COURT OF APPEALS
DECISION
DATED AND FILED

October 19, 2017

Diane M. Fremgen
Clerk of Court of Appeals

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* WIS. STAT. § 808.10 and RULE 809.62.

Appeal No. 2016AP869 **Cir. Ct. No. 2014CV2874**

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

ANIMAL LEGAL DEFENSE FUND,

PETITIONER-APPELLANT,

V.

BOARD OF REGENTS OF THE UNIVERSITY OF WISCONSIN AND RICHARD R. LANE,

RESPONDENTS-RESPONDENTS.

APPEAL from a judgment of the circuit court for Dane County: ELLEN K. BERZ, Judge. *Reversed and cause remanded with directions*.

Before Lundsten, P.J., Sherman and Kloppenburg, JJ.

Per curiam opinions may not be cited in any court of this state as precedent or authority, except for the limited purposes specified in WIS. STAT. RULE 809.23(3).

¶1 PER CURIAM. Animal Legal Defense Fund (ALDF) appeals a judgment of the circuit court dismissing ALDF's action for a writ of mandamus to compel the Board of Regents of the University of Wisconsin and Richard R. Lane, records custodian for the University of Wisconsin's Research Animal Resource Center (collectively, the Board of Regents), to grant ALDF access to documents withheld following an open records request by ALDF, and a declaratory judgment. The documents at issue were created by employees of the University of Wisconsin's Institutional Animal Care and Use Committee[1] (Animal Care and Use Committee) during a meeting of that committee. The court determined that the documents are not "record[s]" for purposes of Wisconsin's public records law, WIS. STAT. §§ 19.31 through 19.39 (2015-16),[2] because they are "notes … prepared for the originator's personal use," and granted summary judgment in favor of the Board of Regents. We conclude that the documents are not excepted from the definition of "record[s]" under WIS. STAT. § 19.32(2) and, therefore, reverse.

BACKGROUND

¶2 In December 2013, ALDF submitted a records request to Lane under the public records law seeking Animal Care and Use Committee's records between December 6, 2011 and December 6, 2013. The request specifically

[1] Institutional Animal Care and Use Committees are federally mandated oversight committees charged with determining whether experiments using live animals comply with the Animal Welfare Act, 7 U.S.C. §§ 2131 *et seq.* *See* 9 C.F.R. § 2.31. The University of Wisconsin's Animal Care and Use Committee is an all-campus advisory committee that serves to advise that institutional official at UW-Madison who has overall authority for the animal program on animal matters.

[2] All references to the Wisconsin Statutes are to the 2015-16 version unless otherwise noted.

requested: "All [Animal Care and Use Committee] investigation notes … including … records produced at meetings pertaining to" all protocols approved by the Animal Care and Use Committee regarding research on non-human primates involving maternal deprivation and social isolation or deprivation, and all protocol revision requests pertaining to those protocols.

¶3 Lane responded to the request by providing ALDF with a copy of some, but not all, requested documents. In a June 2014 letter to Lane, ALDF stated that it sought all "records from [Animal Care and Use Committee] meetings and investigations, including handwritten notes of Committee deliberations, regarding any and all protocols of maternal deprivation and social isolation in primates." Lane responded by advising ALDF that:

> Your emphasis on handwritten notes suggests that you have a particular interest in any such documents produced at meetings…. The official record of [Animal Care and Use] [C]ommittee deliberations is the final version of the minutes of a meeting …. To the extent that any notes are taken at meetings by individual committee members and that any such notes exist, they are not used by the [Animal Care and Use Committee] for any official purpose, and would fall within the [WIS. STAT. § 19.32(2)] exclusion to Wisconsin's definition of "record."… The [Animal Care and Use Committee] staff charged with taking meeting minutes may take notes at meetings to refresh their memories as they prepare the minutes; however, to the extent any such notes exist, they are also not "records" under Wisconsin law.

¶4 In response to a September 2014 request by ALDF for maternal deprivation study records, Lane responded:

> To the extent that your request can reasonably be interpreted to include notes produced by [Animal Care and Use Committee] staff at [Animal Care and Use Committee] meetings even if not in an investigation context, such documents are not "records" within the meaning of the Wisconsin public records law, are not subject to public records requests, and will not be produced to you.

¶5 ALDF brought the present action seeking a writ of mandamus directing the Board of Regents to produce all notes taken by Animal Care and Use Committee staff during Animal Care and Use Committee meetings and an order declaring that the Board of Regents violated Wisconsin's public records law.

¶6 At issue are ten documents that were created during the March 10, 2014 Animal Care and Use Committee meeting. Six of the documents were created by Holly McEntee, the senior administrative program specialist with the University of Wisconsin-Madison Research Animal Resource Center, and four of the documents were created by Christine Finney, who provided office support for the Research Animal Resource Center at the time of the March 10 meeting.[3]

¶7 ALDF moved the circuit court for an in camera review of the documents at issue and for summary judgment. Following an in camera inspection of the documents, the court determined that all ten records are "notes … prepared for the originator's personal use" and, therefore, not "record[s]" subject to disclosure for purposes of Wisconsin's public records law. *See* WIS. STAT. § 19.32(2). As to the ten documents submitted for the court's in camera review, the court denied ALDF's motion for summary judgment, entered summary

[3] In their brief on appeal, ALDF states that "[t]he central issue concerns not McEntee's notes, but those taken by the minutes takers …." Pointing to this statement and deposition testimony by another Animal Care and Use Committee member who previously prepared the official minutes for that committee's meetings that the employee would "gather [McEntee's] notes and my notes … and try to piece it all together" after the meeting, the Board of Regents asserts that "ALDF has been adamant that [] McEntee's notes are not at issue in this case." The circuit court considered all ten notes in its summary judgment decision, and it is clear to us from ALDF's briefing on appeal that ALDF is seeking review of the circuit court's decision as to the ten documents created during the March 10, 2014 meeting by both McEntee and Finney, not just those created by Finney.

judgment in favor of the Board of Regents, and dismissed the present action. ALDF appeals.

DISCUSSION

¶8 ALDF contends the circuit court erred in denying its motion for summary judgment and in granting summary judgment in favor of the Board of Regents. The circuit court made it clear that its summary judgment ruling applies only to the ten withheld documents reviewed in camera by the court. Our review similarly extends to reviewing only whether those ten documents were properly withheld.

¶9 We review a circuit court's decision to grant or deny summary judgment de novo. ***Hardy v. Hoefferle***, 2007 WI App 264, ¶6, 306 Wis. 2d 513, 743 N.W.2d 843. Summary judgment is appropriate if there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. WIS. STAT. § 802.08(2). We draw all reasonable inferences from the summary judgment materials in the light most favorable to the non-moving party. ***Burbank Grease Servs., LLC v. Sokolowski***, 2006 WI 103, ¶40, 294 Wis. 2d 274, 717 N.W.2d 781. Whether an inference is reasonable and whether more than one reasonable inference may be drawn are questions of law. ***Hennekens v. Hoerl***, 160 Wis. 2d 144, 162, 465 N.W.2d 812 (1991).

¶10 In Wisconsin, there is a statutory presumption that all government records are public. ***Voice of Wisconsin Rapids, LLC v. Wisconsin Rapids Public Sch. Dist.***, 2015 WI App 53, ¶10, 364 Wis. 2d 429, 867 N.W.2d 825. WISCONSIN STAT. § 19.31 provides that Wisconsin's public 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 ….” The strong presumption in favor of public access may be overcome, however, where there is a statutory exception, a limitation under common law, or an overriding public interest in keeping the public record confidential. ***Portage Daily Register v. Columbia Cty. Sheriff's Dep't***, 2008 WI App 30, ¶11, 308 Wis. 2d 357, 746 N.W.2d 525. “‘Any exceptions to the general rule of disclosure must be narrowly construed.’” ***Voice of Wisconsin Rapids***, 364 Wis. 2d 429, ¶10 (quoted source omitted).

¶11 At issue here is WIS. STAT. § 19.32(2), which defines “record” for purposes of Wisconsin's public records law. Section 19.32(2) provides that “‘Record’ means any material on which written, drawn, [or] printed … information … is recorded or preserved, … that has been created or is being kept by an authority. ‘Record’ includes, but is not limited to, handwritten, typed or printed pages ….” Section 19.32(2) further provides, however, that “‘[r]ecord’ does not include … *notes … prepared for the originator's personal use* ….” (Emphasis added.)

¶12 The Board of Regents contends that the documents at issue here are “notes … prepared for the originator's personal use” and are, therefore, not “record[s]” subject to disclosure under WIS. STAT. § 19.31. ALDF disagrees, arguing that the documents “are the antithesis of personal notes.”

¶13 For the reasons set forth below, we conclude that the documents at issue are “notes,” but that the “notes” were *not* “prepared for the originator's personal use.”

A. The Records are "Notes"

¶14 The first question we must answer is whether there is a legal or factual dispute as to whether the documents are "notes" within the meaning of WIS. STAT. § 19.32(2). The Board of Regents argues that the documents are "notes" and ALDF does not present this court with a developed argument that the documents at issue are not "notes." However, even if ALDF had presented this court with such an argument, we would conclude that there is no legal or factual dispute that the documents are "notes."

¶15 In ***Voice of Wisconsin Rapids***, we addressed whether the documents at issue in that case, which were created by "district employees in connection with interviews that the employees conducted as part of a district investigation," were "notes" within the meaning of WIS. STAT. § 19.32(2). *See* ***Voice of Wisconsin Rapids***, 364 Wis. 2d 429, ¶¶1, 14-16. Pointing to dictionary definitions of the word "[n]otes," we stated the "ordinary meaning of this common word … covers a broad range of frequently created, informal writings." ***Id.***, ¶15. After inspecting the documents at issue in that case, we concluded that there was not a more suitable word than "notes" to describe the documents. ***Id.***, ¶16. The documents in ***Voice of Wisconsin Rapids*** that were "mostly handwritten and at times barely legible," included copies of post-it notes and telephone message slips, and "in other ways appear to reflect hurried, fragmentary, and informal writing." ***Id.*** Although some of the documents were in the form of "draft letters," we construed those documents to be in the nature of notes, "which were created for and used by the originators as part of their preparation for, or as part of the processing after, interviews that they conducted." ***Id.***

¶16 We have inspected the sealed record containing the documents at issue in this case. Eight of the ten documents are entirely handwritten and at times are barely legible. The other two documents, documents nine and ten, are typewritten preliminary animal research protocol review discussion questions that were distributed to Animal Care and Use Committee members at the March 10, 2014 meeting. Both documents nine and ten have handwritten notations by McEntee on them. The handwriting on all documents appears to reflect hurried, fragmentary, and informal writing. As we concluded about the documents in ***Voice of Wisconsin Rapids***, we conclude here that "we cannot think of a more suitable word to describe how these documents consistently appear than 'notes.'" ***Id.*** Accordingly, we conclude that the withheld documents are "notes" as that word is used in WIS. STAT. § 19.32(2).

B. The Records were not "Prepared for the Originator's Personal Use"

¶17 Having determined that the withheld documents are "notes," we now turn to the question of whether the "notes" were "prepared for the originator's personal use." This is the primary focus of the parties' arguments on appeal.

¶18 In ***Voice of Wisconsin Rapids***, we concluded that the following excerpt from a longstanding attorney general opinion correctly interpreted the phrase "prepared for the originator's personal use":

> "[E]xclusion of material prepared for the originator's personal use is to be construed narrowly. Most typically this exclusion may be invoked properly where a person takes notes for the sole purpose of refreshing his or her recollection at a later time. If the person confers with others for the purpose of verifying the correctness of the notes, but the sole purpose for such verification and retention continues to be to refresh one's recollection at a later time, … the notes continue to fall within the exclusion. However, *if one's notes are distributed to others for the purpose of communicating information* or *if*

> *notes are retained for the purpose of memorializing agency activity,* the notes would go beyond mere personal use and would therefore not be excluded from the definition of 'record.'"

Id., ¶¶21, 25 (quoting 77 Wis. Op. Att'y Gen. 100, 102 (1988)) (emphasis added). We pointed out in ***Voice of Wisconsin Rapids*** that the two emphasized statements in the quoted excerpt above are potentially ambiguous. ***Id.***, ¶23. With regard to the first emphasized statement, "'if one's notes are distributed to others for the purpose of communicating information,'" we stated that it might be difficult to imagine a scenario in which anyone would distribute notes to others for a purpose other than to communicate information of some kind. ***Id.***, ¶24. We observed, however, that one possible scenario could be where the notes are intended only for the originator's personal use, but the notes change hands solely for storage or maintenance purposes. ***Id.***

¶19 As to the second emphasized statement, "if notes are retained for the purpose of memorializing agency activity," we stated that this statement makes a distinction between the situation in which the originator creates and retains notes for the purpose of "establishing a formal position or action" and the situation in which the originator creates and retains the notes for the sole purpose of "'refresh[ing] one's recollection at a later time' regarding an activity the originator has undertaken." ***Id.***, ¶25. We concluded in ***Voice of Wisconsin Rapids*** that "whenever notes are used to establish a formal position or action of an authority, such uses go beyond any personal uses of the originator." ***Id.***

¶20 As previously stated, in the present case we are concerned here with ten "notes" that were created during the March 10, 2014 Animal Care and Use Committee meeting. Six of the notes were created by Holly McEntee, and four of the notes were created by Christine Finney.

¶21 In an affidavit, McEntee averred that she created her six notes "solely to refresh [her] recollection when [she] later assisted in the drafting of meeting minutes" and that she "referenced [her] notes to help another [University of Wisconsin-Madison Research Animal Resource Center] employee, Christine Finney, draft meeting minutes of the March 10, 2014, Graduate School Animal Care and Use Committee meeting." McEntee averred that she did not create the notes "for the purpose of communicating information to any other person."

¶22 During her deposition, Finney testified that her job responsibilities included "tak[ing] minutes at the [Animal Care and Use Committee] meetings, combin[ing] the three notes that I had taken along with [the notes of McEntee] and Gayle [Orner, another employee of the Research Animal Resource Center] and combin[ing] them into the final minutes that would be filed." Finney testified that at the meetings, she would "writ[e] down who was at the … meetings … and [] would try to write down what was said." Finney testified that she would "write down as much as [she] could … the essence of what was said," but that she would not write down things that were "off topic."

¶23 Finney testified that after the meeting, McEntee and Orner would give her the notes they had taken during the meeting and that she would then combine her notes "with theirs into an understandable … draft" of the meeting minutes. Finney explained the process of creating the draft of the meeting minutes as follows: "I would write down my notes more clear[ly] … in draft form. I would look at [McEntee's] notes and interject what [McEntee] wrote into mine. I would do the same … with [Orner's] notes so that everything came into order between the three." Finney testified that she would store her notes, as well as McEntee's and Orner's notes, in a file cabinet used exclusively to store "notes from the meetings." As summarized above, the factual background for the notes

created by McEntee is somewhat different from the factual background for the notes created by Finney, leading to different legal analyses for each. We, therefore, consider each set of notes separately.

¶24 Turning first to the notes created by McEntee, we conclude that those notes were not created for McEntee's personal use. McEntee averred that she created the notes "solely to refresh [her] recollection" and not "for the purpose of communicating information to any other person." However, McEntee's self-professed intent in creating the notes is belied by the summary judgment evidence. As detailed above, Finney testified that after the Animal Care and Use Committee meeting, McEntee gave her notes to Finney, who used McEntee's notes, along with Finney's own notes, to create a draft of the final minutes. We stated in ***Voice of Wisconsin Rapids*** that material cannot be considered to have been prepared for the originator's personal use if the material is "'distributed to others for the purpose of communicating information.'" ***Id.***, ¶21 (quoting 77 Wis. Op. Att'y Gen. at 102). We conclude that the only reasonable inference to be drawn is that McEntee gave the notes she created to Finney for Finney to review and use when drafting the official minutes of the meeting. The notes created by McEntee were distributed to Finney "for the purpose of communicating information," and were, therefore, not prepared for McEntee's personal use. Accordingly, we conclude that the personal use exception does not apply to those notes.

¶25 We turn next to the question of whether the notes created by Finney are not "record[s]" subject to disclosure under WIS. STAT. § 19.32(2). We conclude that they were not "prepared for [Finney's] personal use," and are, thus, subject to disclosure.

¶26 In ***Voice of Wisconsin Rapids***, we agreed with an opinion of the Attorney General that "'if notes are retained for the purpose of memorializing agency activity, the notes would go beyond mere personal use" and would therefore not fall within the personal use exception under WIS. STAT. § 19.32(2)." ***Id.***, ¶21 (quoting 77 Wis. Op. Att'y Gen. at 102). We went on to state in ***Voice of Wisconsin Rapids*** that it "seems obvious that whenever notes are used to establish a formal position or action of an authority, such uses go beyond any personal uses of the originator." ***Id.***, ¶25. Providing additional direction is our decision in ***State v. Panknin***, 217 Wis. 2d 200, 579 N.W.2d 52 (1998). In ***Pankin***, we concluded that sentencing notes that were created by a circuit court judge were not public records because the notes were "a voluntary piece of work completed by the trial court for its own convenience and to facilitate the performance of its duties." ***Id.*** at 212. In reaching that decision, we cited cases from other jurisdictions that held that where notes were prepared at the initiative or convenience of the public employee, for the employee's own convenience, the notes were prepared for the personal use of the public employee and not subject to disclosure under the applicable public records law. *See* ***id.*** at 211-12.

¶27 The summary judgment evidence establishes that Finney's primary job function was to write down who was present and what was said at the Animal Care and Use Committee meetings, and then to take her notes, as well as the notes prepared by McEntee and Orner, to create a draft of the final, official minutes of the meeting. Finney testified at her deposition that when taking notes at Animal Care and Use Committee meetings, she would attempt to "write down as much as [she] could" as to what was said at the meeting that was not "off topic." Finney testified that she would then "write down [her] notes more clear[ly] … in draft form" and insert in the draft what McEntee and Orner had written in their notes.

¶28 No reasonable inference can be drawn from the evidence that Finney's creation of the notes at the March 10, 2014 meeting was voluntary, at her own initiative, and for her own convenience. Rather, the only reasonable inference from Finney's deposition testimony is that Finney was obligated to take notes at the meeting as part of her employment and that she used those notes to "memorializ[e] agency activity" in the form of the official minutes of the meeting. Accordingly, we conclude that the Finney's notes were not created for Finney's "personal use" and are therefore not excepted from the public records law under WIS. STAT. § 19.32(2).[4]

CONCLUSION

¶29 For the reasons discussed above, we conclude that the ten withheld notes prepared by McEntee and Finney were not created for their "personal use" within the meaning of that phrase in WIS. STAT. § 19.32(2). Accordingly, we reverse summary judgment in favor of the Board of Regents and remand to the circuit court with directions that summary judgment be granted in favor of ALDF as to the ten withheld notes in dispute.[5]

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

[4] In its brief on appeal, the Board of Regents puts forth nine "factors" that it asserts establish that the ten withheld notes in dispute were created for "personal use." We discuss many of the "factors" in our discussion above. However, those "factors" that we do not address are omitted from our discussion because the factors are relevant to the issue of whether the documents were "notes," which we determined above is not in dispute, or because the Board of Regents' arguments as to those factors fail to explain why the notes were created for "personal use" or are not sufficiently developed to warrant a response.

[5] The Board of Regents moves this court to strike a portion of ALDF's reply brief. We deny the motion.

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