COURT OF APPEALS
DECISION
DATED AND FILED

September 16, 2014

Diane M. Fremgen
Clerk of Court of Appeals

Appeal No. 2014AP95 **Cir. Ct. No. 2012CV247**

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

THE LAKELAND TIMES AND GREGG WALKER,

PLAINTIFFS-APPELLANTS,

V.

LAKELAND UNION HIGH SCHOOL,

DEFENDANT-RESPONDENT.

APPEAL from a judgment of the circuit court for Vilas County: LEON D. STENZ, Judge. *Affirmed.*

Before Hoover, P.J., Stark, J., and Thomas Cane, Reserve Judge.

¶1 CANE, J. In this open records law dispute, The Lakeland Times and its publisher, Gregg Walker (Lakeland Times), seek a record allegedly used by Lakeland Union High School (LUHS) and members of the board of education while hiring a new basketball coach, Rich Fortier. Lakeland Times suspects the

record contains fabricated or selectively edited comments from Fortier's former employers and seeks discovery—confidential or otherwise—so it may prove the record is not truthful and its author engaged in misconduct. Following an *in camera* review of the document, the circuit court granted summary judgment for LUHS.[1]

¶2 We conclude summary judgment was appropriate because the complaint's allegations, taken as true, establish all elements of LUHS's defense. Specifically, LUHS relies on WIS. STAT. § 19.36(10)(d), which prohibits an authority from releasing information "relating to one or more specific employees that is used … for staff management planning."[2]

¶3 We further conclude the circuit court erroneously determined genuine issues of material fact existed as to whether the record was an honest representation of Fortier's former employers' comments. Whether a record accurately captures information from former employers is irrelevant under WIS. STAT. § 19.36(10)(d). Accordingly, Lakeland Times was not entitled to discovery on that matter. We affirm.

BACKGROUND

¶4 Lakeland Times filed the present action on November 7, 2012. The complaint alleged that during the summer of 2012, LUHS officials had narrowed their search for a new boys basketball coach to two finalists, Rich Fortier and

[1] An *in camera* inspection is "[a] trial judge's private consideration of evidence." BLACK'S LAW DICTIONARY 775 (8th ed. 2004).

[2] All references to the Wisconsin Statutes are to the 2011-12 version unless otherwise noted.

Levi Massey. LUHS formed a five-member citizen committee to interview the candidates and make a recommendation to the board of education. The committee recommended Massey after LUHS officials submitted a two-page report containing negative comments about Fortier. Principal James Bouché drafted the report based on his telephone conversations with Fortier's previous employers. The committee was not given a similar document about Massey.

¶5 On August 27, 2012, district administrator Todd Kleinhans included the report in an email to at least one board of education member. A contentious board meeting was held later that day. Before convening in closed session to discuss the hire, a board member raised concerns about the fairness of the committee process, asking why the interview committee had been provided with negative comments about Fortier, but no comments about Massey. The board ultimately decided to hire Fortier.

¶6 The board member's reference to a negative report about Fortier caught Lakeland Times' attention, and it quickly filed an open records request for the report. Kleinhans responded by producing two email messages and Fortier's application materials. However, he refused to produce the report, asserting it was exempt from disclosure under WIS. STAT. § 19.36(10)(d) as a "staff management planning" document.

¶7 Lakeland Times launched its own investigation but was unable to independently identify the sources Bouché interviewed or determine the veracity of the negative comments ascribed to them. It then commenced the present suit, alleging the report did not represent a "fair and true report" of Fortier's former employers' comments, with the comments either "selectively edited to negatively portray" Fortier or fabricated entirely. For these reasons, Lakeland Times argued

the report was not exempt from disclosure under WIS. STAT. § 19.36(10)(d). LUHS denied the allegations of misconduct.

¶8 During discovery, Lakeland Times requested by interrogatory that LUHS divulge the names of the former employers Bouché spoke to. LUHS refused to provide the names or to permit confidential discovery under WIS. STAT. § 19.37(1)(a).

¶9 LUHS then sought summary judgment, asserting the record was exempt from disclosure. Lakeland Times opposed the motion, claiming there was a genuine issue of material fact regarding whether the report contained actual comments from Fortier's former employers. Lakeland Times then filed a motion to compel requesting that LUHS produce the record for *in camera* review by the circuit court and to Lakeland Times' attorney under a protective order prohibiting disclosure to anyone else. The motion further requested an order requiring LUHS to identify each source quoted in the document or appointing a referee to conduct a confidential investigation and prepare a report.

¶10 The circuit court initially denied LUHS's summary judgment motion and granted Lakeland Times' motion to compel. It concluded there was a genuine issue of material fact regarding whether Bouché accurately reported the comments of Fortier's former employers. However, the court stayed further discovery and ordered LUHS to submit the report for *in camera* review.

¶11 After reviewing the record, the court wrote both parties. It noted the report did not identify its author or the quoted sources. Accordingly, the court requested that LUHS submit an affidavit from the author of the report identifying the individuals contacted and averring "that the statements and quotes attributed to these individuals are truly and accurately represented in the 'notes.'" It also

requested an affidavit that the report provided was actually used in the hiring process.

¶12 LUHS submitted the requested affidavit, after which the court vacated its earlier order and granted LUHS summary judgment. The court determined Bouché's report was exempt from disclosure under WIS. STAT. § 19.36(10)(d). It reaffirmed that its earlier decision denying summary judgment had been correct because LUHS's defense was "not supported by evidentiary facts" at the time. However, the affidavit "supplie[d] the necessary information for the court to determine that the … claimed exemption is appropriate and summary judgment warranted." Lakeland Times filed a reconsideration motion, which the court denied. It now appeals.

DISCUSSION

¶13 We are required to determine whether the circuit court properly granted summary judgment for LUHS. We review that issue independently of the circuit court's determination, but applying the same methodology. ***Tews v. NHI, LLC***, 2010 WI 137, ¶40, 330 Wis. 2d 389, 793 N.W.2d 860 (citing ***Green Spring Farms v. Kersten***, 136 Wis. 2d 304, 315-17, 401 N.W.2d 816 (1987)).

¶14 The summary judgment methodology is well established. ***Id.***, ¶41. We first examine the pleadings to determine whether they state claims and present material factual issues for resolution. ***Id.*** If the moving party has made a prima facie case for summary judgment, we then examine the affidavits and other proof of the opposing party to determine whether summary judgment is appropriate. ***Id.*** If the defendant is the moving party, it must show that a defense would defeat the plaintiff's claims. ***Id.***

¶15 Summary judgment is appropriate where there is no genuine dispute of material fact and the moving party is entitled to judgment as a matter of law. WIS. STAT. § 802.08(2). The purpose of summary judgment is "to avoid trials when there is nothing to try." ***Tews***, 330 Wis. 2d 389, ¶42 (citing ***Rollins Burdick Hunter of Wis., Inc. v. Hamilton***, 101 Wis. 2d 460, 470, 304 N.W.2d 752 (1981)).

¶16 The parties request that we interpret and apply Wisconsin's Open Records Law, WIS. STAT. §§ 19.31-.37. "Where a circuit court, determining a petition for writ of mandamus, has interpreted Wisconsin's open records law … and has applied that law to undisputed facts, we review the circuit court's decision de novo." ***ECO, Inc. v. City of Elkhorn***, 2002 WI App 302, ¶15, 259 Wis. 2d 276, 655 N.W.2d 510.

¶17 If the meaning of a statute is plain, we will not inquire further. *See* ***State ex rel. Kalal v. Circuit Court for Dane Cnty.***, 2004 WI 58, ¶45, 271 Wis. 2d 633, 681 N.W.2d 110. Statutory language is generally given its common, ordinary, and accepted meaning. ***Id.*** We interpret a statute "in the context in which it is used; not in isolation but as part of a whole; in relation to the language of surrounding or closely-related statutes; and reasonably, to avoid absurd or unreasonable results." ***Id.***, ¶46.

¶18 "The Wisconsin Open Records Law embodies one part of the legislature's policy favoring the broadest practical access to government." ***Hempel v. City of Baraboo***, 2005 WI 120, ¶22, 284 Wis. 2d 162, 699 N.W.2d 551. Indeed, the public policy statement within the legislation declares 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." WIS. STAT. § 19.31. The statement further declares that the open records

law "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." ***Id.***

¶19 However, the right of the public to access is not absolute. *See* ***Woznicki v. Erickson***, 202 Wis. 2d 178, 194, 549 N.W.2d 699 (1996). Several statutory and common law exemptions prohibit disclosure. One exemption is WIS. STAT. § 19.36(10)(d), which prohibits disclosure of records containing information used for "staff management planning." Paragraph 19.36(10)(d) was enacted in 2003 along with other provisions establishing a category of employee-related records that are absolutely closed to public access. *See* 2003 Wis. Act 47, § 7; ***Local 2489, AFSCME, AFL-CIO v. Rock Cnty.***, 2004 WI App 210, ¶4, 277 Wis. 2d 208, 215-16, 689 N.W.2d 644 (citing Joint Legislative Council Prefatory Note to 2003 Wis. Act 47).[3]

¶20 WISCONSIN STAT. § 19.36(10)(d) generally bars an authority from disclosing employee records used for "staff management planning." The exemption has two requirements. First, the records must contain information "relating to one or more specific employees …." ***Id.*** Second, the record must be "used by an authority or by the employer of the employees for staff management planning …." ***Id.***

[3] WISCONSIN STAT. § 19.36(10)(d)'s enactment followed our supreme court's decision in ***Woznicki v. Erickson***, 202 Wis. 2d 178, 187, 195, 549 N.W.2d 699 (1996), in which the court, despite recognizing a public policy interest in "protecting the personal privacy and reputations of citizens," nonetheless concluded the open records law did not provide a blanket exception for a public employee's personnel or telephone records.

¶21 Our first task when reviewing a grant of summary judgment is to examine the pleadings to determine whether Lakeland Times has stated a claim. In making this determination, we must accept as true "all facts alleged in the complaint and all reasonable inferences from those facts." *See* ***Gritzner v. Michael R.***, 2000 WI 68, ¶6, 235 Wis. 2d 781, 611 N.W.2d 906; *see also* ***Evans v. Cameron***, 121 Wis. 2d 421, 426, 360 N.W.2d 25 (1985) ("Since pleadings are to be liberally construed, a claim will be dismissed only if 'it is quite clear that under no conditions can the plaintiff recover.'" (quoted source omitted)). LUHS contends the complaint fails to state a claim because even if the allegations are true and Bouché falsified or omitted information, the record sought is exempt from disclosure under WIS. STAT. § 19.36(10)(d).

¶22 We agree with LUHS. Lakeland Times seeks a two-page report which, according to the complaint's allegations, was used during Fortier's hiring and contains false or incomplete information from Fortier's former employers. As we explain, this is precisely the type of record the legislature chose to protect from disclosure, not because it may contain false or incomplete information but because it concerns the job performance and reputation of an LUHS employee.

¶23 First, the complaint's allegations demonstrate that the record sought relates to an employee, as required by WIS. STAT. § 19.36(10)(d). The open records law broadly defines an "employee" to include "any individual who is employed by an authority, … or any individual who is employed by an employer other than an authority." WIS. STAT. § 19.32(1bg). Lakeland Times does not argue Fortier is not an "employee" within the meaning of § 19.32(1bg). Questions not argued will not be considered or decided. ***Riley v. Town of Hamilton***, 153 Wis. 2d 582, 588, 451 N.W.2d 454 (Ct. App. 1989).

¶24 Instead, Lakeland Times argues the document does not "relate to" Fortier unless and until LUHS proves the report accurately captured the views of Fortier's former employers. Lakeland Times reasons that fictional or selectively edited comments would not be exempt from disclosure because they represent only the views of their author and not anyone associated with Fortier.

¶25 We reject Lakeland Times' interpretation of WIS. STAT. § 19.36(10)(d). Its reading of the phrase "relating to" does not comport with that phrase's common, ordinary, and accepted meaning. To "relate to" Fortier, the record sought need only have a relationship with him or be connected to him in some way. *See* WEBSTER'S THIRD NEW INT'L DICTIONARY 1916 (unabr. 1993). Even demonstrably false statements "relate" to their subject. Indeed, this principle forms the very basis of defamation law. *See* ***Hart v. Bennet***, 2003 WI App 231, ¶21, 267 Wis. 2d 919, 672 N.W.2d 306 (elements of defamation include a false statement tending to harm one's reputation).

¶26 Further, it would be absurd to hold that a record "relates to" an employee only if it contains verifiably accurate information about that employee. Lakeland Times fails to propose a workable standard for determining whether a record is truthful and honest. *See* ***Kroeplin v. DNR***, 2006 WI App 227, ¶35, 297 Wis. 2d 254, 725 N.W.2d 286 (rejecting DNR's argument that WIS. STAT. § 19.36(10)(d) protects "evaluative judgments" but not "factual information" in part because of the absence of a workable standard for distinguishing between the two). Instead, Lakeland Times contends the veracity of the quotes in the record lies somewhere on a spectrum between "verbatim transcript" and "complete fabrication." What Lakeland Times does not tell us is where the line between disclosure and nondisclosure should be drawn on that spectrum. Indeed, Lakeland Times avoids the issue entirely, asserting it would be "premature to speculate"

how the circuit court would ultimately rule. In short, Lakeland Times would have us remand to the circuit court while giving it virtually no guidance regarding the proper application of the statute.

¶27 Even assuming such a standard could be adopted, the result of Lakeland Times' proposal would be public disclosure of inaccurate records. But Lakeland Times does not explain the logic of shielding accurate employee records from public scrutiny while authorizing the release of inaccurate or false information. Instead, it seems the legislature desired to prohibit the disclosure of all qualifying employee records, regardless of their accuracy or truth.

¶28 Once it is established that the record sought contains information relating to an employee, the party opposing disclosure must also show that the record was "used by an authority or by the employer … for staff management planning …." WIS. STAT. § 19.36(10)(d). Although the open records law does not define "staff management planning," paragraph 19.36(10)(d) does provide a nonexclusive list of qualifying records, which include "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." ***Id.***

¶29 Lakeland Times does not directly argue the record it seeks was used for a purpose other than "staff management planning." However, it obliquely suggests that the report was not used for staff management planning because it was not akin to a letter of reference. Lakeland Times draws the following distinction: "In a letter of reference, the former employer has complete control over the content and presentation of his or her views. With telephone notes, by

contrast, the former employer has no control over content or presentation and must rely upon the interviewer to accurately convey his or her views."

¶30 Lakeland Times' focus on the record's author is unwarranted because that is not the statute's focus. The state prohibits disclosure based on what the record is and how it was used. All employee records used for "staff management planning" are exempt from disclosure, including specifically enumerated documents like "letters of reference" and "other comments or ratings related to employees."

¶31 These specific examples of "staff management planning" records compel the conclusion that the record here qualifies as such. The doctrine of *ejusdem generis* holds that when a general word is used in a statute, followed by specific enumerating words, the general word is construed to embrace something similar to the specific word. *See* ***State v. Engler***, 80 Wis. 2d 402, 408, 259 N.W.2d 97 (1977). It is undisputed the record sought in this case is not a traditional reference letter. However, the complaint alleges the record contains "negative comments" about Fortier's previous job performances, which is certainly fair game for a traditional reference letter. Because the report in the present case is in substance similar to that which might be found in a specifically exempt reference letter, we conclude the report qualifies as a "staff management planning" document.

¶32 In addition, Lakeland Times cannot reasonably argue the record does not contain "comments or ratings" about Fortier. Indeed, that is the report's only alleged content and the reason Lakeland Times wants the record. Accordingly, the complaint establishes that the second component of WIS. STAT. § 19.36(10)(d) has been established.

¶33 Alternatively, Lakeland Times argues summary judgment was inappropriate because LUHS "offered no admissible evidence" to prove the record was exempt from disclosure under WIS. STAT. § 19.36(10)(d). We disagree. LUHS was not required to submit evidence when the very allegations of Lakeland Times' complaint, which we assume to be true, established the relevant facts.

¶34 Perhaps realizing that the record sought comfortably fits within WIS. STAT. § 19.36(10)(d)'s purview, Lakeland Times' primary argument seems to be that the record is not exempt because it may be either partially or totally false. This argument is closely related to its earlier argument regarding the meaning of the phrase "relating to," in that Lakeland Times continues to assert LUHS was obligated to prove that Bouché "accurately reported … the views of Fortier's former employers concerning his suitability for the coach position." Lakeland Times insinuates LUHS's failure to disclose the record or identify Fortier's former employers "provides strong justification" for discovery in this case to the extent it suggests a cover-up. *See* ***Hempel***, 284 Wis. 2d 162, ¶68 ("Evidence of official cover-up would be a very potent reason to disclose public records."). In essence, Lakeland Times argues public policy should compel disclosure.

¶35 Lakeland Times misapprehends the process by which open records requests are honored. When a person makes a general open records request, the record custodian must first determine whether the requested records are subject to an exception that prevents disclosure. ***Id.***, ¶28. Both statutes and the common law may contain blanket exceptions for certain records. ***Id.*** If neither a statute nor the common law prohibit disclosure, only then does the record custodian weigh competing policy interests to determine if disclosure if warranted. ***Id.***

¶36 Here, LUHS determined the record fell within WIS. STAT. § 19.36(10)(d). Based on the allegations in Lakeland Times' complaint, we agree with that determination. Accordingly, we have no need "to determine 'whether permitting inspection would result in harm to the public interest which outweighs the legislative policy recognizing the public interest in allowing inspection.'" ***Hempel***, 284 Wis. 2d 162, ¶63 (quoting ***Woznicki***, 202 Wis. 2d at 192). The legislature has done the requisite balancing and declared this particular class of records entirely off limits.

¶37 Lakeland Times also argues summary judgment was inappropriate because there was a genuine issue of material fact to be resolved—namely, whether the record contains a fair and accurate representation of the comments of Fortier's former employers. While that is a disputed fact, it is not material. As we have established, an employee record's veracity is simply not relevant when determining whether it is exempt from disclosure under WIS. STAT. § 19.36(10)(d).

¶38 The circuit court, at least initially, agreed with Lakeland Times that there was a genuine issue of material fact regarding whether the quotes were accurately recorded. It should be clear that conclusion was in error; the accuracy of the record was irrelevant to whether the statutory exception applied. The court should have granted LUHS's summary judgment motion based on the pleadings alone. That being said, we briefly address Lakeland Times' assertions that the circuit court used improper procedures after it denied LUHS's motion.

¶39 Lakeland Times challenges the *in camera* procedure used by the circuit court. It alleges the court "manifestly erred by assuming the role of fact-finder while denying [Lakeland Times] any of the procedural rights state law

affords a party opposing a motion for summary judgment." Lakeland Times argues the veracity of the record could not be determined without testimony from the individuals Bouché quoted. From this, Lakeland Times reasons the circuit court's decision to grant summary judgment was in error because the court could not have determined the record's accuracy based on its *in camera* review.

¶40 As we have indicated, Lakeland Times' argument is premised on the incorrect notion that the record's accuracy was a material fact in dispute. Lakeland Times believes ***Fox v. Bock***, 149 Wis. 2d 403, 438 N.W.2d 589 (1989), supports its position, but that case is inapposite. There, our supreme court was required to determine whether a study commissioned and prepared for the Racine County Corporation Counsel's office was a "record" as that term is defined in the open records law. ***Id.*** The relevant statute did—and still does—state that a "draft" is not a "record." *See* WIS. STAT. § 19.32(2). The corporation counsel seized upon this definition to argue the study was exempt from disclosure because it was not in final form. *See* ***Fox***, 149 Wis. 2d at 408-09.

¶41 The ***Fox*** court held that the burden of proof to show a document is exempt from disclosure rests with the records custodian, who must make that showing by "the greater weight of the credible evidence." ***Id.*** at 417. Thus, the corporation counsel was required to prove the study was a draft, which the evidence did not bear out. In this case, LUHS does not dispute that it bears the burdens of production and proof. However, the complaint's allegations establish all material facts justifying the withholding. It makes no sense to require LUHS to prove that which Lakeland Times has already alleged to be true.

¶42 This is one of those cases in which a requested record necessarily falls within a statutory or common law exception to the open records law. In such

cases, there is no need for an *in camera* inspection. *See* ***George v. Knick***, 188 Wis. 2d 594, 598, 525 N.W.2d 143 (Ct. App. 1994). For example, a court need not conduct an *in camera* inspection of a judgment of conviction because the contents of that document are well known. ***Id.*** at 599 (citing ***State ex rel. Morke v. Record Custodian***, 154 Wis. 2d 727, 454 N.W.2d 21 (Ct. App. 1990)). Here, the court could have determined from the complaint's representation of the requested record and the circumstances surrounding its creation that the record was subject to the statutory exception in WIS. STAT. § 19.36(10)(d).

¶43 That being said, the circuit court's decision to review the requested record *in camera* was an adequate exercise of its discretion. Sometimes, a court cannot determine whether the document was justifiably withheld without first viewing it. ***George***, 188 Wis. 2d at 599-600. If it is unclear whether the record qualifies for an exemption, the court may view the record *in camera* to determine "whether the information contained in the withheld document is of the character asserted by the custodian." ***Id.*** at 600. In this case, the circuit court believed—albeit mistakenly—it could not test the validity of the custodian's basis for refusal, so it acted within its authority to request the document for *in camera* inspection.

¶44 In addition, we observe Lakeland Times' motion to compel requested *in camera* review. "Generally, where a party 'invites error' on a given issue, we will not review the issue on appeal." ***Fosshage v. Freymiller***, 2007 WI App 6, ¶15, 298 Wis. 2d 333, 727 N.W.2d 334 (refusing to consider assertion of improper procedure where appellant requested the court to proceed in the fashion it did).

¶45 Further, none of Lakeland Times' procedural rights were violated by the circuit court's refusal to authorize confidential discovery. Lakeland Times'

argument is based on a hodgepodge of what it describes as "fundamental precepts of our adversary justice system." For example, quoting ***Hickman v. Taylor***, 329 U.S. 495, 507 (1947), Lakeland Times notes that "[m]utal knowledge of all the relevant facts" is essential and "either party may compel the other to disgorge whatever facts he has in his possession." *See also* ***Glenn v. Plante***, 2004 WI 24, ¶20, 269 Wis. 2d 575, 676 N.W.2d 413 ("In general, the public has a right to every person's evidence at trial."). Lakeland Times complains the court refused to authorize confidential discovery, dictated the contents of Bouché's sealed affidavit, and granted LUHS's summary judgment motion without notifying the parties or providing Lakeland Times an opportunity for further discovery.

¶46 Next, Lakeland Times contends that, at a minimum, its attorney needed to view the record to "assist in presenting a more accurate and balanced picture" to the court. *See* ***Appleton Post-Crescent v. Janssen***, 149 Wis. 2d 294, 303, 441 N.W.2d 255 (Ct. App. 1989). While the open records law authorizes a court to permit the parties or their attorneys to access the requested record "under restrictions or protective orders as the court deems appropriate," such access is not required. *See* WIS. STAT. § 19.37(1)(a); ***Heritage Farms, Inc. v. Markel Ins. Co.***, 2012 WI 26, ¶32, 339 Wis. 2d 125, 810 N.W.2d 465 ("[W]hen interpreting a statute, we generally construe the word 'may' as permissive."); *see also* ***Milwaukee Journal v. Call***, 153 Wis. 2d 313, 319-20, 450 N.W.2d 515 (Ct. App. 1989) (upholding circuit court's decision to bar counsel from participating in an *in camera* review based on risk of inadvertent disclosure). As we have long recognized, "cases may arise where preliminary access even by the [requesting party's] attorney is inappropriate." ***Janssen***, 149 Wis. 2d at 302. Because WIS. STAT. § 19.36(10)(d) does not turn on the accuracy of the employee record sought, and the complaint's allegations established each and every material fact justifying

the withholding, there was nothing Lakeland Times' attorney could have added to the court's analysis.

¶47 Nor are we persuaded the circuit court's decision to require LUHS to file a sealed affidavit was reversible error. The court's request for an affidavit authenticating the record, identifying the individuals quoted within, and averring that their statements were "truly and accurately represented in the 'notes'" was ill-advised because the requested information was largely irrelevant.[4] But since we agree with the court's ultimate conclusion that the record is not subject to disclosure, reversal is not warranted. *See* ***B&D Contractors, Inc. v. Arwin Window Sys., Inc.***, 2006 WI App 123, ¶4 n.3, 294 Wis. 2d 378, 718 N.W.2d 256 (court of appeals may affirm the circuit court on any ground).

¶48 Finally, we reject Lakeland Times' assertion that any of its procedural rights were violated when the court granted LUHS's motion for summary judgment after reviewing the record *in camera*. Lakeland Times argues the circuit court's decision and procedures violate ***Sands v. Whitnall Sch. Dist.***, 2008 WI 89, 312 Wis. 2d 1, 754 N.W.2d 439. It contends that case establishes a fundamental right to take discovery even when subject matter is confidential. For several reasons, we disagree that ***Sands*** supports Lakeland Times in this case.

¶49 First, ***Sands*** was a discovery dispute involving a teacher whose contract was terminated by the school board following a closed-session meeting. ***Id.***, ¶5. The teacher filed suit, alleging the board violated her rights as a school district administrator. ***Id.***, ¶6. During discovery, she requested the identity of

[4] We see nothing wrong with the circuit court's practice of requesting an affidavit to establish that the record provided for *in camera* inspection was the one Lakeland Times sought.

each person present during the closed session and the substance of their statements regarding her contract. ***Id.***, ¶8. The board opposed discovery, asserting a statute authorizing the body to deliberate in closed session created an absolute evidentiary privilege for the content of the board's discussions. ***Id.***

¶50 Despite resting its argument on ***Sands***, Lakeland Times fails to fully appreciate that decision's nuances. As our supreme court made abundantly clear, ***Sands*** was a scope-of-discovery case, not a case about the propriety of releasing confidential information to the public. *See* ***id.***, ¶16. The court ultimately agreed the teacher was entitled to discovery, emphasizing that the "rights of private litigants to engage in legitimate discovery requests are critical to the functioning of our truth and transparency-focused adversary system." ***Id.***, ¶46.

¶51 However, the distinction between the discovery rights of private litigants and the ability of the general public to access confidential governmental information was a key point in the court's decision. The court recognized "there may be situations in which a discovery request implicates sensitive information to which the general public should not be given access." ***Id.***, ¶72. "In such cases, the public is not necessarily entitled to as much information about government matters as a private individual seeking discovery about an issue directly affecting him or her." ***Id.*** Lakeland Times wholly ignores the fact that this is an open records case, not a case involving an aggrieved private litigant.

¶52 Lakeland Times' discovery-based arguments also conflate evidentiary privilege and confidentiality. As ***Sands*** acknowledged, legal privilege and confidentiality are distinct concepts. ***Id.***, ¶32. A privilege provides a legal right to refuse a valid subpoena for certain information. ***Id.*** Confidentiality, on the other hand, merely ensures that sensitive information is kept secret, a goal that

may be reached with appropriate protective orders. ***Id.*** A statute containing confidentiality requirements does not automatically grant an evidentiary privilege. *See* ***id.***

¶53 Lakeland Times repeatedly asserts the information it seeks is discoverable and not subject to an evidentiary privilege, but this argument is directed at a straw man. LUHS does not contend that its employee records are entitled to an absolute evidentiary privilege. LUHS would presumably agree that where a genuine issue of material fact exists regarding whether a record was justifiably withheld, further discovery would be warranted. In this case, however, LUHS argues that such discovery was unnecessary based on the complaint's allegations, which established all material facts justifying the withholding. We agree with LUHS.

¶54 Finally, ***Sands*** specifically endorsed the *in camera* procedure used by the circuit court in this case. "In addition to issuing protective orders, courts may consider motions to seal the record, or may conduct *in camera* proceedings to ensure that the information requested is necessary to the litigant and does not exceed the scope of allowable discovery." ***Id.***, ¶74 (citing ***State ex rel. Ampco Metal, Inc. v. O'Neill***, 273 Wis. 530, 78 N.W.2d 921 (1956)). *In camera* examination is the preferred procedure in open records cases. *See* ***State ex rel. Youmans v. Owens***, 28 Wis. 2d 672, 682, 137 N.W.2d 470 (1965), *reh'g denied and opinion modified*, 28 Wis. 2d 672, 139 N.W.2d 241 (1966).

¶55 In the defamation context, our supreme court has cautioned that a litigant cannot manipulate the rules of discovery to obtain the identity of anonymous political speakers simply by filing a facially unsustainable complaint. *See* ***Lassa v. Rongstad***, 2006 WI 105, ¶42, 294 Wis. 2d 187, 718 N.W.2d 673. In

this case, we similarly conclude a party making an open records request cannot use the discovery process to circumvent the statutory exemptions to disclosure when the complaint's allegations establish the record was properly and justifiably withheld.

By the Court.—Judgment affirmed.

Not recommended for publication in the official reports.