COURT OF APPEALS
DECISION
DATED AND FILED

August 8, 2007

David R. Schanker
Clerk of Court of Appeals

Appeal No. 2006AP2633 **Cir. Ct. No. 2006CV306**

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

THOMAS W. KYLE AND SARAH J. KYLE,

PETITIONERS-APPELLANTS,

V.

SWALLOW SCHOOL DISTRICT AND JEFFREY KLAISNER,

RESPONDENTS-RESPONDENTS.

APPEAL from a judgment of the circuit court for Waukesha County: MARK S. GEMPELER, Judge. *Affirmed*.

Before Anderson, P.J., Nettesheim and Snyder, JJ.

¶1 PER CURIAM. Thomas and Sarah Kyle appeal from a judgment dismissing their petition for a writ of mandamus to compel the Swallow School District and its superintendent, Jeffrey Klaisner, to produce documents under an

open records request. They argue that their request was unambiguous and the district simply failed to respond. We affirm the judgment of the circuit court.

¶2 The Kyles sought documents relating to contacts with the school district regarding a request for a tuition waiver for their son for the 2004-05 school year. The tuition waiver request was denied at the school board meeting held November 17, 2004. On November 24, 2004, the Kyles requested all material created or kept by the school board relating to the denial and/or investigation of the tuition waiver request, including all billings submitted by the law firm of Davis and Kuelthau (DK) that dealt with the tuition waiver request. The district replied on December 3, 2004, that the minutes of the November 17, 2004 board meeting would be forwarded when approved and that the district had not yet received any billings from DK. The minutes were provided. On January 3, 2005, the district sent the Kyles the billing statement from DK relating to legal services relative to the residency issue.

¶3 On October 6, 2005, the Kyles asked the district to provide

> any and all personally identifiable information pertaining to Ivan Kyle, Thomas Kyle, and Sarah Kyle in any regard that the District and any of the Board members possess. This is to include, but not limited to, any materials gathered and considered by the District in connection with the request to waive tuition for Ivan Kyle that was voted on in the School Board meeting on November 17, 2004. Please be responsive to the statute and in accord with the Wisconsin Supreme Court's most recent interpretation of it set forth in 2005 WI 120 that was filed on July 13, 2005. … In addition, I am requesting any and all documents, to include legal billing, that in any way relate to the redrafting of Board Policy 420.1.

¶4 Superintendent Klaisner responded on October 20, 2005 that he was not aware of any material pertaining to the tuition waiver request that had not been

previously provided to the Kyles and that if the request for personally identifiable information included their son's pupil records, the Kyles should let him know. His response also indicated that there were no legal billings for services related to revision of policy 420.1 and that he was in the process of identifying what, if any, relevant documents existed. The Kyles wrote back providing a copy of the bill for legal work that had already been provided to them and suggesting that it was axiomatic that additional legal billings existed. The district made no further response.

¶5 The Kyles petitioned for a writ of mandamus asserting that the district was in violation of Wisconsin's Open Records Law because it had not provided them with any and all records requested in their November 24, 2004 and October 6, 2005 requests.[1] In response to a discovery request the district produced all billing statements from DK from August 1, 2004 to March, 2006. Four additional invoices from DK which referenced the Kyle name were included. The invoices were dated January 17, August 10, September 13 and October 19, 2005. At Klaisner's deposition, the agenda for the board meeting held January 12, 2005 was produced. The agenda reflected that proposed changes to policy 420.1 were being read.[2] The agenda was not provided to the Kyles in response to their written request.

[1] After commencing the action, the Kyles admitted that the district's response to their November 24, 2004 request was sufficient.

[2] Agendas for meetings held February 15, 2006, and March 15, 2006 were also produced and reflected that changes to policy 420.1 were being read. Based on the board's policy of having policy changes read twice, the Kyles surmise that the agenda for the February 2005 board meeting would include reference to changes to policy 420.1 and that the agenda was never produced in response to their request.

¶6 Cross-motions for summary judgment were filed. The circuit court ruled that the Kyles's request was not sufficiently specific to put the district on notice as to what in particular they wanted. The court observed there was no limitation as to time. It concluded that Klaisner could reasonably rely on the prior superintendent's response to the November 2004 request as acceptable and complete regarding DK billings when no legal services were rendered on changes to policy 420.1. It also determined that agendas and minutes of board meetings did not fall within the scope of the non-specific request. In sum, the court concluded that the district's response was reasonable in light of the varying and inartfully drafted requests.

¶7 When reviewing a grant of summary judgment, we apply the same methodology as the circuit court and decide de novo whether summary judgment was appropriate. ***Coopman v. State Farm Fire & Cas. Co.***, 179 Wis. 2d 548, 555, 508 N.W.2d 610 (Ct. App. 1993). Summary judgment is warranted when "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." WIS. STAT. § 802.08(2) (2005-06).[3] We will reverse a decision granting summary judgment if the circuit court incorrectly decided legal issues or material facts are in dispute. ***Coopman***, 179 Wis. 2d at 555. Application of Wisconsin's Open Records Law to undisputed facts is likewise reviewed de novo. ***ECO, Inc. v. City of Elkhorn***, 2002 WI App 302, ¶15, 259 Wis. 2d 276, 655 N.W.2d 510.

[3] All references to the Wisconsin Statutes are to the 2005-06 version unless otherwise noted.

¶8 We first reject the Kyles's contention that the district failed to respond with either a grant or denial of their request. Klaisner's October 20, 2005 letter indicated his understanding that the Kyles had been provided with the documents related to the tuition waiver request and that nothing else would be forthcoming on that issue. Klaisner also requested clarification on the request for personally identifiable information, particularly as it related to pupil records. The Kyles did not respond further on that issue. Although Klaisner indicated he was trying to identify any documents related to the revision of policy 420.1, his response stated there were not legal billings to produce on that issue and such bills would be produced only if found. The letter signaled that nothing further was going to be provided to the Kyles.

¶9 An open records request must reasonably describe the requested record or the information requested and include a reasonable limitation as to subject matter or length of time represented by the record. WIS. STAT. § 19.35(1)(h). We read Klaisner's responsive letter to indicate that the Kyles's second request was unclear in light of the district's compliance with the earlier request for materials related to the tuition fee waiver. As the circuit court observed, the request for personally identifiable information included no time or subject matter limitation. The request used the phrases "in any regard," and "not limited to." The Kyles did not respond when Klaisner inquired if they were seeking pupil records. The Kyles did not specify why it was axiomatic that additional legal billings existed or the probable date of the relevant billings. Additionally, the request's unexplained reference to "2005 WI 120," the case of ***Hempel v. City of Baraboo***, 2005 WI 120, 284 Wis. 2d 162, 699 N.W.2d 551, which addresses the inspection of documents generated during an internal police department investigation of allegations of sexual harassment between two police

officers, only served to suggest that the Kyles were interested only in information pertaining to the investigation of the tuition waiver request.[4]

¶10 At best, to supply a reasonable limitation as to time and subject matter, the Kyles's request for personally identifiable information must be limited to the tuition waiver request for the 2004-05 school year. The district indicated it had provided all related documents. With the exception of the January 17, 2005 DK invoice, which indicated services provided on the Kyles's November 2004 record request and a follow-up letter regarding the board's decision on the tuition waiver, the other DK invoices produced during discovery did not relate to the Kyles's tuition wavier request for the 2004-05 school year.[5] The reference on the January 17, 2005 invoice for services on "12/20/04 Correspondence to parent regarding Board's decision on request for tuition waiver," did not personally identify the Kyles. The district did not violate the open record law by not producing that invoice or other documents that had already been provided in response to the request for personally identifiable information related to the tuition waiver request.

¶11 The request for "any and all documents, to include legal billing," related to the redrafting of policy 420.1 also failed to include any time limitation. However, the request went on to explain that after the board denied the Kyles's

[4] By their November 24, 2004 request, the Kyles earlier sought the name of the "tipster" who may have provided the district information that the Kyles were not in fact occupying a house they owned within the school district.

[5] It appears that some investigation was done in anticipation of the 2005-06 school year of whether the Kyles were eligible for enrollment in the school district. The Kyles were not required to pay tuition for the 2005-06 school year.

tuition waiver request, the district changed its policy. The request can be read to deal with the change to policy 420.1 that occurred in early 2005.

¶12 The Kyles argue that the district failed to produce the January and February 2005 agendas that reference the reading of the proposed change to policy 420.1, the minutes of those meetings, and the final version of the policy.[6] Those documents do not reflect the redrafting of the policy, they only pertain to the adoption of the proposed change. In short, there were no documents to produce related to the redrafting of policy 420.1 in early 2005. Klaisner's letter response that no legal billing existed with respect to the redrafting of policy 420.1 was accurate. The district did not violate the open records law by not producing any documents in response to the request for documents relating to the redrafting of policy 420.1.

By the Court.—Judgment affirmed.

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

[6] For the first time on appeal the Kyles argue that the final version of the policy was a document that should have been produced in response to their request. We generally will not consider an issue raised for the first time on appeal. ***Finch v. Southside Lincoln-Mercury, Inc.***, 2004 WI App 110, ¶42, 274 Wis. 2d 719, 685 N.W.2d 154.