

**COURT OF APPEALS
DECISION
DATED AND FILED**

September 9, 1998

Marilyn L. Graves
Clerk, Court of Appeals
of Wisconsin

NOTICE

This opinion is subject to further editing. If published, the official version will appear in the bound volume of the Official Reports.

A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals. See § 808.10 and RULE 809.62, STATS.

No. 98-1266

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT III**

**STATE OF WISCONSIN EX REL. STEPHEN J.
WEISSENBERGER,**

PETITIONER-APPELLANT,

V.

**ROBERT KELLBERG, SHERIFF, BURNETT COUNTY
SHERIFF'S DEPARTMENT,**

RESPONDENT-RESPONDENT.

APPEAL from an order of the circuit court for Burnett County:
JAMES H. TAYLOR, Judge. *Affirmed.*

Before Cane, C.J., Myse, P.J., and Hoover, J.

CANE, C.J. Stephen J. Weissenberger appeals an order dismissing his mandamus action without costs under § 19.37, STATS. Pursuant to § 19.37(2), STATS., Weissenberger seeks actual costs and \$100 in damages from the Burnett

County Sheriff's Department for its refusal, until served with an alternative writ of mandamus, to comply with his open records request. We affirm.

I. BACKGROUND

On February 4, 1998, Weissenberger, who is confined in the Wisconsin Resource Center, mailed an open records request to the sheriff's department. In his request, Weissenberger sought a listing of the department's employees and law enforcement officers. No further action or follow-up occurred between Weissenberger and the department until April 6, 1998, when the court signed an alternative writ of mandamus. The writ commanded the department to release the requested records. On April 15, the department was served with the writ. In its April 21 answer, the department indicated that it had supplied Weissenberger with the requested information,¹ and it further moved to dismiss the matter. After the court dismissed the matter without costs on April 23 (filed April 24), Weissenberger filed a motion for costs and damages. This appeal followed.

II. ANALYSIS

Section 19.37, STATS., controls enforcement and penalties under the open records laws. *Eau Claire Press Co. v. Gordon*, 176 Wis.2d 154, 159, 499

¹ The department provided the requested information in the form of a booklet. The department argues that because the booklet is free and provided as a public service, "its release is not subject to open records laws." We do not address this argument because the department provides no legal authority to support this assertion. See *State v. Shaffer*, 96 Wis.2d 531, 545-46, 292 N.W.2d 370, 378 (Ct. App. 1980).

N.W.2d 918, 919 (Ct. App. 1993). Under § 19.37(1), the requester² may commence a mandamus action against an authority which wrongfully withholds records. *Id.* Section 19.37(2) governs costs, fees and damages for such mandamus actions and provides that a "court shall award reasonable attorney fees, damages of not less than \$100, and other actual costs to the requester if the requester prevails in whole or in substantial part" in a mandamus action.³

Wisconsin case law interpreting this statute provides that Weissenberger must meet a two-part test to receive costs and damages for a mandamus action. *See Eau Claire Press*, 176 Wis.2d at 160, 499 N.W.2d at 920. First, he must show that the mandamus action was reasonably necessary to obtain the information. *See id.* Second, he must show a "causal nexus" between the mandamus action and the department's surrender of the list. *See id.* To show a causal nexus, Weissenberger must demonstrate that the mandamus action was a substantial factor contributing to the booklet's release. *See id.*

² Under § 19.32(3), STATS., a "requester" is "any person who requests inspection or copies of record, except an incarcerated person" The department argues that Weissenberger is "incarcerated" and therefore is not a proper "requester" entitled to minimum damages under § 19.37(2), STATS.; instead, it argues that the court "may" award damages. Under *Klein v. Wisconsin Resource Center*, 218 Wis.2d 487, 492-93, ___ N.W.2d ___ (Ct. App. 1998), however, Weissenberger is not incarcerated because he is not incarcerated in a penal institution. *See* § 19.32(1c), STATS. (defining "incarcerated person"). In fact, *Klein* directly holds that Weissenberger's confinement at the Wisconsin Resource Center was the result of a civil commitment procedure and that he is therefore a proper requester under the statute. *Id.* at 492-93, ___ N.W.2d at ___. Apparently in response to *Klein*, on April 13, 1998, the legislature amended § 19.37(2)(a) to include committed persons with those not entitled to minimum damages, 1998 WIS. LEGIS. SERV. Act 94 (1997 S.B. 140) (West), effective April 28, 1998, and after the events giving rise to this appeal.

³ In its answer, the department asserts that Weissenberger failed to comply with the notice of claim requirements under §§ 893.80 and 893.82, STATS. In his brief, Weissenberger correctly notes that § 19.37(1n), STATS., specifically provides that §§ 893.80 and 893.82 do not apply to open records laws. In any event, the department does not respond to this argument, and arguments not refuted are deemed admitted. *See Charolais Breeding Ranches, Ltd. v. FPC Secs. Corp.*, 90 Wis.2d 97, 108-09, 279 N.W.2d 493, 499 (Ct. App. 1979).

Weissenberger has satisfied the causal nexus standard.⁴ More than two months passed before the department sent Weissenberger the booklet. In addition, the department sent the information two days after it received the writ. For these reasons, the writ seems to have been a substantial factor contributing to the release. In contrast, however, the writ of mandamus was not reasonably necessary to obtain the booklet. After mailing his request, the only effort Weissenberger made to obtain the information was to institute formal legal proceedings and seek the writ. For example, he did not contact the department to check on the status of his request or inquire whether the department had even received his request. Without more effort on Weissenberger's part to obtain the information, we cannot conclude that the writ was reasonably necessary to obtain the booklet. A mailed request with no follow-up effort does not render a mandamus action reasonably necessary. Because he has not satisfied the two-part test from *Eau Claire Press*, Weissenberger is not entitled to damages and costs under § 19.37(2), STATS.

By the Court.—Order affirmed.

Not recommended for publication in the official reports.

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⁴ We agree with the department that Weissenberger's brief lacks proper argument. While we generally refuse to supply an appellant's argument for him, *see Shannon v. Shannon*, 150 Wis.2d 434, 446, 442 N.W.2d 25, 31 (1989), we have elected to do so here.

MYSE, P.J. (*dissenting*). I dissent from the majority's conclusion that before costs can be imposed under the open records statute something other than a valid open records demand must be made. The conclusion that a person making a valid open records request must do more after waiting a reasonable period of time for a response, such as making a follow-up inquiry as to the reasons the request has not been honored, is without support in the language of the statute or the case law of this state. The majority cites no authority for the proposition that a demand once properly made and after the expiration of a reasonable time in which the request for open records is not honored is insufficient to support an award of costs.

Section 19.35(1), STATS., authorizes the right of any requester to inspect any record. The entire subsection addresses requests for various types of documents or information and speaks of request in the singular. Nowhere in the section is there a requirement that a person seeking open records information needs to submit more than one request. The only limitation to a request for information in this section is found in § 19.35(1)(h), which requires that *a request* reasonably describe the requested information or document. Section 19.35(4) addresses the record custodian's responsibilities once a request is made. Again, this entire subsection refers to request in the singular. Finally, § 19.37, STATS., which addresses enforcement and penalties for violations of the open records law, also refers to requests in the singular. I find no statutory language in the open records law suggesting that a follow-up inquiry must be made. The only requirement incumbent on the requester is an initial request reasonably describing the information or document sought.

If the demand was not received, or if the custodian of the public records has other good and sufficient reasons for failing to honor the request, it is

incumbent upon the custodian to advance such reasons in response to the writ issued. Section 19.35(4)(b), STATS. Here, the sheriff has not suggested that the request was not received or that there was a good and sufficient reason why it could not be honored in the more than two months that elapsed from the time the request was made until a response was received.

The majority's decision suggesting that no costs can be awarded unless the requester does more than make a proper demand upon a custodian of public records does violence to the language and public policy underlying the open records law. To require further follow-up from an open records requester is also contrary to the obligation placed upon the records custodian once a proper request is made to "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." Section 19.35(4)(a), STATS. For this reason I cannot agree with the majority's conclusion and am compelled to file this dissent.

