

FILED
05-19-2022
CIRCUIT COURT
DANE COUNTY, WI
2022CV001216
Honorable Rhonda L.
Lanford
Branch 16

STATE OF WISCONSIN

CIRCUIT COURT
BRANCH ____

DANE COUNTY

WISCONSIN INSTITUTE FOR LAW
& LIBERTY, INC.
330 E. Kilbourn Avenue, Suite 715
Milwaukee, WI 53202

Petitioner,

v.

MADISON METROPOLITAN SCHOOL DISTRICT
545 West Dayton Street
Madison, WI 53703

Respondent.

Petition for Writ of Mandamus
Case Code: 30952
Case No. 22-CV-

SUMMONS

THE STATE OF WISCONSIN, To each person named above as a Respondent:

You are hereby notified that the Petitioner named above has filed a lawsuit or other legal action against you. The Petition, which is attached, states the nature and basis of the legal action.

Within 20 days of receiving this Summons, you must respond with a written answer, as that term is used in Chapter 802 of the Wisconsin Statutes, to the Petition. The court may reject or disregard an answer that does not follow the requirements of the statutes. The answer must be sent or delivered to the court, whose address is: **Clerk of Circuit Court, Dane County Courthouse, 215 S. Hamilton Street, Suite 1000, Madison, WI 53703**, and to Attorney Cory Brewer, Petitioner's attorney, whose address is: **330 E. Kilbourn Avenue, Suite 725, Milwaukee, WI 53202**. You may have an attorney help or represent you.

If you do not provide a proper answer within 20 days, the court may grant judgment against you for the award of money or other legal action requested in the Petition, and you may lose the right to object to anything that is or may be incorrect in the Petition. A judgment may be enforced as provided by law. A judgment awarding money may become a lien against any real estate you own now or in the future, and may also be enforced by garnishment or seizure of property.

Dated this 19th day of May, 2022.

WISCONSIN INSTITUTE FOR LAW & LIBERTY

Electronically signed by Cory J. Brewer

Rick Esenberg (WI Bar No. 1005622)

Luke N. Berg (WI Bar No. 1095644)

Katherine Spitz (WI Bar No. 1066375)

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545 West Dayton Street
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Respondent.

PETITION FOR WRIT OF MANDAMUS

Petitioner Wisconsin Institute for Law & Liberty, Inc. (“WILL”), by its undersigned attorneys, hereby alleges as follows:

PARTIES

1. Petitioner Wisconsin Institute for Law & Liberty, Inc. (“WILL”) is a non-stock corporation incorporated under the laws of the State of Wisconsin with a business address of 330 E. Kilbourn Avenue, Suite 725, Milwaukee, WI 53202.

2. Respondent Madison Metropolitan School District (the “District”) is a “school district” as that term is used in Chapters 115 through 121 of the Wisconsin Statutes. Upon information and belief, its offices are located at 545 West Dayton Street, Madison, WI 53703.

3. The District is an “authority” as that term is defined in Wis. Stat. § 19.32(1).

JURISDICTION AND VENUE

4. This is a petition for writ of mandamus seeking declaratory and injunctive relief under Wis. Stat. § 19.37. As a court of general jurisdiction, this Court has jurisdiction over this action pursuant to Wis. Stat. § 801.01.

5. Venue in this Court is proper pursuant to Wis. Stat § 801.50(2).

STATEMENT OF FACTS

6. On July 20, 2021, WILL submitted an open records request to the District via email. A true and correct copy of this request is filed herewith as Exhibit 1 to Affidavit of Luke Berg.

7. The request sought a single document—a copy of the District’s training entitled LGBTQA+101 (the “Training”), provided by the District to its teachers in the spring of 2021.

8. Despite the narrow, specific nature of the request, the District failed to provide the requested record—or even an estimate of when a response could be expected, despite repeated requests for such an estimate—for nearly two months. A copy of a chain of correspondence requesting an estimated time of response is filed herewith as Exhibit 2 to Affidavit of Luke Berg.

9. On October 13, 2021, Attorney Sherrice Perry issued a letter on behalf of the District to Attorney Berg denying WILL’s request in total. A true and correct copy of the District’s response is filed herewith as Exhibit 3 to Affidavit of Luke Berg.

10. The response asserted the following reasons for the denial:

- The Family Educational Rights and Privacy Act (FERPA) prohibits the disclosure of “education records,” and the document requested included images of students who attend schools in the District. The District maintained the pictures were “personally identifying information.”

- The District alleged that the document was being sought as a “discovery tool.”¹
- The District maintained that it had conducted a public records balancing test and determined that “the balancing test weighs in favor of the students’ interest in privacy, the protection of the students’ personal and sensitive information, and accessing the requested records in the appropriate manner and through the discovery process.”
- The District also stated that redacting the record “would negate the purpose of the record and it would no longer constitute a training regarding transgender students and would not be responsive to your request.”

11. Upon information and belief, the Training was given to every teacher in the District.

12. Given its widespread dissemination, as well as its effect on the conduct of public employees, the Training cannot be considered “private” information.

13. Even if the District failed to get permission or a release from parents who have children with images featured in the Training, these photographs could easily have been redacted from the Training and the redacted version provided to WILL.

14. As indicated by the District’s response, the Training was not produced either in whole or in a redacted format.

15. Under Wisconsin law, if a record that may not be produced in its entirety can be produced with redactions, the redacted document must be provided. *Milw. Dep. Sheriffs’ Ass’n v.*

¹ WILL is litigating a case against the District for its policy to hide gender-identity transitions from parents. *Doe v. MMSD*, Case No. 20CV454 (filed Feb. 18, 2020). While the reasons for an open-records request are irrelevant, WILL made its request after it received an anonymous tip from a teacher that the District had violated an injunction in that case by continuing to train its teachers in conflict with that injunction. Based on this tip and a screenshot of the training, WILL filed a motion to enforce the injunction, and that motion has since been resolved by the District notifying all teachers of the scope of the injunction.

Cty. of Milw. Cty. Clerk, 2021 WI App 80, ¶ 21, 399 Wis. 2d 769, 967 N.W.2d 185; *State ex rel. Journal/Sentinel, Inc. v. Arreola*, 207 Wis. 2d 496, 518, 558 N.W.2d 670 (Ct. App. 1996). The District thus had no right to withhold the entirety of the document because a portion is allegedly protected by a privacy interest.

CLAIM ONE: Mandamus Pursuant to Wis. Stat. § 19.37 – Withholding of Training

16. Petitioner realleges and incorporates the preceding allegations of the complaint.

17. Under Wis. Stat. § 19.31, it is the public policy of this state, as expressed by the Legislature, that every citizen is entitled to the greatest possible information regarding the affairs of government and that “providing persons with such information is declared to be an essential function of a representative government and an integral part of the routine duties of officers and employees whose responsibility it is to provide such information.” The statute further provides that the “denial of public access generally is contrary to the public interest, and only in an exceptional case may access be denied.”

18. Section 19.35(1)(a) and (b) provide that “any requester has a right to inspect any record” and “to make or receive a copy of a record.”

19. Subject to certain qualifications, Wis. Stat. § 19.32(2) defines a record as “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 kept by an authority.”

20. The Training is a record that falls within this broad definition.

21. Upon information and belief, the Training does not constitute a “pupil record” as that term is defined in the Wisconsin statutes.

22. The Family Educational Rights and Privacy Act, or FERPA, protects a student's individual education records and does not apply to training materials distributed widely to all teachers.

23. Furthermore, the fact that WILL was the requester and is also counsel for the plaintiffs in the *Doe* case (*supra* n.1) is immaterial.

24. The Wisconsin Court of Appeals has held that pending litigation does not preclude or affect a requester's statutory rights to seek public records. As the Court explained, "the legislature has not carved out an exception to the requirement of disclosure when the public records sought are germane to pending litigation between the requester and the public entity. ... Parties to litigation routinely obtain material and information relevant to the proceeding by methods beyond the discovery process. The fact that such information is obtained by a nondiscovery process does not mean the party is not entitled to it." *State ex rel. Lank v. Rzentkowski*, 141 Wis. 2d 846, 853–54, 416 N.W.2d 635 (Ct. App. 1987).

25. The public, including WILL, are entitled to send Open Records Requests to the District, and the District has no authority to withhold the requested records based on the pendency of the *Doe* case.

26. Pursuant to Wis. Stat. § 19.37(a), if an authority withholds a record or part of a record or delays granting access to a record or part of a record after a written request is made, the requester may bring an action asking the court to order release of the record.

27. Wisconsin law prohibits withholding access to a record based upon the identity of the requester or based upon the authority's belief concerning the requester's reasons for seeking the record.

28. The District had a plain legal duty to provide WILL with a copy of the Training and violated that duty by denying WILL's request.

29. The District has wrongfully denied WILL a copy of or access to the Training in violation of Wisconsin's public records law.

CLAIM TWO: Claim for Costs, Fees and Damages

30. Petitioner realleges and incorporates the preceding allegations of the complaint.

31. Wis. Stat. § 19.37(2) provides in pertinent part that 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 . . . relating to access to a record or part of a record."

32. Wisconsin courts have construed this language as mandatory, meaning that if WILL prevails, it is entitled to the relief spelled out in that statute. *See Friends of Frame Park, U.A. v. City of Waukesha*, 2020 WI App 61, ¶ 30 n.8, 394 Wis. 2d 387, 950 N.W.2d 831 (distinguishing mandatory nature of Wis. Stat. § 19.37(2)'s fee provision from optional award of attorneys' fees for prevailing plaintiff in FOIA action).

33. For the reasons stated above, the District's justifications for the denial are insufficient, incorrect, or wrong as a matter of law.

34. WILL is therefore entitled to its actual costs, attorney fees, as well as damages of not less than \$100 for the denial.

REQUEST FOR RELIEF

Petitioner therefore requests the following relief:

A. Compelling the District to immediately produce the Training;

B. Awarding Petitioner its reasonable attorneys' fees, damages of not less than \$100, and its actual costs under Wis. Stat. § 19.37(2); and

C. Awarding such other relief as this Court deems appropriate.

Dated this 19th day of May, 2022.

WISCONSIN INSTITUTE FOR LAW & LIBERTY

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