

FILED
01-11-2022
CIRCUIT COURT
DANE COUNTY, WI
2021CV002521

BY THE COURT:

DATE SIGNED: January 11, 2022

Electronically signed by Judge Valerie Bailey-Rihn
Circuit Court Judge

STATE OF WISCONSIN CIRCUIT COURT BRANCH 3 DANE COUNTY

AMERICAN OVERSIGHT,

Plaintiff

V.

ROBIN VOS

Defendant.

DECISION AND ORDER

Case No. 21CV2521

On December 22, 2021, Defendant Robin Vos (“Vos”) filed a motion for a protective order concerning a deposition scheduled for January 12, 2022. The Court scheduled a hearing on this matter for January 4, 2022 in order to address Defendant’s motion. In this and a companion case, Case No. 21-CV-3007, the Court has had several hearings on whether documents asked for in open records requests exist, were destroyed after the requests were made, or never existed. Plaintiff have produced documents responsive to the requests, documents that were not turned over by Defendant Vos. No affidavits were provided to explain why these documents were not turned over by Defendant Vos, other than a statement by Vos’ counsel that although the documents would have been responsive, parties delete emails. The Court understands a habit of deleting emails may be normal, but after an open record request is made, deleting relevant emails is improper.

In addition, Defendant Vos argued in the January 4, 2022 hearing that discovery is not appropriate in a writ of mandamus action, because unlike typical civil litigation, “this is not a search for the truth.” This was the only basis for the motion to quash the deposition.

Although sanctions were requested in the companion case, this Court declined to assess sanctions at that time. In the companion case, the Court held that the Plaintiff was entitled to have discovery in the form of an evidentiary hearing in front of this Court. In this case, the Plaintiff requested a deposition to determine similar issues. The Court granted the request, but limited the

scope to questions relating to what process was undertaken to search for responsive documents, what procedures are in place to ensure that documents are not destroyed after an open record request was made, when documents were destroyed, who undertook the search, and what directions were provided to the individuals performing the search. This Court-ordered tailored discovery was pursuant to Wis. Stat. §781.01, which allows discovery in a writ of mandamus action.¹ In both cases, the Court issued its orders because it was reluctant to sanction anyone before understanding whether documents exist or not, although the paucity of documents produced in contrast to the time the investigation has been pending is troublesome .

The Court now has in front of it a motion to stay the depositions pending the Court of Appeals decision regarding the Emergency Relief and Ex Parte Order to stay discovery. For the following reasons, the Court is not granting the Motion to Stay.

The standards for a stay are well known. A stay pending appeal is appropriate where the moving party (1) makes a strong showing that it is likely to succeed on the merits of the appeal; (2) shows that, unless a stay is granted it will suffer irreparable injury; (3) shows that no substantial harm will come to other interested parties; and (4) shows that a stay will do no harm to the public interest. *State v. Gudenschwager*, 191 Wis. 2d 431, 440, 529 N.W.2d 225, 229 (1995).

As to the first factor, the argument for a stay is similar to the arguments raised at the January 4, 2022 hearing. The additional argument that this court should order a writ of mandamus prior to ordering discovery puts the Court in the position of ordering turnover of documents that possibly do not exist and perhaps, assessing penalties that are improper. The Court declines to do so, as it takes its judicial responsibilities seriously. Thus, for this reason and the reasons set forth in the Court's oral decision, the Court finds that this element has not been demonstrated by the Defendant.²

The second factor also does not favor Defendant Vos. The Court has made itself available to rule on any deposition disputes tomorrow, and the scope of the deposition is limited to

¹ If there are no documents responsive to the request, this begs the question, what are the Wisconsin taxpayers paying for? The Court could understand if there were objections to producing documents because of other reasons, but in this case, the only argument is that there are no other documents.

² Defendant Vos cites *Karcher v. Wisconsin Dep't of Health Servs.*, No. 20AP211, 21WL608365 (Wis. Ct. App. Feb. 17, 2021) (unpub.) (pet. for review filed), for the proposition that discovery is not allowed. This case can be cited for persuasive use only. If a party does not have any evidence that documents exist or have been improperly withheld, the Court would have denied the request for discovery, similarly to what occurred in *Karcher*. However, that is not the case here. Vos' counsel admitted that at least one relevant document existed but were deleted.

relevant questions regarding the document search and production, not a “fishing expedition” as feared by Defendant. If questions are improper, the Court will be available to rule immediately.

No other reasons for a protective order were advanced other than there are no documents. Something, if true, can be stated by Defendant Vos under oath.

The third factor also supports the Plaintiff. These open records request have been pending for months; thus, additional delay may cause harm in the way of documents being destroyed or becoming stale. Finally, the fourth factor clearly supports the Plaintiff. As the Court has stated, the citizens of Wisconsin, all of them, deserve open government. That is why the legislature enacted the robust Open Records Law. This Court is duty bound to support the enforcement of the laws as enacted.

IT IS SO ORDERED this 11 January 2022

cc: Counsel of record (via e-filing)