

**COURT OF APPEALS
DECISION
DATED AND RELEASED**

January 30, 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. 95-1898

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT III**

BOB STEIGERWALDT,

Plaintiff-Appellant-Cross Respondent,

v.

**TOWN OF KING, LINCOLN
COUNTY CLERK, HELEN KENNEY,**

Defendants-Respondents-Cross Appellants.

APPEAL and CROSS-APPEAL from a judgment of the circuit court for Lincoln County: JAMES P. JANSEN, Judge. *Affirmed in part; reversed in part and cause remanded with directions.*

MYSE, J. Bob Steigerwaldt appeals a judgment that denied his writ of mandamus for a copy of a tape-recorded statement made by Helen Kenney, the Town of King clerk, at a town board meeting. The judgment also awarded Steigerwaldt damages of \$200 plus costs based on the Town's violations of the open records law. On appeal, Steigerwaldt contends that: (1) the tape recording of Kenney's statement at the town board meeting was a public record that he had a right to receive a copy of pursuant to § 19.35, STATS.; (2) the trial court erred by failing to award him reasonable attorney fees; and (3) the trial court erred when it refused to award him punitive damages. On cross-

appeal, Kenney and the Town of King challenge the trial court's finding that the Town failed to timely furnish public records to Steigerwaldt.

This court concludes that: (1) sufficient evidence supports the trial court's conclusion that the tape recording was Kenney's personal property and therefore not subject to the open records law; (2) the trial court erred by failing to award Steigerwaldt reasonable attorney fees; (3) the trial court did not err by refusing to award punitive damages; and (4) the evidence supports the trial court's finding that the Town violated the open records law by failing to timely furnish public records to Steigerwaldt. The judgment is therefore affirmed in part, reversed in part and remanded for a determination of reasonable attorney fees.

This case arises from a series of demands Steigerwaldt made for Town records. Steigerwaldt made written requests for several records including minutes of Town meetings, the November 1990 Town poll list, and the tape recording of Kenney's statement made at the July 11, 1994, Town meeting. Kenney never provided Steigerwaldt with the poll list because she could not find it; she furnished the minutes of the Town meeting but did so in an untimely fashion; and she refused to provide a copy of the tape recording because it was her personal property and not an official record.

Kenney testified that at the July 11, 1994, town board meeting, she requested permission from the town board to make a statement and have the statement tape-recorded. Kenney explained that the reason for her request was that various inaccurate statements had been attributed to her in the past and she wished to have an accurate record of the statement. Kenney had brought her own personal tape recorder and tape and a citizen in the back of the room operated the machine for her. Kenney kept the tape at home, never stored the tape with other Town records and did not use the tape in preparing the minutes of the Town meeting. Following trial, the court determined that the tape recording was Kenney's personal property and therefore not a public record subject to an open records request. The court concluded however that the Town violated the open records law by failing to timely furnish Steigerwaldt with the polling list, a letter from state representative Tom Ourada, and minutes of Town meetings. Accordingly, the court awarded Steigerwaldt \$200 in damages plus costs under § 19.37(2)(a), STATS. However, the court did not award reasonable

attorney fees and refused to impose punitive damages, concluding that the Town's violations were not arbitrary and capricious.

Steigerwaldt first contends that the trial court erred by concluding that the tape recording of Kenney's statement at the town board meeting was not a public record subject to the open records law. This issue raises a mixed question of law and fact because it involves a determination of the facts that occurred and a legal conclusion as to the status of the tape based upon those facts. This court accepts the trial court's findings of fact unless they are clearly erroneous. Section 805.17(2), STATS. However, application of a statute to the facts presents a question of law that this court reviews without deference to the trial court. *Wisconsin State Journal v. University of Wisconsin-Platteville*, 160 Wis.2d 31, 36, 465 N.W.2d 266, 268 (Ct. App. 1990).

Section 19.35(1)(a), STATS., states that any requestor has a right to inspect any record, except as otherwise provided by law. Section 19.32(2), STATS., provides:

"Record" means any material on which written, drawn, printed, spoken, visual or electromagnetic information is recorded or preserved, regardless of physical form or characteristics, which has been created or is being kept by an authority. "Record" includes, but is not limited to, handwritten, typed, or printed pages, maps, charts, photographs, films, recordings, tapes (including computer tapes), computer printouts, and optical disks. "Record" does not include drafts, notes, preliminary computations, and like materials prepared for the originator's personal use or prepared by the originator in the name of a person for whom the originator is working; materials which are purely the personal property of the custodian and have no relation to his or her office

Under the clear and unambiguous language of § 19.32, the tape recording is not an official record subject to inspection if it is Kenney's personal property. The court made the following findings of fact:

1. The tape was Kenney's personal property.
2. The tape was made for purely personal reasons and was not used for any Town reason.

These findings of fact are not clearly erroneous because there is sufficient evidence to support each finding. Kenney testified that the tape and tape recorder were her personal property, the recording was made by a member of the public at the back of the room, she did not use the tape to prepare the minutes of the meeting or for any other Town purpose, she kept the tape at home, and she never placed the tape among Town records.

However, Steigerwaldt contends that the tape recording is an official record because it was of an "official statement." This court disagrees. Not every recording of an official statement results in the creation of a public record. Just as official statements being made by the President of the United States, or the Governor of the State of Wisconsin could be tape-recorded by any person for his or her personal use and not become an official record, so too can an official statement by a town clerk. In this case, the recording was made for Kenney's personal reasons by a member of the public. Kenney did not use the tape in preparing the meeting's minutes and the tape recorder and tape were her personal property. This is sufficient to support the trial court's conclusion that the tape recording was Kenney's personal property and used solely for personal reasons. Therefore, this court affirms the trial court's determination that the tape recording is not an official record subject to the open records law.

The trial court, however, concluded that the Town failed to timely provide minutes of meetings and the 1990 poll list to Steigerwaldt after written requests. This is a violation of the open records requirement and is sufficient to support the damage award of \$200 plus costs. On cross-appeal, the Town does not contest the trial court's findings as to the poll list or minutes, but merely contends that the court erred by considering a letter written by Tom Ourada to the town board because there was no written request under § 19.37(1), STATS. Because there were other properly filed written requests that the Town did not honor, it is not necessary to examine the contention that the court erred by considering the letter. The failure to furnish the poll list and the untimely furnishing of the minutes is a sufficient basis for the imposition of damages awarded by the court.

Next, Steigerwaldt contends that the trial court erred by refusing to award reasonable attorney fees. Section 19.37(2)(a), STATS., provides in part:

The court *shall* award reasonable attorney fees, damages of not less than \$100, and other actual costs to the requester if the requester prevails in whole or in substantial part in any action filed under sub. (1) relating to access to a record or part of a record under s. 19.35(1)(a). (Emphasis added.)

By using the word "shall," § 19.37(2)(a) requires the court to award reasonable attorney fees if Steigerwaldt prevailed in whole or substantial part. See *State ex rel. Young v. Shaw*, 165 Wis.2d 276, 292, 477 N.W.2d 340, 347 (Ct. App. 1991). Because the trial court awarded damages under § 19.37(2)(a), it implicitly made a finding that Steigerwaldt prevailed in substantial part. Therefore, the trial court was required to award Steigerwaldt reasonable attorney fees under § 19.37(2)(a).

The Town contends that the trial focused on whether the tape of Kenney's statement was an official record and accordingly Steigerwaldt did not prevail in substantial part. While it is true that the contested issue concerned the nature of the tape recording, the trial court found that the Town violated the open records law by failing to timely furnish the minutes of meetings and the poll list. The fact that there were documents requested that were not timely furnished is a sufficient basis to find that the Town violated the provisions of the open records law and that Steigerwaldt prevailed in substantial part. The court therefore has no option but to impose reasonable attorney fees as Steigerwaldt requested. Therefore, this court remands for a determination of reasonable attorney fees. However, because Steigerwaldt did not prevail on the tape recording issue, attorney fees incurred in the appellate process should not be part of the award.

Steigerwaldt next contends that the trial court erred by refusing to impose punitive damages based on its conclusion that the Town's violations were not arbitrary and capricious. Under § 19.37(3), STATS., a court may award punitive damages if it finds "that an authority or legal custodian under s. 19.33 has arbitrarily and capriciously denied or delayed response to a request" When the facts have been established, the issue whether decisions were

arbitrary and capricious presents a question of law. *Shaw*, 165 Wis.2d at 294, 477 N.W.2d at 347. However, even if the custodian acted arbitrarily and capriciously, the award of punitive damages is left to the discretion of the trial court. See § 19.37(3), STATS.

Although the trial court did not make any explicit findings of fact regarding this issue, this court concludes that Steigerwaldt has not established that the Town or Kenney acted arbitrarily and capriciously. These parties have a long history involving Steigerwaldt's continuing demand for various open records. He is entitled to the records and the Town attempted on numerous occasions to accommodate his requests. The imposition of punitive damages is not mandated by the fact that, over a significant period of time, minutes of meetings were not timely delivered and the 1990 poll list was not provided because Kenney could not find the document. While Steigerwaldt contends the Town has deliberately discriminated against him and has historically been tardy with responses to his open records requests, there is other evidence that the Town went significantly out of its way to accommodate Steigerwaldt's requests, including delivering documents personally to his home, mailing documents to his home and discharging a bill for costs that he had accumulated. While the evidence may permit the court to have decided this issue to the contrary, this court concludes that the evidence supports the trial court's determination that the Town's violation of the open records law was not arbitrary or capricious. Therefore, the trial court properly exercised its discretion by refusing to award punitive damages.

By the Court.—Judgment affirmed in part; reversed in part and cause remanded with directions. No costs on appeal.

This opinion will not be published. RULE 809.23(1)(b)4, STATS.