COURT OF APPEALS
DECISION
DATED AND FILED

June 25, 2013

Diane M. Fremgen
Clerk of Court of Appeals

Appeal No. 2012AP2673 **Cir. Ct. No. 2011CV435**

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

JAMES L. WEBSTER,

PETITIONER-APPELLANT,

V.

TOWNSHIP OF SPRUCE, TERRY BRAZEAU, JANE HOFFMAN, ANNETT BEHRINGER, BARBARA BAUGNET AND SALLY WITT,

RESPONDENTS-RESPONDENTS.

APPEAL from an order of the circuit court for Oconto County: JAY N. CONLEY, Judge. *Reversed and cause remanded with directions.*

Before Hoover, P.J., Mangerson and Stark, JJ.

¶1 PER CURIAM. James Webster appeals an order dismissing his petition for writ of mandamus and denying his WIS. STAT. § 19.37(2)[1] motion for attorney's fees, damages, and costs. Webster primarily argues the circuit court erroneously failed to grant his motion, despite its finding that Webster prevailed in his mandamus action. We agree with Webster. Accordingly, we reverse and remand for the circuit court to determine the appropriate award of fees, damages, and costs. Additionally, the circuit court shall order the Town of Spruce to provide Webster copies of, or access to, the general ledger.

BACKGROUND

¶2 This case involves an open records request. Webster, an attorney, wrote the Town a letter expressing concerns over the operation of Holt Park. Following a response letter, Webster sought further information via a June 15, 2011 public records request, which set forth eighteen individual record requests. Barbara Baugnet, the town clerk in a part-time capacity, arranged for the inspection of records at her home on July 18.[2] On that date, two individuals appeared on Webster's behalf with a laptop computer and scanner and reviewed documents.

¶3 Webster sent a second public records request on July 21, this time setting forth forty-nine individual requests, for documents that were allegedly not produced at the first meeting. Webster's representatives again appeared at

[1] All references to the Wisconsin Statutes are to the 2011-12 version unless otherwise noted.

[2] We occasionally refer to the Town and its clerk, Baugnet, interchangeably throughout the opinion. They are represented by the same attorney.

Baugnet's home as scheduled on July 25 and were permitted to review documents. However, that review was terminated at noon, per Baugnet's instruction.[3] Webster and Baugnet then rescheduled for another review on July 28. However, on July 27, Baugnet cancelled the review. Her letter (and e-mail)[4] provided:

> I … met with our attorney this morning. He advised me to cancel our meeting of tomorrow for FOIA[5] until further notice. He is going over all of our paper work and correspondence regarding Holt Park and will further advise us when the records will be made available for copying.
>
> ….
>
> I will also be sending you an interim billing statement for expenses incurred to this point.

¶4 After receiving no further notice, Webster contacted Baugnet on August 11, again requesting access. Webster's letter construed Baugnet's July 27 letter as a denial, and emphasized he had received no reasons for denying his requests. Webster also cited the WIS. STAT. § 19.34(2)(b) requirement that public records be made available for inspection upon forty-eight hours' notice. Webster e-mailed Baugnet again on August 16. Baugnet replied: "Please contact our attorney; Vance Waggoner at [e-mail address]. I have been advised to refer all future correspondence to him."

¶5 Webster did not contact the Town's attorney. Baugnet e-mailed Webster on September 6, stating:

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[3] Baugnet left early during the meeting, due to a friend's potential medical emergency. A relative remained at Baugnet's home for the remainder of the meeting.

[4] It appears from the record that most of the correspondence between Webster and the Town/Baugnet was sent in duplicate by mail and e-mail.

[5] Freedom of Information Act.

> I will be responding to you[r] FOIA request. I will be copying as many of the items requested that I am able to find. I will then mail them to you. I will … determine how much it will cost and send you the amount. When I receive payment, I will send the information to you. You have requested a tremendous amount of records and it is not fair to the taxpayers that I do this for free. …
>
> You will be hearing from me soon with an amount.

Webster responded the same day, taking issue with the vague representation that Baugnet would be responding at some unspecified later time. He also requested that the documents be made available for inspection by September 9. Further, he indicated he had already prepared a mandamus petition, which he intended to file if access was not provided on the ninth. There was no further correspondence between the parties, and Webster filed this mandamus action on October 26, 2011, representing that the Town had still not complied with his requests.

¶6 The circuit court issued an Alternative Writ on October 27, 2011, directing the Town and Baugnet to produce all records requested and related to the issues addressed in Webster's requests contained in the petition, or appear before the court to show cause why performance should not be compelled. The Town filed a return of record and motion to quash, and a hearing was held. The parties disputed whether all documents had been produced. On the Town's suggestion, a time was scheduled for a meeting where essentially all of its documents—related to the requests or not—would be made available for Webster's review.

¶7 Following that meeting, Webster requested further documents that he believed still had not been produced. The circuit court held an evidentiary hearing, received briefs and further affidavits and, later, held oral argument.

¶8 In a written decision, the court observed that Webster's record requests were deficient because they lacked limitation as to length of time and

were ambiguous because they requested records that may or may not exist. However, the court further observed that Baugnet did not object that the requests were overbroad, and, citing ***Osborn v. Board of Regents***, 2002 WI 83, 254 Wis. 2d 266, 647 N.W.2d 158, recognized it was "not the Court's role to consider reasons to deny a request that were not asserted by the custodian[.]"

¶9 The court found "Baugnet attempted to comply with the requests as best she could. I found [her] testimony very credible and find that she acted in good faith at all times." The court stressed that Baugnet's clerk position was only part time, she had no staff, her office was at home, and this was "a complex records request." Further, the court found Baugnet's July 27, 2011 letter "standing alone" to be a denial, because it only suggested compliance at an unidentified future date. However, the court found that, considered in light of her August 16, 2011 e-mail directing Webster to instead correspond with the Town's attorney, the July 27 letter was rendered not a denial. The court reasoned that Baugnet had a constitutional right to an attorney, and explained:

> It is inexplicable to the Court why the Petitioner did not contact the Town's attorney after August 16, 2011. [The July 27 letter], standing alone, is a denial, but it's not when [Baugnet] later, expressly, directed Petitioner to contact the Town attorney which Petitioner never did. Petitioner is an attorney, and in Wisconsin, an attorney has an ethical duty to deal with counsel of a represented party. … Her request should have been honored.

¶10 The court next addressed Baugnet's September 6, 2011 letter. Although observing that "[t]he Court views it more as a letter indicating … that she will be responding to [the] requests[,]" it acknowledged that the letter constituted a denial under case precedent. Nonetheless, the court indicated, "Assuming this to be a denial, this letter was sent after Ms. Baugnet directed Petitioner to contact the Town attorney, a request he should have honored."

¶11 Addressing Webster's argument that he still had not received a specific record, the general ledger, the court cited Baugnet's testimony that the failure to provide the record was an "oversight." The court nonetheless found that the record had been provided, because the information in the ledger was compiled from other documents, all of which had been provided.

¶12 Finally, the court denied attorney fees, damages, and costs under WIS. STAT. § 19.37(2). It found, "Here Petitioner did obtain the Alternative Writ, and Respondents provided additional records in their return." The court stated the applicable legal standard, reasonable necessity, and found that the action was not necessary to obtain the records. The court reasoned, "Respondents had a right to counsel here. The Court believes the same result could have been achieved—and much more expeditiously—if Petitioner had, simply, contacted opposing counsel as he was asked to do in" the August 16, 2011 e-mail. Webster now appeals.

DISCUSSION

¶13 Webster argues the circuit court erroneously denied his motion for attorney's fees, damages, and costs. Additionally, he argues the court erroneously excused the Town from producing its general ledger. Application of the open records law to undisputed facts presents a question of law that we review de novo. ***Osborn***, 254 Wis. 2d 266, ¶12.

¶14 The open records law provides a requester with the procedure to inspect a public record and/or to make or receive a copy of a public record that appears in written form. ***Id.***, ¶13 (citing WIS. STAT. § 19.35(1)(a)-(b)). After receiving an open records request, a records custodian should turn to the statutes and our supreme court's established procedural standards to determine whether disclosure of the requested public records is proper. ***Id.***, ¶15. Accordingly:

> First, the custodian must determine whether any of the exceptions to open access apply, and then "weigh the competing interests involved and determine whether permitting inspection would result in harm to the public interest which outweighs the legislative policy recognizing the public interest in allowing inspection." If the custodian decides that the open records request should be denied, then the custodian must state the specific policy reasons relied on to make that determination. Further, pursuant to WIS. STAT. § 19.35(4)(b), if the custodian "denies a written request in whole or in part, the requester shall receive from the authority a written statement of the reasons for denying the written request."

Osborn, 254 Wis. 2d 266, ¶15 (citations omitted).

¶15 "If an authority withholds a record or a part of a record or delays granting access … after a written request …, the requester may … bring an action for mandamus asking a court to order release of the record." WIS. STAT. § 19.37(1), (1)(a). In reviewing a mandamus action, we first examine the sufficiency of the custodian's stated reasons for denying the request. ***Osborn***, 254 Wis. 2d 266, ¶16. The threshold question is whether the custodian stated legally specific reasons for denying the open records request. ***Id.*** It is not a court's role to hypothesize or consider reasons to deny the request that were not asserted by the custodian. ***Id.*** If the custodian states insufficient reasons for denying access, then the writ of mandamus compelling disclosure must issue. ***Id.***

¶16 If a records requester who files a writ of mandamus "prevails in whole or in substantial part" in the action, "the court *shall* award reasonable attorney fees, damages of not less than $100, and other actual costs …." WIS. STAT. § 19.37(2) (emphasis added). Such an award is mandatory where a requester prevails. ***WTMJ, Inc. v. Sullivan***, 204 Wis. 2d 452, 462, 555 N.W.2d 140 (Ct. App. 1996). A party seeking costs must show that prosecution of the action could reasonably be regarded as necessary to obtain the information and

that a "causal nexus" exists between that action and the agency's surrender of the information. ***Id.*** at 458. The test of cause is whether the action was a substantial factor in contributing to the result. ***Id.*** "The action may be one of several causes; it need not be the *sole* cause." ***Id.*** at 458-59. Causation is a question of fact that we will not overturn unless clearly erroneous. ***Id.*** at 459.

¶17 The circuit court found that Baugnet's July 27, 2011 and September 6, 2011 letters constituted denials of Webster's record requests. Baugnet does not dispute that those letters constituted denials. Her concession is well founded.[6] Records requests must be honored or denied "as soon as practicable and without delay." WIS. STAT. § 19.35(4). "Those are the statutory choices: comply or deny." ***WTMJ***, 204 Wis. 2d at 457. "The [government's] third choice, compliance at some unidentified time in the future, is not authorized by the open records law." ***Id.*** at 457-58.

¶18 We turn next to Baugnet's stated reasons for denying Webster's requests. Baugnet does not argue she provided any valid reasons for denial, nor does she attempt to justify the court's rationale—that the denials were justified because she had some unspecified right to counsel. Indeed, at the May 14, 2012 hearing, Baugnet testified that not only did she not conduct any balancing test before denying access, *see* ***Osborn***, 254 Wis. 2d 266, ¶¶14-15, but that "I don't even know what that is."

[6] Baugnet's arguments are largely, if not entirely, unresponsive to Webster's arguments. Thus, she essentially concedes Webster's arguments. *See* ***Charolais Breeding Ranches, Ltd. v. FPC Secs. Corp.***, 90 Wis. 2d 97, 109, 279 N.W.2d 493 (Ct. App. 1979) (unrefuted arguments are deemed conceded). Additionally, Baugnet's arguments all but ignore the applicable legal standards. *See* ***State v. Flynn***, 190 Wis. 2d 31, 39 n.2, 527 N.W.2d 343 (Ct. App. 1994) (we may summarily reject arguments that are inadequately briefed or not supported by legal authority).

¶19 Regardless of whether sufficient reasons for denial were stated, the circuit court did issue a writ of mandamus, which, as the circuit court acknowledged, resulted in Baugnet disclosing further records. Under this situation, it would be unreasonable to conclude that filing the action was not at least "a" cause of the disclosure. Moreover, as discussed more fully below, this appeal of the action was necessary to obtain disclosure of the general ledger. In this instance, the action is indisputably "the" cause of the disclosure.

¶20 Further, we reject the circuit court's finding that filing the action was not reasonably necessary to obtain records. After Baugnet consulted an attorney, no further records were produced until after Webster filed the mandamus action. The circuit court cited no authority for its conclusion that Webster was required to redirect his requests to the Town's attorney, and Baugnet abandons this rationale on appeal.[7] Webster did all that was required of him by statute; there is no provision in the open records statutes allowing a records custodian to impose additional requirements. The court's finding also lacks evidentiary support. There is nothing in the record to suggest Webster would have received prompt disclosures had he contacted the Town's attorney. Indeed, the only reasonable inference is to the contrary. Baugnet had referred Webster's requests to the Town's attorney, yet there is no evidence that the attorney so much as attempted to

[7] WISCONSIN STAT. § 19.34(1) requires every public authority to post a notice setting forth, among other things, "the legal custodian under s. 19.33 from whom, and the methods whereby, the public may obtain" public records. The Town's posted notice instructed the public to direct their records requests to "the Town Clerk."

Further, as Webster argues, citing legal authority, he had no ethical duty to refrain from contacting Baugnet or to correspond with the Town's attorney. Because Baugnet concedes this issue by failing to respond, we do not address the matter further. *See* ***Charolais Breeding***, 90 Wis. 2d at 109.

contact Webster. Moreover, while the circuit court believed Baugnet had a right to counsel, Webster's actions in no way impeded any such right. Indeed, it appears Baugnet was acting based on the ill-advice of counsel.

¶21 Excusing nondisclosure by failing to award costs, damages, and fees in the present case would be rewarding the Town for Baugnet's failure to know and perform her statutory dutites.[8] "Good faith" failure to comply based on ignorance of one's duties does not justify denying records in the absence of conducting a proper balancing test and offering appropriate reasons for denial.[9] "In Wisconsin, we have a presumption of open access to public records, which is reflected in both our statutes and our case law." ***Osborn***, 254 Wis. 2d 266, ¶13 (collecting cases).

> [I]t is declared to be the public policy of this state that all persons are entitled to the greatest possible information regarding the affairs of government and the official acts of those officers and employees who represent them …. The denial of public access generally is contrary to the public interest, and only in an exceptional case may access be denied.

[8] In the circuit court's terms, it is "inexplicable" that Baugnet and the Town failed to properly respond to Webster's requests even after consulting with their attorney. For our purposes, their attorney's advice/actions are imputed to Baugnet. There is no "attorney defense" to the open records laws, which would impermissibly excuse a records custodian from his or her duties. We also observe Baugnet and the Town do not make any argument that the mandamus action was premature because the request was complex. *See* ***WIREdata, Inc. v. Village of Sussex***, 2008 WI 69, 310 Wis. 2d 397, 751 N.W.2d 736.

[9] As noted above, it appears Baugnet still had not become properly educated on her responsibilities as a record custodian well after the action was brought, and after she had consulted an attorney. She testified, six and one-half months after the action was brought, that she did not know what the disclosure balancing test even was. She further testified that she was not aware of any statutory, common law, or public policy reason for denying the requests. In our view, Baugnet's consultation with an attorney is an aggravating, rather than mitigating, circumstance given her continued noncompliance. If the scope of Webster's request was unclear, Baugnet or her attorney should have simply, and promptly, requested clarification or objected on that basis.

WIS. STAT. § 19.31. Further, we have observed:

> These are not always easy statutes with which to comply. There are many exemptions to Wisconsin's open records law throughout the statutes. A records custodian is required to quickly make difficult decisions. The penalty for inadequate compliance is severe; attorney fees can be substantial. But the legislature has decided that this is worth the benefit of openness.

WTMJ, 204 Wis. 2d at 462.

¶22 Because the action was a reasonably necessary cause of the Town's compliance with Webster's record requests, Webster is entitled to recover his reasonable attorney fees, damages, and other actual costs. *See* WIS. STAT. § 19.37(2). On remand, the circuit court shall conduct whatever proceedings are necessary to determine the amount of the award.

¶23 We turn next to the Town's continued withholding of the general ledger. The circuit court excused the withholding because it was inadvertent and the underlying data and documents that formed the basis of the general ledger had already been disclosed. Neither of these are valid reasons for nondisclosure of a public record. Regardless, the Town fails to respond to this issue, thereby conceding it. *See* ***Charolais Breeding Ranches, Ltd. v. FPC Secs. Corp.***, 90 Wis. 2d 97, 109, 279 N.W.2d 493 (Ct. App. 1979). Accordingly, on remand the circuit court shall direct the Town to promptly provide Webster copies of, or access to, the general ledger.

¶24 Finally, we specifically address the Town's three arguments. The Town argues only that the mandamus action was not reasonably necessary because: Baugnet attempted in good faith to provide the requested records; Webster lacked personal knowledge of what records were actually produced at the

two viewings in Baugnet's home; and the records requests "were cumulative, confusing, and repetitious."

¶25 We have already determined that a "good faith" failure to provide records is not excusable when no reasons for the denial are provided to the requester. In the absence of reasons for the denial, filing a mandamus action was perfectly appropriate. As to the second argument, the Town's attorney expressly waived the associated objection in the circuit court, electing instead to proceed when the court offered a continuance to address Webster's proffered affidavits. The Town therefore forfeited its right to raise this argument on appeal. *See* ***State v. Huebner***, 2000 WI 59, ¶¶10-12, 235 Wis. 2d 486, 611 N.W.2d 727. Finally, it is far too late for Baugnet to now first assert reasons for denying the records request. *See* WIS. STAT. § 19.35(4)(a)-(b); ***Osborn***, 254 Wis. 2d 266, ¶16; ***Oshkosh Nw. Co. v. Oshkosh Library Bd.***, 125 Wis. 2d 480, 484, 373 N.W.2d 459 (Ct. App. 1985) ("Where inspection is denied, it is the custodian, not the attorney representing the governmental body after a mandamus action is commenced, who must give specific and sufficient reasons for denying inspection.").

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

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