

FILED
08-26-2024
CIRCUIT COURT
DANE COUNTY, WI
2024CV000511

BY THE COURT:

DATE SIGNED: August 23, 2024

Electronically signed by Susan M. Crawford
Circuit Court Judge

STATE OF WISCONSIN

CIRCUIT COURT

DANE COUNTY

BRANCH 1

Daniel Libit,

Plaintiff,

Decision and Order on Motion
to Dismiss Petition for Writ of
Mandamus

vs.

University of Wisconsin-Madison and
University of Wisconsin Foundation

Case No. 2024CV511

Respondents

INTRODUCTION

Respondents University of Wisconsin- Madison (hereafter "University") and University of Wisconsin Foundation (hereafter "UW Foundation") move the Court for an order to dismiss the Petitioner's Daniel Libit's (hereafter "Libit") Petition for Writ of Mandamus. The parties filed briefs on the motions. Libit has failed to establish a claim for relief as to either respondent. Accordingly, I am GRANTING the motions to dismiss.

BACKGROUND

On October 31, 2023, Libit made an open record request to the University for "the most current agreement between the University and Altius Sports Partners (hereafter "Altius"), inclusive of any amendments, addenda or exhibits." Dkt. 3, ¶50.

On November 1, 2023, the University responded by stating "[t]here are no records responsive to your request." Later that day, Libit wrote back, noting:

I believe there should be records responsive to this request. Last August, the [U]niversity announced that it had engaged with Altius Earlier this year it was announced that the partnership had expanded I believe, at the very least there should be agreements memorializing the terms of the partnership as stipulated in these announcements.

Id., ¶¶51-52. In reply, the University wrote to Libit that "[t]he contract with Altius . . . resides with the UW Foundation, not the [U]niversity." *Id.*, ¶53.

On December 5, 2023, Libit made a written request to the UW Foundation for the "current consulting contract between UW's Athletic Department and [Altius]" noting that the University had claimed the contract "resides with the UW Foundation." *Id.*, ¶56.

On December 8, 2023, UW Foundation responded to Libit as follows: "The [UW Foundation] is a private entity that is not subject to the Wisconsin statute regarding public records. [UW Foundation] does not share its confidential business information." *Id.*, ¶¶57-58.

RELEVANT PROCEDURAL POSTURE

On February 21, 2024, Libit petitioned this Court, pursuant to the Wisconsin Open Records law, Wis. Stat. §§ 19.31-.37, for a writ of mandamus directing the University and

UW Foundation to produce the records he requested. Dkt. 3:3. On April 19, 2024, the UW Foundation moved to dismiss the case. Dkt. 19. A few days later, the University also moved to dismiss the case. Dkt. 21.

APPLICABLE LEGAL PRINCIPLES

A motion to dismiss for failure to state a claim tests the legal sufficiency of the complaint. *Wausau Tile, Inc. v. County Concrete Corp.*, 226 Wis.2d 235, 245, 593 N.W.2d 445 (1999). "The facts set forth in the complaint must be taken as true and the complaint dismissed only if it appears certain that no relief can be granted under any set of facts that the plaintiffs might prove in support of their allegations." *Northridge Co. v. W.R. Grace Co.*, 162 Wis.2d 918, 923, 471 N.W.2d 179 (1991); *H.A. Friend & Co. v. Pro. Stationery, Inc.*, 2006 WI App 141, ¶8, 294 Wis. 2d 754, 761, 720 N.W.2d 96, 99; see Wis. Stat. § 802.02(1).

The Wisconsin Open Records law, codified in Wis. Stat. §§ 19.31-19.37, is designed to ensure public access to existing government records. *Media Placement Servs. v. Wis. DOT*, 2018 WI App 34, ¶10, 382 Wis. 2d 191, 199, 913 N.W.2d 224, 229. The policy governing the disclosure of records is outlined under Wis. Stat. § 19.31, which states:

. . . [I]t is declared to be the public policy of this state that all persons are entitled to the greatest possible information regarding the affairs of government and the official acts of those officers and employees who represent them. Further, providing persons with such information is declared to be an essential function of a representative government and an integral part of the routine duties of officers and employees whose responsibility it is to provide such information. To that end, ss. 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. The denial of public access generally is contrary to the public interest, and only in an exceptional case may access be denied.

Additionally, "any requester has a right to make or receive a copy of a record" and "to inspect any record." Wis. Stat. § 19.35(1)(a)-(b). If a request reasonably describes the requested record or the information requested, it is deemed sufficient. Wis. Stat. 19.35(1)(h). Following a request for a record, "[e]ach authority shall, as soon as practicable and without delay, either fill the request or notify the requester of the authority's determination to deny the request in whole or in part and the reasons therefor." Wis. Stat. § 19.35(4)(a). "If an authority withholds a record or a part of a record or delays granting access to a record or part of a record after a written request for disclosure is made," a requester may bring "an action for mandamus asking a court to order release of the record." Wis. Stat. § 19.37(1).

The Court has consistently recognized the general presumption that all public records shall be open to the public, unless there is a clear statutory exception, a common law exception, or an overriding public interest in keeping the public record confidential. *Wis. Newspress v. Sch. Dist.*, 199 Wis. 2d 768, 776, 546 N.W.2d 143, 146 (1996). Moreover, the Open Records law is to be construed liberally in favor of access to public records. *ECO, Inc. v. City of Elkhorn*, 2002 WI App 302, ¶23, 259 Wis. 2d 276, 655 N.W.2d. Access is presumed and exceptions to access are to be narrowly construed. *Seifert v. Sch. Dist. of Sheboygan Falls*, 2007 WI App 207, ¶31, 305 Wis. 2d 582, 740 N.W.2d 177.

ANALYSIS AND LEGAL CONCLUSIONS

Libit contends that the Respondents "withheld responsive records" by denying his open record requests that "reasonably described" the Altius and UW Foundation contract. The Respondents ask this Court to dismiss Libit's petition for a writ of mandamus because the petition fails to make a claim upon which relief can be granted. In addressing whether Libit's pleadings state a claim for relief under Wisconsin's Open Records law, the court must consider the statutory framework and relevant case law governing public records requests.

A. Withholding Responsive Records

Libit contends that the Respondents withheld responsive records. Dkt. 25:10-12. The University and the UW Foundation argue there are no responsive records that would satisfy Libit's request. Dkt. 22:6 and 19:6. The University points out that Libit requested the agreement between the "University and Altius," which it was unable to find because there is no such agreement. Dkt. 22:8-9. Similarly, the UW Foundation argues there were no responsive records to Libit's request for the contract between "UW's Athletic Department and Altius," because such contract does not exist. Dkt. 19:6. A contract between the UW Foundation and Altius exists, but that was not what was requested. *Id.* The UW Foundation eventually provided its contract with Altius. *See* Exhibits A-D.

A requester may bring an action for mandamus if an authority withholds a record or delays granting access to a record after a written request for disclosure is made. Wis. Stat. § 19.37(1). However, mandamus is not warranted when an authority does not possess the requested records, because "an authority cannot deny or withhold

access to that which does not exist." *Karcher v. WI Dep't of Health Servs. Div. of Pub. Health*, 2021 WI App 20, 396 Wis. 2d 703, 958 N.W.2d 168 (citing *State ex rel. Zinngrabe v. School Dist. of Sevastopol*, 146 Wis. 2d 629, 631-32, 633, 431 N.W.2d 734 (Ct. App. 1988)); see also *Journal Times v. City of Racine Bd. of Police & Fire Comm'rs*, 2015 WI 56, ¶153, 362 Wis. 2d 577, 866 N.W.2d 563 (Abrahamson, J., concurring)(explaining the futility of a mandamus action seeking to compel the disclosure of nonexistent records). The Open Records law "is designed to make *existing* records available to the public unless withholding such documents is specifically authorized by law." *State ex rel. Gehl v. Connors*, 2007 WI App 238, ¶13, 306 Wis. 2d 247, 742 N.W.2d 530 (emphasis added)(citation omitted).

Here, there are no responsive records to Libit's requests. The University has no agreement with Altius, and there is no contract between Altius and the University's Athletic Department as requested by Libit. See Exhibits A-D. The University and the UW Foundation cannot be compelled to produce a nonexistent record, nor can the court find that the respondents improperly withheld responsive records. Because there were no responsive records withheld, no relief is available under a mandamus action.

B. Reasonably Described

Libit argues that both Respondents ought to have provided the contract between Altius and the UW Foundation in response to his request, as his request reasonably described such contract. Dkt. 25. He argues "the law does not state a request must precisely identify the record or information sought. It does not require the requester to accurately name the document or describe it perfectly. It only requires that the request be

specific enough such that a custodian does not have to 'guess at what records a requester desires.'" Dkt. 25:5; (Citing *Seifert*, 2007 WI App 207, ¶42).

Under Wis. Stat. § 19.35 (1)(h), a request under the Open Records law "is deemed sufficient if it reasonably describes the requested record or the information requested." Little published precedent in Wisconsin explains the requirements for a "reasonably described" request under § 19.35 (1)(h). However, federal court decisions under the Freedom of Information Act ("FOIA") are persuasive authority for the interpretation of similar language in the state statute. *Racine Educ. Ass'n v. Racine Bd. of Educ.*, 129 Wis. 2d 319, 326, 385 N.W.2d 510, 512 (Ct. App. 1986). Under FOIA, as interpreted by federal courts, the analogous requirement in federal law for a "reasonably described" request does not require a records custodian to expand their searches beyond "the four concerns of the request," nor are they "required to divine a requester's intent." *Landmark Legal Found. v. EPA*, 272 F. Supp. 2d 59, 64 (D.D.C. 2003) (citing *Kowalczyk v. Dep't of Justice*, 73 F.3d 386, 388-89, 315 U.S. App. D.C. 286 (D.C. Cir. 1996)); see 5 U.S.C. § 552(a)(3).

The Court remains cognizant of the general presumption of disclosure of public records, but it is equally cognizant that requests for records must be "reasonably described." See Wis. Stat. 19.35(1)(h). Neither the Court nor record custodians should be obliged to stray from the "four corners" of Libit's requests. Libit made two narrow and specific records requests, one for the agreement between the University and Altius and another for the contract between UW's Athletic Department and Altius, neither of which exist. It is unreasonable to require a records custodian to assume that Libit intended to obtain a different contract, one between the UW Foundation and Altius.

Therefore, Libit's records requests failed to reasonably describe the contract he hoped to receive and therefore no responsive records were withheld from him. As such, Libit failed to state a claim upon which relief may be granted.

C. Attorney Fees

All parties agree that if no responsive documents were withheld, Libit has no recourse to obtain attorney's fees, damages, or other costs. Dkts. 19:9, 25:11, 27:7. As discussed above, the University and the UW Foundation did not withhold any responsive records from Libit's requests because there are no such records. Therefore, under Wis. Stat. § 19.37(2)(a), Libit is not entitled to an award of attorney's fees, damages, or other costs in this case.

DECISION AND ORDER

Given that no responsive records were withheld, due to their non-existence, the Court finds that Libit's pleadings fail to state a claim for relief. Consequently, Libit's petition for a writ of mandamus is DENIED. The University and the UW Foundation's motions to dismiss are hereby GRANTED.