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CIRCUIT COURT
DANE COUNTY, WI
2020CV000764

BY THE COURT:

DATE SIGNED: June 30, 2021

Electronically signed by Juan B. Colas
Circuit Court Judge

STATE OF WISCONSIN CIRCUIT COURT DANE COUNTY
Branch 10

Wisconsin State Journal, et al.,
Plaintiff

vs. Case No. 20CV764

Edward A Blazel, in his official capacity, et al.

Defendant

DECISION ON MOTIONS FOR SUMMARY JUDGMENT

This case concerns requests by plaintiffs for release of records of the Legislative Human Resources Office of an investigation into allegations by a legislative employee that she had been harassed by then-Representative Staush Gruszynski. The parties have cross-moved for summary judgment and I decide the motions on affidavits and briefs without oral argument.

SUMMARY JUDGMENT STANDARD

In deciding a motion for summary judgment a court reviews the pleadings to determine whether a material issue of fact or law has been properly joined. If so, the court examine determines whether the moving party's affidavits make a prima facie case for summary judgment and then determine whether the opposing party's affidavits create any material issues of fact. *State v. Schneck*, 2002 WI App 239, ¶ 8, 257 Wis. 2d 704, 708. Affidavits must be made on personal knowledge and set forth admissible evidentiary facts. Wis. Stat. §802.08(3). Summary judgment shall be granted "when 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).

UNDISPUTED FACTS

The material facts are undisputed. There are also many relevant facts in the record that are undisputed, but are not material to the issues in litigation. The records at issue are referred to as Disputed Record 1, 2 and 3.

Procedural Facts & History

On March 18, 2020 the plaintiffs filed a complaint against the Wisconsin State Assembly and its then-Chief Clerk, Patrick Fuller. It alleged an improper denial of access by the Assembly Chief Clerk to records of a complaint and investigation of allegations that Gruszynski had sexually harassed a legislative employee. The complaint sought a declaratory judgment, a writ of mandamus and attorney fees, costs and punitive damages. Defendants answered on May 1, 2020, largely admitting the underlying facts of the requests and denial, but asserting that the denial was a proper application of the public interest balancing test.

On October 9, 2020 plaintiffs filed an amended complaint that took into account that on August 12, 2020, following a story about the allegations and investigation in the Capital Times on August 7, the defendants released redacted copies of records related to the complaint and the investigation, along with defendants' explanation of the reasons for the redactions. The amended complaint added to the original allegations that the delay in release of records and redactions were in violation of the Open Records Law. The answer to the amended complaint, filed on October 29, again largely admitted the underlying facts concerning the records, the requests and the responses and releases, but reasserted that the initial withholding and the later redactions and the delay in release of records did not violate the Open Records Law.

Defendants filed a motion for summary judgment on November 18, 2020. There was briefing on the motion and a cross-motion for summary judgment in favor of the plaintiffs. In mid-March the parties both submitted additional argument in the form of letters concerning the status of the Supreme Court's review in *Friends of Frame Park v. City of Waukesha,* 2020 WI App. 61 and whether a decision on summary judgment in this case should await the outcome of that case.

For convenience and clarity, citations supporting the stated facts refer to the numbering of proposed undisputed facts in each party's brief, rather than to the source affidavits or exhibits (which are cited in each party's proposed facts).

Facts Related to LHRO

The Legislative Human Resources Office ("LHRO") directs employment matters relating to the Wisconsin Legislature, including handling formal harassment complaints. Def. 1. The process for handling harassment complaints in the Assembly is governed by the Assembly's "Harassment, Discrimination, Retaliation, Violence and Bullying Policy." Def. 2. That policy provides that "[a]lthough the confidentiality of the information received and the privacy of the individuals involved cannot be guaranteed, they will be protected to as great an extent as is legally possible. The expressed wishes of the employee regarding confidentiality will be considered in the context of our legal obligations to the extent possible." Def. 4

Facts Related to Incident and Investigation

On November 1, 2019 LHRO staff met with an employee and her supervisor, a state legislator, to discuss a

claim that she had been sexually harassed by a different legislator, Rep. Staush Gruszynski on October 30, 2019 at a Madison bar called the Malt House. Pltf. 1, Def. 13. On November 26, the employee told LHRO that she had decided to pursue a formal complaint and provided a formal written complaint (Disputed Record No. 1), records of Facebook Messenger texts and calls between her and Rep. Gruszynski (Disputed Record No. 3) and a list of witnesses and their phone numbers. Pltf. 2, Def. 14,15

Before the employee filed her formal complaint, LHRO staff informed her that the Policy provided that confidentiality could not be guaranteed but would be protected as much as legally possible. Pltf. 6, Def. 19. LHRO interviewed four witnesses and Rep. Gruszynski. Witnesses and the employee asked for confidentiality and expressed their fears that disclosure of their identities would harm their careers. Pltf. 5, Def. 21. The employee, the employee's supervisor and a witness reported to LHRO that the incident had a significant impact on the employee. Pltf. 4.m, Def. 22-24. On December 17, 2019, the LHRO finished the report of its investigation, which substantiated the allegations and found that Gruszynski had violated the harassment policy. Pltf. 7, Def. 25. The LHRO shared its conclusion with Rep. Hintz, the Assembly Minority Leader, and worked with him on remedial action. Pltf. 8, Def. 26. On December 19, Assembly Democratic Leadership issued a public statement disclosing the investigation and the conclusions. Pltf. 11, Def. 27.

Facts Related To Records Requests and Responses

On December 19th and 20th, following the public statement, the plaintiff submitted public records requests to the Assembly Chief Clerk for records relating to the complaint and investigation. Pltf. 13, Def. 28. Other news media representatives made similar requests. Pltf. 14-16. On December 20 the Chief Clerk responded to Plaintiffs' request by providing a document titled "High Level Summary for S.G. Complaint." Pltf. 17, Def. 29. LHRO Human Resources Manager Amanda Jorgenson prepared the summary. Def. 33. The summary stated that a complaint of verbal sexual harassment of an employee by Rep. Gruszynski had been substantiated and that there would be remedial actions as determined by Democratic Leadership, Rep. Gruszynski would attend anti-harassment training with the LHRO and that any further incidents would not be tolerated. Pltf. 18, Def. 30. The summary did not contain any information about how the investigation was conducted, the facts alleged in the complaint or discovered during the investigation, statements made by witnesses or Rep. Gruszynski or how the remedial actions were determined. Pltf. 19-27. The response also stated that "the Legislature" had applied the public records balancing test and concluded that the public interest in disclosure of the complaint and the investigation records was outweighed by the public interest in treating employee complaints as confidentially as possible and respecting the privacy and dignity of the complainant and witnesses. Pltf. 30-31, Def. 31-32.

In preparing the summary and performing the balancing test Jorgenson consulted with the employee, who did not wish any information to be released but did agree to release of the summary. Def. 34.

On August 7, 2020 LHRO learned that the employee provided details of the incident to the Capital Times, a plaintiff in this case, resulting in an article with significant details about the incident. Pltf. 34, Def. 38. On August 12, the LHRO concluded from the employee's contact with the Capital Times, that the employee no longer objected to details being released as long as her name was not released. Def. 39. The LHRO re-applied the balancing test in light of that and concluded that the interest in preserving confidentiality of the details was now outweighed by the interest in public access and then released

redacted versions of the Disputed Records to plaintiff's counsel. Pltf. 39, Def. 39. The redacted records were provided only to parties in this action and to requesters, including original requesters, who filed new requests. Pltf. 42.

LHRO did conclude that the public interest in the confidentiality of redacted identities and health information still outweighed the public interest in that information. Def. 40, Pltf. 40.

APPLICABLE LAW

Wisconsin Statutes §§19.31-19.39 are known as the Open Records Law. It begins with a very strong declaration of policy:

> [A]ll 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.

Wis. Stat. §19.31.

When presented with a request for access a records custodian must either grant the request, or deny it in whole or in part with an explanation of the reasons for the denial. Wis. Stat. 19.35(4)(a). When there are no statutory or common law exceptions the custodian must apply a public policy balancing test in deciding whether to grant access. *Democratic Party of Wisc.,* 2016 WI 100 at ¶11. That test is a balancing of whether the public interest in nondisclosure outweighs the public interest in favor of disclosure. *Id.*

The parties agree that the Disputed Records are subject to the Open Records Law, that no statutory or common-law exceptions apply and that a denial of public access in this case must be based on the application of the public interest balancing test.

In a judicial review of a custodian's decision the court applies the balancing test *de novo*, without deference to the decision of the records custodian. *John K. MacIver Inst. for Pub. Pol'y, Inc. v. Erpenbach*, 2014 WI App 49, ¶ 12-15, 354 Wis. 2d 61. In applying the balancing test the court is limited to the reasons given by the custodian for the denial; it is not to hypothesize or supply reasons not asserted in the denial. *Newspapers, Inc. v. Breier*, 89 Wis. 2d 417, 427–28, 279 N.W.2d 179

DISCUSSION

I. Effect of *Friends of Frame Park*

Defendants argue that I should wait for the Supreme Court decision in *Friends of Frame Park v. City of Waukesha,* 2020 WI App. 61, 394 Wis. 2d 387 (Appeal Case Number 19AP96) before ruling on the plaintiff's First Cause of Action, challenging the initial denial of the records request. *Friends of Frame Park* is a published decision holding that when public records are released while an Open Records Lawsuit is pending and the initial withholding of the records was improper, a court may find that the plaintiffs substantially prevailed and award appropriate attorney's fees even if the lawsuit was not a cause the release of the records. *Id.* at 4-5.

Defendants argue that if the Supreme Court reverses the Court of Appeals decision in *Friends of Frame Park* there would be no need to address the plaintiff's First Cause of Action, since redacted records were released in August, 2020 and only the claim for attorney fees remains. If the case had already been argued and if a decision was imminent, waiting might be justified.

Friends of Frame Park is scheduled for oral argument before the Supreme Court on September 9, 2021. A period of three or four months between oral argument and decision is common. A stay while awaiting that decision would likely delay this court's decision until past the end of the year. That long a delay is not justified by the possibility that the Supreme Court may reverse a Court of Appeals decision that is on point and binding on this court. The request to delay the decision on the First Cause of Action is denied.

II. Initial Denial

The First Cause of Action challenges the initial denial of the records request. The initial response to the request for records was the "High Level Summary." This was simply a statement of the reasons for denial of release of the records, followed by a restatement of the press release issued the day before by the Assembly Democratic Leadership, with an additional sentence listing the remedial actions taken. It was created as a response to the records request and did not provide, even in redacted form, any of the records requested and must be treated as an outright denial of the requested records.

The reasons given for refusing to disclose the requested records were that "the public interest in treating employee internal complaints as confidentially as possible and respecting the privacy and dignity of the complainant/witnesses" outweighed any public interest in releasing the records. The response went on to explain that there was a public interest in protecting the privacy and dignity of past and future victims, complainants and instilling employee confidence that sensitive complaints would be handled in as confidential a manner as possible. The public purpose of this was to ensure that future victims and witnesses would feel safe reporting concerns and cooperating with internal investigation. In support of this the response stated that staff had asked that the materials not be released and had expressed concerns that release even in redacted form would allow easy identification of the complainant and witnesses. It added that this would have a chilling effect on future reporting of concerns and cooperation with internal investigation, compromising the Legislature's ability to be informed and respond to concerns and complaints. That stated interest outweighed "the public's interest in shedding light on the workings of government and the official acts of elected officials and employees."

The Open Records Law entitles the public to "the greatest possible information regarding the affairs of government and the official acts of those officers and employees who represent them." Wis. Stat. §19.31 There is a presumption of complete public access, the denial of access is generally against the public interest and only in exceptional cases may access be denied. *Id.*

The records requested concerned an investigation by a public office (the LHRO) of an allegation of sexual harassment of a legislative employee by a sitting state representative. Access to the information contained in the requested records serves the public's interest in assessing the performance of the LHRO, the extent and quality of the investigation, the serious misconduct of an elected public official, the effect of that misconduct on employees and the adequacy of the response to the substantiated complaint. These are the kind of interests at the core of the public's right to information about how its government is operating. The LHRO failed to consider that releasing the records also serves a public interest of giving confidence to employees and the public that employee complaints against elected officials are taken seriously, investigated thoroughly and addressed fairly and a public interest in educating other public officials of the bounds of proper conduct toward employees (and educating employees about what conduct they do not have to tolerate and what to do about it) and deterring other officials from misconduct.

The LHRO did not give those public interests sufficient weight in the balancing test when compared with the interest of ensuring future reporting by according confidentiality and privacy.

At a minimum redacted records could have been released at the time of the initial request. I am not persuaded by the argument made by defendants that redaction could not have protected identities because details would have allowed identification by inference. I have reviewed unredacted Disputed Records 1, 2 and 3. Redacting all names (other than Representative Gruszynski's, the LHRO Director and non-witnesses mentioned by witnesses), and redacting other indirectly identifying information, would achieve the public interests in protecting identification of the complainant or witnesses while still satisfying the public interests in release of the record and would result in public access to meaningful amounts of information. The initial refusal to release any records and the eight-month delay in releasing redacted records are violations of the Open Records Law.

The plaintiffs are entitled to summary judgment on their First Cause of Action.

III. Challenges to Redactions

Plaintiff's Second Cause of Action challenges some of the redactions in the records released on August 12. First, they challenge the redaction of two names of persons mentioned in the records but not interviewed during the investigation. Second, they challenge the redaction of a portion of Rep. Gruszynski's statement to investigators related to his health. Exh. H, First Amended Complaint.

Defendants explained their application of the balancing test to these redacted records in a letter from their attorneys to plaintiffs' counsel that accompanied the redacted records. They repeated the public interest in protecting the identity of the victim and witnesses. With respect to the redaction of health information the letter offered no rationale other than "the public interests identified in the original response provided to your clients continue to outweigh any public interest in disclosing this information" and describing the statement as "protected health information." First Amended Complaint, Exh. I. Defendants argue that redaction of the names of persons not interviewed was necessary to protect the complainant and witnesses who were interviewed from being identified by inference.

A. Redaction of Names

The propriety of the challenged redactions of two names depends on the likelihood that the unredacted names would indirectly disclose the identities of victims and witnesses. The redacted names identify a legislator ("Legislator A") and that legislator's employee ("Employee B") who were present at three events before the gathering at which the sexual harassment occurred. The victim and some witnesses were also present at some of those events. The record also identified Legislator A was as sharing a hotel room with Rep. Gruszynski.

Defendants argue that someone who knew who had been with Legislator A and Employee B at the events would be able to deduce who the victims and witnesses were. Rep. Gruszynski, the victim and witnesses were with Legislator A and Employee B at a bar or restaurant. Legislator A and Employee B and a witness left to go to a Planned Parenthood event. The victim and some witnesses and Rep. Gruszynski went to a different restaurant. Later that evening they were at a large gathering at which Legislator A was also present (Employee B is not said to have been at that gathering). The victim, witnesses and Rep. Gruszynski left that event separately and eventually reunited at the bar where the harassment occurred. The text messages in Disputed Record 3 refer to Legislator A as Rep. Gruszynski's roommate.

The possibility that someone who did not already know who the victim and witnesses were could identify them by knowing the names of Legislator A and Employee B is so remote that it carries no weight in analyzing the competing public interests. The public interest in protecting the identity of the victim and witnesses does not require the redaction of the names of persons identified but not interviewed and who did not provide information to the investigation. Therefore, the public interest in access to the records outweighs any competing public interest and redaction of those names violated the Open Records Law.

B. Rep. Gruszynski's Statement

In the cover letter explaining the release of the redacted records, the defendants do not say how they applied the balancing test to the redaction of Rep. Gruszynski's statement. They simply call it "protected health information" without explanation or analysis. In their briefs Defendants argue that the statement, which they concede is not a medical record, is private medical information and that there is a public interest in keeping private certain health information. .

They point to the expectation of privacy employees have when they provide health information to an employer and to the exception to the open meetings law for consideration of medical histories of specific persons. They offer the rationale that a human resources office needs employees to be honest and open about health and medical information in order to make appropriate decisions regarding a person's employment. Employees might not be open with the LHRO if they did not trust that health information they provided would be kept confidential. They give none of these reasons in the cover letter to explain the redaction. On judicial review, the law limits custodians to the reasons given at the time of the denial or partial records release. *Newspapers, Inc. v. Breier*, 89 Wis. 2d 417, 427–28

Even if the reasons offered in the briefs are allowed consideration they are not convincing. Defendants' argument glosses over the fact that Rep. Gruszynski is not an employee, but an elected public official. There is a heightened public interest in his health and statements he makes about it. In addition, he made the statement during an investigation of alleged misconduct, not to seek an accommodation because of a medical condition or to support use of leave or to comply with some requirement of an employer. He volunteered it as information he wished the investigating and disciplining authorities to consider in

assessing the matter.

In addition to the public interests in favor of disclosure identified in Section II, *supra*, there is a strong public interest in knowing what an elected official said during an investigation into his conduct. This includes statements about his health, how any investigating or disciplining authority weighed that information and whether it had any effect on remedial actions taken.

In the context in which this statement was made, the public interests in disclosure outweigh the public interests in confidentiality and the statement should not have been redacted. The redaction violated the Open Records Law and the plaintiffs are entitled to summary judgment on their Second Cause of Action.

IV. Attorney Fees and Costs

The plaintiffs have prevailed on both causes of action and under *Frame* Park are entitled to full attorney fees and costs. They are also entitled to attorney fees and costs under the causal nexus test, which requires that the lawsuit be a cause of the release.

The lawsuit was pending for 5 months before defendants provided plaintiffs redacted records that partially satisfied the Open Records Law. The redacted records were provided only to parties to the lawsuit, to new requesters and to original requesters who made new requests. The custodian was not legally obligated to provide an updated response to original requesters after the initial denial. The plaintiffs did not renew their requests or make new requests but were provided the updated response anyway, only because of their status as plaintiffs in a pending case. Defendants provided the records to induce dismissal of the case: "With the release of these records it is the Assembly's view that there no reason for your clients to continue the above-referenced litigation and that your clients should voluntarily dismiss their case." First Amended Complaint, Exh. H, p. 2. There is sufficient evidence to establish that this lawsuit was a cause of the release of records to these plaintiffs.

CONCLUSION

The defendants misapplied the balancing test and violated the Open Records Law by denying access to even redacted records in their response to the initial records requests. The defendants also misapplied the balancing test and violated the Open Records Law in redacting the names of non-witnesses and in redacting Rep. Gruszynski's health statement. Plaintiffs are entitled to summary judgment and to full attorney fees and costs.

ORDER

IT IS ORDERED:

1. Within 5 days the defendants shall release to plaintiffs the redacted records provided on August 12, 2020, without the challenged redactions.

2. Within 21 days plaintiffs shall file an affidavit of attorney fees and costs and any claim for damages, with a supporting authority and citations to the record. Defendants shall have 14 days after the date

of filing to file any objection and response and to request for a hearing on fees and costs and damages.

3. Numerous unredacted exhibits and briefs were filed and sealed so the court could evaluate the validity of the records denial without publicly releasing records in dispute. Those documents and briefs now sealed in the court records shall remain sealed in order to preserve the confidentiality of records the court has not ordered released or unredacted.