STATE OF WISCONSIN PERSONNEL COMMISSION

BARBARA J. NEAL,

Appellant,

v.

Secretary, DEPARTMENT OF CORRECTIONS,

Respondent.

Case No. 94-0019-PC-ER

RULING ON MOTION FOR PROTECTIVE ORDER

This matter is before the Commission on a motion for a protective order which was filed by the respondent as a consequence of an Open Records request of the Commission by James D. Martin for a copy of the materials in the file.

The complaint was filed on February 10, 1994, and alleges discrimination based on sex. The complaint references a number of incidents and concludes with the following paragraph:

> I feel as if a select few male officers are using their union board positions to harass the female officers at OCI [Oakhill Correctional Institution] and at the UWH & C [University of Wisconsin Hospital and Clinics] and that the OCI administration is aware of this situation but allows it to continue, if not encourage it, to distract from other situations at OCI.

The general nature of the harassment alleged in the body of the complaint is "reporting every rule violation the female officers did to see how the OCI Administration would respond." One of the "few male officers" identified in the complaint is James Martin. Complainant later amended her complaint to include a letter of suspension received on February 26, 1994.

Respondent's motion for a protective order relates specifically to the request by James Martin and is based upon the following arguments:

> The respondent believes that while Commission files are generally open records that an exception be made in this case. The Supreme Court last week issued its decision in Armada Broadcasting, Inc. v. Stirn, Case No. 92-3036, filed 5/12/94, that

> the person who is the subject of a public record may intervene in a lawsuit by a requestor in order to keep the record from the public. Such public policy should be considered by the Commission in making its balancing test decision in this matter.
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> First, the requestor is named in the complaint as a sex harasser and discriminator of the complainant, female correctional officer Bobby Neal. Second, requestor Martin works with Ms. Neal and represents her as a union representative and Mr. Martin's review of the file is likely to result in further harassment of Ms. Neal or retaliation against Ms. Neal by Mr. Martin, one of respondent's employees, thus subjecting the respondent to potential liability for Mr. Martin's acts. The requestor believes the public has a greater interest in protecting complainants like Ms. Neal from retaliation from co-worker complained of by women in Ms. Neal's situation than in providing access to the records.

The respondent's reliance on the recent decision of the supreme court in Armada Communications v. Stirn is unjustified. In that case, the appellant-petitioner sought review of a court of appeals' decision which denied him the right to intervene in an action by Armada to compel disclosure of an investigative report in which the appellant-petitioner was a subject. The court identified "the sole issue on review" as whether the appellant-petitioner had "a right to intervene in the mandamus action under sec. 803.09(1), Stats." Slip op., p. 4.

The dispute currently before the Commission relates to whether Mr. Martin is entitled to obtain a copy of the documents in the Commission's investigative file. The analysis to be used is described in In Matter of Estates of Zimmer, 151 Wis. 2d 122, 442 N.W. 2d 578 (Ct. App., 1989). There, the court required disclosure of a probate settlement agreement which purportedly resolved all disputes between the personal representative of decedents' estates and decedents' adopted son who had entered a no contest plea to a petition alleging he had killed the decedents.

> We begin our inquiry, then with the presumption that the public has a right to inspect the settlement agreement, that any exceptions to the rule of disclosure must be narrowly construed, and that denial of access to the agreement is contrary to the public interest and will be tolerated only in the "exceptional case."...
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> A third party's right to disclosure of public records under ch. 19, Stats., is not absolute; it is presumptive: "[T]he general presumption of our law is that public records shall be open to the public unless there is a clear statutory exception, unless there exists a limitation under the common law, or unless there is an

> overriding public interest in keeping the public record confidential." The estate does not claim entitlement to any statutory exemption from the provisions of the open records law, and we are satisfied that none exists. Nor does it argue any common law exceptions. When this its the case, the presumption of disclosure is implemented through a "balancing" of the public interest of free access against the public interest in nondisclosure.
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> Where a request for disclosure is made to the custodian of the record, the custodian "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." Before access may be denied, the "strong presumption" of disclosure must be rebutted by the party advocating closure. 151 Wis. 2d 122, 131, 132 (citations omitted)

In the present case, the respondent has not identified any statutory or common law bars to disclosure. Respondent suggests that Mr. Martin is likely to further harass or retaliate against the complainant upon reviewing the file. However, Mr. Martin is already aware of the existence of the complaint and his knowledge of the specifics of the allegations raised in Ms. Neal's complaint are not likely to alter his conduct.[1] The respondent also should not be subjected to "potential liability for Mr. Martin's acts" if it reacts to any improper conduct by Mr. Martin by imposing discipline according to its normal procedures.

Here there is no public purpose against disclosure that is comparable to that in Journal/Sentinel, Inc. v. Aagerup, 145 Wis. 2d 818, 429 N.W. 2d 772 (Ct. App., 1988). In that case, an autopsy report was withheld because the information contained in the report was a potential tool for finding and prosecuting the victim's killer. The present case can also be distinguished from Morke v. Record Custodian, 465 N.W.2d 235, 159 Wis. 2d 722 (Ct. App. 1990) where the court held that a prison records custodian was not required to provide an inmate with the names, home addresses and published home telephone numbers of all persons employed at the institution. The concern for the safety and well-being of the prison staff and for institutional morale was found to outweigh the general rule of access to records.

The complainant filed a claim of discrimination with a public agency, against her employer, in order to seek to gain a remedy for the alleged misconduct of her employer. The complaint does not allege any criminal miscon-

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[1]Mr. Martin contends that Ms. Neal and respondent have "no basis for any accusation" against him.

duct on the part of Mr. Martin, nor is there an ongoing investigation into the misconduct which would necessarily be compromised by providing disclosure. Members of the public have a general interest in the affairs of government, including the official acts of government employes. This interest extends to the allegations made by Ms. Neal regarding the conduct of her employing agency. Given the circumstances presented here, the "strong presumption" of disclosure has not been rebutted.

ORDER

Respondent's motion for protective order is denied, and Mr. Martin is entitled to obtain a copy of the above complaint.

Dated: June 2, 1994 STATE PERSONNEL COMMISSION

LAURIE R. MCCALLUM, Chairperson

KMS:kms
K:D:temp 7/94 Neal

DONALD R. MURPHY, Commissioner

JUDY M. ROGERS, Commissioner