



JUDGE AMY R. SMITH
DANE COUNTY CIRCUIT COURT, BRANCH 4
215 S Hamilton Street, Room 8107
Madison, Wisconsin 53703-3292

Colleen Peterson, Clerk
(608) 266-4352

Telephone: (608) 266-4351
TTY: (608) 266-4625
Fax No: (608) 266-4080

Secretary
John Ly
(608) 266-4351

Nadine Ripp, Court Reporter
(608) 266-9123

FACSIMILE

DATE: 5/22/15
TO: Atty Lennington, (608) 267 2223
Atty Westenberg, (608) 310 3561
Atty McGillivray (608) 310 3561
FROM: John Ly
Circuit Court, Branch 4

TOTAL PAGES INCLUDING THIS PAGE: 10

If you did not receive all of/or have any problems or questions on this fax, please call:

John or Colleen at 266-4351

COMMENTS:

STATE OF WISCONSIN

CIRCUIT COURT
BRANCH 4

COUNTY OF DANE

FILED *JF*

**FREEDOM FROM RELIGION FOUNDATION, INC.,
and PATRICK ELLIOT,
Plaintiffs,**

MAY 22 2015

DANE COUNTY CIRCUIT COURT

v.

Case No. 14-CV-3429

**WISCONSIN OFFICE OF THE
COMMISSIONER OF INSURANCE,
and THEODORE NICKEL,
In his official capacity as
COMMISSIONER OF INSURANCE,
Defendants.**

**DECISION ON DEFENDANTS'
MOTION FOR JUDGMENT ON THE PLEADINGS, OR
IN THE ALTERNATIVE, MOTION FOR PROTECTIVE ORDER,
AND ORDER FOR *IN CAMERA* INSPECTION**

This case is before the Court on Defendants' March 6, 2015 Motion for Judgment on the Pleadings or, in the Alternative, Motion for Protective Order.

Plaintiffs Freedom from Religion Foundation, Inc. and Patrick Elliot ("Plaintiffs") filed this action under the Wisconsin Open Records Law¹ on December 17, 2014, seeking declaratory and mandamus relief. Defendants Office of the Commissioner of Insurance ("OCP") and its Commissioner, Theodore Nickel (collectively "Defendants"), filed an Answer and Affirmative Defenses on January 22, 2015.

On January 26, 2015, Plaintiffs served discovery requests on Defendants. Defendants objected, asserting that the discovery requests amount to nothing more than a fishing expedition and that they are not appropriate in the context of this action.

¹ Complaint at p. 1.

Now before this Court is Defendants' Motion for Judgment on the Pleadings or, in the Alternative, Motion for Protective Order filed March 6, 2015 (hereafter, "Motion"). Defendants assert that dismissal is warranted because Plaintiffs fail to state claims upon which relief can be granted. In the alternative, Defendants seek a protective order against all discovery in this case. Plaintiffs filed their Response in Opposition to Defendants' Motion on March 25, 2015. Defendants filed their Reply on April 1, 2015.

For the reasons summarized below, Defendants' Motions are **GRANTED IN PART, and DENIED IN PART.**

BACKGROUND

Between July 22, 2014, and July 25, 2014, Plaintiffs emailed five separate open records requests to Defendants. The requests sought records that were sent and received between Defendants, the Governor's Office, and Media Trackers related to coverage for contraceptives. The requests also generally sought records concerning non-enforcement or disregard of Wisconsin's contraceptive insurance coverage.

OCI's Chief Legal Counsel, Mollie Zito ("Zito"), compiled the response to the various records requests, granting the requests in part, and denying them in part. By way of letter dated August 27, 2014, Zito turned over 16 pages of responsive documents, and withheld other documents. Zito set forth the reasons for denying the requests in part, namely: 1) some of the records are protected by attorney-client privilege; 2) some of the documents are protected as attorney work product; and 3) some of the documents were withheld based on the balancing test because the need for Defendants to seek and obtain

legal advice and representation outweighs the public interest in disclosure of the records related to the representation.

Plaintiffs later made a similar records request to the Governor's Office. In response, the Governor's Office provided a copy of a July 24, 2014 email string between it and the Defendants. The email referenced contraceptive coverage and was relevant to Plaintiff's requests to Defendants. Defendants had not provided the email string in response to the requests². Plaintiffs did not contact Defendants after receiving the email string from the Governor's Office to inquire as to why Defendants did not produce it. Instead, after having received the document, Plaintiffs filed this action, claiming that Defendants violated the Open Records Law by failing to provide responsive documents.

Plaintiffs filed their Complaint on December 17, 2014. The only record that Plaintiffs specifically identify in their Complaint as being improperly withheld is the July 24, 2014 email string, although they also claim that Defendants' response describing the reasons for withholding other documents is faulty. Plaintiffs have had the July 24, 2014 email string³ in their possession since November 24, 2014. Plaintiffs now seek the documents that Zito withheld, seek discovery related to these documents, and apparently, through discovery, seek other documents not sought in their original requests.

² Defendants have since asserted that the email string was accidentally omitted from its document production.

³ Plaintiffs now speculate that maybe the July 24, 2014 email string attached to their Complaint as Exhibit G might not be identical to what Defendants possess. Notably, the Complaint is silent on this subject, and Plaintiff did not raise this issue when the Court asked questions of Plaintiffs' counsel specifically about Plaintiffs' possession of the email string at the hearing held on February 18, 2015. Whether these documents are identical can be readily ascertained in the Court's *in camera* review, ordered below. Therefore, as a courtesy to Plaintiffs and in the interests of efficiency and economy for all parties, the Court will review Defendants' copy of the email string and compare it to Plaintiffs' Exhibit G, and share its determination and any related rulings with the parties accordingly.

APPLICABLE LAW

Open Records Law

The purpose behind the Wisconsin Open Records Law, Wis. Stat. §19.31, *et seq.*, is to allow members of the public “the greatest possible information regarding the affairs of government and the official acts of those officers and employees who represent them.”

Wis. Stat. §19.31. If after making an Open Records Law request, a requester believes that the public entity or official has wrongly withheld responsive documents, the requester may either file a mandamus action asking a court to order the release of the documents, or they may ask the district attorney to file a mandamus action on their behalf. Wis. Stat. §19.37(1)(a) and (b). Aside from issuing a writ of mandamus, the only other remedies a court may order under the open records law are costs and fees incurred in obtaining a court order to release the requested documents, as described by statute. Wis. Stat. §19.37(2)(b). Punitive damages are also available in limited circumstances which have not been alleged by the Plaintiffs in this action. Wis. Stat. §19.37(3).

The remedies set forth in Wis. Stat. §19.37 are the exclusive remedies available for violations of the Open Records Law. *See State v. Stanley*, 2012 WI App 42, ¶ 61, 340 Wis. 2d 663, 814 N.W.2d 867; *see also Capital Times Co. v. Doyle*, 2011 WI App 137, ¶1, 337 Wis. 2d 544, 807 N.W.2d 666 (“Wisconsin Stat. §19.37 (2009–10) exclusively lists mandamus as the vehicle by which open records law is enforced by our courts.”)

Therefore, the remedy available in an Open Records Law action is a writ of mandamus directing the production of records and possibly costs and fees related to obtaining those records.

Complaint/Pleadings Sufficiency

Wisconsin is a notice pleading state; therefore, in order to state a claim, a complaint need only contain “a short plain statement of the claim, identifying the transaction[s] or occurrence[s] out of which the claim arises and showing that the pleader is entitled to relief. . . .” Wis. Stat. §802.02(1). The complaint must also contain a demand for judgment for relief. *Id.*

Wisconsin Statutes §802.06(3) provides that a defendant may move a court for judgment on the pleadings any time after it has filed its Answer. *Id.* Defendants ask this Court to dismiss the Complaint because it fails to state claims upon which relief may be granted. *See* Wis. Stat. §802.06(2)(a)6. In ruling on a motion under this section, a court accepts as true all of the facts as alleged in the Complaint. A court should only dismiss a claim pursuant to this section if it is clear that there are no circumstances under which the Plaintiff could recover. *Morgan v. Pennsylvania General Insurance Co.*, 87 Wis. 2d 723, 275 N.W.2d 660 (1979).

DISCUSSION

Plaintiffs bring their action against Defendants under Wisconsin’s Open Records Law. The Court analyzes the Motion and pleadings accordingly.

Defendants argue that dismissal of this action is appropriate because Plaintiffs have failed to state claims upon which relief may be granted. In the event Defendants do not prevail on their request for dismissal, they move in the alternative for a protective order to prohibit discovery.

Failure to State a Claim - Declaratory Judgment

The statutes provide the exclusive remedies for violations of Wis. Stat. §19.31, *et seq.*; specifically, mandamus is the only remedy, and then, if granted, the costs and fees necessary in procuring the writ. Wis. Stat. §19.37(1) and (2); *State v. Stanley*, 2012 WI App 42, ¶ 61. *See also Capital Times Co. v. Doyle*, 2011 WI App 137, ¶1. It is a well-accepted principle of statutory construction that when the legislature provides a comprehensive remedy scheme within the statutes, those are accepted as the only remedies available under that particular statute. *See Hermann v. Town of Delavan*, 208 Wis. 2d 216, 221, 560 N.W.2d 280 (Ct. App. 1996) *aff'd*, 215 Wis. 2d 370, 572 N.W.2d 855 (1998), *citing Bourque v. Wausau Hosp. Ctr.*, 145 Wis. 2d 589, 594, 427 N.W.2d 433 (Ct.App.1988) (“when the legislature provides a comprehensive statutory remedy, it is deemed to be the exclusive remedy”).

The Open Records Law clearly establishes the remedies available for suspected violations. None of the remedies set forth in the statutory scheme specify the right to pursue a declaratory action. In filing, Plaintiffs classified this action as both a Petition for a writ of mandamus, which is permissible under the statutes, and a declaratory judgment, which is not. Given that the statute limits this court to ordering release of the record(s) sought, and, if it does so, any costs and fees incurred in the process, this Court reviews Plaintiffs' Complaint under these constraints.

Because there are no circumstances under which Plaintiffs can obtain declaratory relief under the Open Records Law, Defendants' Motion to Dismiss Plaintiffs' declaratory judgment claim is **GRANTED**.

Failure to State a Claim - Mandamus claim regarding July 24, 2014 email string

Plaintiffs received the July 24, 2014 email string that appears key in this action before filing their lawsuit, as evidenced by its attachment to the Complaint. There are no practical mandamus remedies with respect to this particular document because Plaintiffs already possess it. *See Capital Times Co. v. Doyle*, 2011 WI App 137, ¶1 (affirming trial court's dismissal as untimely an open records civil suit when action was filed 22 days after the record was released).

Plaintiffs argue that the fact they already possess the email string from another source does not bar their pursuit of mandamus relief. Whether Plaintiffs received this document from Defendants or from another source is, in this Court's opinion, a distinction without a difference. The policy behind mandamus relief is to permit public access to government information so that the public may be aware of governmental activities. If Plaintiffs already possess this document, that policy is served, regardless of the document's source.

Therefore, this Court **GRANTS** Defendants' Motion as to Plaintiff's mandamus claim regarding the July 24, 2014 email string.

Petition for Writ of Mandamus – Other Withheld Documents

The Complaint also asserts that the response Plaintiffs received from the Governor's Office providing, among other things, the July 24, 2014 email string, indicates that Defendants withheld responsive records. Plaintiffs also allege that, by way of Zito's letter, Defendants improperly denied Plaintiffs' requests for other responsive records in addition to the email string. Plaintiffs appear to argue that because Defendants

failed to produce the July 24, 2014 email string, they must have also failed to produce other responsive records.

Plaintiffs ask this Court to issue a writ of mandamus to compel the production of the documents that Zito identified in her August 27, 2014, letter, but which were withheld for various reasons. Due to the claimed protected nature of these documents, this Court will not issue a writ ordering their production without first reviewing the documents to determine whether they are exempt from disclosure as Defendants claim. *See Milwaukee Journal v. Call*, 153 Wis. 2d 313, 450 N.W.2d 515 (1989).

Therefore, this Court ORDERS that Defendants produce for *in camera* inspection the documents identified by Zito as exempt from production as well as a copy of the July 24, 2014 email string in Defendants' possession. This Court will then conduct an *in camera* review of the documents.

Because the Court's *in camera* review will determine whether or not mandamus relief ought to issue, discovery is unnecessary, as additional information sought by discovery would not be relevant to issues which remain in this matter.

Defendants' Motion to Dismiss Plaintiffs' mandamus claim regarding documents withheld other than the July 24, 2014 email string is therefore **DENIED**. Defendant's alternative motion for a protective order to prohibit discovery is therefore **GRANTED**.

CONCLUSION

For the reasons stated above, Defendants' Motion is **GRANTED IN PART**, and **DENIED IN PART**. This Court grants Defendants' Motion for Judgment on the Pleadings with respect to Plaintiffs' claim for declaratory judgment, and with respect to

Plaintiffs' mandamus claim as to the July 24, 2014 email string. Plaintiffs' mandamus claim as to whether Defendants improperly withheld documents responsive to Plaintiffs' document requests survives.

To appropriately address Plaintiffs' remaining claim, this Court **ORDERS** the Defendants to produce to the Court for *in camera* inspection no later than 4:30 p.m. on June 12, 2015 the records withheld from Plaintiffs, including a copy of the July 24, 2014 email string in Defendants' possession. This Court will seal those records, and review them to determine whether Defendants were justified in not producing the documents.


No discovery shall be taken in this case pending this Court's *in camera* review.

Defendants will draft and file any additional Order necessary to effectuate the intent of this Decision.

The hearing scheduled for May 29, 2015 at is **CANCELLED**.

SO ORDERED. Dated this 21st day of May, 2015.

BY THE COURT:



Hon. Amy R. Smith
Circuit Court Judge, Branch 4

C (via FAX): Attorney Daniel Lennington
Attorney Christa Westerberg
Attorney Pamela McGillivray