

**COURT OF APPEALS
DECISION
DATED AND RELEASED**

March 7, 1996

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(1), STATS.

NOTICE

This opinion is subject to further editing. If published, the official version will appear in the bound volume of the Official Reports.

No. 95-0232

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT IV**

JOHN F. BAUSCH,

Petitioner-Appellant,

v.

**JOHN HUSZ, CHAIRMAN,
WISCONSIN PAROLE COMMISSION,**

Respondent-Respondent.

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

Before Gartzke, P.J., Dykman and Sundby, JJ.

PER CURIAM. John Bausch, an inmate at Oakhill Correctional Institution, appeals from an order dismissing his claim against John Husz, Chairman of the Wisconsin Parole Commission. Bausch claimed damages for Husz's alleged violation of the open records law. Because we conclude that the trial court properly dismissed the claim, we affirm.

On July 31, 1994, Bausch asked Husz in writing for a copy of the tape of his recent inmate interview with the parole commission. When he received no response, he commenced this mandamus action on August 30, 1994, demanding a court order for release of a tape copy. He also asked for damages.

Husz was served on September 8, 1994. On October 11, his assistant, Gail Faust, sent Bausch a copy of the tape. In an accompanying letter, she explained that Husz had received the letter on August 3, but that she had mistakenly attached it to other documents and had just relocated it.

Husz then moved to dismiss this action because Bausch had received the tape, and because Bausch was not entitled to damages for Faust's unintentional failure to timely provide it. The trial court granted the motion over Bausch's objection that he was entitled to damages under § 19.37(2) and (3), STATS. The issue on appeal is whether, on the undisputed facts, damages are available.

Inmates' parole interviews are exempt from the Open Meeting's Rule and the parole commission is, therefore, not required to disclose the records of those interviews to the public. Sections 19.85(1)(d) and 19.35(1)(a), STATS. However, under § 19.35(1)(am), disclosure is nevertheless mandatory as to the subject of the document, in this case, the parole interviewee. It was therefore under that section that Bausch asked for and received the taped copy.

Because disclosure was made under § 19.35(1)(am), STATS., rather than § 19.35(1)(a), Bausch cannot recover damages. In the latter case, damages of at least \$100 are available if a lawsuit could reasonably be regarded as necessary to obtain the document, and a causal nexus exists between the lawsuit and the surrender of the document. *See* § 19.37(2)(a), STATS; *Racine Educ. Ass'n v. Racine Bd. of Educ.*, 145 Wis.2d 518, 522, 427 N.W.2d 414, 416 (Ct. App. 1988) (quoting *Cox v. United States Dep't of Justice*, 601 F.2d 1, 6 (D.C. Cir. 1979)). In contrast, under § 19.35(1)(am), damages are only available if "the court finds that the authority acted in a willful or intentional manner." Section 19.37(2)(b). Here, undisputed facts establish that Faust was merely negligent in delaying her response to Bausch's request. There is no evidence of a willful or intentional delay.

Additionally, Bausch claims punitive damages under § 19.37(3), STATS. Punitive damages are available only if the court finds that the record custodian has arbitrarily and capriciously denied or delayed a response to a request. *Id.* Again, the undisputed facts establish mere negligence. There is no evidence of an arbitrary and capricious delay in providing Bausch the taped copy.

By the Court.—Order affirmed. Costs are assessed against Bausch and shall be deducted from the amount in his prison account as of the date of this decision. *See* § 814.29(3)(b), STATS.

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