STATE OF WISCONSIN | CIRCUIT COURT BRANCH VI | OUTAGAMIE COUNTY

MARILYN BARTELT

Plaintiff,

vs. Case No. 12CV1318

APPLETON AREA SCHOOL DISTRICT, et al,

Defendants.

DECISION & ORDER

Marilyn Bartelt (Bartelt) seeks records from the Appleton Area School District (AASD) regarding disciplinary proceedings against teachers, administrators, and aides within AASD's special education program. AASD denied Bartelt's request, and Bartelt now seeks a Writ of Mandamus compelling the disclosure of the records. In the alterative, Bartelt requests an in camera review of the records. Is Bartelt entitled to disclosure or in camera review?

Background Facts

Bartelt's grandson is a special needs student within AASD. Due to past allegations of child abuse within the AASD special needs program, including the conviction of one former teacher, and complaints filed by Bartelt's daughter, Bartelt seeks access to the disciplinary records of those teachers, administrators, and aides involved in the AASD special needs program. Bartelt identified seven AASD employees: Ashley Bath, Christine DeBoer, Doreen McCoy, Heidi Mendonca-Erstad, Tammy Scott, Rick Waters, and Cara Wege. Of these individuals, Waters had been the principal at the school where the incidents leading to a criminal conviction occurred. Mendonca-Erstad is the teacher who worked the closest with Bartelt's

grandson and about whom Bartelt's daughter had made the most complaints according to the documents attached to the briefs on this motion.

AASD denied Bartelt's request and a request for reconsideration. In its initial denial, AASD did not give specific reasons for its decision not to release the records. After Bartelt's second request, AASD cited general concerns for the reputations of the individuals who were the subjects of the records, stating specifically that the records that existed concerned only "discipline of specific individuals in isolated incidents" of "low-level" employees, contained hearsay statements, and may be relevant to pending or future litigation. Bartelt commenced this action seeking a writ of mandamus to compel AASD to turn over the records. AASD files a cross-motion for summary judgment.

DECISION

Mandamus is an "extraordinary writ" that may be requested "to compel public officers to perform a duty that they are legally obligated to perform." *Watton v. Hegerty*, 2008 WI 74, ¶ 7, 311 Wis.2d 52. A petitioner must show that (1) he has a clear legal right to the records sought; (2) the government entity has a plain legal duty to disclose the records; (3) substantial damages would result if the petition was denied; and (4) no other adequate remedy exists at law. *Id.* at ¶ 8. The burden is on the custodian to state the specific reasons for denying access. Wis. Stat. § 19.35(1)(a) (2011). If the custodian fails to give sufficient reasons for withholding the public record, a writ of mandamus compelling production must issue. *Id.*

The Wisconsin public records law "shall be construed in every instance with a presumption of complete public access, consistent with the conduct of government business." Wis. Stat. § 19.31 (2011). There are, however, exceptions to this presumption where defined by statute, common law, or "if there is an overriding public interest in keeping the records confidential." *Portage Daily Register v. Columbia County Sheriff's Dep't*, 308 Wis.2d 357, 365

(Ct. App. 2007). Exceptions are to be narrowly construed. *Id.* Where no explicit exception applies, the court must review the sufficiency of the custodians' refusals. *Id.*

Here, the parties agree that no explicit exception applies; therefore, the Court must conduct a balancing test to determine whether disclosure can be precluded. *Milwaukee Journal Sentinel v. Wis. Dept. of Admin.*, 2009 WI 79, ¶ 54, 319 Wis.2d 439. The balancing test involves balancing the public interest in disclosure against the public interest in non-disclosure. *Id.* at ¶ 55. The test should be applied when the record custodian has refused to produce the record, in order to evaluate the merits of the custodian's decision. *Id.* In applying this test, there will be no "blanket exceptions from release." *Linzmeyer v. Forcey*, 2002 WI 84, ¶ 10, 254 Wis.2d 306. The test is applied on a case-by-case basis and with respect to each individual record. *Wis. Newspress, Inc. v. Sch. Dist. of Sheboygan Falls*, 199 Wis.2d 768, 780 (1996).

Bartelt urges the Court to issue mandamus without further analysis because AASD did not do a record-by-record review, but *Milwaukee Journal Sentinel* speaks only of a requirement for the court on review to conduct a record-by-record review. 2009 WI 79, at ¶¶ 57-58. However, *Milwaukee Journal Sentinel* also holds that if the custodian fails to identify specific reasons as to each record, then a record by record review is not necessary. Furthermore, if the reasons the custodian presented for refusal would not be a valid reason for withholding the records under any circumstance, then a record by record review is not necessary for the Court's determination.

AASD asserts three primary reasons for refusing to disclose the requested disciplinary records: (1) The employees are low-level employees who have a higher expectation of privacy than higher-ranked public employees; (2) The documents contain hearsay and disclosure is likely to have a chilling effect on future internal investigations; and (3) the records are pertinent to litigation or a possible criminal case against Waters. AASD describes Bath, DeBoer, McCoy,

Mendonca-Erstad, Scott, and Wege as "low-level paraprofessionals" and thus, exempt from disclosure. (Def.'s Br., 12, Sept. 4, 2013.) Even if AASD was correct that there was a different expectation of privacy, it would not apply to all of these records because some of the listed individuals are teachers and a school psychologist, who are typically not considered "paraprofessionals."[1] *See Linzmeyer*, 2002 WI 84, at ¶¶ 28-29 (finding a public school teacher to be in a position of "some visibility" which "support[ed] public scrutiny of potential misconduct, particularly if it occurs in the school and classroom settings"). As it is all public school employees, by nature of their positions in close contact with children, are subject to "some increased accountability" by the public. *Id.* The employees at issue do not have a heightened expectation of privacy which would support not disclosing their disciplinary records.

AASD's argument regarding hearsay and a chilling effect on future investigations can be similarly rejected. One of the primary purposes of the Open Records Law is to allow the public to monitor the "disciplinary actions taken against public officials and employees"; this includes not only the discipline imposed, but whether and the extent to which the misconduct was "properly investigated." *See Kroeplin v. Wis. Dept. of Natural Res.*, 2006 WI App 227, ¶¶ 22, 38, & 46 (holding interests in keeping records confidential did not outweigh the public interest in the release of disciplinary records). Hearsay statements that were considered relevant in the course of an investigation into alleged misconduct are also relevant to the public in its interest in whether misconduct was properly investigated.

Kroeplin also explicitly rejected a public employer refusing to disclose documents for fear of "chilling" cooperation with future internal investigations. *Id.* at ¶ 52. As stated by the court of appeals in that case,

[1] The term "paraprofessional" is usually used to refer to a teacher's aide.

> If public employers know that the investigations they perform are subject to public review, common sense dictates that they will be more diligent in ensuring that charges of potential misconduct are thoroughly investigated, and that the appropriate discipline is imposed, than they would be if they were not so held accountable to the public.

Id. Thus, AASD's argument that disclosing the records would harm future disciplinary investigations does not outweigh the public's interest in monitoring misconduct by public employees and the manner in which it is investigated. In addition, the disciplinary investigations at issue here have been concluded. In general, courts "give greater weight to the public's interest in knowing the disciplinary results of conduct of its public officials than to the possible harm to a particular official's reputation," especially when the disciplinary investigation has concluded. *Newspress*, 199 Wis.2d at 788.

Finally, AASD's argument that ongoing or potential litigation justifies its decision not to disclose the records can also be rejected. With respect to the federal court litigation, AASD does not claim that any of the records at issue are subject to an attorney-client privilege. *See Journal/Sentinel, Inc. v. Sch. Bd. of the Sch. Dist. of Shorewood*, 186 Wis.2d 443, 459 (Ct. App. 1994) (recognizing privileged documents are not to be disclosed). Furthermore, Wisconsin courts have already held that the public has an interest in lawsuits involving public bodies because litigation entails the expenditure of public funds. *Id.* (requiring disclosure of a "Memorandum of Understanding" prepared in conjunction with a settlement offer). If a school district can be compelled to disclose records prepared specifically in the course of litigation, it can surely be compelled to disclose records that have only a loose connection to the litigation.

AASD also claims that the potential for renewed criminal charges to be brought against Waters justifies nondisclosure. AASD relies on case law involving ongoing criminal investigations to support this argument, but its authorities are not on point. Where records were not subject to disclosure because of ongoing criminal investigations, there was the potential for

harm to government informants or destruction of evidence. *Milwaukee Journal v. Call*, 153 Wis.2d 313, 318 (Ct. App. 1989) (finding crime detection to be sufficient grounds to prevent disclosure of records pertinent to an unresolved homicide investigation). While the potential for interfering with an ongoing investigation is a consideration, AASD provides no indication of why its records would hurt crime detection efforts. In fact its argument appears to promote using the criminal investigation exception to disclosure to shield a public employee from criminal liability. If release of these records would lead to a criminal investigation, the public interest is clearly greater than any privacy interest held by Waters.

Because AASD has failed to give sufficient reasons for withholding the public record, a writ of mandamus compelling production must issue. Because AASD has not presented sufficient grounds to justify its refusal to disclose the records, the Court does not address the request for in camera review. Finally, pursuant to the above findings, AASD's Motion for Summary Judgment is denied.

ORDER

The Writ of Mandamus requested by the Plaintiff is granted and AASD shall produce the records pursuant to the procedure outlined in §19.356 Wis. Stats. Defendant's Motion for Summary Judgment is denied.

Dated this 7th day of February, 2014.

BY THE COURT:

Honorable Dee R. Dyer
Circuit Court Judge, Branch VI