STATE OF WISCONSIN PERSONNEL COMMISSION

NANCY STROUD,

Complainant,

v.

Secretary, DEPARTMENT OF REVENUE,

Respondent.

Case No. 82-PC-ER-97

DECISION ON COMPLAINANT'S DISCLOSURE MOTION

This §230.45(1)(b), Fair Employment Act proceeding is before the Commission on complainant's motion, filed February 27, 1985, which seeks:

> ... disclosure of the true identity of confidential informants 'Smith' and 'Jones', referred to in paragraphs 35 and 36 of the initial determination authored by Judy M. Rogers on October 4, 1984. This motion is based on the attached affidavit, Wisconsin Administrative Code PC 6, and Wis. Stat. 905.10.

(Subsequent to the filing of this motion, "confidential informant 'Jones'" has advised the Commission that she would not object to disclosure of her identity. Consequently, this decision will address only the matter of the disclosure of "Smith's" identity.)

The affidavit referred to in the aforesaid motion states, as relevant, as follows:

> C. William Foust, being first duly sworn, on oath deposes and states that:
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> 1. He is the attorney for the complainant in this action and makes this Affidavit in support of a motion to compel the disclosure of the identities of confidential informants interviewed in the investigation of this case.
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> 2. On February 18, 1985, I personally asked Judy Rogers, the author of the initial determination, who the confidential informants "Smith" and "Jones" were.

> 3. Judy Rogers told me that the information was confidential and could be obtained only by making a motion before the Commission.
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> 4. Part of the complainant's theory of the case is that the selection process by which the four positions at issue were filled was a sham, that the men hired were predetermined by the hiring authorities.
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> 5. The information provided by "Smith" is material to this issue. See Paragraph 35 of the initial determination and Wis. Stat. 905.10(3)(b)... The material information to be provided by "Smith" corroborates the initial information given by Schmidt in that Smith learned from Glenn Niere, prior to the interviews for the four positions in question, who Niere thought should be hired for each position. Niere's preferences, prior to the interviews, coincided exactly with the results of the hiring process.

In the initial determination, the investigator recounted, inter alia:

> This investigator found Smith to be a credible witness who stated more than once at the investigative interview that Smith feared losing Smith's job with respondent for giving the requested information. p. 22.

In a letter to the Commission dated March 21, 1985, witness "Smith" stated the following:

> I wish to maintain my anonymity concerning my testimony in the Nancy Stroud case before the Personnel Commission. My testimony involves conversations with a person who has direct supervisory authority over me. Since we already have a rollercoaster relationship as supervisor to employe, I'm fearful that my testimony will affect future promotional opportunities, merit increase, evaluations, and everyday working conditions with this person as well as upper management viewing me as a non-team player.

The disclosure of the information sought by the complainant is subject to the state's open records law. This law was revised by Chapter 335, Laws of 1981, effective January 1, 1983.

The "Declaration of Policy" for the open records law is set forth in §19.31, Stats., as follows:

> Declaration of policy. In recognition of the fact that a representative government is dependent upon an informed electorate, it is declared to be the public policy of this state that all persons are entitled to the greatest possible information regarding the affairs of government and the official acts of those officers and employes who represent them. further, providing persons with such information is declared to be an essential function of a representative government and an integral part of

> the routine duties of offices and employes who responsibility it is to provide such information. To that end, ss. 19.32 to 19.37 shall be construed in every instance with a presumption of complete public access, consistent with the conduct of governmental business. The denial of public access generally is contrary to the public interest, and only in an exceptional case may access be denied. (emphasis supplied)

There is a strong presumption in favor of public access. Section 19.35(1)(a), Stats., provides in part:

> Except as otherwise provided by law, any requester has a right to inspect any record. Substantive common law principles construing the right to inspect, copy or receive copies of records shall remain in effect....

Newspapers Inc. v. Breier, 89 Wis. 2d 417, 279 N.W. 2d 179 (1979), contains, inter alia, the following discussion of the open records law:

> Nevertheless, we have concluded, where common-law limitations on the right to examine records and papers have not been limited by express court decision or by statute, that presumptively public records and documents must be open for inspection. We stated in Youmans, relying on sec. 19.21(1) and (2), Stats.:
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> ... that public policy favors the right of inspection of public records and documents, and it is only in the exceptional case that inspection should be denied....
>
> In Beckon v. Emery, 36 Wis. 2d 510, 516, 153 N.W. 2d 501 (1967), we stated that the 'public policy, and hence the public interest, favors the right of inspection of documents and public records: See, also State ex rel Dalton v. Mundy, 80 Wis. 2d 190, 196, 257 N.W. 2d 877 (1977). These cases restate the legislative presumption that, where a public record is involved, the denial of inspection is contrary to the public policy and the public interest.
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> To implement this presumption, our opinions have set out procedures and legal standards for determining whether inspection of records is nandated by the statute. In the first instance, when a demand to inspect public records is made, the custodian of the records must weigh the competing interests involved and determine whether permitting inspection would result in harm to the public interest which outweighs the legislative policy recognizing the public interest in allowing inspection. Beckon v. Emery, supra, at 516; Youmans, supra, at 682. If the custodian decides not to allow inspection, he must state specific public policy reasons for the refusal.... (emphasis supplied)

In the case before the Commission, there is more than just the strong public interest discussed above which favors disclosure. The disclosure is sought not simply by a member of the public, but by the complainant's attorney, who has made a particularized showing of need for the information in order to pursue this complaint of discrimination. It can be inferred from the affidavit of counsel that the identity of this witness is a significant part of the litigation of this complaint. The public interest in eliminating employment discrimination, see §111.31, Stats., may be said to be served to some extent by disclosure.

Against these interests, the Commission must weigh the interests served by nondisclosure. The witness fears retaliation by the employer[1] If the witness's name is disclosed, it can be inferred that in future cases, some witnesses who also may be fearful of retaliation may be reluctant to be completely forthcoming with investigators if they believe their names may become known. This could impede the investigative process.

On the other hand, if witnesses are encouraged to come forth because of a belief the Commission would protect their identity under circumstances such as are present here, this would be a mixed result with respect to the public interest underlying the Fair Employment Act. Obviously, the Commission can only enter remedial orders after a finding of discrimination following a hearing on the merits. See §111.39(4)(c), Stats. If the

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[1] There is nothing to suggest that the witness indicated a refusal to talk to the investigator in the absence of a pledge of confidentiality, although even if such a pledge had been given, this would not necessarily be determinative under the open records law, Compare, 60 Opinions Attorney General 284 (1971).

Commission were to grant to witnesses a de facto waiver of testimonial obligation under circumstances like these, this conceivably could encourage the development of information at the investigative stage, but discourage it at the hearing state where a tangible effect can be produced.

Furthermore, any retaliation against a witness for testifying in the hearing on the merits would be illegal under the Fair Employment Act, see §§111.322(3), 111.325, Stats., and possibly under the "Whistleblower" law, see §230.81, Stats. This of course does not mean that retaliation never occurs or that employes are not concerned about retaliation. Nevertheless, the presence of legal protection against retaliation is a factor that cannot be overlooked in ruling on this request for disclosure.

Finally, before ruling on this record for disclosure, the Commission has exhausted the apparent possibilities of avoiding the issue by inquiring about the possibility of a stipulation between the parties as to the factual matters to which the witness would testify. No such stipulation was forthcoming. There does not appear to be a way short of disclosure to serve the interests in disclosure.

ORDER

For the foregoing reasons, the Commission grants the complainant's request for disclosure. The identity of this witness is being supplied to the complainant's attorney under separate cover. Complainant's attorney is directed not to disclose the identity of this witness unless he decides to call the witness to testify at the hearing, or unless disclosure is otherwise necessary in pursuing this case. Complainant's attorney further is directed, should he decide to call the witness to testify at the hearing, to procure the witness's attendance by the use of a subpoena issued by this Commission.

Dated: March 27 ,1985 STATE PERSONNEL COMMISSION

DENNIS P. McGILLIGAN, Chairperson

DONALD R. MURPHY, Commissioner

LAURIE R. McCALLUM, Commissioner

AJT:jmf
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