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DISTRICT II

December 6, 2023

To:

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Circuit Court Judge
Electronic Notice

Connie Mueller
Clerk of Circuit Court
Ozaukee County Justice Center
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Joel S. Aziere
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You are hereby notified that the Court has entered the following opinion and order:

2022AP1941 Mark Gierl v. Mequon-Thiensville School District (L.C. #2022CV40)

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

Mequon-Thiensville School District ("District") appeals an order granting Mark Gierl's motion for summary judgment on his petition for writ of mandamus that determined the District's refusal to release email messages and addresses was unlawful. Based upon our review of the briefs and Record, we conclude at conference that this case is appropriate for summary disposition. *See* WIS. STAT. RULE 809.21 (2021-22).[1] We affirm.

[1] All references to the Wisconsin Statutes are to the 2021-22 version unless otherwise noted.

In 2020, the District sent an email to District staff and parents, inviting them to participate in a webinar. ***Gierl v. Mequon-Thiensville Sch. Dist.***, 2023 WI App 5, ¶2, 405 Wis. 2d 757, 985 N.W.2d 116. In response, Gierl requested from the District a list of the email addresses to which the invitation was sent. ***Id.*** The District refused to provide Gierl with the parent email addresses. ***Id.*** Gierl subsequently petitioned for a writ of mandamus seeking the list of parent email addresses. ***Id.***, ¶3. Following summary judgment, the circuit court issued the writ, and we affirmed the circuit court. ***Id.***, ¶¶3, 15.

During the pendency of that case, Gierl learned that the District maintained other distribution lists. As relevant, the District advised Gierl that it maintained an "Alumni" list – "This goes out to former students"; a "Momentum Newsletter" list – "This goes out to parents/guardians and community members"; and a "Mequon-Thiensville Recreation" list – "This goes out to Recreation department participants[.]" On November 16, 2021, Gierl, pro se, requested that the District provide him with "Email lists and any electronic communications with Alumni, Momentum Newsletter recipients and any and all Recreation Department Participants between 1/1/2019-11/16/2021."

On November 24, 2021, the District denied Gierl's request. The District explained:

> Under the Public Records Law, a request that contains no reasonable limitation as to the subject matter of the records being sought is not a sufficient request. WIS. STAT. [§] 19.35(1)(h). Your request contains no limitation as to the subject matter of the requested records and thus is not a sufficient request. As initially submitted, the request would likely require the production of a large volume of records that would not implicate your interests in any way. In addition, it would be unduly burdensome for the District to have to review all of the records that would potentially be identified as responsive to your request to determine if any such records were protected in whole or in part from being disclosed in response to your request. Also, some of the requested records contain information the disclosure of which is the subject of

> ongoing litigation and would not be disclosed while that litigation is still active.

On December 14, 2021, Gierl, pro se, responded to the District's email, "amend[ing] [his] request to data going back just six months from today 12/14/2021." The District did not respond to Gierl's amended request.

On February 22, 2022, Gierl, by counsel, petitioned for a writ of mandamus, asking the circuit court to require the District to produce the requested records. He argued the District's November 24, 2021 denial was legally insufficient. In response to Gierl's petition, the District advised Gierl that it never received his amended request, and after subsequent discussions between counsel, the District provided Gierl with the requested six months' worth of email messages but continued to withhold the email addresses from each list.

The parties filed cross-motions for summary judgment. The District argued that because it had since provided the requested email messages, that request was no longer an issue before the court. As for the email addresses, the District argued the email addresses were not "public records" subject to disclosure. Gierl argued that the District's initial refusal to provide the email messages and continued refusal to provide the email addresses were illegal.

The circuit court granted summary judgment in favor of Gierl. In regard to the email messages, the court found that the District initially denied Gierl's request but had since produced the requested email messages. The court concluded that, even though the District had since provided Gierl with the requested email messages, this did not make the improper-withholding issue moot. The court determined the District's initial denial was illegal. The court reasoned that the timeframe identified in Gierl's initial request was not unreasonable in light of the nature

of the records—the records were limited, digital, and easy for the District to provide, and Gierl's purpose for seeking the records was irrelevant and not a basis to deny his request.

As for the District's refusal to provide the email addresses, the court found the District's reasons for denial to be "woefully inadequate." The circuit court again noted that the time-period limitation was not unreasonable, a large volume of records would not be implicated, and it would not be unduly burdensome for the District to review those records. The court also reasoned that the District's vague reference to "ongoing litigation" as a basis to deny the request was insufficient because "the threshold question is whether the custodians stated legally specific reasons for denying requests." The court explained this denial "put[] the Court in a situation where … I would be hypothesizing or trying to fabricate reasons that they denied the request." The court concluded "the denial itself is inadequate. And when the denial's inadequate the case law is clear that the mandamus must issue."

On appeal, the District first argues that the circuit court erred by determining it improperly withheld the email messages. It contends that its initial refusal to provide Gierl with the email messages was rendered moot when Gierl amended his request to a six-month time period and the District provided him with those requested messages. We disagree.

The District did not provide Gierl with the requested email messages until *after* Gierl petitioned for a writ of mandamus. *See* ***Wisconsin State J. v. Blazel***, 2023 WI App 18, ¶43, 407 Wis. 2d 472, 991 N.W.2d 450 ("[T]he voluntary disclosure of a requested record does not render the action moot because a ruling on the merits 'will have the practical effect of determining the [requester's] right to recover damages and fees under WIS. STAT. § 19.37(2)(a) based upon the

[custodian's] denial of its request.'" (second and third alterations in original; citation omitted)). Stated another way, by the time Gierl filed his petition, the alleged violations had occurred.

As for the District's refusal to provide Gierl with the email messages before the petition was filed and its continued refusal to provide Gierl with the email addresses, we agree with the circuit court that the District's reasoning for its refusal was insufficient.[2] "The legislature has created in the public records law a presumption of public access to public records." ***Wisconsin State J.***, 407 Wis. 2d 472, ¶51; *see also* WIS. STAT. § 19.31. "In light of this policy, 'Except as otherwise provided by law, any requester has a right to inspect any record.'" ***Wisconsin State J.***, 407 Wis. 2d 472, ¶52 (citing WIS. STAT. § 19.35(1)(a)). "[I]f the custodian 'denies a written request in whole or in part, the requester shall receive from the authority a written statement of the reasons for denying the written request." ***Osborn v. Board of Regents of Univ. of Wis. Sys.***, 2002 WI 83, ¶15, 254 Wis. 2d 266, 647 N.W.2d 158.

"In reviewing a mandamus action seeking to compel the custodian to disclose the requested public records, we first examine the sufficiency of the custodian's stated reasons for denying the request." ***Id.***, ¶16. "The threshold question is whether the custodian stated legally specific reasons for denying the open records request." ***Id.*** "It is not this court's role to hypothesize or consider reasons to deny the request that were not asserted by the custodian." ***Id.*** "If the custodian states insufficient reasons for denying access, then the writ of mandamus compelling disclosure must issue." ***Id.***

[2] We do not question the circuit court's reliance on the District's November 24, 2021 written denial of Gierl's request. Although the District argues its denial became irrelevant after Gierl amended his request, the District never amended its written denial in response to Gierl's amended request, even after acknowledging the amended request and continuing to deny production of the email addresses.

Here, the District denied Gierl's request by stating that Gierl's interest was not implicated in the records; that there was no subject-matter limitation on the request; that the request would likely require the production of voluminous records; that it would be burdensome for the District to review the records for confidentiality concerns; and that there was ongoing litigation. We conclude that these reasons, without more, are legally insufficient to justify a refusal to withhold the records in this case. *See* ***Journal/Sentinel, Inc. v. Aagerup***, 145 Wis. 2d 818, 825, 429 N.W.2d 772 (Ct. App. 1988) ("The duty of the custodian is to specify reasons for nondisclosure and the court's role is to decide whether the reasons asserted are sufficient." (quoted source omitted)). The District did not make a showing to support its assertion that Gierl's request for emails sent to three specific distribution lists for a certain period of time was insufficient under WIS. STAT. § 19.35(1)(h).[3] There is also no indication that the District engaged in any balancing test in its denial, and no specific legal or policy basis was given that suggested the records were protected from disclosure.[4] The District's stated reasons in its denial for withholding the records do not outweigh the strong public policy in favor of disclosure. *See* ***id.*** at 821-22.

Therefore,

IT IS ORDERED that the order of the circuit court is summarily affirmed.

[3] WISCONSIN STAT. § 19.35(1)(h) provides in relevant part: "A request … is deemed sufficient if it reasonably describes the requested record or the information requested. However, a request for a record without a reasonable limitation as to subject matter or length of time represented by the record does not constitute a sufficient request."

[4] Although the District advances policy reasons and balancing-test arguments on appeal in support of why it properly withheld the requested records, we review the stated reasons a custodian gives to a requestor when denying a public records request. *See* ***Journal/Sentinel, Inc. v. Aagerup***, 145 Wis. 2d 818, 825, 429 N.W.2d 772 (Ct. App. 1988).

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

Samuel A. Christensen
Clerk of Court of Appeals