COURT OF APPEALS
DECISION
DATED AND RELEASED

July 13, 1995

NOTICE

No. 93-3451

STATE OF WISCONSIN

IN COURT OF APPEALS
DISTRICT IV

STATE OF WISCONSIN EX REL.
THOMAS W. REIMANN,

Petitioner-Appellant,

v.

CAPTAIN JOSEPH TOPP,

Respondent-Respondent.

APPEAL from an order of the circuit court for Dane County: DANIEL J. MOESER, Judge. *Affirmed in part; reversed in part and cause remanded with directions.*

Before Eich, C.J., Dykman and Vergeront, JJ.

PER CURIAM. Thomas Reimann, an inmate at the Green Bay Correctional Institution (GBCI), appeals from an order denying his petition for mandamus in this open records action. For the reasons set forth below, we affirm in part and reverse in part.

BACKGROUND

In November 1992, Reimann received a telephone call at GBCI from an old "crime partner" named Marc Fenne, then in custody in the Dane County Jail. According to police, the two discussed details of a plan for Reimann's escape from custody. According to Reimann, the discussion was confined to "small talk" and other miscellaneous matters.[1] It is undisputed, however, that Fenne called Reimann on behalf of the Dane County Sheriff Department (DCSD).

In January and February 1993, Reimann made three open records requests to the DCSD, seeking all investigative reports and other records related to Fenne's call. After receiving two of the requests, DCSD Detective Bongiovani contacted both the Brown County Sheriff Department and GBCI security personnel, asking whether either was interested in pursuing an investigation into the phone discussion between Reimann and Fenne. In a supplemental report prepared on February 3, 1993, Bongiovani stated that "if [GBCI] was not interested in pursuing an investigation, we would be forced to send Tom Reiman [sic] the reports." GBCI responded by requesting the reports, which DCSD sent. The Brown County Sheriff Department declined the invitation to investigate.

By letter dated February 12, 1993, DCSD formally denied Reimann's request on the grounds that (1) DCSD no longer had the records; and (2) the investigation at GBCI was ongoing and involved security concerns. Reimann attempted to obtain the records from GBCI, which referred him to DCSD. Further attempts to obtain the records from DCSD were unavailing. Quoting the language of Bongiovani's February 3 report ("we would be forced"), Reimann argues DCSD wrongly forwarded the records to GBCI on the pretext of a GBCI investigation, and that the trial court erred when it failed to require that DCSD comply with his open records request.

OPEN RECORDS REQUEST

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[1] Reimann obtained a transcript of the telephone conversation as the result of a separate proceeding. However, the transcript is not part of the record of this appeal.

The open records law exempts from disclosure records "collected or maintained" that implicate "the security of any state correctional institution." Section 19.35(1)(am) and (2)(c), STATS. The only legally relevant question in applying this exemption is whether the records sought to be disclosed implicate security concerns. Thus, the fact that Bongiovani solicited GBCI's investigation is irrelevant. We reject Reimann's invitation to construe the exemption in light of Bongiovani's intent. Unlike a criminal statute where "intent" is relevant to whether a crime has been committed, nothing in the text of the exemption indicates that intent is relevant to whether the security exemption pertains to particular information.[2]

Reimann argues that the trial court erred in failing to *sua sponte* review the records *in camera*. In support, he cites **State ex rel. Youmans v. Owens**, 28 Wis.2d 672, 137 N.W.2d 470 (1965), *modified on other grounds*, 28 Wis.2d 672, 139 N.W.2d 241 (1966), and **State ex rel. Morke v. Donnelly**, 155 Wis.2d 521, 455 N.W.2d 893 (1990). The cases do not control here.

Youmans stands for the proposition that where a custodian cites an exemption to the openness requirement and denies an open records request, the circuit court shall conduct an *in camera* inspection to determine whether the requested records meet the standards of the cited exemption. *See* **Youmans**, 28 Wis.2d at 682, 137 N.W.2d at 475. **Morke** stands for the proposition that where the records custodian cites an exemption to the openness requirement and the contents of the records are necessarily unknowable by the trial court, an *in camera* inspection is required. *See* **Morke**, 155 Wis.2d at 533, 455 N.W.2d at 898. Together, the two cases stand for the proposition that *in camera* inspection is required in an open records case where the trial court cannot otherwise determine whether the records requested fall under the exemption claimed for it by the records custodian *because* the contents of the records are unknowable without inspection.

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[2] Further, Reimann's interpretation of DCSD's motives rest on surmise. While Reimann seeks to impute an improper cover-up to Bongiovani's warning, that warning (that DCSD might be "forced to" disclose the records) is also consistent with a lawful concern to maintain the confidentiality of records concerning a security risk.

As stated above, these cases do not control. Rather, the situation here is similar to that in *Newspapers, Inc. v. Breier*, 89 Wis.2d 417, 279 N.W.2d 179 (1979), where the contents of the records sought were knowable without *in camera* inspection. Stated otherwise, the trial court (and the supreme court) could determine whether the requested records fell under an exemption created to protect the personal reputation of persons arrested by the police without *in camera* inspection. Thus, *Newspapers* stands for the proposition that where the contents of the requested records are knowable without *in camera* inspection, lack of *in camera* inspection is not error. *See Newspapers*, 89 Wis.2d at 430, 279 N.W.2d at 185; *see also State ex rel. Morke v. Donnelly*, 155 Wis.2d at 532, 455 N.W.2d at 898 (*in camera* inspection not necessary where contents of records are knowable without inspection).

In this case, Reimann requested records concerning a phone call made to him by Fenne. As in *Newspapers*, the contents of these records are knowable without *in camera* inspection. Indeed, the trial court relied upon the knowable nature of the records in making its decision.

FEES

The circuit court entered an order deducting twenty-five dollars from Reimann's inmate account for court fees. Reimann argues that the trial court erred because the order had the effect of deducting the amount from his future earnings, rather than restricting the amount to that currently in his inmate account. We agree that the trial court erred, and reverse on this issue.

Section 814.29(3)(b), STATS., provides:

If the affiant is a prisoner ... a request for leave to commence or defend an action, proceeding, writ of error or appeal without being required to pay fees or costs or to give security for costs constitutes consent ... [that if] judgment is in favor of the opposing party ... [the prisoner] consent[s] for the court to order the institution to deduct the unpaid fees and costs ... *from*

the amount in the inmate's account at the time the judgment was rendered.

(Emphasis supplied.)

The court did not make an order "from the amount in the inmate's account" at the time judgment was rendered but simply entered an order for the entire amount. This was error. We remand so that the trial court may enter an order that conforms to § 814.29(3)(b), STATS. The court shall determine what amount was in Reimann's account at the time the original order was entered and enter an order not exceeding that amount. If Reimann has paid more than that amount, the trial court shall enter an order refunding the overage to Reimann's inmate account.

By the Court.—Order affirmed in part, reversed in part and cause remanded with directions.

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