

**COURT OF APPEALS
DECISION
DATED AND FILED**

February 8, 2001

Cornelia G. Clark
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 WIS. STAT. § 808.10 and RULE 809.62.

No. 00-1728

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT IV**

THOMAS WILLAN,

PLAINTIFF-APPELLANT,

V.

SHERIFF STEVEN ROWE,

DEFENDANT-RESPONDENT.

APPEAL from an order of the circuit court for Columbia County:
PATRICK J. TAGGART, Judge. *Reversed and cause remanded.*

Before Roggensack, Deininger and Lundsten, JJ.

¶1 PER CURIAM. Thomas Willan appeals from an order that quashed a previously issued writ of mandamus requiring the sheriff of Columbia County to comply with Willan's public records request. The trial court quashed the writ on the dual grounds that the request was overly broad and that the Columbia County

District Attorney's office had already provided Willan with all of the relevant documents in existence. While we agree that a large portion of Willan's request went beyond the scope of the public records law, we conclude that his request was sufficient in other respects to require a response from the records custodian. Furthermore, because a motion to quash is to be decided based on the sufficiency of the petition, we conclude that the trial court erred procedurally in making factual findings about whether the requested documents had already been provided. Accordingly, we reverse the order quashing the writ and remand for further proceedings.

¶2 Before proceeding to the merits, we will comment on Willan's charge that the trial court's decision indicates either incompetence or corruption. We see nothing in the record to indicate that the trial court here engaged in anything but a conscientious attempt to determine whether the relief Willan requested was warranted. It appears that the trial court made a common sense determination that the writ was not going to yield any new information for Willan. With the benefit of hindsight, we find in this opinion that the trial court skipped a procedural step. That error, however, does not warrant Willan's scurrilous personal attack. We have cautioned Willan against such attacks in the past, and again emphasize that they have no place in an appellate brief.

BACKGROUND

¶3 On January 21, 2000, Willan faxed a letter to Columbia County Sheriff Steven Rowe asking for copies of any and all documents relating to Deputy Todd Horn's whereabouts and actions during his shift on April 16, 1999. Willan also asked the sheriff to respond to eight specific questions about Horn's actions on the day in question, focusing on a background check which Willan

believes Horn performed on that date. Willan renewed the requests on February 7, 2000.

¶4 On February 16, 2000, Columbia County Corporation Counsel Joseph Ruf wrote a letter informing Willan that the information requests had been forwarded to him. Ruf indicated that he would provide Willan with a response by early March, but never did so. In mid-March, Willan asked the attorney general's office to take action under WIS. STAT. § 19.37(1)(b) (1999-2000).¹ An assistant attorney general declined to file suit on the grounds that Ruf's letter indicated that a response was intended, but noted that the request for documents relating to Horn's whereabouts appeared to be sufficient to require a response under the open records law.

¶5 On March 29, 2000, Willan petitioned for a writ of mandamus compelling the sheriff to comply with his records request. On April 11, 2000, the trial court issued a writ of mandamus compelling the sheriff to turn over within five days all law enforcement records relating to Horn's whereabouts during Horn's shift on the day in question, plus any relevant transmittal logs, dispatch recordings, background check documents, and interoffice memos relating to Willan.

¶6 The sheriff filed a motion to quash the writ on April 14, 2000, alleging that Willan's request for documents was insufficient. Willan moved to strike the motion to quash as frivolous. The trial court heard arguments on the motions, but did not take testimony. At the conclusion of the motion hearing, the

¹ All references to the Wisconsin Statutes are to the 1999-2000 version unless otherwise noted.

trial court denied Willan's motions to strike, granted the sheriff's motion to quash the previously issued writ of mandamus, and dismissed the case. Willan appeals.

STANDARD OF REVIEW

¶7 WISCONSIN STAT. § 783.01 provides that a motion to quash a writ of mandamus shall be deemed a motion to dismiss the complaint under WIS. STAT. § 802.06(2). We will, therefore, independently determine whether the facts alleged in the petition for a writ of mandamus state a cause of action under the public records statute. *See State ex rel. Morke v. Donnelly*, 155 Wis. 2d 521, 526, 455 N.W.2d 893 (1990).

ANALYSIS

¶8 The public has a right to inspect and copy records in the possession of government entities, except in limited circumstances when a public interest in nondisclosure outweighs the general policy in favor of disclosure. *See* WIS. STAT. §§ 19.35(1) and 19.31; *Oshkosh Northwestern Co. v. Oshkosh Library Bd.*, 125 Wis. 2d 480, 482-83, 373 N.W.2d 459 (Ct. App. 1985). "Each authority, upon request for any record, shall, 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." WIS. STAT. § 19.35(4)(a). A writ of mandamus is the appropriate remedy to pursue when an official denies or fails to respond to a public records request. WIS. STAT. § 19.37(1); *Newspapers, Inc. v. Breier*, 89 Wis. 2d 417, 427, 279 N.W.2d 179 (1979).

¶9 In his petition for a writ of mandamus, Willan alleged that he had made a request for public documents to the appropriate custodian of those documents and that he had received neither the documents nor a written response

stating why his request was being denied. We are satisfied that his petition stated a proper claim under the public records law described above.

¶10 The sheriff argues that Willan's request was overly broad. We agree that those portions of Willan's letter which asked for information regarding where, when, and why Deputy Horn took certain actions lie beyond the scope of the public records law. The public records statute applies to records which are already in existence. It does not require public officials to generate new documents based on information which may be within the officials' knowledge. However, Willan's request for any and all documents pertaining to a certain deputy's actions on a particular day was appropriately tailored to existing documents. Therefore, the sheriff, or his delegate,² was statutorily required to provide either the requested documents or a written response explaining why the documents would not be provided.

¶11 The sheriff next contends that the requested documents were, in fact, provided to Willan. This factual assertion may be correct, but the trial judge was not empowered to make a finding on the topic based on the record in this case. As the sheriff acknowledges, whether the petitioner has stated a cause of action is to be determined solely upon the facts alleged in the petition. Nothing in Willan's petition suggests that he ever received the requested documents. The sheriff's assertion to the contrary may have created a factual dispute, but it did not affect the sufficiency of the petition. If there was a factual dispute between the parties as to whether the requested documents had been provided, that dispute could not be

² Willan seems to imply that the sheriff should have personally responded to his request. However, we see no reason why the sheriff could not properly delegate the task of responding to Willan's public records request to corporation counsel as he did here. *See* WIS. STAT. § 19.33(1).

resolved based upon the arguments of counsel or the parties. Without competent evidence, the trial court could not make factual findings on that disputed issue.

¶12 Finally, we note that even if the district attorney's office had provided Willan with copies of all the relevant documents which had at one time been in the possession of the police department, the sheriff was still obligated by statute to explain in writing his reasons for not providing the requested documents. WIS. STAT. § 19.35(4)(b). We therefore reverse the order quashing the writ of mandamus and remand for further proceedings in accordance with this decision.

By the Court.—Order reversed and cause remanded.

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

