COURT OF APPEALS
DECISION
DATED AND FILED

May 18, 2000

Cornelia G. Clark
Clerk, Court of Appeals
of Wisconsin

No. 99-1378

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

STATE OF WISCONSIN EX REL. TROY R. GAINER,

PETITIONER-APPELLANT,

V.

PAULETTE J. LOCKWOOD,

RESPONDENT-RESPONDENT.

APPEAL from an order of the circuit court for Dodge County: JOSEPH E. SCHULTZ, Judge. *Reversed and cause remanded with directions.*

Before Eich, Vergeront and Roggensack, JJ.

¶1 PER CURIAM. Troy Gainer appeals from an order quashing his petition for a writ of mandamus in an open records case. The dispositive issue is whether the trial court must conduct an *in camera* inspection of the records to determine whether the custodian properly denied access on the ground that they do not contain specific references to Gainer, as required by WIS. STAT. § 19.32(3)

(1997-98)[1] when the request is made by an incarcerated person. We conclude that an *in camera* inspection is necessary in this case, and we reverse and remand for the inspection.

¶2 The open records law provides, with certain exceptions, that "any requester has a right to inspect any record." *See* WIS. STAT. § 19.35(1). However, the definition of requester excludes "committed or incarcerated persons" unless the requested record "contains specific references to that person … and the record is otherwise accessible to the person by law." *See* WIS. STAT. § 19.32(3). Gainer does not dispute that he is an "incarcerated person" as that term is defined in WIS. STAT. § 19.32(1b).

¶3 Gainer submitted an open records request for specific records relating to an inmate protest demonstration and its suppression. The agency's final decision on the request was made by William D. Ridgely, the Department of Corrections record custodian. Ridgely denied the request because the records do not contain specific references to Gainer.[2]

¶4 Gainer petitioned for a writ of mandamus. After briefing, the trial court quashed the writ. The court concluded that "it is clear" that the records do not contain specific references to Gainer. However, there is no indication in the

[1] All references to the Wisconsin Statutes are to the 1997-98 version unless otherwise noted.

[2] The initial decision was made by Paulette Lockwood, and Gainer named her as respondent in his mandamus petition. Later, both Gainer and Lockwood requested that Ridgely be included as a respondent. Lockwood's attorney, who is also counsel for Ridgely, wrote that because Ridgely's decision was the final one by the agency, it was the only decision reviewable in this action. The trial court did not expressly decide the requests to add Ridgely. However, the court apparently agreed with them, because it reviewed only the decision by Ridgely. In this appeal, we confine our discussion to Ridgely's decision.

appellate record that the records were available to the court for review, or that an *in camera* inspection of them occurred.

¶5 On appeal, Gainer argues that the trial court erred by making its decision without reviewing any records. Ridgely argues that Gainer's petition should be quashed because Ridgely determined that there are no specific references to Gainer, and therefore Gainer is not properly a requester.

¶6 The essence of Ridgely's position is that no judicial review is possible when a custodian states that the requested record does not contain a specific reference to the incarcerated person. This is the necessary implication of Ridgely's argument that Gainer's mandamus petition should be quashed. Ridgely's brief assumes, without argument or an independent factual basis in the record, that the custodian was correct in his determination that there are no specific references to Gainer. We have not found any case law addressing the issue of *in camera* review for "specific references." However, we conclude that an *in camera* inspection should occur.

¶7 This case is similar to ***George v. Knick***, 188 Wis. 2d 594, 525 N.W.2d 143 (Ct. App. 1994). In ***George***, an inmate requested copies of certain conduct reports filed against other inmates. The custodian denied the request on the basis of a statutory exception for records which might threaten institution security. *See* WIS. STAT. § 19.35(1)(am)2.c. The trial court denied the mandamus petition without an *in camera* inspection. We reversed, and emphasized the importance of *in camera* inspection. We said that in some circumstances an inspection might not be necessary because the content of the record could be determined from the type of document, such as a judgment of conviction. However, in other cases an inspection would be necessary, even when the record

request was denied under a specific statutory exception. "There is no way to test a record custodian's reasons for withholding a record, the contents of which are unknown, without an *in camera* inspection by a trial court." ***Id.*** at 600. As to that particular inmate's request, we concluded that the potential threat to institution security could not be evaluated without inspecting the records.

¶8 ***George*** appears quite similar to the case before us. Ridgely has denied the request using a specific statutory exception. As in ***George***, there is no way to test the accuracy of that decision other than by *in camera* inspection. ***George*** makes it clear that we are not to simply accept the custodian's conclusion at face value. The records Gainer has requested are not ones whose content can be determined from their description alone. Ridgely's argument, if adopted, would put Gainer in an impossible position by requiring him to show that the documents contain specific references to him, even before he has been able to view the documents or ask a court to inspect them.

¶9 In addition, we do not see any reason *not* to have an *in camera* inspection in this case. The question about the records is limited to a very definite, identifiable issue: do they contain specific references to Gainer? There seems to be no dispute about what documents would be produced for *in camera* inspection, and there is no question about what the court would be looking for. Although the legislature has decided to restrict the record access of incarcerated persons, there is no indication that it has sought to eliminate judicial review of whether a person is properly considered a requester.

¶10 Accordingly, we reverse and remand for an *in camera* inspection as to whether the requested records contain specific references to Gainer.[3] In the trial court's dismissal order, it determined that Gainer's mandamus petition was frivolous and that this constituted a dismissal within the meaning of WIS. STAT. § 801.02(7)(d). Our opinion necessarily reverses that determination as well.

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

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

[3] The initial decision by Lockwood denied the request partly on the ground that release of the records would jeopardize informants and cause a breach of security. The respondents have not relied on that ground in these proceedings. However, if they make such an argument on remand, the trial court may also address those issues in its *in camera* inspection.