 139, ¶42.

In this case, we determine that because the City intentionally presented the power point to Weidner who saw the entire power point, and because the City does not show how a tangible or digital copy of the power point contains more information than she saw, the City's conduct, as the privilege holder, resulted "in disclosure of the entire privileged matter or communication ...." ***Id.***

We further hold that the City waived attorney-client privilege as to the newly discovered power point as well. First, the City cannot say which power point was actually presented at the meeting. Weidner might have seen the version saved earlier, or she might have seen the version saved later. Second, the City admits that the differences between the two power points are "non-material," and "minor." The waiver of privilege respecting one power point then applies to the second one, as the disclosure of substantially all of the material in one allows for waiver of the remainder of the material in the other. *See* ***id.***

In conclusion, we hold the City waived any attorney-client privilege as to Weidner, for both power points. We therefore reverse the circuit court's order and remand to the court to direct release of both power points to Weidner and her attorney.[7]

IT IS ORDERED that the order of the circuit court is reversed and remanded for further proceedings consistent with this opinion.

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

Sheila T. Reiff
Clerk of Court of Appeals

[7] Because the court, with agreement of the City, already released the information to Weidner's attorney under an AEO order, we include Weidner's attorney in the ambit of release.