

**COURT OF APPEALS
DECISION
DATED AND FILED**

April 8, 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. 98-2832

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT IV**

JOHN MARDER,

PLAINTIFF-APPELLANT,

v.

**BOARD OF REGENTS OF THE UNIVERSITY
OF WISCONSIN SYSTEM,**

DEFENDANT-RESPONDENT.

APPEAL from an order of the circuit court for Dane County:
GERALD C. NICHOL, Judge. *Affirmed.*

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

PER CURIAM. John Marder appeals from an order dismissing his action to enjoin the release of certain public records by the University of Wisconsin-Superior (U.W.S.). Marder is a professor at U.W.S. For the most part, the records in question pertain to certain conduct of Marder, actual or alleged, and

the University's response to it. He contends that we should review the trial court de novo and bar the release of those documents, because the damage to his personal and professional reputation far outweighs the public interest in them. We disagree and affirm.

This dispute began when a newspaper and radio station jointly asked U.W.S. to release records pertaining to any allegations of misconduct or grievances against Marder, copies of his employment history and qualifications, records of any condemnations, warnings or disciplinary action concerning Marder, and any records pertaining to allegations of sexual misconduct against University staff from 1988 to the present.

In response to the request, the University assembled a packet of documents including investigatory files concerning allegations made against Marder by C.L., a U.W.S. student, and by L.B., Marder's friend who later became a U.W.S. student; documents related to travel restrictions placed on Marder as a result of C.L.'s allegations; and documents related to a University employee who filed a police complaint against Marder.¹

According to the documents to be released, C.L.'s allegation concerned conduct in a shared hotel room while the two attended a conference in New York City. She complained to the City of Superior police. The University conducted an investigation, resulting in Marder writing a letter of apology to the student and the University limiting his interaction with students while traveling to

¹ The University also prepared to release documents relating to Marder's position as an adviser to a school newspaper. Marder consents to their release and, therefore, those documents are not at issue in this appeal.

conferences or other events. That the details of the allegation against him are highly embarrassing is not subject to reasonable dispute.

Another set of documents concern a University complaint filed against Marder by L.B., who had a close personal relationship with Marder before becoming a student, although apparently a nonsexual one. She alleged that Marder's efforts to continue their relationship after she became a student were inappropriate and damaged her academically. Her letter of complaint also made embarrassing allegations about Marder's conduct before she enrolled at U.W.S. The University treated the letter as a sexual harassment complaint. The subsequent investigation resulted in a finding, by the University's affirmative action committee, that Marder did not sexually harass L.B. The committee concluded, however, that Marder acted inappropriately, and determined that the decision should be placed in his personnel file. The documents also contained a letter written by the U.W.S. chancellor stating his view that Marder acted unprofessionally and improperly toward L.B.

As noted, the investigation into C.L.'s allegations resulted in certain restrictions placed on Marder's contacts with students while he traveled to conferences. Marder objects to the release of documents concerning those restrictions, because they contain an unsubstantiated allegation of Marder's sexual contact with a third student, and also refer to Marder's sexual harassment of both C.L. and L.B., despite the fact that no such finding was made in either case.

The final set of documents at issue here include a police complaint filed by a University employee, in which she accused Marder of filing complaints with the administration and spreading lies about her on campus. The allegation of Marder's sexual misconduct is repeated in the report.

The personnel records of state employees are not exempt from disclosure under the Open Records Law. See *Wisconsin Newspress, Inc. v. School Dist. Of Sheboygan Falls*, 199 Wis.2d 768, 781-82, 546 N.W.2d 142, 148 (1996). They are subject to the same balancing test as other public records; “whether permitting inspection would result in harm to the public interest which outweighs the legislative policy recognizing the public interest in allowing inspection.” *Newspapers, Inc. v. Breier*, 89 Wis.2d 417, 427, 279 N.W.2d 179, 184 (1979). Applying this balancing test is a question of law that we review de novo. See *Klein v. Wisconsin Resource Center*, 218 Wis.2d 487, 496, 582 N.W.2d 44, 47 (Ct. App. 1998). Favoring disclosure is

[T]he public policy of this state 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. Further, providing persons with such information is declared to be an essential function of a representative government ... [the open records law] shall be construed in every instance with the presumption of complete public access The denial of public access generally is contrary to the public interest, and only in an exceptional case may access be denied.

Section 19.31, STATS.

On the other hand, we must balance this policy of presumptive openness with “the legislative policy of not disclosing data [that] might unduly damage reputations,” with the emphasis on “unduly.” See *Wisconsin Newspress*, 199 Wis.2d at 777-78, 546 N.W.2d at 146; see also *Woznicki v. Erickson*, 202 Wis.2d 178, 187, 549 N.W.2d 699, 703 (1996) (stressing the public policy interest in protecting personal privacy and reputation).

In this case, the balance weighs in favor of releasing the records in question. Marder will undoubtedly suffer embarrassment and damage to his

reputation if the records become public. However, the question is whether he will be unduly damaged by disclosure, when his interests are balanced against the interest of the public. *See Wisconsin Newspress*, 199 Wis.2d at 777-78, 546 N.W.2d at 146. We conclude that he will not. The public has a substantial legitimate interest in student-faculty relations at our state universities, the manner in which school administrations handle student complaints against faculty, and the enforcement of university rules. That is the primary subject of the records in question here, and it presents a compelling reason for disclosure. In contrast, the damage to Marder's interests may not rise to the level he contends. For example, the records disclose that Marder was exonerated on the most serious and damaging allegation against him, that of sexual harassment. Additionally, while Marder complains of damaging hearsay and unsubstantiated allegations contained in the documents, disclosure will reveal them to be just that. One could also reasonably conclude from the documents that Marder's version of all the events in question was the true one and reject the allegations against him as unproven or untrue. In short, Marder's privacy concerns are legitimate and entitled to consideration, but they do not outweigh the public's interest in disclosure of the documents in question.

By the Court.—Order affirmed.

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

