COURT OF APPEALS
DECISION
DATED AND FILED

June 1, 2016

Diane M. Fremgen
Clerk of Court of Appeals

NOTICE

This opinion is subject to further editing. If published, the official version will appear in the bound volume of the Official Reports.

A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals. *See* WIS. STAT. § 808.10 and RULE 809.62.

Appeal No. 2015AP1120-AC **Cir. Ct. No. 2014CV127**

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

JANA L. TETZLAFF,

PLAINTIFF-APPELLANT,

V.

COUNTY OF GREEN LAKE,

DEFENDANT-RESPONDENT,

JOY WATERBURY,

INTERVENOR.

APPEAL from an order of the circuit court for Green Lake County: DANIEL GEORGE, Judge. *Affirmed.*

Before Neubauer, C.J., Reilly, P.J., and Gundrum, J.

¶1 PER CURIAM. In this Public Records Law case, Jana Tetzlaff brought an action under WIS. STAT. § 19.356 (2013-14)[1] to enjoin Green Lake County from disclosing to County Supervisor Joy Waterbury an investigative report in which Tetzlaff was named. The circuit court dismissed the action, concluding that no statutory or common-law exceptions barred the report's release and that the presumption of public access, *see* WIS. STAT. § 19.31, outweighed any public interest in nondisclosure. We affirm the order.

¶2 Tetzlaff was hired in 2012 to manage the Clinical Services Unit (CSU) of the County's Department of Health and Human Services (HHS). A year later, CSU employees lodged complaints with the county board that CSU management—Tetzlaff, HHS Director LeRoy Dissing, and HHS Deputy Director Phillip Robinson—created a hostile work environment.

¶3 The County's insurer retained Attorney Jenifer Binder to investigate the allegations. Upon completing her investigation, Binder submitted a sixteen-page report. The report concluded that the actions of CSU management did not constitute illegal hostile environment discrimination under state or federal law.

¶4 Waterbury and others sought to obtain the Binder report. The County denied all requests. Waterbury renewed her request after being elected to the county board, broadening it to include three years of performance evaluations for Dissing and Robinson. The records custodian denied the performance evaluations request on the basis that WIS. STAT. § 19.36(10)(d) bars public access to employee information used for "staff management planning"; however, she

[1] All references to the Wisconsin Statutes are to the 2013-14 version unless noted.

concluded that neither § 19.36(10)(b) nor (d) shielded the report—the result of a completed internal investigation—and that the public's interest in access to it outweighed its interest in nondisclosure. Tetzlaff, Dissing, and Robinson received notice of Waterbury's request and the decision to release the report.

¶5 Tetzlaff commenced this action under WIS. STAT. § 19.356(4) to enjoin the County from disclosing the report. Waterbury intervened. *See* ***id.*** The circuit court denied Tetzlaff's request for an evidentiary hearing, but allowed the parties to submit evidentiary materials. It also granted the County's motion for a protective order prohibiting Tetzlaff from conducting depositions she had noticed.

¶6 After an in camera inspection of the record and the parties' submissions, the court concluded that Tetzlaff had identified no statutory or common-law exception to disclosure; the county board had expressly waived any attorney-client or work-product privilege; pursuant to ***Kroeplin v. DNR***, 2006 WI App 227, ¶32, 297 Wis. 2d 254, 725 N.W.2d 286, WIS. STAT. § 19.36(10)(b) is the only exception to the Public Records Law that applies to investigations into allegations of employee misconduct; and § 19.36(10)(b) did not bar release here, as the report related to a completed investigation. Finding no applicable exceptions itself, the court engaged in the common-law balancing test and concluded this was not an "exceptional case" warranting nondisclosure. *See* WIS. STAT. § 19.31; ***Kailin v. Rainwater***, 226 Wis. 2d 134, 142, 593 N.W.2d 865 (Ct. App. 1999). It granted the County's motion to dismiss the action. This appeal followed.

¶7 Absent a clear statutory exception, a limitation under the common law, or an overriding public interest in keeping a public record confidential, ***Hathaway v. Joint Sch. Dist.***, 116 Wis. 2d 388, 397, 342 N.W.2d 682 (1984),

Wisconsin's Public Records Law "shall be construed in every instance with a presumption of complete public access." WIS. STAT. § 19.31. As the denial of public access generally is contrary to the public interest, access may be denied "only in an exceptional case." ***Id.*** "[A]n 'exceptional case' … exists when the facts are such that the public policy interests favoring nondisclosure outweigh the public policy interests favoring disclosure, notwithstanding the strong presumption favoring disclosure." ***Hempel v. City of Baraboo***, 2005 WI 120, ¶63, 284 Wis. 2d 162, 699 N.W.2d 551. The interpretation and application of the Public Records Law presents a question of law that we review de novo but benefiting from the circuit court's analysis. ***Kailin***, 226 Wis. 2d at 147.

¶8 Tetzlaff first asserts that the County failed to give proper notice of its decision to release the requested record to all "record subjects," *see* WIS. STAT. § 19.356(2)(a), depriving them of due process. She contends that two other individuals named in the report and "numerous others identified by position" also should have been notified of the decision to release the report.

¶9 Notice must be given to a "record subject," that is, "an individual about whom personally identifiable information is contained in a record." WIS. STAT. §§ 19.356(2), 19.32(2g). Even for record subjects, notice is required only in regard to particular categories of records, § 19.356(2)(a), only one of which applies here:

> 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.

Sec. 19.356(2)(a)1.

¶10 CSU employees alleged that Tetzlaff, Dissing, and Robinson, individually or as a management team, created an internal hostile work environment. Binder's report resulted from her investigation into a possible disciplinary matter or statute or rule violation involving Tetzlaff, Dissing, and Robinson. Any others named or alluded to in the report simply were interviewed in the course of the investigation. Notice to them was not required.

¶11 Tetzlaff next complains that the circuit court erred when it concluded that no common-law exemptions applied, specifically the attorney-client and attorney work-product privileges. We disagree.

¶12 The attorney-client privilege belongs to the client. ***Lane v. Sharp Packaging Sys., Inc.***, 2002 WI 28, ¶33, 251 Wis. 2d 68, 640 N.W.2d 788. Binder's client was the County. In a letter to Waterbury dated November 26, 2014, the County explained its decision to release the report. The County's position was that the attorney-client privilege did not apply, but stated that, if it did, the County waived it. Tetzlaff filed her lawsuit in December 2014. In April 2015, the County passed a resolution formally waiving any privilege.

¶13 Similarly, attorney work product includes "material, information, mental impressions and strategies an attorney compiles in preparation for litigation." ***Seifert v. School Dist. of Sheboygan Falls***, 2007 WI App 207, ¶28, 305 Wis. 2d 582, 740 N.W.2d 177. Binder was retained to investigate CSU employee complaints. Binder filed an affidavit averring that she waived any right to assert the work-product privilege, to the extent her report even was protected by it. Neither exemption is viable.

¶14 Tetzlaff likewise complains that the circuit court erred when it concluded that no statutory exemptions applied. She asserts, for example, that the

court concluded that release of the report was allowed under WIS. STAT. § 19.36(10)(b) without considering the other § 19.36(10) exemptions.[2]

¶15 Examining all four exemptions would have been an empty exercise. There is no claim that either WIS. STAT. § 19.36(10)(a) or (c) apply. Tetzlaff contends that para. (10)(d) should exempt the report, as the report has utility in "staff management planning." This court has made clear, however, that, once the investigation of a public employee is completed, para. (10)(d) does not exempt records of the investigation from disclosure. ***Kroeplin***, 297 Wis. 2d 254, ¶32.

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[2] WISCONSIN STAT. § 19.36(10) provides:

> EMPLOYEE PERSONNEL RECORDS. Unless access is specifically authorized or required by statute, an authority shall not provide access under [WIS. STAT. §] 19.35(1) to records containing the following information ...:
>
> (a) Information maintained, prepared, or provided by an employer concerning the home address, home electronic mail address, home telephone number, or social security number of an employee, unless the employee authorizes the authority to provide access to such information.
>
> (b) Information relating to the *current* investigation of a possible criminal offense or possible misconduct connected with employment by an employee prior to disposition of the investigation.
>
> (c) Information pertaining to an employee's employment examination, except an examination score if access to that score is not otherwise prohibited.
>
> (d) Information relating to one or more specific employees that is used by an authority or by the employer of the employees for staff management planning, including performance evaluations, judgments, or recommendations concerning future salary adjustments or other wage treatments, management bonus plans, promotions, job assignments, letters of reference, or other comments or ratings relating to employees. (Emphasis added.)

¶16 Only WIS. STAT. § 19.36(10)(b) remains, and it expressly exempts only records of a *current* investigation. It is undisputed that the Binder report was generated as a result of a completed investigation. The circuit court's construction of § 19.36(10)(b) was consistent with the construction this court adopted and applied in ***Kroeplin***.[3]

¶17 Tetzlaff then contends the circuit court erroneously neglected to apply WIS. STAT. § 19.35(1)(am)1., which precludes disclosure of "personally identifiable information" collected or maintained in anticipation of litigation.

¶18 Under WIS. STAT. § 19.35(1)(am), "any requester who is an individual … has a right to inspect any personally identifiable information pertaining to the individual in a record containing personally identifiable information." Paragraph (am) "is clearly limited to personally identifiable information about the requester." ***Hempel***, 284 Wis. 2d 162, ¶34. Waterbury was the requester. The report contains no personally identifiable information about her. The § 19.35(1)(am)1. exemption does not apply.

¶19 We turn to the balancing test. It entails assessing whether allowing inspection would result in a harm to the public interest that outweighs the legislative policy recognizing the strong public interest in allowing inspection. ***Hathaway***, 116 Wis. 2d at 402-03. Tetzlaff argues that the circuit court erred in applying the test because it failed to undertake the full two-step analysis she contends is required. *See* ***Kroeplin***, 297 Wis. 2d 254, ¶36. We disagree.

[3] Tetzlaff endeavors to factually and legally distinguish ***Kroeplin v. DNR***, 2006 WI App 227, 297 Wis. 2d 254, 725 N.W.2d 286. Her efforts are unpersuasive and we do not detail them here.

¶20 A court follows the two-step procedure ***Kroeplin*** describes on review of a custodian's *denial* of access to a record. Here, the court performed a de novo review of the custodian's decision to *release* the report. The court's de novo review and in camera inspection were proper. *See* ***Woznicki v. Erickson***, 202 Wis. 2d 178, 192, 549 N.W.2d 699 (1996) (court reviews balancing of public interests for and against disclosure de novo), *superseded by statute on other grounds as stated in* ***Teague v. Van Hollen***, 2016 WI App 20, ¶23, 367 Wis. 2d 547, 877 N.W.2d 379; ***State ex rel. Morke v. Donnelly***, 155 Wis. 2d 521, 531, 455 N.W.2d 893 (1990) (in camera inspection assists court in determining whether harm to public interest by allowing inspection outweighs public interest in inspection).

¶21 Tetzlaff next contends the circuit court erred in denying her requests to depose witnesses and for an evidentiary hearing. She reasons that she commenced an action pursuant to WIS. STAT. § 19.356, WIS. STAT. chs. 801 to 847 "govern procedure and practice in circuit courts of this state in all civil actions … except where different procedure is prescribed by statute or rule," WIS. STAT. § 801.01(2); § 19.356 does not prescribe a different procedure; and WIS. STAT. § 804.05(1) permits depositions after the action is commenced. Citing ***Zellner v. Herrick***, 2009 WI 80, ¶38, 319 Wis. 2d 532, 770 N.W.2d 305, she asserts that "an action under WIS. STAT. § 19.356 is considered a mandamus action," and mandamus actions are subject to civil procedure statutes, *see* ***Moore v. Stahowiak***, 212 Wis. 2d 744, 747, 569 N.W.2d 711 (Ct. App. 1997).

¶22 Taking the last first, her mandamus argument rests on a misreading of the law. Which of the two procedural pathways of review a person chooses under the Public Records Law—mandamus or, as Tetzlaff did, an injunction—depends on (1) whether the records custodian decided to deny or provide access to

the requested records and (2) who is the aggrieved party. *See* ***Zellner***, 319 Wis. 2d 532, ¶38. A record *requester* may commence a mandamus action under WIS. STAT. § 19.37(1) if the custodian *denies* access. ***Zellner***, 319 Wis. 2d 532, ¶38. A record *subject* may commence a circuit court action under WIS. STAT. § 19.356(4) to enjoin release of the records if the custodian *grants* access. ***Zellner***, 319 Wis. 2d 532, ¶38. Tetzlaff did not bring her action under § 19.37, she was not the requester, and the custodian did not deny access to the report.

¶23 The time frames set forth in WIS. STAT. § 19.356 make clear that the statute does not contemplate discovery. The record subject has five days after being given notice of the decision to release a record to notify the authority of his or her intent to seek an injunction, § 19.356(3), and ten days to commence the action, § 19.356(4). The court has ten days after the summons and complaint are filed to issue its decision, absent a showing of good cause by a party, but in no case beyond thirty days after the filings. Sec. 19.356(7).

¶24 The legislature plainly intended an accelerated process free of the added time and expense discovery or an evidentiary hearing can entail.[4] Further, subjecting record requesters or custodians to questioning by opposing counsel

[4] Tetzlaff cites two unpublished cases in support of her argument that denying her an evidentiary hearing was error. We do not discuss them beyond observing that both were issued before July 1, 2009, both are per curiams, neither is in her appendix, and neither is on point. We urge counsel to review WIS. STAT. § 809.23(3).

The Statement of Facts prompts additional reminders. It is argumentative and presents as fact inferences, legal conclusions, and unproved allegations from the complaint. Facts must be set forth accurately and objectively. "Spin" and argument belong in the argument section. *See* WIS. STAT. RULE 809.19(1)(d), (e); *see also* ***Arents v. ANR Pipeline Co.***, 2005 WI App 61, ¶4 n.2, 281 Wis. 2d 173, 696 N.W.2d 194. Also, citations must be to the record, not only to the appendix. *See* RULE 809.19(1)(d), (e). The appendix is not the record. ***United Rentals, Inc. v. City of Madison***, 2007 WI App 131, ¶1 n.2, 302 Wis. 2d 245, 733 N.W.2d 322.

would deter requests for and disclosure of records. Neither result supports the Public Records Law's presumption of complete public access. In any event, while the court denied the request for an evidentiary hearing, it allowed the parties to submit evidence they thought relevant. Not having a hearing did not prejudice Tetzlaff.

¶25 Wisconsin courts have recognized the "great importance of disclosing disciplinary records of public employees and officials where the conduct involves violations of the law or significant work rules," ***Kroeplin***, 297 Wis. 2d 254, ¶28, and the public's "particularly strong interest in being informed about public officials who have been 'derelict in [their] duty,'" even at the cost of possible reputational harm, ***Wisconsin Newspress, Inc. v. School Dist. of Sheboygan Falls***, 199 Wis. 2d 768, 786, 546 N.W.2d 143 (1996) (citation omitted). The circuit court's ruling permitting disclosure of the report is consistent with Wisconsin's law and public policy.

¶26 The record and briefs were received under seal. The record shall remain sealed for thirty days after the date of this decision to give Tetzlaff the opportunity to petition the supreme court for review should she wish to do so, *see* WIS. STAT. § 808.10(1), or after a decision on a timely motion for reconsideration under WIS. STAT. RULE 809.24. If Tetzlaff wishes to keep the records sealed past this time period, motion shall be made to the supreme court.

By the Court.—Order affirmed.

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