STATE OF WISCONSIN
COURT OF APPEALS
DISTRICT II
Appeal No. 2018-AP-1189

SANDRA J. WEIDNER,

Petitioner-Appellant,

v.

CITY OF RACINE,

Respondent-Respondent.

Appeal from a Final Judgment entered on May 16, 2018,
in Racine County Circuit Court,
the Honorable Eugene A. Gasiorkiewicz Presiding Circuit
Court Case No. 17-CV-1644

REPLY BRIEF OF PETITIONER-APPELLANT SANDRA J. WEIDNER

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

ARGUMENT

For the first time in this matter, whether in circuit court or on appeal, the City directly argues that this is not a public records case.[1] It proffers no legal authority to convince one that this is not a valid public records case. It does not examine the Public Records Law and specify exactly how Weidner's requests did not have the appropriate bona fides, except to say there was no express mention of the public records law.[2]

Instead, the best it can do is characterize what it believes are Weidner's motives, despite the fac that purpose is irrelevant in a public records case.[3] It paints Weidner as a rogue actor bent on usurping investigative authority and touts its benevolence in pursuing ethics advice over disciplinary action.

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[1]The City's primary attack via its motion to quash was that the mandamus request was moot, not that this is not a public records case. At best for the City, in the circuit court, the City did circuitously imply that this is perhaps not a public records case. But it was done indirectly via statements in it motion to quash briefing that Weidner attempted to "shift the focus" or "shift this case" into a "public records case." [R40:2, 6]. Moreover, at the hearing on the City's motion to quash, the City's argument was based on alleged mootness; its counsel made no mention that this was not a public records case. [R112:2-7].

[2]The law does not require a request to contain any "magic words" nor does it prohibit the use of any words. *ECO, Inc. v. City of Elkhorn,* 2002 WI App 302, ¶ 23, 259 Wis.2d 276, 655 N.W.2d 510.

[3]*See* Wis. Stat. § 19.35(1)(i), Stats. (stating that a request may not be denied because the requester failed "to state the purpose of the request").

The City is too late. Had the City truly believed that this was not a public records case, it could have and should have appealed the circuit court's treatment otherwise.

Even putting that aside, if anything, the circuit court proceedings have revealed that the contours of privilege – and whether the subject communications qualify as such – can be subject to dispute, especially in the municipal governance context.

Based on its Ethics Board submission, one might assume that the City perhaps recognized these disputed contours and that it was truly seeking guidance and clarity as to the nature of the subject communications and, consequently, the propriety of their dissemination. Yet the City's position throughout – from when it denied Weidner's information requests through its Brief herein – is unequivocal: The communications are absolutely privileged and thus any public dissemination was improper.

The Court should not accept the City's invitation to view this case as a malcontent's disillusioned attempt to thwart authority. It is a public records case necessitating court interpretation against the backdrop of attorney-client privilege and confidentiality. When that prism is applied, as confirmed below, the City's Brief does not effectively advance its position that the

subject documents are in any way privileged and thus exempt from public disclosure.

I. THIS COURT MAY CONSIDER PETITIONER'S ARGUMENT THAT THE CIRCUIT COURT ERRED IN REJECTING HER AMENDED PETITION.

As the City has noted, the circuit court rejected Weidner's amended petition at both the February 5 and March 13 hearings. (It did so *sua sponte*). The facts relating to the rejection are undisputed. Thus, the issue of whether the circuit court erred by not allowing Weidner to amend is one of law this Court reviews de novo. *See Kox v. Ctr. for Oral and Maxillofacial Surgery, S.C.*, 218 Wis. 2d 93, 579 N.W.2d 285, 288 (Ct. App. 1985).

In support of its forfeiture argument, the City cites several cases with procedural contexts and circumstances different from that at hand. *See, e.g., State v. Rogers*, 196 Wis. 2d 817, 539 N.W.2d 897 (Ct. App. 1995) (ruling, in interlocutory appeal by state following trial court ruling at preliminary hearing that statement of alleged co-conspirator was inadmissible, that court would not consider two new theories in support of admissibility for the first time asserted by state on appeal).

The City also quotes the first sentence of Wis. Stat. § 805.11(1): "Any party who has fair opportunity to object before a ruling or order is made must do so in order to avoid waiving error." Notably, however, the second sentence provides: "An objection is not necessary after a ruling or order is made."

Weidner disagrees that her not raising the applicability of Wis. Stat. § 802.09(1) argument in circuit court forfeits consideration by this court. However, even if *arguendo* the forfeiture rule applies, it "is not inflexible" and "is a rule of administration, not of power." *Northern States Power Co. v. Town of Hunter Bd. of Sup'rs,* 203 N.W.2d 878, 57 Wis.2d 118 (1973). In other words, the rule "is not absolute and exceptions are made." *Wirth v. Ehly*, 93 Wis. 2d 433, 287 N.W.2d 140 (1980).

This should especially be the case where, such as here, an issue of law – the impact of a procedural statute in the context of undisputed facts – is involved. *See Harvest Sav. Bank v. ROI Invs.,* 209 Wis. 2d 586, 596, 563 N.W.2d 579 (Ct. App.1997)(noting that forfeiture exceptions "involve questions of law which, though not raised below, may nevertheless be raised and decided by the court on appeal").

This is not a situation where as the City contends, for strategic reasons, Weidner is trying to "blindside" or "sandbag." The circuit court made a sua sponte ruling in contravention of a straightforward (and applicable) procedural rule. Rather than argue that rule's inapplicability, which it could have briefed, the City instead chose to focus on forfeiture. This is not a case where the forfeiture rule applies or should apply.

II. THE CITY FAILS TO MEET ITS BURDEN OF SHOWING THAT THE COMMUNICATIONS ARE PRIVILEGED.

In its heading descriptions and discussion, the City attributes the legal terms of art "legal advice," "legal analysis," or "legal insight" to many of the documents, without explaining exactly how they so qualify.

In *In re County of Erie*, 473 F.3d 413 (2d Cir. 2007), the Second Circuit defined "legal advice" as follows: "Fundamentally, legal advice involves the interpretation and application of legal principles to guide future conduct or to assess past conduct. . . . It requires a lawyer to rely on legal education and experience to inform judgment." 473 F.3d at 419-20.

The City has the burden of proving privilege. *Dyer v. Blackhawk Leather LLC,* 2008 WI App 128, ¶ 8, 313 Wis. 2d 803,

758 N.W.2d 167 (citation omitted). Calling content "legal advice" or "legal insight" or "legal analysis," without elaboration on how the content fits, does not suffice.

A. Communication one.[4]

The City contends that the document is privileged because it seeks advice "regarding a pending claim against the City." (Resp. Br., p. 31). Yet the City does not elaborate on or specify how merely inquiring about claim status and processing constitutes a request for legal advice.

In this case, the alderperson is not asking the City Attorney to interpret and apply legal principles to guide that alderperson's conduct -- the hallmark of "legal advice." (*See In re County of Erie, supra*). The alderperson is not inquiring as to the claim's legal or substantive merits.

A request for information as to "[i]nternal processing of a pending claim"[5] – how the circuit court characterized it – is not a

[4]The City correctly points out that it was the alderperson, not the City, who forwarded the e-mail to the City paralegal. Weidner erroneously (and inadvertently) stated otherwise and revokes any argument based on the erroneous assertion. As for the alderperson-to-City paralegal transmission, the City inexplicably included this document in its Ethics Board submission as one of its several alleged examples of wrongful disseminations to third parties outside the City (despite the fact that the City paralegal is obviously not an outside third party).

[5]R62:8; A-App. 13.

request for "legal advice." This is because, in providing claim status and a timeline, the City Attorney is acting as a claim processor – not legal advisor. Courts have generally held that the privilege does not apply to that context. *See, e.g., Mission Nat'l Ins. Co. v. Lilly,* 112 F.R.D. 160, 163 (D. Minn. 1986). *See also Dawson v. New York Life Ins. Co.,* 901 F. Supp. 1362, 1367 (N.D. Ill. 1995) (attorney-client privilege did not attach where attorneys were acting more as "couriers of factual information" rather than "legal advisors"); *Schmidt v. California State Auto. Ass'n,* 127 F.R.D. 182, 183 (D. Nev. 1989)("The entire claims file is not shielded by the attorney-client privilege because not all of the material within the claims file embodies confidential communications between the defendant and an attorney acting in the role of attorney")(emphasis added).

B. Communication 2.

The circuit court held that this document "references legal advice regarding changes to a City ordinance." (R62:8)(A-App. 13). The City calls it "providing advice regarding the process the City should take with respect" to the subject Petition. It then states that it "involves the City Attorney's confidential legal advice regarding the best way to handle a petition to change certain

ordinances" and that it "clearly includes the City Attorney's legal analysis." (Resp. Br., p. 33).

The communication is devoid of legal advice. Providing a brief summary of the Petition and the procedure to handle it is not advice, much less "legal advice," and certainly not "legal analysis." The City Attorney was not using his judgment as a lawyer to advise the council as to which path amongst several paths it should take. (The City's statement that the City Attorney advised as to the "best way to handle" the petition is thus misleading; he merely summarized the procedure and gave no recommendation).

C. Communication 3.

The City states that the communication involves "confidential legal advice" regarding "a legal conflict of interest analysis related to City's outside counsel." (Resp. Br., p. 35). Again, there is no explanation or analysis as to how the communication's substance actually constitutes "legal advice." Without more, that does not suffice.

D. Communication 4.

This document merely transmits the statutes regarding when the City may go into closed session, which is what the alderperson specifically requested. A very general description of

the statutes – as the City Attorney provides – falls woefully short of containing legal opinions or involving confidential legal insight into certain parts of the statute.

Noting the obvious – that exemptions to the open records law are set forth in Wis. Stat. § 19.85 (which is titled "Exemptions") – is a far cry from being "legal insight" or providing "legal opinion." As such, this is no different from the other emails transmitting statutes and ordinances that the circuit court deemed non-privileged.

E. Communication 5.

The City concedes that the circuit court erred in applying the work product doctrine here to cover one of the two transmitted items. However, the City never challenged in the circuit nor appealed the finding that the attorney-client privilege did not apply to the subject statute the email transmits.

The alderperson simply requested information on the authority of the RDA – one narrow question (and thus misdescribed by the City in the heading as "questions [plural] about the Redevelopment Authority")(Resp. Br., p. 37).

The City also states that the City Attorney "analyzed" the inquiry and "formulated an opinion." (*Id.*) As such, it implies that

this constitutes "legal advice," without elaborating on how that can be.

Consistent with its ruling that transmittal of the resolution creating the RDA and City ordinances were not privileged – because they reflected no legal analysis – the statute and referenced publication are likewise not privileged. Nowhere does it reveal, as the City asserts, the "City Attorney's confidential legal thought process." (Resp. Br., p. 37). And the City cites no legal precedent to support a contention that the mere transmission of publicly accessible information, without any legal analysis in the transmitting document, deserves "attorney-client privilege" protection.

F. Communication 6.

The City again merely makes cursory statements, without elaboration, that the City Attorney was asked for "legal insight" and gave his "legal analysis." (Resp. Br., p. 38). A basic reference to, and provision of, the purchase order and engagement letter mooring the subject contractual relationship is not legal advice, reasoning, insight, or analysis (and nowhere does the City substantively explain otherwise).

7. Communication 7.

As with Communication 5, the City concedes that the circuit court erred in applying the work product doctrine. As with Communication 5, the City failed to object in the circuit court or on appeal that the circuit court erred in its ruling that the transmission of the City ordinances was not attorney-client privileged.

The circuit court's ruling that transmission of the City ordinances was non-privileged is consistent with its rulings that the provision of the RDA-creating resolution, statute regarding RDA authority, and other City ordinances were not privileged.

The item erroneously afforded work product protection – what the City calls a "prospective ordinance" - is of the same genus as these non-privileged items and thus this Court should reject the City's request to otherwise categorize it as privileged.

G. Communication 8.

Again, the City makes cursory statements that the email "reflects legal analysis and opinion" (as found by the circuit court) and involves "confidential legal analyses and advice" on the mayoral vacancy laws. (Resp. Br., p. 40). Again, the City does not explain how the email rises to that level. This is likely because it

cannot do so; a mere summary description of the subject procedures – where no suggestion as to a course of action is made - does not so qualify.

H. Communication 9.

Again, the City resorts to a cursory reference to privilege, without analysis. The City references "confidential legal analyses and advice related to analysis of laws related to Common Council contract approval." (Resp. Br., p. 41). This is insufficient.

I. Communication 10.

The City attempts to recast the e-mail from an outline of the terms of a tentative settlement agreement into a document conveying "confidential legal analyses and advice regarding potential settlement." (Resp. Br., p. 42). Yet the email is totally devoid of anything that can be considered the use of legal judgment or application of legal principles to in any way advise the council members.

The City tries to distance the *Journal/Sentinel* case[6] by stating that this case involves a proposed, and not consummated settlement, fearing that to do otherwise "would allow adverse

[6]*Journal/Sentinel, Inc. v. Shorewood School Board*, 186 Wis. 2d 443, 521 N.W.2d 165 (Ct. App. 1994).

parties to obtain attorneys' thoughts on prospective settlements before they are finalized." (Resp. Br., pp. 42-43). Yet nowhere in the document is any hint of the City Attorney's "thoughts" (legal opinion/advice) on the terms. Simply put, it contains a summary and nothing more.

J. Communication 11.

The City continues to assert that the document "contains a City employee's confidential health information." (Resp. Br., p. 43). Rather than point to any express reference in the letter (it cannot), the City asks this Court to connect the dots to a newspaper article 13 days prior. It raises the possibility that the public could ascertain that the subject of the letter was the same subject referenced in the article. This tenuous connection does not justify the City's nondisclosure.

K. Communication 12.

Again, the City overstates the document's status, casting it as involving "confidential legal analyses" and "advice related to the analysis laws" on scheduling and dissemination of confidential information. (Resp. Br., p. 44-45). The City, as it has done with many of the others, again fails to explain how the substance of this

email could in any way be rationally construed as legal analysis or advice.

L. Communication 13.

The City dichotomously states that on the one hand the trial court correctly concluded that the email asked for legal advice/analysis yet on the other it states it is protected because it "reveals the City Attorney's confidential legal analyses and advice previously provided to an alderperson." (Resp. Br., p. 45-46). The email contains no legal advice or analysis.

And even, purely *arguendo*, if it does constitute a request for legal advice, the fact that it was indisputably copied to non-City recipients waives any possible privilege claim. *See Nelson v Greenspoon,* 103 F.R.D 118, 123-124 (S.D.N.Y. 1984)(stating that "documentary communications are not confidential if copies thereof are sent to third parties").

The City does not expressly dispute this legal proposition. But it tries to avoid its impact by stating that Weidner had no authority to waive the privilege on the City's behalf. This was not a situation where Weidner – in copying third parties - disclosed or disseminated legal advice, thus potentially waiving the privilege.

She initiated the communication via an email devoid of any reference to any legal advice.

The City is correct that in *Jenkins*,[7] the court found no waiver despite the presence of a third party. But the third party in that case was Milwaukee's police liaison officer (and president of the police union of the Milwaukee Police Association), who was present to assist a union-appointed attorney representing an officer. *See* 487 F.3d at 491, n. 6 ("However, where, as is the case here, the district court finds that a third party is present during conversations between an attorney and a client in preparation for an investigatory interview and the third party is present solely to assist the attorney in rendering legal services to the client, the third party's presence will not defeat a claim of privilege").

Here, the third-party recipients were in no way affiliated with the City Attorney and not assisting him or his office in any way. Unlike in *Jenkins*, transmittal to the third-party recipients defeats any privilege claim.

[7] *Jenkins v. Bartlett*, 487 F.3d 482 (7th Cir. 2007).

CONCLUSION

Based on the foregoing, and as stated in her initial Brief, Petitioner-Appellant Sandra J. Weidner respectfully requests the relief requested in her initial Brief's Conclusion.

Dated this 8th day of July, 2019.

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FORM AND LENGTH CERTIFICATION

I hereby certify that this brief conforms to the rules contained in Wis. Stat. § 809.19(8) (b) and (c) for a brief and appendix produced with a proportional serif font. The length of this brief is 2,975 words.

Dated this 8th day of July, 2019.

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CERTIFICATION OF COMPLIANCE WITH RULE 809.19(12) FOR ELECTRONIC BRIEF

I hereby certify that:

I have submitted an electronic copy of this brief, which complies with the requirements of s. 809.19(12). I further certify that:

This electronic brief is identical in content and format to the printed form of the brief and appendix filed as of this date.

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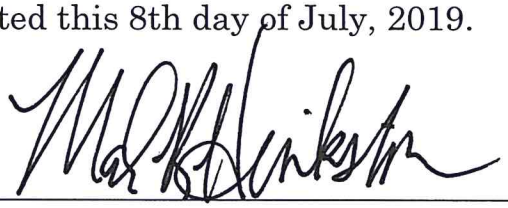

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CERTIFICATE OF SERVICE

I hereby certify that three (3) copies of Petitioner-Appellant Sandra J. Weidner's Reply Brief were hand-delivered to below counsel on July 8, 2019:

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I further hereby certify that the requisite number of copies of Petitioner-Appellant Sandra J. Weidner's Reply Brief were hand-delivered to the Wisconsin Court of Appeals on July 9, 2019 at the following address:

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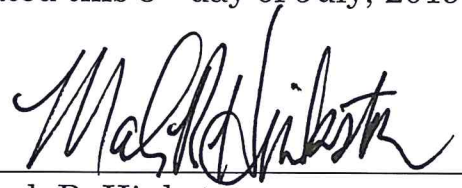

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