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December 16, 2015

Ms. Diane Fremgen
Clerk, Wisconsin Court of Appeals
110 East Main Street, Suite 215
P.O. Box 1688
Madison, WI 53701-1688

Re: ***Dennis Teague v. J.B. Van Hollen, et al.***
Appeal No. 14AP2360
Defendants' supplemental letter brief

Dear Ms. Fremgen:

In response to plaintiffs' supplemental letter brief in the above-captioned case, the defendants provide the following.

Background

The supplemental issue is whether Teague has a cause of action for his public records claim. In his reply brief, Teague cited cases that he asserted support a right of judicial review for record subjects, including him. (Reply Br. 2-3.) The defendants argued that a subsequently enacted statute, Wis. Stat. § 19.356, incorporated that line of cases to a certain extent, and otherwise limited what actions may be brought. This Court asked for supplemental letter briefs on the significance of Wis. Stat. § 19.356 to Teague's public records claim.

Argument

I. The legislature may alter the common law and did so when limiting when a record subject may challenge disclosure.

Teague raises arguments about the public records balancing test. In support of his asserted standing to bring a challenge as a record subject, he cites a line of cases that includes *Woznicki v. Erickson*, 202 Wis. 2d 178, 549 N.W.2d 699 (1996), and *Milwaukee Teachers Education Ass'n v. Milwaukee Board of School Directors*,

227 Wis. 2d 779, 596 N.W.2d 403 (1999).[1] (Reply Br. 2-3.) Those cases did not address Teague's specific circumstances. More to the point, they have been subsumed and limited by statute. Teague cannot show that he has a proper avenue for bringing his public records challenge.

The legislature is free to alter the common law. *See MBS-Certified Pub. Accountants, LLC v. Wis. Bell, Inc.*, 2012 WI 15, ¶ 71, 338 Wis. 2d 647, 809 N.W.2d 857. If there is a conflict between a common law doctrine and "the manifest purposes of a statutory cause of action," then courts must conclude that the legislature intended that the common law give way. *Id.* [2]

When construing a statute, statutory language is given its "common, ordinary, and accepted meaning," and if the meaning is plain, the inquiry ends. *State ex rel. Kalal v. Circuit Court for Dane Cty.*, 2004 WI 58, ¶ 45, 271 Wis. 2d 633, 681 N.W.2d 110. The legislature was clear when it created the statute—Wis. Stat. § 19.356—that post-dates and limits *Woznicki* and *Milwaukee Teachers*. *See Local 2489, AFSCME, AFL-CIO v. Rock Cty.*, 2004 WI App 210, ¶ 2, 277 Wis. 2d 208, 689 N.W.2d 644 (recognizing that the creation of Wis. Stat. § 19.356 was "[i]n response to the supreme court's holdings" in *Milwaukee Teachers* and *Woznicki*). As of 2003, the legislature limited who may challenge the release of a record:

> (1) *Except as authorized in this section or as otherwise provided by statute,* no authority is required to notify a record subject prior to providing to a requester access to a record containing information pertaining to that record subject, and *no person is entitled to judicial review of the decision of an authority to provide a requester with access to a record.*

Wis. Stat. § 19.356(1). "Except as authorized in this section" refers to the section's exclusive list of records for which record subjects may seek judicial review (unless "otherwise provided by statute"): certain disciplinary-related employment records, records obtained via subpoena or search warrant, and records prepared by non-authority employers. *See* Wis. Stat. § 19.356(2)(a).

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[1] Teague also cited court of appeals opinions that are part of the *Milwaukee Teachers/Woznicki* line of cases, including *Klein v. Wisconsin Resource Center*, 218 Wis. 2d 487, 582 N.W.2d 44 (Ct. App. 1998). *See, e.g., Milwaukee Teachers Educ. Ass'n*, 227 Wis. 2d at 797-98 (discussing *Woznicki* and *Klein*).

[2] To be clear, Teague argues that the public records law should not be interpreted as barring his separate constitutional claims. (Teague Ltr. Br. 2.) DOJ does not contend otherwise; in the merits briefing, rather, DOJ argues that the constitutional claims fail on their merits. The issue addressed here regards whether Teague has a cause of action based on the public records law itself.

The italicized language is unambiguous and should end the analysis. The legislature has stated that there are some enumerated avenues to challenge release of a record, and that the avenues are comprehensive. Consistent with that, this Court has observed that, except for express exceptions, "record subjects are not entitled to notice that a record concerning them will be released, *nor* are they entitled "to judicial review of the decision of an authority to provide a requester with access to a record." *Moustakis v. Wis. Dep't of Justice*, 2015 WI App 63, ¶ 14, 364 Wis. 2d 740, 869 N.W.2d 788 (quoting Wis. Stat. § 19.356(1)) (emphasis added).

Teague does not argue that he fits any of the categories "authorized in this section." And Teague does not contend that he fits any other category "otherwise provided by statute." *See* Wis. Stat. § 19.356(1). Thus, a plain reading reveals that Teague is not entitled to judicial review premised on the public records law.

Because the statute is plain, the analysis ends. But even if this Court went further, the history that Teague discusses does not help him. Teague points out that the legislative history discusses Wis. Stat. § 19.356(1)'s limits on notice and judicial review at the same time. (Teague Ltr. Br. 3.) Teague proposes that this means Wis. Stat. § 19.356(1)'s prohibition on "judicial review" is narrow and has no effect on people like Teague, who are not entitled to notice in the first place. (Teague Ltr. Br. 2.) But that does not follow. It is true that judicial review is the route through which an objection is raised by someone who is entitled to receive notice.[3] But that fact does not explain the second and broader statement in the statute: "no person" may seek judicial review of a decision to release, unless otherwise provided.

Also citing the history, Teague points out that Wis. Stat. § 19.356(1) is only a "partial codification" of the prior case law. That is true as far as it goes. The legislature codified what it wanted to keep from the cases and then expressly said nothing more is included. It is not "partial" in the sense that the statute left the door open to other challenges. The notes appended to 2003 Wisconsin Act 47 reveal that the legislature was concerned with the open-ended implications of *Woznicki* and wanted to limit them. The Act's prefatory note explains the concern with *Woznicki*: "the logical extension of these opinions [*Woznicki* and *Milwaukee Teachers*] is that the right to notice and the right to judicial review may extend to any record subject." In turn, the note following Wis. Stat. § 19.356(1) states that it is designed "to limit *Woznicki*."

The fact that the legislature sought to limit *Woznicki*'s implications undermines Teague's argument that the "judicial review" limit in Wis. Stat. § 19.356(1) is inapplicable to him. *Woznicki* allowed a record subject to seek

[3] Likewise, the joint discussion of notice and judicial review in *Local 2489, AFSCME, AFL-CIO*, 277 Wis. 2d 208, ¶¶ 3-4, stems from the fact that the case was premised on statutory notice.

"de novo review by the circuit court." *Woznicki*, 202 Wis. 2d at 181. That is what Teague seeks here. It follows that, when limiting the effect of *Woznicki*, the legislature foreclosed Teague's proposed avenue of review.

Teague asserts that this result is absurd, but that misunderstands the public records law. It is primarily designed to compel disclosure and to resolve disputes when a record is not released. *See* Wis. Stat. §§ 19.31 (purpose), 19.35(1)(a) (right to inspect), 19.37 (compel disclosure when record withheld). Its provisions are construed "in every instance with a presumption of complete public access." *Moustakis*, 364 Wis. 2d 740, ¶ 12. It is only when a record is withheld, not when it is produced, that a decision may be challenged under Wis. Stat. § 19.37, and then only by a requester, not by the record subject. Teague argues that there should be a way for other people to seek review who are affected by express exemptions in the public records law—for example, the exemption on disclosure in Wis. Stat. § 19.36(10) that applies to certain employee personnel records. (Teague Ltr. Br. 4.) But Teague does not argue that he is covered by a provision in Wis. Stat. § 19.36. Even assuming that those other people could come to court based on specific statutory exemptions that apply to them, that assumption does not show that Teague is entitled to judicial review.

To illustrate, Teague cites *Zellner v. Cedarburg School District*, 2007 WI 53, 300 Wis. 2d 290, 731 N.W.2d 240, where a record subject sought review based on specific statutory exemptions for copyrighted materials under Wis. Stat. § 19.32(2) and for employee investigations under Wis. Stat. § 19.36(10)(b). *See id.* ¶¶ 18, 32.[4] But, unlike Zellner, Teague points to no express statutory exemption. Thus, he fails to identify a proper avenue for his challenge.

II. Teague may not rely on the declaratory judgment act to avoid the limits of Wis. Stat. § 19.356(1).

Teague contends that he may invoke Wisconsin's general declaratory judgment act to challenge the release of records under the public records law. (*See* Teague Ltr. Br. 1.) The declaratory judgment act provides that courts may "declare rights, status, and other legal relations." Wis. Stat. § 806.04(1).

The declaratory judgment act may not be used to bypass the limits in the public records law. "The rule of statutory construction that a more specific statute controls over a more general statute is not measured by the relief requested, but by the subject matter in question." *State ex rel. Hensley v. Endicott*, 2001 WI 105, ¶ 21,

[4] Teague also highlights that *Zellner* discussed reputational interests, but that discussion is consistent with what DOJ has argued. *Zellner*, in rejecting the challenger's reputational argument, explained: "This public interest is not equivalent to an individual's personal interest in protecting his or her own character and reputation." 300 Wis. 2d 290, ¶ 50 (citation omitted).

245 Wis. 2d 607, 629 N.W.2d 686. The public records law provides instances when a third-party may challenge the release of a record, and states that no other avenues are available except those provided by statute. Teague contends that he may use the declaratory judgment act to address the same subject—whether a record should be released under the public records law. That is not allowed. That is "especially true" where, as here, "the specific statute is enacted after the general statute." *Id.* ¶ 21 (paraphrasing, with approval, *Martineau v. State Conservation Comm'n*, 46 Wis. 2d 443, 449, 175 N.W.2d 206 (1970)); *Skowron v. Skowron*, 259 Wis. 17, 19, 47 N.W.2d 326 (1951) (discussing enactment of the declaratory judgment act in 1927); 2003 Wis. Act 47, § 4 (creating Wis. Stat. § 19.356(1) in 2003).

III. Teague's final argument was not pled and should be rejected.

Lastly, Teague argues that this case also is about "the Defendants' refusal to grant 'access' to Teague's record in response to a request for a background check." (Teague Ltr. Br. 5.) This is a reference to the "innocence" letter that DOJ provided to Teague. The argument has at least three flaws. First, there is no allegation that anyone in fact requested Teague's innocence letter and was denied the letter. The searches here were of criminal history data; the innocence letter does not contain a criminal history. Second, Teague did not plead this kind of claim (*see* Am. Compl., filed 3/19/12), which is an argument that DOJ improperly withheld a requested public record. This un-pled claim cannot be raised for the first time in an appellant's letter brief. Third, even if preserved, Teague does not explain how this solves his procedural problem. When an authority withholds a record, "the requester" may pursue a mandamus action. Wis. Stat. § 19.37(1). Teague is not a "requester" and, in any event, he did not bring a mandamus action.

Thank you for the opportunity to provide these supplemental arguments.

Respectfully submitted,

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ADR:mlk

c: Attorney Jeffery R. Myer / Attorney Shelia Sullivan