STATE OF WISCONSIN CIRCUIT COURT DANE COUNTY
BRANCH 4

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

Plaintiffs,

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.

DEFENDANTS' MOTION FOR A JUDGMENT ON THE PLEADINGS, OR, IN THE ALTERNATIVE, MOTION FOR PROTECTIVE ORDER, AND BRIEF IN SUPPORT

MOTION

Defendants move under Wis. Stat. § 802.06(3) for a judgment on the pleadings because the Complaint fails to state a claim upon which relief can be granted. In the alternative, if the Court denies any part of this motion, then Defendants move for a protective order under Wis. Stat. § 804.01(3) against all discovery served by Plaintiffs on January 26, 2015, and all future discovery in this case.

BRIEF

I. Introduction.

This is a public-records lawsuit about Plaintiffs' quest for a record they already have. Because of the peculiar circumstances surrounding this case, there is actually no relief that this Court can order. The public-records law is about the public's right to know and access to public records. But because Plaintiffs already have the record they now sue over, any potential remedy is foreclosed.

As an ancillary claim, Plaintiffs also seek relief concerning Defendants' response to their public-records requests. But contrary to their claims, Plaintiffs are not entitled redacted versions of attorney-client privileged records, and neither are they entitled to a privilege log detailing exactly what Defendants withheld. The public-records law does not impose these obligations on an authority; dismissal is therefore appropriate.

In the event the Court denies any part of this motion, Defendants in the alternative move for a protective order. If Plaintiffs are entitled to relief, then the Court can simply order that relief. No amount of discovery will make these alleged violations any more or less true. If Defendants violated the law by failing to provide a privilege log or redacted versions of privileged records, then the Court can order release of the record. And if Plaintiffs are entitled to

a public record that they already have, then the Court can enter an order regarding that record. The exclusive remedy for a violation of the public-records law is in Wis. Stat. § 19.37, and if Defendants have violated the law, then the Court should use the appropriate remedy in that section. But discovery will not assist Plaintiffs—there is simply nothing to discover relevant to their claims. What's more, Plaintiffs are not entitled to discovery simply because they have a concern or suspicion that more records may be out there.

For these reasons, Defendants respectfully request an order dismissing this case, or in the alternative, a protective order from discovery. If the Court chooses the latter course, then Defendants respectfully request that the Court move directly toward judgment so that the parties may brief the propriety of any relief under Wis. Stat. § 19.37.

II. Background.

A. Facts as alleged in the Complaint.

Between July 22 and 25, 2014, Plaintiffs emailed five separately numbered public-records requests to Defendants related to contraceptive

insurance coverage under Wisconsin law. (Compl. ¶¶ 10, 12, & Compl. Exs. A and B.)[1] The following is a summary of the requests:

1. Records related to non-enforcement of contraceptive coverage under Wisconsin statutes by Defendants;

2. Records sent or received between Defendants and the Office of the Governor concerning contraceptive coverage requirements;

3. Records sent or received between Defendants and Brian Sikma or Media Trackers Wisconsin;

4. Records concerning the authority of Defendants to disregard Wisconsin statutes regarding contraceptive coverage; and

5. Correspondence or emails from July 21, 2014 to July 2014 sent by Defendants concerning the non-enforcement of contraceptive coverage insurance requirements.

(*Id.*)

On August 27, 2014, Defendants responded by granting the request in part, and denying the request in part. (Compl. ¶ 15 & Compl. Ex. C.) Defendants' response enclosed 16 pages of responsive records. (Compl. Ex. D.)

Defendants' Chief Legal Counsel, Mollie Zito, authored Defendants' response. In it, she explained that Defendants' denial was supported by three legal theories. First, "[t]he attorney-client privilege allows a client to refuse to disclose, and to prevent any other person from disclosing, confidential

[1]For the Court's benefit, a copy of the Complaint and its exhibits are attached as Exhibit 1 to this motion and brief.

communications made for the purpose of providing legal representation . . . ." (Compl. Ex. C.) Second, the public-records law provides an exception for attorney work product, and the "purpose of some of the withheld documents was to communicate with and confer with legal counsel." (*Id.*) And third, under the balancing test,

> [t]he need for [Defendants] to be afforded the opportunity to obtain confidential legal advice and representation relating to its regulatory and other obligations outweighs the public's interest in the disclosure of records related to that representation.

(*Id.*) Together, these three legal bases justified Defendants' decision to withhold certain records.

Later, Plaintiffs made a request to the Office of the Governor for similar records. (Compl. ¶ 20.) In response, the Governor's office provided a July 24, 2014, email between Defendants and the Office of the Governor concerning contraceptive coverage (the "July 24 Email"). (Compl. Ex. G.) The July 24 Email was covered by Plaintiffs' request #2, *supra,* but Defendants did not disclose the July 24 Email in their response. Nowhere in their Complaint do Plaintiffs allege that they called Defendants and inquired about this missing email. If they had, Defendants would have explained that the July 24 Email was accidentally withheld, and Defendants would have immediately rectified this oversight.

B. Claims and relief sought in the Complaint.

Plaintiffs make three separate claims in the Complaint. First, Plaintiffs claim that Defendants violated the public-records law by "failing to provide responsive records in response to Plaintiffs' requests." (Compl. 8 ¶ 4.) The only record identified in the Complaint is the July 24 Email.

Second, Plaintiffs claim that Defendants failed "to separate and provide non-privileged portions of responsive records." (*Id.*) Plaintiffs, however, do not allege that any of the withheld records contain "non-privileged portions."

Third, Plaintiffs allege that Defendants improperly denied Plaintiffs' request for records "by failing to explain the specific reasons for denial . . . and by failing to identify the documents that were withheld." (Compl. 8 ¶ 5.)

For relief, Plaintiffs seek a declaration that Defendants violated the public-records law, a mandamus order directing Defendants to produce withheld records, and damages and costs. (Compl. 8.)

III. Argument.

A. Plaintiffs have not set out a plausible claim for relief.

After the answer is filed, as it has been in this case, the defendant may move for a judgment on the pleadings at any time. Wis. Stat. § 802.06(3). When considering a motion for a judgment on the pleadings, courts "examine

the complaint to determine whether a claim has been stated." *DeBraska v. Quad Graphics, Inc.*, 2009 WI App 23, ¶ 12, 316 Wis. 2d 386, 763 N.W.2d 219 (quotations omitted). Recently, the supreme court held that complaints must satisfy the standard set out in *Bell Atlantic Corporation v. Twombly*, 550 U.S. 544 (2007). Under that standard, plaintiffs "must allege facts that plausibly suggest they are entitled to relief." *Data Key Partners v. Permira Advisers LLC*, 2014 WI 86, ¶ 31, 356 Wis. 2d 665, 849 N.W.2d 693. Additionally, bare factual assertions and conclusory legal allegations are "not entitled to be assumed true," and must be disregarded by a reviewing court. *Ashcroft v. Iqbal*, 556 U.S. 662, 681 (2009) (explaining the *Twombly* standard).

Plaintiffs' three claims in the Complaint do not state plausible claims for relief, and should therefore be dismissed.

1. Failure to provide responsive records.

Plaintiffs' first claim is that Defendants violated the public-records law "by failing to provide responsive records in response to Plaintiffs' requests." (Compl. 8 ¶ 4.) Under the standard set forth in *Data Key Partners*, this conclusory allegation alone is not entitled to a presumption of truth. So other parts of the Complaint must be examined in order to determine the contours of this claim.

Plaintiffs only identify one record that was improperly withheld: the July 24 Email. Plaintiffs do not identify any other record that was allegedly withheld.

This claim concerning the July 24 Email should be dismissed because no relief can be granted to remedy this violation of the public-records law. The purpose of the public-records law is to shed light on the workings of government and the acts of public officers and employees. *Bldg. & Constr. Trades Council v. Waunakee Cmty. Sch. Dist.*, 221 Wis. 2d 575, 582, 585 N.W.2d 726 (Ct. App. 1998). Its goal is to provide access to records that assist the public in becoming an informed electorate. *Milwaukee Journal Sentinel v. City of Milwaukee*, 2012 WI 65, ¶ 73, 341 Wis. 2d 607, 815 N.W.2d 367 (Roggensack, concurring).

These purposes and goals, however, are not served by Plaintiffs' first claim. Plaintiffs already have the July 24 Email. They attached the email to the Complaint. (Compl. Ex. G.) Plaintiffs are therefore asking for access to a record they already have, and a record that they had long before they filed this lawsuit.

The exclusive remedy for a violation of the public-records law is provided in Wis. Stat. § 19.37.

> If an authority withholds a record or a part of a record . . . .

> (a) The requester may bring an action for mandamus asking a court to order release of the record.

Wis. Stat. § 19.37(1)(a). The public-records law also provides for costs, fees, and damages as potential remedies. *See* Wis. Stat. § 19.37(2), (3), and (4). When taken together, these remedies in Wis. Stat. § 19.37 are comprehensive and address all possible violations of the public-records law; they are therefore the exclusive remedy for violations of the public-records law. *See State v. Stanley*, 2012 WI App 42, ¶ 61, 340 Wis. 2d 663, 814 N.W.2d 867 (the remedies provided in Wis. Stat. § 19.37 are exclusive remedies); *see also 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). Any request for a declaration, therefore, must be dismissed as not part of Wis. Stat. § 19.37's exclusive list of remedies.

The available remedies in Wis. Stat. § 19.37 are not applicable in this case. This Court may "order release of the record." Wis. Stat. § 19.37(1)(a). But because the record at issue was attached to the Complaint, this remedy is moot. An issue is moot if the determination sought will have no practical effect on an existing controversy. *See DeLaMatter v. DeLaMatter*, 151 Wis. 2d 576, 591, 445 N.W.2d 676 (Ct. App. 1989). Courts generally do not decide issues that are moot. *See id.* Plaintiffs already have the

July 24 Email and ordering Defendants to turn it over would have no practical effect.

The other remedies provided by Wis. Stat. § 19.37—costs and damages—all flow from an original violation of the public-records law. But if the violation is moot, then so are the damages. Damages are intended to remedy violations. And remedies become moot when the plaintiff obtains the objective sought by the lawsuit, which in this case was access to a record. *See Wausau Joint Venture v. Redevelopment Auth. of City of Wausau*, 118 Wis. 2d 50, 56, 347 N.W.2d 604 (Ct. App. 1984) (case became moot when developers obtained the objective sought by their lawsuit through a stipulation establishing the parking rates). In this case, the alleged violations stem from a lack of access to public records. Plaintiffs, however, were not denied access to public records; they received public records, but just from a different authority. Therefore, Plaintiffs have not stated any claim upon which relief can be granted because they received the record they sought.

2. Failure to separate and provide non-privileged portions of responsive records.

Plaintiffs' second claim is that Defendants failed to "separate and provide non-privileged portions of responsive records." (Compl. 8 ¶ 4.) The Complaint, however, does not allege any facts supporting this claim. There are no facts identifying the records that allegedly contain non-privileged

portions, and there are no allegations that Defendants withheld a non-privileged portion of a specific record. In fact, Defendants' response to Plaintiffs' public-records request makes absolutely no mention of non-privileged portions, or withholding non-privileged portions of records. (Compl. Ex. C.) This claim, therefore, should be disregarded as insufficient under *Key Data Partners*, 356 Wis. 2d 665, ¶ 31 (adopting *Twombly*, and by extension *Iqbal*, standards of pleading).

It appears, however, that Plaintiffs are attempting to make a novel claim: that the public-records law does not simply allow an authority to withhold a privileged record, but that the authority must produce a fully redacted version of the record. Apparently, Plaintiffs believe that the public-records law would call for blacked-out versions of records, rather than a straightforward denial. The public-records law makes no such provision, and clearly permits authorities to withhold records on the basis of privilege.

3. Failure to explain the specific reasons for the denial and identify the documents that were withheld.

Plaintiffs' third and final claim is that Defendants violated the public-records law by failing to "explain the specific reasons for denial . . . and by failing to identify the documents that were withheld." (Compl. 8 ¶ 5.) As a matter of law, however, the Court may dispose of this final claim.

Plaintiffs' claim that Defendants did not explain the "specific reasons for denial" is belied by other allegations in the Complaint itself. The Complaint alleges, for example, that Defendants denied access "on the basis of attorney-client privilege, attorney work product privilege, and the Open Records law balancing test." (Compl. ¶ 15.) The Complaint further attaches Exhibit C, which is Defendants' letter that lays out the specific reasons for denial. Therefore, ignoring the conclusory factual allegation that Defendants did not explain the "specific reasons for denial," and accepting the other non-conclusory facts as true in the Complaint, any allegation that Defendants did not explain the "specific reasons for denial" must be dismissed. *See generally*, *Iqbal*, 556 U.S. at 664 ("A court considering a motion to dismiss may begin by identifying allegations that, because they are mere conclusions, are not entitled to the assumption of truth.")

Furthermore, the public-records law does not require the authority to identify the documents that were withheld. If this were the case, then each authority would have to prepare a privilege-log-type document each time it denied a records request. The public-records law imposes no such burden on authorities. The supreme court has held that "the statute does not require the records custodian to give facts supporting the reasons for its denial." *Hempel v. City of Baraboo*, 2005 WI 120, ¶ 79, 284 Wis. 2d 162, 699 N.W.2d 551. The authority is only required to give specific reasons for

the denial, *see id.*, which it did in this case, according to the allegations in the Complaint. (Compl. ¶ 15 & Compl. Ex. C.)

B. In the alternative, Defendants are entitled to a protective order.

On January 26, 2015, Plaintiffs served on Defendants a set of written discovery requests. (Attached as Exhibit 2.) If the Court denies any portion of the motion for a judgment on the pleadings, Defendants request a protective order from these requests and any future discovery. "Good cause" exists under Wis. Stat. § 804.01(3) for one simple reason: no amount of discovery will make Plaintiffs' claims more or less true. The Court's choice is binary: if Plaintiffs stated a claim, then the Court must order an appropriate remedy; if Plaintiffs have not stated a claim, then the Court must dismiss. Discovery will do nothing to illuminate the choice faced by the Court—a choice that should be made on the face of the pleadings and as a matter of law.

Discovery may be had on any topic that is relevant to the subject matter. Wis. Stat. § 804.01(2)(a). "'Relevant evidence' means evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." Wis. Stat. § 904.01. Plaintiffs cannot identify any type of evidence that would be relevant, that is, evidence that would make their claims more or less true.

1. Discovery is not available for Plaintiffs' first claim concerning the July 24 Email.

Under their first claim, Plaintiffs allege that Defendants failed to turn over the July 24 Email. Defendants concede that they failed to turn over this email and that they should have. No factual dispute exists. If Plaintiffs' have stated a claim, then the remedy is provided by Wis. Stat. § 19.37: mandamus ordering the release of the record, and any appropriate costs or damages.

No amount of discovery is going to change the outcome of Plaintiffs' first claim for relief. Instead, Plaintiffs want discovery because they have a "concern" or "suspicion" that more documents are out there. Much of the discovery is aimed at this suspicion:

- describe in detail Defendants' process for responding to discovery (Interrogatory Nos. 2, 3);
- identify employees who deal with contraceptive coverage (Interrogatory Nos. 8, 9);
- identify all communications, meetings, conversations relating to contraceptive coverage (Interrogatory Nos. 10, 11, 12, 13);
- identify whether Defendants' employees use personal email accounts (Interrogatory No. 15); and
- produce all communications related to the Complaint or records requests (Document Request Nos. 1-6).

But Plaintiff cannot identify a single fact responsive to these requests that could make Plaintiffs' first claim more or less likely. They only hope that discovery will lead to the discovery of new claims, not any support for the

existing claims. Where a public authority responds to a public-records request and asserts that it has turned over the responsive documents it has, the requester is not entitled to take discovery based on a mere concern that something more might be out there.

A protective order is therefore warranted for topics of discovery that purport to challenge the adequacy of Defendants' search or investigate whether other records might possibly exist.

2. Discovery is not available related to Plaintiffs' second and third claims about alleged inadequate response.

Plaintiffs' second and third claims are all about the adequacy of the Defendants' response. Plaintiffs claim, among other things, that Defendants should have provided more detailed explanations concerning their denial and identified the documents that were withheld. (Compl. 8 ¶¶ 4-5.) As with Plaintiffs' first claim about the July 24 Email, however, no amount of discovery will affect the validity of their claims.

The supreme court has concluded that, when reviewing the sufficiency of response, the trial court is free to review the response in the "absence of facts." *Hempel*, 284 Wis. 2d 162, ¶ 79. This means that outside facts are not determinative of whether the response is sufficient; only the words in the response are to be considered. *See Osborn v. Bd. of Regents*, 2002 WI 83, ¶ 16, 254 Wis. 2d 266, 647 N.W.2d 158 ("If the custodian states insufficient reasons

for denying access, then the writ of mandamus compelling disclosure must issue.")

Here, the discovery requests related to these second and third claims include:

- the Requests for Admission, which ask Defendants if they turned over everything;
- Interrogatory Nos. 4, 5, 6, 7, which ask for more detail about what records were withheld and why; and
- Interrogatory No. 14, which seeks information about a telephone conversation between Plaintiffs and Defendants on the topic of the denial.

The information responsive to these discovery requests will not affect the claims. Either Defendants were required to identify the withheld documents or not; either defendants were required to provide fully-redacted copies of attorney-client memoranda or not; either the letter denying access was sufficient or it was not.

So whether Defendants had additional reasons, or whether Defendants' employees had conversations about the denial with Plaintiffs, are irrelevant to this dispute. Therefore, a protective order concerning these topics is warranted.

IV. Conclusion.

This is a case about three claims: (1) Defendants failed to turn over the July 24 Email; (2) Defendants failed to provide non-privileged portions of records; and (3) Defendants should have provided a privilege-log when responding to Plaintiffs' records requests. Taking all the allegations as true, Plaintiffs have not stated a claim upon which any relief can be granted. Plaintiffs already have the July 24 Email, which Defendants concede they accidentally withheld. And Plaintiffs have not even alleged that Defendants improperly withheld non-privileged portions of any particular record. Finally, no principle of law provides that an authority must provide a privilege log when responding to a public-records request.

If any of Plaintiffs' claims survive, Defendants request a protective order. Plaintiffs may only discover relevant claims concerning their *existing* claims, not claims that they hope to find through discovery. Discovery is not a fishing expedition, and no amount of discovery will make Plaintiffs' existing claims more or less true. Therefore, if Plaintiffs have stated a claim, the

Court should simply move to a remedy phase and allow the parties to brief the issues surrounding Wis. Stat. § 19.37.

Dated this 5th day of March, 2015.

Respectfully submitted,

BRAD D. SCHIMEL
Attorney General

DANIEL P. LENNINGTON
Assistant Attorney General
State Bar #1088694

Attorneys for Defendants

Wisconsin Department of Justice
Post Office Box 7857
Madison, Wisconsin 53707-7857
(608) 267-8901
(608) 267-2223 (Fax)
lenningtondp@doj.state.wi.us