STATE OF WISCONSIN CIRCUIT COURT BRANCH 4 DANE COUNTY

FREEDOM FROM RELIGION FOUNDATION, INC. and PATRICK ELLIOTT

Plaintiffs,

v.

WISCONSIN OFFICE OF THE COMMISSIONER OF INSURANCE and THEODORE NICKEL, in his official capacity as Commissioner of Insurance

Defendants.

Case No. 14-CV-3429
30701 Declaratory Judgment;
30952 Petition for Writ of Mandamus

PLAINTIFFS' RESPONSE IN OPPOSITION TO DEFENDANTS' MOTION TO DISMISS OR, IN THE ALTERNATIVE, MOTION FOR A PROTECTIVE ORDER

INTRODUCTION

Plaintiffs Freedom from Religion Foundation and Patrick Elliott ("Plaintiffs") submitted two open records requests to Defendants Office of the Commissioner of Insurance and Theodore Nickel (collectively, "OCI" or "Defendants") in July 2014. When the Defendants only partially granted the request with a thin set of documents covering a four-day period, and believing the response unclear, Plaintiffs asked Defendants to clarify their response and again search their records. Defendants never responded. Plaintiffs exercised due diligence by contacting the Governor's office for similar documents prior to filing an Open Records lawsuit against Defendants under Wis. Stat. § 19.31 *et seq.* The

Governor's response confirmed responsive documents in OCI's possession were not provided, and this suit followed.

Defendants now seek to dismiss this case and bar discovery on the basis that Plaintiffs have all the information they requested and the Court cannot offer further relief. This is untrue, for three reasons: 1) Plaintiffs have alleged that records *other than* those provided by the Governor's office were available and should have been provided, and are entitled to understand the scope of Defendants' search for records to test this claim, 2) even if the records provided by the Governor's office were the only responsive records, this Court can still order relief related to those records under Wis. Stat. § 19.37, and 3) Defendants' partial denial did not meet the specificity requirements of the Open Records law, and Plaintiffs are entitled to full copies or at least segregable, non-privileged portions of the withheld records.

Defendants have not met their heavy burden to show their motion to dismiss and alternative motion for a protective order should be granted, but have rather misrepresented the complaint and twisted Plaintiffs' claims and applicable law. The Court should deny Defendants' motion and order swift responses to Plaintiffs' discovery requests.

FACTS

OCI Wades into Contraceptive Debate

On June 30, 2014, the Supreme Court of the United States decided *Burwell v. Hobby Lobby Stores, Inc.*, Case No. 13-354. (Compl.¶ 6.) The Court's opinion held that requiring certain family-owned corporations to pay for employees' insurance coverage for contraception under the Affordable Care Act violated a federal law known as the Religious Freedom Restoration Act of 1993, 42 U.S.C. §2000bb *et seq.* (*Id.*) On July 21, 2014, the

website *MediaTrackers* quoted OCI Legislative Liaison and Public Information Officer J.P. Wieske as stating that Wisconsin's own contraceptive mandate, known as the Contraceptive Equity Law, would no longer be enforced because it was preempted by the *Hobby Lobby* decision. (*Id.* ¶ 7.) The quote in the *MediaTrackers* story was picked up by other news outlets, including the Milwaukee *Journal-Sentinel*, and provoked controversy among women's health advocates and others who disagreed about the effect of the federal ruling on Wisconsin law. (*Id.* ¶ 8; *see also, e.g.*, Compl. Ex. D at 2-4 (press release from Planned Parenthood of Wisconsin).)

Plaintiffs' Requests to Defendants and Responses

On July 22, 2014, Plaintiffs emailed and mailed an Open Records Request to Defendants seeking four broad categories of records:

1) Any records related to non-enforcement of contraceptive coverage under Wisconsin statutes by the Office. This includes:

    a. Any Office memos, reports, plans and other records concerning *Burwell v. Hobby Lobby Stores, Inc.* and its impact on Wisconsin law or insurance requirements relating to contraceptive coverage;
    b. Any correspondence and emails from January 1, 2014 to the present concerning Office enforcement of contraceptive coverage requirements.

2) Any correspondence, emails, and other records sent or received between the Office and the Office of the Governor concerning contraceptive coverage requirements.

3) Any correspondence, emails, and other records sent or received between the Office and Brian Sikma or Media Trackers Wisconsin.

4) Any records concerning the authority of the Commissioner to disregard Wisconsin statutes mandating contraceptive coverage by insurance providers.

Compl. ¶ 10 & Ex. A. The OCI's Chief Legal Counsel, Mollie Zito, confirmed receipt of the July 22, 2014, request on the same day it was submitted. *Id.* ¶ 11.

On July 25, 2014, after additional media coverage of the issue, Plaintiffs emailed another Open Records Request to Defendants seeking the following records for the four-day period since the initial *MediaTrackers* story broke:

1) Any correspondence and emails from July 21, 2014 to July 25, 2014 sent by Office employees concerning enforcement or non-enforcement of contraceptive coverage insurance requirements. This includes:
    a. Any internal communications discussing the Office's handling of contraceptive coverage
    b. Any communications with media or any other persons not employed by the Office

Compl. ¶ 12 & Ex. B. Again, Ms. Zito confirmed receipt of the request.

On August 27, 2014, Ms. Zito responded to both requests with a letter on behalf of OCI attaching sixteen (16) pages of records. Compl. ¶ 15 & Ex. C. The responsive documents were copies of correspondence between OCI employees and reporters dated between July 21 and 24, 2014, except for one internal OCI email indicating how OCI staff should respond to inquiries from insurers regarding the media reports on *Hobby Lobby*. *Id.* ¶ 16 & Ex. D. The letter also notified Plaintiffs that "OCI has withheld privileged documents" on the basis of the attorney work product doctrine, attorney-client privilege, and "based upon the balancing test." *Id.* Ex. C. The letter did not identify the number of documents withheld or the nature of the documents, except to state, "[t]he purpose of *some of* the withheld documents was to communicate with and confer with legal counsel." *Id.* (emphasis added). The balancing test analysis cited "the need for OCI to be afforded the opportunity to obtain confidential legal advice and representation relating to its regulatory and other obligations," and stated without explanation or identification of the withheld documents that these needs outweighed the public interest in disclosure. *Id.*

After an initial call to clarify the denial on August 27,[1] Plaintiffs wrote Ms. Zito a letter on August 29, 2014, stating that the OCI's response to the July 22 and 25 requests was inadequate and unlawful because, *inter alia*, it did not provide records responsive to the July 22 request, it did not state which of the requests were being denied, the denial was not sufficiently specific, and the denial did not contain an adequate explanation of what and how many documents were being withheld. (Compl. Ex. E.) Mr. Elliott requested that the OCI perform an additional search and that responsive records be provided to Plaintiffs. (Compl. ¶ 18 & Ex. E.) Neither Defendants nor Ms. Zito responded to this letter. (*Id.* ¶ 19.)

The Request to the Governor's Office.

Concerned that they did not receive complete documents from OCI, Plaintiffs subsequently made a request to the Office of the Governor for records related to Wisconsin's contraceptive mandate and the *Hobby Lobby* decision, including communications between the Governor's Office and the OCI. (Compl. ¶¶ 20-21.) By letter dated November 24, 2014, the Office of the Governor responded with thirty-six pages of documents. (*Id.* & Ex. E.) Its response indicated that two documents were being withheld on the basis of attorney-client privilege and attorney work product and contained a detailed explanation of the reasons for withholding the documents. (*Id.*)

The responsive documents provided by the Governor's office included communications with the OCI that were not provided with Defendants' response to Plaintiffs' July 22 and 25, 2014, Open Records requests, but that were responsive to those

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[1] In the August 27 phone call, Ms. Zito confirmed that the response letter and associated sixteen pages of documents were intended to be Defendants' response to both the July 22 and July 25 requests, and that the balancing test denial applied to records *other than* those denied on the basis of attorney-client and attorney work product privilege. (Compl. ¶ 17.) Defendants dispute that Ms. Zito stated that the balancing test applied to issues other than attorney-client privilege and work product privilege. (Answer ¶ 17.)

requests. (*Id.* ¶ 22 & Ex. G.) For example, the response from the Governor's office included multiple email messages between the OCI's J.P. Wieske and staff in the Governor's office dated July 24, 2014. (*Id.*)

Procedural History

Having confirmed that Defendants withheld responsive records, and seeking to understand and obtain these and other responsive records in Defendants' possession, Plaintiffs filed this action. (Summons & Complaint, 12/17/14.) Plaintiffs alleged in part:

> The response from the Office of the Governor, media reports, and other events indicate that the Defendants improperly withheld records that were responsive to Plaintiffs' July 22 and July 25, 2014, Open Records Requests, and that other records continue to be withheld.

(Compl. ¶ 23.) Plaintiffs also alleged that Defendants' denial was not sufficiently specific, improper, and should have at least segregated any non-privileged information in otherwise privileged records. (*Id.* at 7-8.) Defendants filed an Answer on January 20, 2015, denying many allegations in the Complaint and claiming they lacked knowledge sufficient to respond to others. (Answer.)

In order to evaluate Defendants' denials and develop facts to support their case, Plaintiffs filed their first set of written discovery seeking responses to requests for admission, interrogatories, and document requests. (Defs' Mot, Ex. 2.) These requests sought to understand the scope of the Defendants' search for records in response to Plaintiffs' requests, the basis for Defendants' denials, and what and how many records were denied. (*Id.*) On February 5, 2015, counsel for Defendants wrote the Court to request a status conference. (Ltr. to Hon. Amy Smith, 2/5/15.) The letter contended that discovery was not necessary because Plaintiff's suit only sought to disclose a record that OCI "admits that it accidentally failed to produce" and that "plaintiff already has." (*Id.*) This was an

apparent reference to the documents from the Governor's office. (*See id.*) A phone status conference occurred on February 18, 2015, followed by this Court's written order allowing Defendants to file a motion for protective order or motion to dismiss and setting a briefing schedule. (Order, 2/23/15.) However, the Court directed that prior to filing any motion for protective order, the parties must meet and confer in good faith on which requests were disputed. (*Id.* ¶ 5.) Counsel for the parties did confer on February 26, 2015, and the discussion regarding discovery was brief, with Defendants informing Plaintiffs they did not intend to respond to any discovery requests without further order of the court. (Westerberg Aff., ¶¶ 2-3.)[2]

Defendants' motion followed.

APPLICABLE LEGAL STANDARDS

Defendants have filed a motion for judgment on the pleadings under Wis. Stat. § 802.06(3) or, alternatively, a motion for protective order under Wis. Stat. § 804.01(3). Both motions impose a heavy burden on Defendants.

A motion for judgment on the pleadings is essentially a summary judgment minus affidavits and other supporting documents. *Schuster v. Altenberg*, 144 Wis. 2d 223, 228, 424 N.W.2d 159 (1988); *Jares v. Ullrich*, 2003 WI App 156, ¶ 8, 266 Wis. 2d 322, 667 N.W.2d 843. The methodology for court review is to first examine the complaint to determine whether a claim for relief has been stated. *Schuster*, 144 Wis. 2d at 228. In doing so, "'the facts pleaded by the plaintiff, and all reasonable inferences therefrom, are accepted as true.'"

[2] Plaintiffs file this affidavit in support of their response to Defendants' motion for a protective order, and not their response to motion for judgment on the pleadings. There is no need at this time to convert this motion to a motion for summary judgment pursuant to Wis. Stat. § 802.06(3).

Id. (quoting *Prah v. Maretti*, 108 Wis. 2d 223, 229, 321 N.W.2d 183 (1982)). "The complaint should be found legally insufficient only if 'it is quite clear that under no circumstances can the plaintiff recover.'" *Id.* (quoting Clausen & Lowe, *The New Wisconsin Rules of Civil Procedure Chapters 801-803*, 59 Marq. L. Rev. 1, 55-56 (1976)). If a claim for relief has been stated, the court then turns to the responsive pleadings to determine whether a material factual issue exists. *Id.* Only upon finding no disputed factual issue may the court determine that the moving party is entitled to judgment as a matter of law. *Id.* (reversing trial court decision to grant a motion for judgment on the pleadings because a claim for relief had been stated and because material facts were undeveloped and disputed).

"All pleadings shall be so construed as to do substantial justice." Wis. Stat. § 802.02(6).

A motion for a protective order is also an uphill battle, since Wisconsin affords broad rights to civil discovery. Wis. Stat. § 804.01(2)(a); *see also Sands v. Whitnall Sch. Dist.*, 2008 WI 89, ¶ 18, 312 Wis. 2d 1, 754 N.W.2d 439 ("In order for our adversary system to effectively ensure the ability of litigants to uncover the truth, and to seek and be accorded justice, it is our responsibility to render decisions that do no harm to the fundamental and important right of litigants to access our courts."). To obtain a protective order from a discovery request, Defendants must establish good cause and show that "justice requires" an order to protect them from annoyance, embarrassment, oppression, or undue burden or expense. Wis. Stat. § 804.01(3); *Vincent & Vincent, Inc. v. Spacek*, 102 Wis. 2d 266, 271-72, 306 N.W.2d 85 (Ct. App. 1981).

In interpreting the Open Records law, which provides the substantive basis for Plaintiffs' complaint, the Wisconsin Legislature has declared the state's official policy of

virtually unfettered access to government information. Wis. Stat. § 19.31. "To that end, ss. 19.32 to 19.37 shall be construed in every instance with a presumption of complete public access, consistent with the conduct of governmental business," and "only in an exceptional case may access be denied." Wis. Stat. § 19.31.

ARGUMENT

Defendants' motions are based on a fundamental misunderstanding of Plaintiffs' claims. This is not solely a case about "a record [Plaintiffs] already have." (Defs' Mot. at 2.) Rather, it is about a record custodian's failure to provide a complete, correct, and specific response to two Open Records requests relating to an important policy issue. Plaintiffs' later procurement of records Defendants *should have* produced from a different source is only evidence that Defendants' response was insufficient under the law, and that other records are still outstanding (including unidentified records Defendants have admittedly withheld on the basis of privilege). Properly framed, Plaintiffs' Complaint states valid claims for relief under the Open Records law, and it is premature to dismiss those claims and foreclose discovery at this early stage. Defendants' motions should be denied.

I. PLAINTIFFS HAVE STATED A CLAIM FOR VIOLATIONS OF THE OPEN RECORDS LAW, AND THE PLEADINGS DEMONSTRATE DISPUTED ISSUES.

A. *Plaintiffs Have Alleged Defendants Have Failed to Provide Responsive Records, Including But Not Limited to the Records Provided by the Governor's Office.*

Defendants concede Plaintiffs' allegation that OCI "failed to provide responsive records," but incorrectly assume the only record Plaintiffs seek through this suit are the July 24 email messages produced by the Governor's Office. Even if this were true, however, Plaintiffs could still recover for Defendants' failure to produce these records.

1. Plaintiffs' Complaint is Not Confined to Seeking Records from OCI that the Governor's Office Later Provided.

Defendants' motion depends on their claim that the July 24 emails Plaintiffs obtained from the Governor's office were the only records Plaintiffs allege were withheld from OCI and, hence, are the only records this case is about. (Defs' Mot. at 8; *see also id.* at 6.) This is facially untrue. As the Complaint relates,

> The response from the Office of the Governor, media reports, and other events indicate that the Defendants improperly withheld records that were responsive to Plaintiffs' July 22 and July 25, 2014, Open Records Requests, *and that other records continue to be withheld.*

(Compl. ¶ 23 (emphasis added).) Defendants never mention or acknowledge this allegation.[3] Put another way, while the July 24 emails Plaintiffs obtained from the Governor's office alone evidence Defendants' non-compliance with the Open Records law, these documents indicate that Defendants' search for records was not complete and that *other records* responsive to Plaintiffs' request are still outstanding.

Additional facts in the Complaint support Plaintiffs' allegation, including the dates and content of the 16 pages of records that OCI did provide. For example, no responsive record OCI provided was dated prior to July 21, even though only one of Plaintiffs' five discrete requests used July 21 as a starting date; most had no date limit, and one request specified the start date as January 1, 2014. (*Compare* Compl. Ex. A *with* Ex. B.) Furthermore, except for one internal email, all of the responsive records were copies of correspondence with journalists. (Compl. Ex. D.) Yet the July 22 request sought broader categories of records, including "[a]ny correspondence and emails from January 1, 2014 to

[3] In addition, the Complaint cites Defendants' denial of unspecified documents on the basis of privilege (Compl. at 5-6, 8 & Exs. C, E) as Plaintiffs discuss further in Section I.B., *infra*.

the present concerning Office enforcement of contraceptive coverage requirements" as well as "any records OCI exchanged with MediaTrackers Wisconsin." Compl. Ex. A. These facts suggest OCI only responded to Plaintiffs' July 25, 2014 request, which specifically requested correspondence from July 21-24 with journalists and others concerning enforcement of contraceptive coverage. *See id.* In fact, Mr. Elliott attempted to clarify this very issue via his August 27 phone call and August 29 letter to Ms. Zito, noting that OCI "did not provide one record in response to the four subject areas that were requested on July 22." Compl. Ex. E. Defendants never denied this contention (or responded to it at all), reinforcing Plaintiffs' reasonable belief that Defendants' response was incomplete. (Compl. ¶ 19.)[4]

In addition to these concerns, the small number of records produced (only 16 pages) and the timing of the MediaTrackers story on July 21 (based on a June 30 U.S. Supreme Court decision), suggest that records dated prior to July 21 should have been available. (Compl. ¶¶ 6-8.)[5] The Complaint also states via Mr. Elliot's August 29 letter, that "[w]e have reason to believe that OCI informed insurers about this matter," an allegation supported by the one internal email OCI provided. (Compl. Ex. D at 16, Ex. E.) No information to insurers was provided with OCI's response.

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[4] Defendants fault Plaintiffs for not notifying OCI that the Governor's office produced responsive records (Defs' Mot at 5), but Defendants' failure to respond to the August 29 letter indicated that this notice would have been futile or ignored. Regardless, any such notice is not required prior to an enforcement action under Wis. Stat. § 19.37.

[5] Defendants stated in correspondence to this Court that OCI "accidentally" failed to produce the records Plaintiffs obtained, as a check, from the Governor's office, but this fact is not in the pleadings and the Court should not consider it under Wis. Stat. § 802.06(3). Nonetheless, the fact that OCI admits it "accidentally" failed to produce the exact same records Plaintiffs happened to obtain from the Governor's office did not alleviate—but rather stoked—Plaintiffs' concern that OCI had not been entirely forthcoming.

Defendants imply that an Open Records plaintiff must identify all improperly-withheld documents in her or his complaint (*see* Defs' Mot. at 6, 8) and that anything else is mere "suspicion" incapable of supporting a claim (*id.* at 14). Yet Open Records plaintiffs will often be unable to precisely identify which records they have not been provided since they do not possess those records, and the entire point of the lawsuit is to identify and obtain them. *See, e.g., ECO, Inc. v. City of Elkhorn*, 2002 WI App 302, ¶ 9, 259 Wis. 2d 276, 655 N.W.2d 510 (reversing denial of open records dismissal where request was denied and plaintiffs "remained suspicious that additional records existed"). Furthermore, Defendants' argument puts Open Records plaintiffs in a Catch-22: they must identify all records they have not been provided, but actual possession of these records would moot any claims for relief under the Open Records law's enforcement provision, Wis. Stat. § 19.37. This is an absurd construction of the statute that this Court should not endorse. *Wisconsin v. Gilbert*, 2012 WI 72, ¶ 15, 243 Wis. 2d 82, 816 N.W.2d 215 (stating court should attempt to avoid absurd or unreasonable results in construction of statutes).

In short, the Complaint amply demonstrates that Plaintiffs are seeking records responsive to their July 22 and 25 requests, including *but not limited to* the records Plaintiffs obtained from the Governor's office as a "test" of Defendants' response. Defendants failed that test, and for this and other reasons, Plaintiffs seek to explore the adequacy of OCI's search and obtain other responsive records through this suit. Defendants deny that they have failed to produce responsive records (Ans. at 3-4), indicating this issue is disputed and that a motion under Wis. Stat. § 802.06(3) is premature and inappropriate.

2. Even if the Records for the Governor's Office Were the Only Withheld Records, the Court Can and Must Still Provide Relief.

Assuming, *arguendo*, that the only records Defendants failed to provide in

response to Plaintiffs' requests were the July 24 emails Plaintiffs separately obtained from the Governor's Office, Plaintiffs have still stated a cognizable claim against OCI as to those records.

Defendants admittedly did not provide all records in their possession in response to Plaintiffs' requests. (Defs' Mot. at 14 ("Defendants concede that they failed to turn over th[ese] email[s] and they should have.").)[6] Plaintiffs have still not received these documents from Defendants and thus have not been able to assess the records or whether, as Defendants imply, they are identical to what the Governor's Office provided.

A mandamus order directing Defendants to turn over these records is appropriate. Defendants did not meet their duty to provide those records under Wis. Stat. § 19.34(a) and (b). *See WTMJ, Inc. v. Sullivan*, 204 Wis. 2d 452, 457, 555 N.W.2d 140 (Ct. App. 1996) (holding a custodian's "statutory choices" upon receiving a request are "comply or deny"). Plaintiffs have satisfied the criteria for a mandamus order in Wis. Stat. § 19.37: an authority has withheld a record after a written request for disclosure was made, and Plaintiffs have filed an action for mandamus asking the court to order its release from Defendants. That should end the matter.

Defendants contend that the Court can offer no relief since the records Plaintiffs seek are already in their possession. (Defs' Mot. at 9.) Yet the statute admits no exception when Plaintiffs happen to have a copy of the same document (assuming it is the same) from a *different* source. *See* Wis. Stat. § 19.37. In other words, there is no precedent suggesting that one records custodian can cure another record custodian's violation. Defendants seek a

[6] Defendants have repeatedly attempted to characterize the records as a single email, but it was actually a series of eight emails. (Compl. Ex. G.)

new exception to disclosure that has not been recognized by any court. "Exceptions to public access must be recognized in derogation of the general legislative intent and must therefore be narrowly construed." *ECO, Inc.*, 259 Wis. 2d 276, ¶ 28. Furthermore, it "would be contrary to general well-established principles of open records statutes to hold that, by implication only, any type of record can be held from public inspection." *Id.* (rejecting city's argument that denial of access to public records is allowed based on extraneous information in the request or a mislabeling of the request). The Court should decline this opportunity to create a new exception to disclosure, particularly since it invites mischief and incentivizes custodians to deny requests based on their belief or statement that requesters already have the records being sought.

Indeed, ordering disclosure from OCI would allow Plaintiffs to verify that the records Defendants continue to withhold are the same as the July 24 email chain from the Governor's office.[7] Disclosure would also contribute to the body of public knowledge about these records already generated by this case, i.e. that Defendants did in fact have the records and failed to produce them. For this reason, ordering disclosure serves the purpose of the Open Records law to shed light on the workings of government. Wis. Stat. § 19.31. This remedy will also encourage voluntary compliance with the law as to this and future requests OCI may receive. *See Eau Claire Press Co. v. Gordon*, 176 Wis. 2d 154, 159, 499 N.W.2d 918 (Ct. App. 1993) (holding the purpose of Wis. Stat. § 19.37 is to encourage voluntary compliance). Not ordering disclosure allows the Defendants to violate the law with no consequences.

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[7] Notably, Defendants' answer denies any knowledge of the records provided by the Governor's office that involved OCI, though if in fact identical, the records should be verifiable on OCI's end. (Ans. ¶ 22.). OCI's copy may not be identicial because, for example, it was forwarded to other employees in OCI or contains handwritten notes.

Even if a mandamus order were "moot," as Defendants argue (Defs' Mot. at 10-11), other relief is available under Wis. Stat. § 19.37 that the Court can and should order. This includes mandatory statutory damages of at least $100, reasonable attorneys' fees, and "other actual costs to the requester" when the requester prevails in whole or substantial part. Wis. Stat. § 19.37(2). Defendants claim that these additional remedies are also "moot" and cannot be awarded if "plaintiff obtains the objective sought by the lawsuit, which in this case was access to a record." (Defs' Mot. at 10.) Yet case law holds that "a judgment or order favorable in whole or in part in a mandamus action is not a necessary condition precedent to a finding that a party prevailed against an agency under sec. 19.37(2)." *Eau Claire Press*, 176 Wis. 2d at 159 (citing *Racine Educ. Ass'n v. Bd. of Educ.*, 129 Wis. 2d 319, 328, 385 N.W.2d 510 (Ct. App. 1986)). For example, "a court order compelling disclosure of the requested information is not a condition precedent to an award of fees." *Eau Claire Press*, 176 Wis. 2d at 160 (finding that the mandamus action was a substantial factor leading to release of records prior to judgment and fees should be awarded). Defendants' conduct violated the Open Records law and they still have not produced the requested records, but even if the Court does not order Defendants to produce their version of the July 24 emails, relief is still appropriate under Wis. Stat. § 19.37(2).

For all of these reasons, the case law Defendants cite to claim this case is moot is inapposite (Defs' Mot. at 9-10), and Defendants' motion for judgment on the pleadings should be denied. To the extent there is any doubt based on the pleadings, these doubts must be resolved in Plaintiffs' favor under Wis. Stat. § 802.06(3).

B. *The Complaint Properly Alleges that Defendants' Denial of Records Was Not Sufficiently Specific, and Plaintiffs are Entitled to Production of Withheld Records.*

Setting aside the dispute about the July 24 emails and related records,

Defendants did indisputably deny some records—Plaintiffs are just not sure what they are, or why they were withheld. That is because Defendants' response was not sufficiently specific as required by law, and Plaintiffs' Complaint states a claim as to this issue. (Compl. at 8.) Defendants' motion should be denied so that the entire case can proceed for discovery and further briefing on the merits. Should the Court reach the merits of the specificity issue on this motion, however, the Court should order that the records be produced.

1. Defendants' Denial Was Not Sufficiently Specific, as the Complaint Properly Alleges.

The Complaint States a Claim as to the Insufficiency of the Denial.

According to Defendants, Plaintiffs' claim that OCI's records denial was not sufficiently specific under the Open Records law is conclusory and inadequate. (Defs' Mot. at 11-13 (citing *Ashcroft v. Iqbal* 556 U.S. 662, 664 (2009)). Yet the Complaint identifies the substantive law underlying the claim and relevant facts, and accordingly meets the requirements of Wis. Stat. § 802.02(1); *see also Data Key Partners v. Permira Advisers LLC*, 2014 WI 86, ¶ 31, 356 Wis. 2d 665, 849 N.W.2d 693. To wit, it alleges the records response failed to identify what and how many records were being withheld, in addition to claiming that the reasons for denial were not sufficiently specific. (Compl. at 5-6, 8.) It also attaches Mr. Elliott's letter to Ms. Zito of August 29, which supplies additional facts and legal citations for why the denial was inadequate. Compl. Ex. E; *see also Richards v. Heise*, 2013 WI App 30, ¶ 6, 346 Wis. 2d 280, 827 N.W.2d 929 (documents attached to the complaint are part of the complaint). The Complaint amply notified Defendants of facts supporting Plaintiffs' allegations that OCI's response was not sufficiently specific under the Open Records law and impermissibly failed to identify the records withheld. (Compl. at 8.) Defendants' motion should be denied.

Defendants suggest that the Court may decide the specificity issue as a matter of law on the basis of the response itself, without further discovery or even further briefing. (Defs' Mot. at 12, 15-16.) They point to the records response attached to the complaint as sufficiently identifying the reasons for denial (Defs' Mot. at 12) —a gesture that further reveals Plaintiffs adequately pled this issue. Plaintiffs prefer that the entire case be decided together, plus one aspect of the denial is disputed: whether the balancing test denial was intended to reiterate concerns based on attorney-client and work product privilege (*see* Ans. ¶ 17) or whether the balancing test denial encompassed different reasons for denial (Compl. ¶ 17 & Ex. E). The adequacy of the Complaint and the dispute of fact should preclude judgment at this time. *Schuster*, 144 Wis. 2d at 228. Should the Court determine that the factual dispute is immaterial and a decision on the merits is appropriate on this issue, however, the response was legally inadequate and judgment should be rendered in Plaintiffs' favor.

Defendants' Denial Was Not Sufficiently Specific.

Wis. Stat. § 19.35(4)(b) requires custodians to notify requesters not just of a denial, but to provide "a written statement of the reasons for denying the written request." Wis. Stat. § 19.35(4)(a), (b). When a denial is challenged, the court evaluates 1) whether the custodian's denial of access was made with the requisite specificity, and if so, 2) whether the reasons for denial were sufficient to permit withholding. *Milwaukee Journal v. Call*, 153 Wis. 2d 313, 317, 450 N.W.2d 515 (Ct. App. 1989). The specificity requirement restrains custodians from arbitrarily denying access to public records without weighing whether the harm to the public interest from inspection outweighs the public interest in inspection, and it provides the requester with sufficient notice of the grounds for denial to enable him to

prepare a legal challenge and provides a basis for the court's review. *Mayfair Chrysler-Plymouth, Inc. v. Baldarotta*, 162 Wis. 2d 142, 160-61, 469 N.W.2d 638 (1991), *superseded by statute on other grounds as stated in* 226 Wis. 2d 273 (1999).

Responses should identify both the factual *and* legal reasons for denial to meet the specificity criteria. Denials that do only one or the other are insufficient, as shown in case law. *E.g.*, *Portage Daily Register v. Columbia County Sheriff's Dep't*, 2008 WI App 30, ¶ 25, 308 Wis. 2d 357, 746 N.W.2d 525 (rejecting denial as insufficiently specific that only contained a statement of fact without accompanying public policy or legal basis); *Oshkosh Northwestern Co. v. Oshkosh Library Bd.*, 125 Wis. 2d 480, 485-86, 373 N.W.2d 459 (Ct. App. 1985) (finding records denial defective where custodian cited statute as basis for denial but did not explain relevant facts or how statute applied). At least some factual basis for the custodian's legal conclusions should be spelled out:

> [C]ounsel for the chief of police have contended that the reports were "confidential" or that it was "contrary to the public interest" that the reports be made public. These, of course, are not specific reasons required by law. *They are legal conclusions that can only be reached after a factual determination to be made initially by the custodial officer* and eventually, if the matter reaches litigation, by the courts.

Beckon v. Emery, 36 Wis. 2d 510, 517-18, 153 N.W.2d 501 (1967) (emphasis added);

Defendants' denial of Plaintiffs' requests did not follow the law outlined above. It cited general legal principles about attorney-client confidentiality, work product privilege, and the balancing test without explaining how these principles applied to the records at hand, or even what those records were. (Compl. Ex. C ("OCI has withheld privileged documents").) The denial *at most* related that "[t]he purpose of *some of* the withheld documents was to communicate and confer with legal counsel," which is itself conclusory and leaves the basis for withholding other records entirely unexplained. (Compl. Ex. C.)

These generalized conclusions of law, with no connection to the withheld records, do not meet the Open Records law's specificity criteria. *See Beckon*, 36 Wis. 2d at 517-18. The denial was not cleared up in Mr. Elliott's follow up call and letter to Ms. Zito. In the call, Ms. Zito stated the balancing test denial relied on a different basis than the attorney-client and work product privileges (Compl. ¶ 17), meaning it is entirely unexplained. While Defendants dispute the content of that conversation now (Ans. ¶ 17), Plaintiffs contemporaneously confirmed their understanding in Mr. Elliott's letter, which also identified other deficiencies in the response. (Compl. Ex. E (citing *Newspapers, Inc. v. Breier*, 89 Wis. 2d 417, 427 (1979); Wisconsin Public Records Law Compliance Outline, p.15 (Sept. 2012).) Defendants never replied.

Defendants' denial was also insufficient because it failed to identify or explain what and how many records were withheld. In cases where the specificity of the denial was upheld, the withheld records were all clearly identified: police records concerning a pending homicide investigation, the redacted portions of an autopsy report in a pending criminal case, and certain municipal citations. *Portage Daily Register*, 308 Wis. 2d 357, ¶ 20 (collecting cases). However, without at least generally identifying the withheld records, it is impossible to determine whether Defendants engaged in a supportable and specific analysis as to why the public policy presumption in favor of access is overcome. *See Beckon*, 36 Wis. 2d at 518. Open records guidance from the Wisconsin Department of Justice ("DOJ") supports this conclusion:

> An authority also should indicate in its response if responsive records exist but are not being provided due to a statutory exception, a case law exception, or the balancing test. *Records or portions of records not being provided should be identified with sufficient detail for the requester to understand what is being withheld*, such as "social security numbers" or "purely personal e-mails sent or received by employees that evince no violation of law or policy."

Wis. Dep't of Justice, Wisconsin Public Records Law Compliance Outline at 15 (Sept. 2012) (emphasis added).[8] Defendants' response lacks even this general level of detail.

The DOJ authority also belies Defendants' claim that "the public-records law does not require the authority to identify the documents that were withheld," else authorities "would have to prepare a privilege-log-type document each time it denied a public records request." (Defs' Br. at 12.) This startling claim lacks legal support, as does its somewhat hysterical prediction of the consequences of simply identifying withheld records. Defendants cite *Hempel v. City of Baraboo* for its statement that records custodians need not provide "facts supporting the reasons for [] denial," but they take this statement out of context. (Defs' Br. at 12, citing 2005 WI 120, ¶ 79). In *Hempel*, the withheld records had been identified—documents related to an internal investigation concerning the requester—and some records were provided in redacted form. 2005 WI 120, 31, 284 Wis. 2d 162, 699 N.W.2d 551. The statement Defendants cite was part of the court's conclusion that a custodian need not supply "hard evidence" to support its reasons for denial, but even so the court noted that "[f]actual support for the custodian's reasoning is likely to strengthen the custodian's case before a circuit court." *Id.* ¶ 79. Nothing in *Hempel* excused custodians from identifying the records withheld. This simple exercise also does not require preparation of a litigation-style privilege log, which Plaintiffs have never requested in this case. Even providing an estimate of the number of records withheld—five? fifty? five hundred?—and a description of the nature of the records withheld would be an improvement on OCI's response.

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[8] *Available at* http://www.doj.state.wi.us/sites/default/files/dls/public-records-compliance-outline-2012.pdf (last checked March 22, 2015).

Defendants' denial is not sufficiently specific for this Court to evaluate the records withheld or the reasons for denial. Under these circumstances, the records must be produced: "there is an absolute right to inspect a public document in the absence of specifically stated sufficient reasons to the contrary." *Beckon*, 36 Wis. 2d at 518. Should the Court determine that a merits decision is appropriate on this issue, judgment should be entered for Plaintiffs with an order that the records withheld be produced.

2. If the Court Does Not Order Outright Production, Plaintiffs have Stated a Claim that Some or All of the Withheld Records Must be Produced.

Defendants' denial cannot survive the specificity analysis for the reasons just explained, but if the Court concludes that it does, Defendants' motion still cannot be granted. Plaintiffs' Complaint states a claim that the denial was improper in substance and, at a minimum, that the Defendants should have at least separated and provided non-privileged portions of responsive records. (Compl. at 8.) Defendants' motion should be denied and the case should proceed to discovery and a decision on the merits.

Plaintiffs have Stated a Claim that Defendants' Records Denial was Improper, in Whole or in Part

As an initial matter, Defendants read Plaintiffs' Complaint to claim solely a failure to segregate records, then faults Plaintiffs for not stating what records should have been segregated. (Defs' Mot. at 10-11.) Defendants again read the complaint too narrowly, which both alleges that Defendants "improperly den[ied] Plaintiffs' request for records," and that Defendants "fail[ed] to separate and provide non-privileged portions of responsive records." (Compl. at 8.) For example, records claimed to be attorney-client privileged may not meet the statute's definition of "confidential," or even if they did, the privilege may have been forfeited by disclosure to a third party. *See* Wis. Stat. § 905.03. Plaintiffs have stated a

claim as to the wholesale denial and, alternatively, the failure to segregate. The Court should reject Defendants' "contorted and hypothetical" reading of the complaint and deny Defendants' motion on this issue. *Jares*, 266 Wis. 2d 322, ¶ 27 (reversing motion for judgment on pleadings).

Assuming, *arguendo*, that Plaintiffs had only alleged a failure to segregate, Defendants' motion still must be denied. Defendants contend Plaintiffs' Complaint does not meet minimum pleading requirements because it does not identify what records contain non-privileged, segregable portions. (Defs' Mot. at 10-11.) To the extent this is a problem, it is of Defendants' own making since they failed to identify the withheld records in the first place. *See* Section I.B.1., *supra*. Nonetheless, Plaintiffs did allege Defendants improperly withheld records and failed to separate and provide non-privileged portions of any otherwise nondisclosable records. (Compl. at 7, 9.) Even without knowing exactly what these documents are, it is reasonable to presume at least some portions of these records should be disclosed, given the requirement in Wis. Stat. § 19.36(6) to separate records, the narrow definition of attorney-client privilege and work product doctrine, and the fact that information such as dates and sender and recipient of records is generally not privileged information. *See* Wis. Stat. § 804.01(2)(c) (limiting work product doctrine to materials prepared "in anticipation of litigation or for trial"); *Jax v. Jax*, 73 Wis. 2d 572, 579, 243 N.W.2d 831 (1976) (holding that not all communications between attorney and client are privileged and that the privilege must be narrowly construed). The Complaint states a claim as to failure to segregate.

Defendants Had a Duty to Separate and Provide Any Non-Privileged Portions of Records

Defendants' motion also suggests they were not compelled, as a matter of law, to

provide a redacted copy of the records. (Defs' Mot. at 11.) This argument, though not well-developed, appears to assume the withheld records are actually privileged and thereby protected from disclosure under Wis. Stat. § 19.35(4). Yet Defendants had a duty to evaluate whether the records were fully privileged and provide any non-privileged portions to Plaintiffs:

> SEPARATION OF INFORMATION. If a record contains information that is subject to disclosure under s. 19.35 (1) (a) or (am) and information that is not subject to such disclosure, the authority having custody of the record shall provide the information that is subject to disclosure and delete the information that is not subject to disclosure from the record before release.

Wis. Stat. § 19.36(6). Plaintiffs are entitled to assess whether the records are actually privileged, in whole or in part, and whether Defendants executed their responsibilities under Wis. Stat. § 19.36(6).

Contrary to Defendants' argument (Defs' Mot. at 11), the duty to segregate is not a "novel claim" as the statute shows, and case law is full of examples where custodians produced partially- and even heavily-redacted portions of records. *E.g.*, *Hempel*, 284 Wis. 2d 162, ¶ 16 ("The records Chief Kluge released were substantially redacted. However, even the redacted records disclose a lot of information."); *see also, e.g., Juneau County Star-Times v. Juneau County*, 2013 WI 4, ¶ 21, 345 Wis. 2d 122, 824 N.W.2d 457 (redacted attorney billing invoices); *Milwaukee Journal Sentinel v. City of Milwaukee*, 2012 WI 65, ¶¶ 11-12, 341 Wis. 2d 607, 815 N.W.2d 367 (redacted incident reports and other police records). Separation of confidential information is a regular exercise performed by records custodians, except it is unclear whether it was performed by Defendants in this case.

In sum, Plaintiffs have stated a claim that Defendants' denial of the withheld records was improper, in whole or in part. Defendants have "denied as untrue" Plaintiffs' claim

that they improperly denied Plaintiffs' request and failed to separate and provide non-privileged portions of records. (Compl. at 8; Ans. at 4.) Defendants' request to dismiss Plaintiffs' case now, prior to any discovery or development of the claims on their merits, is unfounded and premature. Defendants' motion for judgment on the pleadings should be denied.

II. DEFENDANTS' MOTION FOR A PROTECTIVE ORDER RESTS ON FAULTY ASSUMPTIONS AND SHOULD BE DENIED.

As an alternative to its motion for judgment on the pleadings, Defendants request a blanket protective order sparing OCI from answering Plaintiffs' first set of written discovery. (Defs' Mot. at 13-16.) Just as a motion for judgment on the pleadings is premature, so is a protective order preventing Plaintiffs from developing their claims on the merits and evaluating OCI's defenses. Defendants' motion for a protective order should be denied.

Defendants' motion is based entirely on their legal theories about Plaintiffs' case. They have not made any additional showing, with affidavits or otherwise, that the requested discovery is financially burdensome, embarrassing, annoying, or meets the criteria of Wis. Stat. § 804.01(3)(a). *See Vincent & Vincent*, 102 Wis. 2d at 272 (upholding protective order where affidavits demonstrated excessive costs). Based on their stated understanding of the case and the law, Defendants contend the discovery requests could not possibly produce any relevant information, despite the broad definition of this term. Wis. Stat. §§ 804.01(2)(a), 904.01.

As Plaintiffs showed above, Section I, *supra*, Defendants' legal theories about this case are wrong and, it follows, so is their understanding of what information is relevant. For example, while Defendants assert that any discovery requests about the July 24 emails are irrelevant, Plaintiffs seek more records than just this document, based on their

reasonable belief that OCI's search for records was incomplete and did not produce all responsive records. Section I.A.1., *supra*. Defendants write off Plaintiffs' claims as mere "concern" or "suspicion" but admit that Plaintiffs' discovery is "aimed at" these concerns. (Defs' Br. at 14.)[9] Even if Defendants' characterizations were correct, the Wisconsin Rules of Civil Procedure give parties some latitude to make claims that are not entirely clear on the facts "provided the attorney or party acts promptly to determine and clarify any unclear facts." *In re Gary Daily v. Thomas Kelly*, 192 Wis. 2d 633, 650-51, 531 N.W.2d 455 (Ct. App. 1995). That is precisely what Plaintiffs' first written discovery attempts to do.

Contrary to Defendants' contention (Defs' Mot. at 14), Plaintiffs' discovery requests will allow Plaintiffs to evaluate whether Defendants improperly withheld records responsive to their July 22 and July 25 requests and violated the Wisconsin Open Records law—the cause of action in this case. (Compl. at 7-8.) For example, Plaintiffs sought to identify the employees whose records were searched, which records were searched, the period of time for which records were searched, and whether other persons have job duties or attended events that encompassed creating or receiving records responsive to Plaintiffs' request. (*E.g.*, *id.*, Interrogatory Nos. 2, 3, 8, 9, 11, 15.) This included seeking documents *about* Plaintiffs' Open Records requests, which would indicate who was asked to search for records and what they were asked to search, as well as documents about Plaintiffs' complaint. (*Id.*, Document Request Nos. 2-6.) Other requests sought to identify responsive

[9] If Defendants contend there are no other responsive records, litigants are not required to accept their opponent's version of the facts, especially prior to discovery. *See In re Gary Daily*, 192 Wis. 2d at 650 ("'Conflicting versions of the facts are standard fare in litigation.'") (quoting *Blankenship v. Computers & Training, Inc.*, 158 Wis. 2d 702, 710, 462 N.W.2d 918) (Ct. App. 1990)).

records regardless of whether Defendants searched for them at the time of Plaintiffs' requests (*id.* Interrogatory Nos. 12-13).[10]

Plaintiffs' Complaint also encompasses the claim that Defendants' denial was substantively improper, in whole or in part. *See* Section I.B., *supra*. To help assess this claim, Plaintiffs have sought to confirm and/or identify the records Defendants withheld, the basis for withholding them, and the scope of the balancing test denial. (*E.g.*, Request for Admission Nos. 1-5, Interrogatory Nos. 4-7, 14.) Defendants do not seem to dispute that the denial is actionable under Wis. Stat. § 19.37, and the need for discovery on this issue is compounded by the vagueness of Defendants' records denial.

Plaintiffs' discovery requests go the heart of their actual claims, not Plaintiffs' claims as mischaracterized and narrowed by Defendants. "[D]iscovery often reveals that there is no material factual dispute," *State v. Bausch*, 2014 Wi App 12, ¶ 23, 352 Wis. 2d 500, 842 N.W.2d 654, and that may be the result in this case. Yet Plaintiffs need Defendants' discovery responses to ascertain whether there are disputed facts or other facts that support or otherwise relate to their claims and OCI's defenses. Defendants have not met their heavy burden to show their motion for a protective order should be granted.

CONCLUSION

As Plaintiffs warned Defendants before commencing this action,

> It is troubling that the [OCI], which apparently issued a change in policy concerning an important health-related matter, has done so in secret and cannot

[10] Defendants have not contended their search at the time was comprehensive. In prior cases, an Open Records lawsuit has caused a more comprehensive search that generated responsive records. *E.g.*, *Dem. Party of Wis. v. Kapanke*, Dane County Circuit Court Case No. 09-CV-3928, *discussed in* Foley, *Milwaukee J. Sentinel*, "Judge Says he is Prepared to Rule Against Kapanke" (Aug. 20, 2009), *available at* http://www.jsonline.com/news/statepolitics/53826142.html ("Stephany . . . filed the lawsuit after Kapanke's office said it had no records related to the April and June forums in La Crosse. Numerous documents have since been released after the party sued and Kapanke's office did a more extensive search for them.").

> produce one record on this subject area [pursuant to the July 22 request]. The residents of Wisconsin have a right to understand the operations of OCI and to receive public records.

(Compl. Ex. E.) Plaintiffs are still attempting, through this suit, to receive public records in response to their requests in July 2014. For the reasons stated above, Defendants' motion for judgment on the pleadings and alternative motion for a protective order should be denied, and Plaintiffs' case should be allowed to proceed on its merits.

Dated this 25th day of March, 2015.

McGILLIVRAY WESTERBERG & BENDER LLC
Attorneys for Plaintiffs

Christa Westerberg
State Bar No. 1040530
Pamela R. McGillivray
State Bar No. 1034194
211 S. Paterson St., Suite 320
Madison, Wisconsin 53703
Telephone: (608) 310-3560
Facsimile: (608) 310-3561
westerberg@mwbattorneys.com
mcgillivray@mwbattorneys.com