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DEPARTMENT OF JUSTICE

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April 1, 2015

HAND DELIVERED

The Honorable Amy R. Smith
Circuit Court Judge, Br. 4
Dane County Courthouse
215 South Hamilton Street, Room 8107
Madison, WI 53703-3288

Re: ***Freedom From Religion Foundation, Inc., et al. v. Wisconsin Office of the Commissioner of Insurance, et al.***
Case No. 14-CV-3429

Dear Judge Smith:

Enclosed for filing is Defendants' Reply in Support of Motion for a Judgment on the Pleadings, or, in the Alternative, Motion for Protective Order in this case. A copy is being mailed this date to opposing counsel.

Thank you.

Sincerely,

Daniel P. Lennington
Assistant Attorney General
State Bar #1088694

DPL:mlk

Enclosure

c: Christa Westerberg/Pamela R. McGillivray

STATE OF WISCONSIN CIRCUIT COURT BRANCH 4 DANE COUNTY

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' REPLY IN SUPPORT OF MOTION FOR A JUDGMENT ON THE PLEADINGS, OR, IN THE ALTERNATIVE, MOTION FOR PROTECTIVE ORDER

I. Introduction.

Plaintiffs' response brief confirms that they are indeed asking the Court to allow three unprecedented claims:

- *First*, if an authority accidentally withholds a record, and later admits that fact, then a plaintiff may use a public-records lawsuit "to explore the adequacy of [the authority's] search and obtain other responsive records through [a lawsuit]." (Pls. Br. at 12.)

- *Second*, a public-records denial is insufficient when it fails to identify "what and how many records are being withheld." (Pls. Br. at 16, 19.)

- *Third,* if an authority denies access to records because of attorney-client privilege or work product, and does not provide "non-privileged, segregable portions" of these records, then "it is reasonable to presume at least some portions of these records should be disclosed." (Pls. Br. at 22.)

These three claims are not recognized under Wisconsin law, and so they cannot proceed. Defendants' motion for a judgment on the pleadings is therefore appropriate.

In the alternative, even if some or all of these claims may proceed, Plaintiffs still have not identified what discovery could possibly yield that would make their claims any more or less true. If Wisconsin public-records law imposes these alleged requirements upon authorities, then Plaintiffs should file for summary judgment. They are not entitled to a fishing expedition if their theories are correct—they are instead entitled to the exclusive remedies provided by Wis. Stat. § 19.37.

II. Argument.

A. Plaintiffs do not dispute that the public-records law's exclusive remedies are provided by Wis. Stat. § 19.37.

As a preliminary, but important, foundational matter, Defendants' brief explained that Wis. Stat. § 19.37 provides the *exclusive* remedies for a public-records law violation. (Def. Br. 8-9.) Plaintiffs acknowledge the exclusive nature of the remedies in Wis. Stat. § 19.37. (Pl. Br. at 14-15.)

Therefore, this Court should enter judgment on Plaintiffs' claims for declaratory relief. (*See* Compl. at pg. 8.) Declaratory relief is not a remedy for a violation of the public-records law. Plaintiffs' *only* available relief is that the Court may "order release of the record," in addition to the fees, costs, and damages allowed. Wis. Stat. § 19.37(1)(a).

B. Plaintiffs cannot state a claim alleging that there might possibly be more records out there.

The starting point of Plaintiffs' first claim—that Defendants did not turn over responsive records—goes to the heart of the public-records law. Defendants have already admitted that they did not turn over the July 24, 2014, email string (July 24 Email) that is attached to Plaintiffs' complaint. Had Plaintiffs not independently obtained this record, this Court could "order release of the record" as provided in the exclusive-remedy provisions of Wis. Stat. § 19.37. As it stands now, however, Plaintiffs already have that record, and so ordering Defendants to copy the record and provide it to Plaintiffs would not serve the policy behind the public-records law. *See* Wis. Stat. § 19.31.[1]

But Plaintiffs want more. They do not just want the July 24 Email—they claim there *must* be more records. Although they did not allege this

[1] Plaintiffs claim that Defendants' version of the July 24 Email might contain handwritten notes or different recipients. (Pl. Br. at 14, n. 7.) That would be a different record, however. Plaintiffs are again speculating that more is out there, which is not a claim for relief under public-records law.

argument in their Complaint, Plaintiffs ask the Court to compare Exhibits A and B of the complaint, and deduce that there *should have been* more records produced. (Pl. Br. at 10.) Defendants are aware of no court decision or law that would require this Court to compare the request and the authority's response, view the number of records produced and their type, and then deduce that more records should be out there.

Further, Plaintiffs' allegation that "these facts suggest" more records are out there fails the plausibility standard imposed by the Wisconsin Supreme Court. *Data Key Partners v. Permira Advisers LLC*, 2014 WI 86, ¶ 31, 356 Wis. 2d 665, 849 N.W.2d 693 (adopting the standard set forth in *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544 (2007)). Plaintiffs' claims about the request and the response are not concrete factual allegations that Defendants did not produce specific records; instead, they are bare factual assertions and legal conclusions that are "not entitled to be assumed true." *See Aschroft v. Iqbal*, 556 U.S. 662, 681 (2009) (explaining the *Twombly* standard). Their claim, in short, is not a plausible claim for relief.

Finally, Defendants are aware of no court decision or law that would provide Plaintiffs with an opportunity to "explore the adequacy of OCI's search and obtain other responsive records through this suit." (Pl. Br. at 12.) If "exploring the adequacy of the search" is a recognized claim, then any

requester could file a claim based on the suspicion of more records.[2] This is not the current state of the public-records law, and so Plaintiffs' first claim of relief should be dismissed.

C. Defendants were not required to identify "what and how many records were being withheld."

Plaintiffs' second claim is about the adequacy of Defendants' written response to their public-records request. In two places in their brief, Plaintiffs make the claim that a response must "identify what and how many records were being withheld." (Pl. Br. at 16, 19.) With such an argument, Plaintiffs invite this Court to be the first court in Wisconsin to require authorities to spell out exactly what and how many records are not being produced. This Court should decline Plaintiffs' invitation.

The cases cited by Plaintiff do not support the proposition that an authority must explain "what and how many records" are being withheld. In *Portage Daily Register v. Columbia County Sheriff's Department*, a

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[2] For example, assume an authority turned over Record #1 and that record referenced Record #2, but the authority did not turn over Record #2. If the requester does not know whether Record #2 exists or is in the authority's possession, does the requester have a cognizable claim based merely on that allegation? No. The public-records law does not support such a claim unless the plaintiff can allege that the authority has Record #2 in its possession, but refuses to disclose it. Otherwise, public-records litigation would devolve into a series of claims that an authority *should have* certain other unidentified records. *See State ex rel. Gehl v. Connors*, 2007 WI App 238, ¶ 15, 306 Wis. 2d 247, 742 N.W.2d 530,("The public records law addresses the duty to disclose records; it does not address the duty to retain records.")

newspaper asked for an investigative report and the sheriff's department denied access because of an "open and ongoing investigation." 2008 WI App 30, ¶3, 308 Wis. 2d 357, 746 N.W.2d 525. The requester in that case asked for a specific record, and the sheriff's department denied the request. In holding that the sheriff's explanation of its policy for withholding the record under the balancing test was insufficient (i.e. "ongoing investigation"), the court did not hold that the sheriff was required to identify "what and how many records" were being withheld. In fact, in beginning its analysis, the court wrote "a records custodian is not required to provide a detailed analysis of the record and why public policy directs that it must be withheld." *Id.* ¶14 (quotation omitted).

In the next case cited by Plaintiffs, *Oshkosh Northwestern County v. Oshkosh Library Board,* a library board denied access to specific motions made at a meeting and roll call votes. 125 Wis. 2d 480, 484, 373 N.W.2d 459 (Ct. App. 1985). The written denial simply invoked a statutory cite to the open-meetings law, and stated that "the reason for the exemption of the meeting carries over to the exemption of the records." *Id.* The court stated that an open-meetings exception does not automatically translate into a public-records exception, and therefore, the written denial was insufficient. *Id.* at 485. Again, the court did not conclude that the authority had to identify exactly "what and how many" records were being withheld.

The final case cited by Plaintiffs in this section, *Beckon v. Emery,* is not about the public-records law, but about a predecessor statute. 36 Wis. 2d 510, 153 N.W.2d 501 (1967). The case is about a traffic ticket and the police department's refusal to allow access to the ticket without explanation: "No reason was given by the police chief for such refusal." *Id.* at 513. The portion of *Beckon* quoted by Plaintiffs discusses a previous case, *State ex rel. Youmans v. Owens,* 28 Wis. 2d 672, 137 N.W.2d 470, 139 N.W.2d 241 (1965), in which the police chief, "without giving any reason whatsoever, denied the right of inspection." *Id.* at 517. *Youmans* and *Beckon* alike simply stand for the proposition that an authority must explain why a records request is being denied, not that an authority must describe "what and how many" records were withheld.

Defendants do not dispute that they must explain the reasons for their denial. Defendants' response is attached to the Complaint, and the Court may assess the completeness of the response as a matter of law. (Compl. at Ex. C.) But an authority is not required to explain the details of the factual reasons surrounding the denial, including "what and how many" records are withheld. *See Hempel v. City of Baraboo,* 2005 WI 120, ¶ 79, 284 Wis. 2d 162, 699 N.W.2d 551 ("the statute does not require the records custodian to give facts supporting the reasons for its denial.")

In the end, Plaintiffs find no support in the caselaw or text of the public-records law for the proposition that Defendants should have included "an estimate of the number of records withheld—five? fifty? five hundred?—and a description of the nature of the records withheld. . . ." (Pl. Br. at 20.) Because there is no legal support for this novel theory of liability, this claim should be dismissed.

D. Plaintiffs have not stated a claim for failure to segregate.

In their final claim, Plaintiffs argue that authorities must segregate information as provided by Wis. Stat. § 19.36(6). This is true. "If a record contains information that is subject to disclosure . . . and information that is not subject to disclosure," then the authority must redact or otherwise provide the portions that must be disclosed. *Id.* But apart from the conclusory allegation that this requirement exists and that Defendants did not segregate records (Compl. at 8, ¶4), Plaintiffs do not allege any facts that would support such a conclusory statement. For example, Plaintiffs do not allege that there were, in fact, non-privileged portions of records that should have been produced.

Plaintiffs' brief solves the puzzle of this allegation: they are just guessing. "Even without knowing exactly what these documents are," the Complaint explains, "it is reasonable to presume at least some portions of these records should be disclosed . . . ." (Pl. Br. at 22.) By way of example,

Plaintiffs say that "dates and sender and recipient" information might not be privileged information, and so therefore, Defendants should have turned over at least that information.

From the face of the complaint, however, there are no allegations about "dates and sender and recipient" information. These allegations appear nowhere in the complaint—only in the brief. But even if Plaintiffs did make allegations, their claim would still be speculative. Plaintiffs are speculating that Defendants' records might have "dates and sender and recipient" information, and that the information was not subject to applicable privileges. Under Plaintiffs' theory, therefore, an authority could *never* completely deny access to a record. There is *always* something that could be disclosed, even if it is a date or a heading. No case makes such a holding, and if accepted, such a theory would turn each public-records request into an overly burdensome redaction exercise. The goal of providing citizens the "greatest possible information regarding the affairs of government," Wis. Stat. § 19.31, would be bogged down and delayed by a new court-imposed requirement to create mountains of blacked-out government documents for requesters. Such a rule would not advance the goals of the public-records law.

E. Even if some of Plaintiffs' claims survive, discovery is not appropriate.

Plaintiffs do not explain what facts they might discover that could make their three claims any more or less true.[3] The claims as pled by Plaintiffs set up a series of binary choices: either Defendants must provide again the July 24 Email, or not; either Defendants did not adequately explain the basis for their denial and therefore the records must be released, or not; either Defendants must provide fully redacted pages of attorney-client communications, or not. Under the theories espoused by Plaintiffs, discovery does not make these claims more or less true—either the law requires what Plaintiffs claim or not. No amount of discovery will assist in their claims, and therefore a protective order is appropriate in the event that this case proceeds in part.

III. Conclusion.

Plaintiffs have asserted three separate legal theories under the public-records law that appear nowhere in the caselaw or text of the statute. These claims, therefore, should be dismissed. Even if this case can go forward with some remaining claims, however, Plaintiffs should not be permitted to engage in a fishing expedition through discovery. If Plaintiffs have stated

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[3] Plaintiffs claim discovery is needed to "evaluate whether Defendants improperly withheld responsive records . . . ." (Pl. Br. at 25.) No case provides this type of double-checking as a potential remedy under the public-records law.

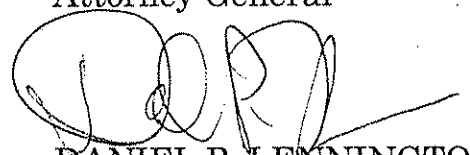
claims upon which relief can be granted, Plaintiffs should move for summary judgment and Defendants can respond. Then the Court can consider whether the exclusive remedies under Wis. Stat. § 19.37 can be applied to this case in any meaningful way.

Defendants respectfully request that their motion for a judgment on the pleadings be granted in full.

Dated this 1st day of April, 2015.

Respectfully submitted,

BRAD D. SCHIMEL
Attorney General



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