

FILED
06-28-2021
Clerk of Circuit Court
Winnebago County, WI
2021CX000002

STATE OF WISCONSIN CIRCUIT COURT WINNEBAGO COUNTY

STATE OF WISCONSIN

Plaintiff,

DA Case No.: 2021WN002904
Assigned DA/ADA: Eric D. Sparr
Court Case No.:

vs.

TOWN OF OMRO
4205 RIVERMOOR RD
OMRO, WI 54963

Defendant.

AMENDED COMPLAINT

CASE TYPE/CODE: CX30109

The State of Wisconsin, by Eric D. Sparr, Deputy District Attorney of Winnebago County, Wisconsin, brings this action against the above-named Defendant.

DESCRIPTION OF OPEN RECORDS REQUESTS MADE

Summary: Sherry and Brian Seaman report making 39 specific open records requests to the Town of Omro from 2020 through May, 2021, and report that the Town of Omro has fully complied with four of those requests. The Seamans indicate there were two requests they believe were improperly denied, and nine were partially fulfilled. The Seamans indicate that for 24 of their requests, there was either no reply, or an initial indication that the request was under review, but that the Town ultimately did not provide the records or provide an exception to open records laws. Additional open records requests were made by Dr. Eric Wagner and Atty. Charles Hertel. Regarding the Wagner/Hertel requests, the Town was at some point informed by an attorney involved in a related lawsuit that they did not need to address those requests as they would be handled in the discovery process the lawsuit. The requesters indicated this was not their desire, and on 5/17/21, Town officials were made aware that the requesters desired that their requests be handled as open records requests, rather than as part of discovery. As of 6/24/21, Dr. Wagner and Atty. Hertel report that there has been neither full compliance nor open records exceptions provided regarding their requests dated 1/23/20 and 4/1/20.

As to Count 1: On 4/21/20, Sherry Seaman requested, via USPS, three years worth of profit and loss and balance sheets for the Town of Omro. Ms. Seaman reports that in response to this request, she received two years of profit and loss sheets, and no balance sheets. No explanation was provided for the requested items that were not provided.

As to Count 2: On 5/22/20, Sherry Seaman requested, via email to numerous Town of Omro officials, agendas, minutes, and detailed findings of the Town of Omro audit committee for the preceding three years. Ms. Seaman indicates that the Town provided the financial report, and the agenda and minutes from the Town board meeting, but no agenda or minutes from the audit committee meeting. After clarification of the request, no explanation was provided for the requested items that were not provided.

As to Count 3: On 7/29/20, Sherry Seaman requested, via email to the Town Clerk, Town Chairman, and Town board members, a complete statement of compensation for Town of Omro Chairman Brian Noe, for 1/1/19 to 7/29/20. Ms. Seaman reports that the Town did not issue a reply responsive to the request.

As to Count 4: On 8/14/20, Sherry Seaman requested, via email to the Town Clerk, Town Chairman, and Town board members, a copy of resolution 01-04620, and the affidavit of posting related to the resolution. Ms. Seaman reports that the Town did not issue a reply responsive to the request.

As to Count 5: On 10/23/20, Sherry Seaman requested, via email to the Town Clerk, Town Chairman, Town Attorney, and Town board members, among other items, all notices for the 2020 Town of Omro special election, as well as dates and locations where the notices were published. Ms. Seaman requested training records for the Town Clerk, chief election inspector, and poll workers. Ms. Seaman requested information related to the absentee voting letter related

to the special election, including a record showing to whom the letter was mailed and when the letter was mailed. Ms. Seaman indicates the Town did not reply to these requests.

As to Count 6: On 1/8/21, Brian Seaman requested, via email to the Town Clerk, Town Chairman, Town board members, and others, copies of invoices and checks paid to an attorney for services rendered in connection with the 2020 Town of Omro special election. In the same email, Mr. Seaman requested all invoices and checks paid for the lawsuit involving the Town of Omro and plaintiffs Ross and Wagner. Sherry Seaman reports that they received an invoice from Strand, and an invoice for election form, but did not receive the other cost documents to support the payments Ms. Seaman indicated were claimed by the Town in a newspaper article.

As to Count 7: On 1/18/21, Brian Seaman requested, via emails to the Town Clerk, Town Chairman, and other individuals, a number of items from the Town of Omro, including the following:

- Bank reconciliations, bank statements, and Quickbooks register showing payees for Town of Omro banks accounts, for July, 2020, through December, 2020
- Copies of documents submitted to the Town's insurance company for payment or reimbursement
- The Town's current insurance policy
- Invoices submitted by Stafford Rosenbaum to the Town for payment for 2020
- Copies of invoices paid in connection to expenses for the 2020 Town recall election
- Copies of year end payroll summaries for board members, employees, persons in appointed positions, and any person listed as an independent contractor for the Town that would receive a 1099 form
- Invoices for website development
- Records of payments made by the Town to Brian Noe

As to Count 8: On 2/25/21, Sherry Seaman requested, via email to the Town Clerk, Town Chairman, and others, a copy of the COVID-19 relief payment issued to the Town of Omro in 2020. Ms. Seaman reports that there was an initial response that the Town was working on the request, but the requested information was not provided, nor was an open records exception given. Regarding Counts 7 and 8, Sherry Seaman reports that the Town did provide some responsive documents, which included a summary invoice from Atty. Marone, Stafford Rosenbaum invoices, and a Blazer invoice related to audio equipment. The other requested documents were not provided, nor were exceptions to the open records law articulated.

As to Count 9: On 1/23/20, Dr. Eric Wagner requested, via email to Town of Omro officials, Town of Omro Planning Commission minutes from 10/3/19 through 1/9/20, various emails from neighbors related to Dr. Wagner's business project, Town Board meeting minutes from 1/20/20, an Engineering Report related to Dr. Wagner's project, Town Board meeting recordings, emails exchanged between the Town Board and Planning Commission, and other items. On 2/6/20, Town Chair Brian Noe informed Dr. Wagner that his project was likely to be litigated, and his open records request would be reviewed by Town Attorney Karen Marone. On 2/15/20, Noe provided the requested Engineering Report to Dr. Wagner. Dr. Wagner reiterated his requests for other documents on 2/15/20, 2/20/20, 2/25/20, and 3/15/20. On 3/21/20, Noe provided neighbor emails related to the Wagner project. Noe indicated that Planning Commission minutes would be provided, but Dr. Wagner indicates they were never provided. Numerous other requested items were not provided, nor were open records exceptions articulated.

As to Count 10: On 4/1/20, Atty. Charles Hertel requested, via email and USPS mail to the Town of Omro Clerk, copies of Town Board meeting minutes from 3/16/20, recordings, notes, and other memoranda. Atty. Hertel reiterated his requests on 4/20/20 and 6/9/20. On 6/12/20, the Town Clerk provided meeting minutes, and indicated that per Atty. Marone, no other documents would be provided. No open records exception was cited.

The Seamans, seek compliance with all of their open records requests, though, in the interest of judicial economy, not all will be spelled out in detail in this complaint. Sherry Seaman indicates that additional requests are in non-compliance, such as a portion of her 4/17/21 request, which included a request for documents related to bill backs for engineering costs charged to the developer for Ormond Beach. The charged counts should not be interpreted as a complete list of non-compliant open records requests.

ADDITIONAL GENERAL INFORMATION

In June, 2020, Sherry Seaman submitted a complaint to the Winnebago County District Attorney's Office, against the Town of Omro, alleging violations related to open records requests, and raising other open government concerns. The matter was assigned to Deputy District Attorney Eric Sparr, who met with Ms. Seaman, as well as with Town of Omro officials, including Town Chair Brian Noe and Town Attorney Karen Marone. Deputy DA Sparr discussed various concerns with Town officials. In some instances, it has appeared that some progress was made. For example, there were discussions about how to redact sensitive information from documents that would otherwise be subject to open records, rather than denying the request entirely because of the sensitive information. There were some specific discussions that did seem to lead to positive developments or new ways to approach issues, such as talking through how to handle situations where the Town Board sought to go into closed session, or consulting about whether a specific document would qualify for an open records law exception. In meeting with Town officials, there were discussions about the need to reply to open records requests, even if the Town believes there is an exception to open records laws with regard to a particular item, or if the Town does not possess the record requested. Simply ignoring the request is not an acceptable action.

On 3/25/21, the Town Clerk provided to Deputy DA Sparr an email with links to numerous files that appeared to address a significant number of the above requests made by the Seamans. Deputy DA Sparr replied, noting the need for the Town to provide access to the documents to the

requesting parties as well. As of the end of May, 2021, the Seamans had still not been granted access to the documents. Atty. Marone was made aware on a couple of occasions in early May, 2021, that the Seamans did not yet have access to the documents. Atty. Marone expressed concern that an attorney involved in a pending Town of Omro lawsuit had not yet reviewed the documents for release.

Concerning the Wagner/Hertel requests, Town officials asserted that they were informed that those requests would be handled in the discovery process for the related lawsuit, which is now pending as Winnebago County 20 CV 438. CCAP records for 20 CV 438 list Eric Wagner as one of the plaintiffs and the Town of Omro as one of the defendants. Atty. Charles Hertel is the attorney of record for multiple plaintiffs. DDA Sparr communicated with one of the attorneys involved in the defense of 20 CV 438, who confirmed that after conversations with Atty. Hertel, the parties had agreed that the Wagner/Hertel open records requests could be handled through the discovery process. DDA Sparr followed up with Dr. Wagner and Atty. Hertel, who each indicated this was not their desire, and Atty. Hertel suggested that should not have been the conclusion from his conversations with defense counsel. DDA Sparr initially informed Dr. Wagner and Atty. Hertel that regardless of what led to the Town being told they did not need to respond to the open records requests, a forfeiture complaint would not be filed based on their reliance on their attorney's representation. DDA Sparr informed Brian Noe and Atty. Karen Marone on 5/17/21, via email, "[T]here is not agreement to delay on the Wagner/Hertel open records request, and they are demanding that those be answered." DDA Sparr advised that the clock was running on those requests as of 5/17/21, and noted that the Wagner/Hertel requests had been noted in an email from DDA Sparr approximately two months prior, outlining the items requested. As of 6/24/21, Dr. Wagner and Atty. Hertel report that no additional documents were provided as a result of the 5/17/21 communication.

APPLICABLE LAW

An authority must respond to an open records request, either by providing the requested documents, or notifying the requester of a decision to deny the request (and providing reasoning for the denial), "as soon as practicable and without delay." Wis. Stat. § 19.35(4). Wisconsin Department of Justice policy, as quoted in the Wisconsin Town Officers' Handbook, 2017 Edition, states that ten days is generally a reasonable time for a response.


REQUEST FOR RELIEF

Wis. Stat. § 19.37(4) authorizes a forfeiture of not more than \$1000 against an entity that arbitrarily and capriciously denies or delays response to an open records request. Wis. Stat. § 19.37(1)(b) authorizes the district attorney or attorney general to bring an action, asking the Court to order release of a record to the requester.

At the time the 3/25/21 email was sent, showing the at least some of the documents had been compiled in response to the Seamans' requests, the requests were already substantially beyond the generally accepted ten day time frame. It is now two months beyond that date, and the Seamans still have not received many of the requested records. The State recognizes that for any open records request, there may be an exception, that would excuse the record holder from providing it. However, any such exception must be communicated to the requester. Some of the requested records do not appear to have such exceptions, yet the requested documents have simply not been provided. Given the extent of the delays, the State does not believe there is an alternative to filing this action and requesting the following:

1. Imposition of forfeitures for requests not complied with by the Town of Omro, and
2. An order, from the Court, directing the Town of Omro to provide any requested documents that do not have an open records exception.

Signed this 28th day of June, 2021.

By: 

Eric D. Sparr
Deputy District Attorney
Winnebago County