

**COURT OF APPEALS
DECISION
DATED AND FILED**

May 6, 1999

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. 98-1964

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT IV**

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

PETITIONER-APPELLANT,

V.

WILLIAM D. RIDGELY,

RESPONDENT-RESPONDENT.

APPEAL from an order of the circuit court for Dane County:
P. CHARLES JONES, Judge. *Reversed and cause remanded with directions.*

Before Dykman, P.J., Eich and Deininger, JJ.

PER CURIAM. Stephen J. Weissenberger appeals an order denying his request for damages and costs in this open records case. We conclude there is

no evidence in the record to support the trial court's conclusion, and therefore we reverse and remand for further proceedings.

The record contains the following information relevant to the issue now before us. On April 29, 1998, the circuit court granted Weissenberger leave to commence this action without payment of fees. His petition for writ of mandamus alleged as follows. Respondent William Ridgely is the records custodian for the Department of Corrections. On February 6, 1998, Weissenberger submitted an open records request to Ridgely seeking "the policies regarding 'inmate visiting lists.'" Weissenberger did not receive a response from Ridgely, and he therefore sought relief by mandamus.

On April 30, 1998, the court entered an alternative writ of mandamus directing Ridgely to comply with the request within forty-five days, or show cause why the requested records should not be released. According to the sheriff's certificate of service, the alternative writ was personally served on Ridgely on May 7, 1998, at 8:33 a.m.

Ridgely filed a response to the writ on June 22, 1998. It asserted that he has complied with the open records law by providing Weissenberger with the requested documents, and it asked that the court dismiss the mandamus petition and deny Weissenberger's demand for damages and costs. The next item in the record is a one-sentence order by the court stating: "The petitioner's motion for damages and costs is hereby denied." The court docket entries do not show that any hearing was held.

Weissenberger argues that the court erred by denying him damages under § 19.37(2)(a), STATS. The parties agree that Weissenberger is entitled to damages under this section if his mandamus action was reasonably necessary and

was a substantial factor in causing the release of the records. Ridgely argues that the court's decision is supported by the record, although he concedes that the record is "unfortunately sparse." We would go further and say the record is entirely devoid of support for the order. Although Ridgely's response to the mandamus petition stated that he provided the documents, it did not say when he did so, or why.

The parties have attempted to supplement the record on appeal by including two additional letters in the appendices to their briefs. The proper way to correct the record is a motion under RULE 809.15, STATS. We have not considered these letters in the above analysis because we are bound by the record submitted. See *State v. Aderhold*, 91 Wis.2d 306, 314, 284 N.W.2d 108, 112 (Ct. App. 1979). However, even if we were to consider them, the result would be the same.

The first letter is to Weissenberger from the department's legal counsel, and appears to be the cover letter sent with the requested documents. It is dated May 7, 1998, the same day Ridgely was served with the alternative writ. The other letter is from Weissenberger to the court, dated May 25, 1998, stating that he is entitled to damages because Ridgely did not comply until the writ was served, and requesting that the court sign an enclosed order to that effect if Ridgely did not object within five days.

Ridgely argues that the same-day release of the records is not enough to show a causal nexus, and that the speed of the release shows that it was "already in the works." We disagree. The mandamus action need not be the *sole* cause of the documents' release, only a substantial factor. It would be reasonable to infer that service of Ridgely's writ at 8:33 a.m. was a substantial factor leading

to the release of the documents that day. The inference is strengthened by the fact that the release came from the department's legal counsel, rather than from the record custodian to whom the request was made. This suggests that the release was handled as a response to Ridgely's mandamus action, and had not been placed in the mail before service of the writ. There is no evidence from which to infer that the release had already occurred before service of the writ, or was already planned to occur on that date, or on any date soon thereafter. The request does not appear to be so complex that it could not be complied with in just one full working day.

Therefore, we reverse the order denying Weissenberger damages and costs, and remand for further proceedings. It may be appropriate for the trial court to take additional evidence. If it does not, the court must, at a minimum, make appropriate findings with sufficient explanation to support them.

By the Court.—Order reversed and cause remanded with directions.

This opinion will not be published. *See* RULE 809.23(1)(b)5, STATS.

