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**DISTRICT II**

October 16, 2024

To:

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

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2023AP1889

Peter Bernegger v. Julianne B. Winkelhorst (L.C. #2023CV43)

Before Neubauer, Grogan and Lazar, 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).**

Peter Bernegger, pro se, appeals a circuit court order dismissing his amended petition for writ of mandamus against the Ozaukee County Clerk at the time, Julianne B. Winkelhorst. Bernegger's amended mandamus action sought a court order requiring Winkelhorst to provide him with the internet protocol ("IP") and server port addresses of Ozaukee County's election server. He also alleged Winkelhorst improperly conducted elections by connecting to the internet and sought an order preventing her from doing so. 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).<sup>1</sup> We summarily affirm.

In broad strokes, Bernegger filed various public records requests with Winkelhorst relating to Ozaukee County’s election materials. Winkelhorst provided Bernegger with responsive records; however, as relevant for appeal, she advised him that she had redacted the IP and server port addresses of Ozaukee County’s elections server from the materials. In her responses, she explained that she had conducted a balancing test and determined the risks of disclosing the IP and server port addresses of Ozaukee County’s elections server outweighed the public interest in disclosure.

Bernegger filed an amended petition for writ of mandamus against Winkelhorst, seeking disclosure of this information. He also argued that Winkelhorst had improperly conducted elections in Ozaukee County by connecting to the internet and sought a circuit court order preventing her from doing so.<sup>2</sup>

Winkelhorst moved to dismiss Bernegger’s amended mandamus petition on the basis that the allegations in the petition did not state a claim for which relief could be granted. She attached copies of her responses to Bernegger’s public records requests, which showed the balancing test she conducted in relation to Bernegger’s requests for the IP and server port addresses. *See Soderlund v. Zibolski*, 2016 WI App 6, ¶37, 366 Wis. 2d 579, 874 N.W.2d 561

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<sup>1</sup> All references to the Wisconsin Statutes are to the 2021-22 version unless otherwise noted.

<sup>2</sup> Specifically, Bernegger sought an order that Winkelhorst “not connect any part of the election management system to the internet. Including not receiving any data, or sending any data, via the internet into the county’s EMS system” and an order that Winkelhorst “remove any hardware, device, software, firmware that permits connecting to the internet.”

("[C]ourt may consider a document attached to a motion to dismiss ... without converting the motion into one for summary judgment, if the document was referred to in the plaintiff's complaint, is central to his or her claim, and its authenticity has not been disputed."). Winkelhorst argued Bernegger "cannot state a plausible claim for relief under the Public Records Law based on [her] withholding of the non-public IP address of Ozaukee County's elections server." She also argued that Bernegger lacked standing to sue her based on allegations that she improperly conducted elections in Ozaukee County. Winkelhorst emphasized WIS. STAT. § 5.06 provided a statutory process for someone to argue she improperly conducted elections. Following a hearing, the circuit court granted Winkelhorst's motion. Bernegger appeals.

"Mandamus is an extraordinary writ that may be used to compel a public officer to perform a duty that he or she is legally bound to perform." *State ex rel. Greer v. Stahowiak*, 2005 WI App 219, ¶6, 287 Wis. 2d 795, 706 N.W.2d 161. "In order for a writ of mandamus to be issued, there must be a clear legal right, a positive and plain duty, substantial damages, and no other adequate remedy at law." *Id.*

We begin with Bernegger's claim that Winkelhorst improperly conducted elections in Ozaukee County by connecting to the internet. As previously stated, mandamus will not lie if there are other adequate and specific remedies. *See Law Enf't Standards Bd. v. Vill. of Lyndon Station*, 101 Wis. 2d 472, 493, 305 N.W.2d 89 (1981). Here, WIS. STAT. § 5.06 provides an administrative process to a person who believes that an election official is acting contrary to law. Subsection (1) allows an "elector of a jurisdiction or district served by an election official" to start the process by filing a "written sworn complaint with the [Wisconsin Elections Commission]" ("WEC"). Sec. 5.06(1). Once WEC disposes of the complaint or fails to act on it, the elector may commence an action seeking judicial review. Sec. 5.06(2) and (8).

“No room exists for an argument that the remedy of judicial review afforded under [WIS. STAT. §] 5.06 ... is inadequate.” *Kuechmann v. Sch. Dist. of La Crosse*, 170 Wis. 2d 218, 224, 487 N.W.2d 639 (Ct. App. 1992). It is the exclusive method. *Id.* As we previously explained:

When the legislature prescribes the method to review alleged deficiencies in election procedure, the legislature must deem that procedure to provide an adequate review. For a court to suggest that the statutorily mandated review in sec. 5.06(9) ... is somehow inadequate would defy the legislature’s decision to the contrary .... The legislature having decreed that deficiencies in an election will be judicially reviewed as in sec. 5.06(8) and (9) ... the circuit court cannot employ some other method of review, such as an independent action for declaratory relief, prohibition or injunction.

*Kuechmann*, 170 Wis. 2d at 224-25.

We conclude the circuit court did not err by dismissing Bernegger’s mandamus petition against Winkelhorst based on his claims that she improperly conducted elections in Ozaukee County. As *Kuechmann* established, an independent action for prohibition (or mandamus) cannot be used in lieu of the statutory procedure outlined in WIS. STAT. § 5.06. While Bernegger fails to satisfy the criteria to invoke the statutory procedure available under § 5.06,<sup>3</sup> it remains that § 5.06 is an adequate remedy to review Winkelhorst’s conduct. See *Kuechmann*, 170 Wis. 2d at 224-25. Mandamus will not lie.

Next, as for Bernegger’s claim that Winkelhorst improperly failed to provide him with the IP and server port addresses of Ozaukee County’s election server, “[a] petition for a writ of mandamus is a proper means by which to challenge a refusal to disclose documents sought under

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<sup>3</sup> Bernegger cannot invoke the statutory process available under WIS. STAT. § 5.06 because he is not a resident of Ozaukee County and he is not excluded from § 5.06 because he is not the district attorney or the attorney general.

the open records law.” See *Watton v. Hegerty*, 2008 WI 74, ¶7, 311 Wis. 2d 52, 751 N.W.2d 369.

“Wisconsin ‘recognizes a presumption of accessibility to public records.’” *Id.*, ¶9 (citation omitted). “However, the presumption of access does not create an absolute right of access.” *Id.*, ¶10. “Access to records may be denied where there is a specific statutory exemption to disclosure ... or where there is a common law or public policy exception.” *Id.* “If the custodian decides not to allow inspection, he must state specific public-policy reasons for the refusal.” *Newspapers, Inc. v. Breier*, 89 Wis. 2d 417, 427, 279 N.W.2d 179 (1979). “These reasons provide a basis for review in the event of court action.” *Id.*

Because Winkelhorst stated her reasons for denying inspection, “it is the duty of this court, as it was for the trial court, to determine as a matter of law whether the custodian’s stated reasons show that inspection would cause harm to the public interest which outweighs the presumptive public interest in allowing inspection.” *Id.* at 428. In the context of a motion to dismiss, a petition “must plead facts, which if true, would entitle the plaintiff to relief.” See *Data Key Partners v. Permira Advisers LLC*, 2014 WI 86, ¶21, 356 Wis. 2d 665, 849 N.W.2d 693.

Winkelhorst argued in the circuit court the public record correspondence between herself and Bernegger established that she performed a balancing test and determined “the risks of disclosing the IP and server port addresses of the County’s elections server outweighed the public interest in disclosure.” As one example, Winkelhorst advised Bernegger:

In considering your request for the material and information on the subject flash cards used by the County in connection with the February 21, 2023 election, the County has determined that the flash cards contain confidential information, including the Internet Protocol and server port addresses of the County’s elections server.

I have evaluated the risk of public disclosure of such confidential information against the public policy reasons supporting disclosure and determined that strong policy reasons support non-disclosure of certain portions of that material, including the IP and server port addresses associated with the County's elections server. The grounds justifying the restriction of access to such materials include:

- The risk that disclosure of the requested information would facilitate or aid attempts to interfere with the County's electronic voting system and/or disrupt the County's administration of future elections; and
- The risk that confidential information that is not subject to disclosure under the Wisconsin Public Records Law could be viewed or copied and used as a result of the disclosure of the requested information.

Even if the subject flash cards contain confidential information that is not expressly exempt from disclosure, my decision to release such information remains subject to a balancing of the considerations of whether the risks of disclosure outweigh the public interest in disclosure. I have conducted that balancing test and conclude that the IP and server port addresses associated with the County's elections server must not be disclosed.

The IP and server port addresses for the County's elections server contained in material on the flash cards are not publicly available and must not be disclosed in order to protect the integrity of future elections conducted by the County. The public disclosure of these IP and server port addresses would create a heightened risk that individuals or entities could attempt to access the County's electronic voting system and interfere with or disrupt future elections.

Winkelhorst provided Bernegger with copies of the documents, but redacted the IP and server port addresses. Winkelhorst moved to dismiss Bernegger's mandamus petition on the basis that he "cannot state a plausible claim for relief under the Public Records Law based on [her] withholding of the non-public IP address of Ozaukee County's elections server."

Bernegger argued that Winkelhorst's motion should be denied. In his brief in the circuit court, Bernegger argued in part that the IP and port server addresses would establish his claim that Winkelhorst improperly conducted elections.

The circuit court found that Winkelhorst had properly evaluated Bernegger’s request for the IP and port server addresses under the public policy balancing test and correctly redacted that specific information from the records production. In applying the balancing test, the court found that disclosure of the IP and port server addresses “could cause significant damages that are disproportionate to the value of the information.”

We agree with the circuit court. Under the circumstances presented here, Winkelhorst appropriately balanced the public interest in interference-free elections against the public interest in disclosing the IP and port server addresses of Ozaukee County’s elections server. Winkelhorst appropriately redacted the addresses from the records production. Moreover, and as established above, Bernegger has no claim against Winkelhorst for improper administration of the elections.

Therefore,

IT IS ORDERED that the order of the circuit court is summarily affirmed. *See* WIS. STAT. RULE 809.21.

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

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*Samuel A. Christensen*  
*Clerk of Court of Appeals*