

STATE OF WISCONSIN

CIRCUIT COURT
BRANCH 12

DANE COUNTY

STATE OF WISCONSIN, PEGGY A.
LAUTENSCHLAGER AND DANIEL P. BACH

Plaintiffs,

v.

Case No. 05-CV-2896

DAVID A. ZIEN and
SCOTT L. GUNDERSON,

Defendants.

**NON-PARTY BRIEF OF THE WISCONSIN NEWSPAPER ASSOCIATION
IN RESPONSE TO THE DEFENDANTS' MOTIONS TO DISMISS
THE AMENDED COMPLAINT**

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This case is about the enforcement of Wisconsin’s Open Records Law, sections 19.31 through 19.39, Stats., and specifically, compliance with “the public policy of this state that *all persons* are entitled to the greatest possible information regarding the affairs of government...” Sec. 19.31, Stats. (emphasis added). Regardless of the identity of the “requester” or the named plaintiffs, therefore, the public’s right of access to the requested records is at stake in every enforcement action and, particularly, this one. The defendants, Senator David A. Zien and Representative Scott L. Gunderson (collectively, “defendants”), have advanced the remarkable position that they, as state legislators, have the unilateral right to determine who shall review and discuss drafts of legislation – permitting them to include selected lobbyists in that special category and to exclude the public. That cannot be the law adopted in this State twenty-five years ago, and it is not.

The defendants have moved to dismiss this case by raising, among other issues, constitutional separation of powers and the very authority of the Attorney General to commence court actions on behalf of the State. The proposed intervenor, the Wisconsin Newspaper Association (“WNA”), takes no position on those issues. Rather, the WNA represents the interests of its members and the public at large to ensure that *all persons* can use the tools legislatively provided in the Open Records Law to obtain timely and equal access to government records.

I. DANIEL P. BACH IS A “REQUESTER” WITHIN THE MEANING OF THE OPEN RECORDS LAW.

The mandate of the Open Records Law is clear: “[A]ny requester has a right to inspect any record.” Sec. 19.35(1), Stats. The statutory definition of “requester,” furthermore, is equally clear:

“Requester” means *any person* who requests inspection or copies of a record, except a committed or incarcerated person, unless the person requests inspection or copies of a record that contains specific reference to that person or his or her minor children for whom he or she has not been denied physical placement under ch. 767, and the record is otherwise accessible to the person by law.

Sec. 19.32(3), Stats. (emphasis added). On August 18, 2005, Daniel P. Bach sent a written request to the defendants, seeking access to “any 2005 Legislative Session bill drafts your offices have been working on relating to carrying a concealed weapon that have been shared with anyone outside the legislature or the Legislative Reference Bureau.” First Amended Complaint, Ex. A. There can be no doubt that Bach’s letter sought access to “records” within the meaning of the Open Records Law. Bach, therefore, is a “requester.”

The defendants contend that Bach cannot be a “requester,” especially in his professional capacity as Deputy Attorney General. Senator Zien claims that the Attorney General and all of her deputy and assistant attorneys general need express statutory authority “to submit a public records request to members of the Wisconsin legislature.” See Senator David A. Zien’s Brief In Support of The Motion to Dismiss the First Amended Complaint (“Zien’s Brief”), p. 13 n.6. Representative Gunderson similarly argues that “the Attorney General’s office,” through Peggy A. Lautenschlager, Daniel P. Bach, or any other member of the Attorney General’s staff cannot make requests under the Open Records Law. See Brief of Representative Scott L. Gunderson in Support of Motion to Dismiss Amended Complaint For Lack of Standing (“Gunderson’s Brief”), pp. 13-14. This is a position that cannot be sustained – as a matter of law or common sense.

The Open Records Law permits “any person” to be a requester. Sec. 19.32(3), Stats. Bach’s status as Deputy Attorney General does not confer on him any greater – or lesser – standing as a requester than any other member of the public to obtain access to records through the Open Records Law. That the request was made on the Attorney General’s letterhead and in

Bach's "official capacity" does not impact, positively or negatively, his ability to use the Open Records Law. It is irrelevant.

Bach's employment as Deputy Attorney General also does not diminish his ability to enforce rights under the Open Records Law – rights that are, in essence, public rights – and to be represented in his mandamus action by the attorney general's office. Bach's unsatisfied request entitles him to bring this action under section 19.37(1)(a), Stats., "asking the court to order release of the record(s)." In addition, section 19.37(1)(b), Stats., specifically contemplates that a requester can be represented by the attorney general in a mandamus action. Contrary to the defendants' arguments, the Open Records Law does not except from representation members of the attorney general's staff. Indeed, any "requester" can be represented by the attorney general under section 19.37(1)(b).

The defendants also argue that Bach cannot rely on section 19.37(1)(b) because the amended complaint does not allege that he submitted a written request to the attorney general for representation. *See* Zien's Brief, p. 22 n. 9; Gunderson's Brief, p. 13. An allegation of a written request for representation, however, is not statutorily required to state a claim under the Open Records Law. Nor does section 19.37(1)(b) state that such a request must be made *prior* to commencing the lawsuit. Accordingly, even if the defendants' speculation that Bach made no written request for representation (simply because the amended complaint does not allege it) is correct, that failure does not justify, or require, dismissal.

II. THE DEFENDANTS' REQUEST FOR DISMISSAL SHOULD BE DENIED.

The defendants contend that dismissal is the appropriate remedy because none of the plaintiffs can be "requesters" or enforce any right to access public records under the Open Records Law. The WNA has no need to take a position on the authority of the Attorney General

to commence an open records enforcement action on behalf of the state or on Peggy A.

Lautenschlager's standing as a named plaintiff. The WNA has a pending motion to intervene on its own rights, asserting its own interests. The joinder in the amended complaint of the person who made the request – Daniel P. Bach – as a plaintiff, is alone sufficient to sustain the action.

The defendants rely on *Fabyan v. Achtenhagen*, 2002 WI App 214, 257 Wis. 2d 310, 652 N.W.2d 649, to claim that this Court lacks “competency to proceed” because any error in naming the plaintiff requires dismissal of the case. *See* Zien's brief, pp. 18-22. In *Fabyan*, the court of appeals dismissed on its own motion the plaintiff's action to enforce the Open Meetings Law under section 19.97, Stats., because the action was not brought on behalf of the state. 2002 WI App 214, ¶ 13. That holding, however, is expressly limited to actions brought under the Open Meetings Law, where “the legislature has specifically dictated what a plaintiff must do to initiate a cause of action.” *Id.* at ¶ 8; *see* sec. 19.97(1), Stats., and compare with sec. 19.37(1), Stats. Any broader reading of *Fabyan* would render Wisconsin's liberal pleading rules and section 803.01(1), Stats., a nullity. Furthermore, this case is about public records, not meetings.

There is no question that Bach properly exercised his right as a “person” who is not “committed or incarcerated” in making the August 18, 2005 open records request to the defendants. *See* sec. 19.32(3), Stats. Accordingly, he certainly has standing to enforce his right of access under section 19.37, Stats, and this Court has “competency” to hear and decide his claim. Stated another way, he is a “real party in interest” under section 803.01, Stats., regardless of whether the State or Peggy A. Lautenschlager are as well. As a result, dismissal is not the appropriate remedy even if the State of Wisconsin is not a proper party.

No action shall be dismissed on the ground that it is not prosecuted in the name of the real party in interest until a reasonable time has been allowed after objection for ratification of commencement of the action by, or joinder or substitution of, the real party in interest;

and such ratification, joinder, or substitution shall have the same effect as if the action had been commenced in the name of the real party in interest.

Sec. 803.01(1), Stats. (emphasis added). Bach's joinder as a named plaintiff, regardless of any others, means that the defendants' motions to dismiss must be denied.

III. SENATOR ZIEN'S MOOTNESS ARGUMENT SHOULD BE REJECTED.

In a final attempt to evade the determination of his responsibilities as a custodian under the Open Records Law, Senator Zien contends that the case should be dismissed as "moot" because "the draft bills requested for 2005 SB 403 and 2005 AB 763" were later introduced and, therefore, are no longer being withheld from the public or the plaintiffs. Zien's Brief, pp. 21-22. Subsequent introduction of the bills in the legislature, however, does not moot the issue of the public's right to equal access to bill drafts *before* introduction or whether legislators may create a "privileged class" of lobbyists with special access. To conclude otherwise would allow custodians to simply deny access to requested records and then subsequently moot every enforcement action by providing access after the lawsuit is filed.

In *Racine Education Ass'n v. Board of Educ. for Racine Unified School Dist.*, 129 Wis. 2d 319, 385 N.W.2d 510 (Ct. App. 1986), the court of appeals concluded that a mandamus action under the Open Records Law was moot because the custodian provided the requested record while the litigation was pending. At issue was a list of members of a bargaining unit that a labor organization wanted for an upcoming election. In concluding that the issue of access to the requested record was moot, the court noted that a decision "would not mark a significant trend in the law." *Id.* at 324.

The *Racine Education Ass'n* reasoning certainly does not apply here. *See also State ex rel. LaCrosse Tribune v. Circuit Court for LaCrosse County*, 115 Wis. 2d 220, 229, 340 N.W.2d

460 (relying on exceptions to the general rule of dismissal for mootness, including “[w]here the issues are of great public importance” and “where a questions was capable and likely of repetition yet evades review....”). Determining the public’s right of equal access to bill drafts prior to introduction of legislation would mark a significant development under the Open Records Law. Indeed, that is an understatement. Furthermore, subsequent access to records does not “defeat” the statutory right to timely access. *See* sec. 19.35(6), Stats. (requiring an authority to “as soon as practicable and without delay, either the fill the request or notify the requester” of the grounds for denial); *see also Press Publishing Co. v. Richard Davis*, 19 Med. L. Rptr. 1030, 1031 (Wis. Cir. Ct. 1991)(“The newspaper had a statutory right to inspect and copy the mug shot *at the time it was requested*, and its subsequent acquisition of a photograph ... does not defeat that right.”)(emphasis added)(attached). Moreover, section 19.37(1), Stats., provides a remedy for *delay* in providing access to a public record, not only for outright denial.

Allowing the subsequent introduction of legislation to moot the significant issues of public access raised in this case for bill drafts would allow the defendants to continue to shirk their statutory duties as public officials and custodians. In addition to the specific bill drafts at issue here, the record demonstrates that the question of equal access to bill drafts is not new. *See* First Amended Complaint, Ex. C (letter from Attorney General Lautenschlager regarding “Confidentiality of Legislative Drafting Materials”). A decision in this case “will have a timely [and significant] impact upon the trial courts,” *Racine Educ.*, 129 Wis. 2d at 325, and the public’s right of access under the Open Records Law. Accordingly, Senator Zien’s mootness argument should be rejected to allow this Court to focus on the important questions raised about the public’s right of timely and equal access to legislative bill drafts.

CONCLUSION

The defendants' dismissal motions collide with their duties to the public as elected officials and custodians of the records at issue. Those records concern the defendants' "official acts" and, therefore, providing them to the public is both an "essential function of a representative government and an integral part of [their] routine duties." Sec. 19.31, Stats. This case concerns the *public's* right of access to legislative bill drafts that the defendants have not denied they shared with favored members of the public before introduction, not the rights of the Attorney General or her deputy. It should not be dismissed on hypertechnical or procedural grounds.

Indeed, for all of the defendants' focus on the identity of the plaintiffs, there is a particular irony – and compelling legal significance – in the identity of the defendants. They are members of the legislature. The Open Records Law is a creature of statute. The legislature, in adopting the statute and amending it from time to time, sets the rules for public access to government records. It has defined an "authority" subject to the presumption of public access as any "elected official" and any "public body created by the constitution. Sec. 19.32(1), Stats. Indeed, the law adopted by the legislature expressly includes the "assembly or senate" in the definition of an "authority" whose records are presumptively public. *Id.* By definition, that includes the defendants and the legislative body to which they are elected.

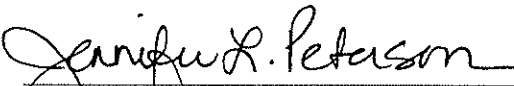
Neither the irony nor the legal significance ends there. The legislature has created a litany of exemptions to the Open Records Law, *see, e.g.*, sec. 19.36, Stats., but it has not created an exemption for itself or its members. To the contrary, there are repeated statutory references to the open records obligations of the legislature. *See, e.g.*, secs. 19.33(8), 19.35(6), Stats.

Moreover, in the Open Meetings Law, the legislature did create specific exemptions -- for example, for its own "partisan caucus[es]" in section 19.87(3), Stats.

The legislature presumably bound itself to the provisions of the law for reasons of sound public policy, the same reasons articulated in section 19.31, Stats. For sound policy reasons as well, it created specific exemptions. There is neither statutory recognition, however, nor sound public policy for pious position advanced by the individual legislators here, including their "right" to decide for themselves individual exceptions to the presumption of public access to public records. If they can make a persuasive argument for that personal exemption, they should make it with their colleagues and, by majority vote with the governor's concurrence, create an appropriate statutory exception. This Court is an appropriate forum to apply the law, not invent it, and it should exercise that authority to decide this case on its merits.

Dated: January 17, 2006.

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claims. See *Nebraska Press Ass'n v. Stuart*, 427 U.S. 539, 556, 96 S. Ct. 2791, 2801, 49 L. Ed. 2d 683, 696 (1976).

For the foregoing reasons the plaintiff's appeal is denied and dismissed, and the case is remanded to the Superior Court.

PRESS PUBLISHING CO. v. DAVIS

Wisconsin Circuit Court
Sheboygan County

PRESS PUBLISHING CO. v. RICHARD DAVIS, Sheboygan County Sheriff; DAVID ADAMS; and RONALD JOOSSE, No. 90-CV-694, July 1, 1991

NEWSGATHERING

Access to records—Law enforcement—In general (§38.1701)

"Mug shots" or booking photographs, of individuals who have been arrested are public records under Wisconsin Open Records Act, Stats. Section 19.31, and must be disclosed to newspaper, since neither right to privacy of individual photographed, nor need to protect individual's right to fair trial, is sufficient to outweigh public interest in disclosure, although public's right of access does not extend to any identifying numbers on photograph.

Action by newspaper seeking access to booking photographs. On plaintiff's motion for summary judgment.

Granted.

Robert J. Dreps, of LaFollette & Sinykin, Madison, Wis., for newspaper.
Alexander Hopp, corporation counsel, for defendants.

Full Text of Opinion

Murphy, J.:

This matter came before the Court on February 21, 1991, for a hearing on the plaintiff's motion for summary judgment in this mandamus action under Wisconsin's Open Records Act, sec. 19.31, Stats., *et seq.* ("the Act"). The plaintiff

appeared by its counsel, Robert J. Dreps of LaFollette & Sinykin, Madison, Wisconsin, and the defendants appeared by Sheboygan County Corporation Counsel, Alexander Hopp.

The Open Records Act

The methodology for deciding an action under the Act is set forth in *Oshkosh Northwestern Co. v. Oshkosh Library Board*, 125 Wis.2d 480, 373 N.W.2d 459 (Oct. App. 1985). The Court begins its analysis with the statutory presumption in Chapter 19, Stats., that the public has a right to inspect public records. The denial of public access is contrary to the public interest and allowed only in an exceptional case. Furthermore, exceptions to the general rule of disclosure must be narrowly construed.

The right of the public to inspect public records, however, is not absolute. When faced with a demand for inspection, the custodian of the records must determine whether the public's interest in non-disclosure outweighs the public's right of inspection. If the custodian refuses to allow inspection, the custodian must state specific reasons for the refusal, and these reasons then provide a basis for review by a court. If specific and legally-sufficient reasons are not given, a writ of mandamus must be issued, compelling disclosure of the requested public record.

Where the material facts are undisputed, as here, the legal issues presented in an open records enforcement action are properly resolved on summary judgment. The Court has before it all of the pleadings, briefs and factual submissions in this matter and has heard, as well, the arguments of counsel. Based upon all of this, the Court hereby finds that there are no facts in dispute, grants the plaintiff's motion for summary judgment and makes the following Findings of Fact, Conclusions of Law and Order:

FINDINGS OF FACT

1. On June 28, 1990, the plaintiff made a written request under the Act for a copy of the booking photograph ("mug shot") of Richard Harvey, who was then under arrest and in custody in the Sheboygan County Jail on five felony charges.

2. The Sheboygan County Sheriff's Department denied the newspaper's open records request by letter dated July 2, 1990 on the grounds that release of the mug shot could reasonably constitute an invasion of personal privacy and could

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result in interference with Mr. Harvey's right to a fair trial.

3. Richard Harvey made numerous appearances at hearings open to the public in the course of the criminal proceedings against him. The newspaper photographed Mr. Harvey prior to a hearing on July 5, 1990 and published his photograph in its July 6 and July 9, 1990 editions.

4. The plaintiff incurred attorney fees totaling \$6,445.00 and actual costs of \$370.85 in the prosecution of this action. The defendants have not challenged the reasonableness of those amounts.

CONCLUSIONS OF LAW

1. The plaintiff has met its burden of establishing the absence of a genuine, disputed issue as to any material fact.

2. The plaintiff's written request for the mug shot complied with all of the statutory prerequisites to the commencement and successful prosecution of an action under the Act.

3. The defendants have not overcome the Act's presumption of complete public access to the mug shot. The mug shot is a "record" subject to the Act.

4. The newspaper's acquisition and publication of Mr. Harvey's photograph prior to the commencement of this action does not render it moot. The newspaper had a statutory right to inspect and copy the mug shot at the time it was requested, and its subsequent acquisition of a photograph by its own means does not defeat that right.

5. Richard Harvey's right of privacy, asserted by the defendants, does not outweigh the public interest in access to his mug shot. The Wisconsin Supreme Court has determined that the release of law enforcement records identifying arrested individuals "would not constitute an invasion of either a constitutionally or statutorily protected right of privacy." *Newspapers, Inc. v. Briar*, 89 Wis. 2d 417, 433, 279 N.W.2d 179 (1979); see *State ex rel. Bidler v. Delavan Township*, 112 Wis.2d 539, 557-58, 334 N.W.2d 252 (1983).

6. The need to protect Richard Harvey's right to a fair trial does not outweigh the public interest in disclosure of his mug shot. The right to a fair trial is a matter to be addressed at trial, if necessary, where it can be remedied by selective voir dire, change of venue or other means.

7. The public's right of access does not extend, however, to any identifying numbers on the mug shot.

8. The Department's remaining arguments for non-disclosure are not properly before the Court because they were not set forth in its written response to the plaintiff's open records request and, in any event, are without merit.

9. Accordingly, the plaintiff is entitled to judgment as a matter of law and an award of reasonable attorney fees, damages of not less than \$100 and its actual costs pursuant to Sec. 19.37(2), Stats.

10. The fees presented to the Court by the plaintiff's attorneys are fair and reasonable.

ORDER

Based upon these Findings of Fact and Conclusions of Law, IT IS HEREBY ORDERED that the plaintiff's Motion for Summary Judgment is granted and judgment for the plaintiff and against the defendants shall be entered accordingly.

FLORIDA v. BROWN

Florida Circuit Court
Second Judicial Circuit
Leon County

STATE OF FLORIDA v. WILLIAM H. BROWN, Nos. %91-00920AF001 et al., July 10, 1991

NEWSGATHERING

Forced disclosure of information—Disclosure of unpublished information—In criminal actions (§60.1005)

Criminal defendant's failure to show that information sought from non-eye-witness newspaper reporter is relevant, of compelling interest, and unobtainable from alternative sources warrants finding that defendant has failed to overcome reporter's qualified First Amendment privilege, and thus warrants quashing of subpoena.

Newspaper reporter subpoenaed by criminal defendant to testify at defendant's sentencing hearing files motion to quash.

Motion granted.