

FILED  
10-04-2018  
Clerk of Circuit Court  
Winnebago County, WI  
2017CV000389

STATE OF WISCONSIN    CIRCUIT COURT    WINNEBAGO COUNTY  
BRANCH 6

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WILLIS W. HAGEN III,

Plaintiff,

v.

Case No. 17-CV-389

BOARD OF REGENTS,  
UNIVERSITY OF WISCONSIN  
SYSTEM AND UNIVERSITY  
OF WISCONSIN OSHKOSH,

Defendant.

ALEXANDER NEMEC

Intervenor

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**DEFENDANTS' NOTICE AND EMERGENCY MOTION FOR A TEMPORARY  
RESTRAINING ORDER AND PERMANENT INJUNCTION  
AGAINST ALEX NEMEC**

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To:            Alexander Nemec  
                c/o Attorney Christa Westerberg  
                Pines Bach LLP  
                122 W. Washington Ave, Ste 900  
                Madison, WI 53703

Willis Hagen  
c/o Attorney Peter Culp  
Dempsey, Edgerton, St. Peter, Petak & Rosenfeldt  
210 N. Main St, Ste 100  
Oshkosh, WI 54903

PLEASE TAKE NOTICE that at a time, date, and place set by the court, Defendant  
Board of Regents for the University of Wisconsin System will move this court for an

emergency permanent injunction enjoining the intervenor, Alexander Nemec, from publishing information that had been mistakenly released to him under the public records law, and requiring him to destroy the document that had been sent to him in error.

This motion is made pursuant to this court's order in this case, dated September 2, 2017 and Wis. Stat. § 813.02(1)(a).

GROUND'S for this motion are as follows:

1. On May 3, 2017, Plaintiff Willis Hagen commenced an action under Wis. Stat. § 19.356(4) to enjoin release of certain employee disciplinary records that Intervenor Alexander Nemec had requested. The records requester, Alexander Nemec, intervened in the action. The court reviewed the records in camera, and, on September 22, 2017, denied the Plaintiff's request to enjoin release of the records and ordered that the "records shall remain in redacted form," except that certain redactions would be eliminated.
2. Hagen appealed this decision, and on June 21, 2018, the court of appeals upheld this court's decision. The court of appeals issued a remittitur on July 26, 2018, returning the file to the circuit court. Hagen did not petition for Supreme Court review.
3. On Wednesday, August 15, 2018, the records custodian emailed Alexander Nemec the records responsive to the request that were the subject of the Section 19.356 action. The records custodian mistakenly emailed the unredacted version of the records to Nemec. Hagen's attorney, who was copied on the email releasing the records, recently noticed the error and brought it to the Board's attorney's attention on or around September 30, 2018.
4. On October 1, 2018 the records custodian communicated to Nemec that the records had been released in error, asked Nemec to delete the unredacted records, and explained she would send the proper redacted version. Nemec stated "Your mistake is not my problem," and refused to give assurances that he would destroy the unredacted record.

5. If Nemec is not directed to destroy the unredacted records and to agree not to publicize their contents, irreparable harm will result, not only for Hagen, but for others whose names are mentioned. This court already determined that the redactions, as ordered on September 22, 2017, were in the public interest.

6. There would be no adequate legal remedy if the unredacted records are publicized and retained by Nemec.

7. This court has jurisdiction to enforce its September 22, 2017 order, and has personal jurisdiction over Alexander Nemec, who has full party status in this action.

8. This court has discretion to issue this temporary restraining order. *Waste Mgmt., Inc. v. Wisconsin Solid Waste Recycling Auth.*, 84 Wis. 2d 462, 466, 267 N.W.2d 659, 662 (1978).

WHEREFORE, the Board of Regents asks this court to enter an order enjoining Alexander Nemec from publicizing, printing, or sharing, in any manner, whether verbally, in writing, or otherwise, the contents of those portions of the records subject to redaction, and further ordering Nemec to delete and destroy any and all copies of the unredacted records that were sent to him on August 15, 2018, and further order that Nemec take all reasonable efforts to obtain any copies, whether electronic or otherwise, of the unredacted records that he may have sent to others.

Dated: October 3, 2018.

Respectfully submitted,

BRAD D. SCHIMEL  
Wisconsin Attorney General

Electronically signed by:

s/Anne M. Bensky  
ANNE M. BENSKY

Assistant Attorney General  
State Bar #1009210

Attorneys for Board of Regents

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WILLIS W. HAGEN III,

Plaintiff,

v.

Case No. 17-CV-389

BOARD OF REGENTS,  
UNIVERSITY OF WISCONSIN  
SYSTEM AND UNIVERSITY  
OF WISCONSIN OSHKOSH,

Defendant.

ALEXANDER NEMEC

Intervenor

---

**DEFENDANTS' NOTICE AND EMERGENCY MOTION TO REOPEN CASE**

---

To:                    Alexander Nemec  
                         c/o Attorney Christa Westerberg  
                         Pines Bach LLP  
                         122 W. Washington Ave, Ste 900  
                         Madison, WI 53703

Willis Hagen  
c/o Attorney Peter Culp  
~~Dempsey, Edgerton, St. Peter, Petak & Roseofield~~  
210 N. Main St, Ste 100  
Oshkosh, WI 54903

PLEASE TAKE NOTICE that at a time, date, and place set by the court, Defendant  
Board of Regents for the University of Wisconsin System will move this court for an order

reopening this case, for the reasons stated in the accompanying Emergency Motion for a Permanent Injunction.

This motion is made pursuant to this court's inherent authority to enforce its own orders, *In re Attorney Fees in Yu v. Zhang*, 2001 WI App 267, ¶ 14, 248 Wis. 2d 913, 925, 637 N.W.2d 754, 760

GROUNDINGS for this motion are as follows:

1. On May 3, 2017, Plaintiff Willis Hagen commenced an action under Wis. Stat. § 19.356(4) to enjoin release of certain employee disciplinary records that Intervenor Alexander Nemec had requested. The records requester, Alexander Nemec, intervened in the action. The court reviewed the records in camera, and, on September 22, 2017, denied the Plaintiff's request to enjoin release of the records and ordered that the "records shall remain in redacted form," except that certain redactions would be eliminated.

2. Hagen appealed this decision, and on June 21, 2018, the court of appeals upheld this court's decision. The court of appeals issued a remittitur on July 26, 2018, returning the file to the circuit court. Hagen did not petition for Supreme Court review.

3. The records custodian mistakenly released, via email, a version of the records to Nemec in unredacted form. When she asked Nemec to delete the records in place of the correct version, he refused.

4. Circuit Courts have inherent authority to enforce their own orders. *Zhang*, 248 Wis. 2d 913, ¶ 14. This court ordered that certain records must be released with redactions. By mistake, the unredacted records were released to Nemec. As a party to the action, Nemec is aware the court ordered that certain information be redacted from the records release. Nemec's refusal to agree to delete the unredacted records directly contravenes the court's determination that certain information must not be publicly released.

WHEREFORE, the Board of Regents asks this court to reopen this case to hear its emergency motion for a permanent injunction.

Dated: October 3, 2018.

Respectfully submitted,

BRAD D. SCHIMEL  
Wisconsin Attorney General

Electronically signed by:

s/Anne M. Bensky  
ANNE M. BENSKY  
Assistant Attorney General  
State Bar #1069210

*Attorneys for Board of Regents*

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10-17-2018

Clerk of Circuit Court

Winnebago County, WI

STATE OF WISCONSIN    CIRCUIT COURT    WINNEBAGO COUNTY    2017CV000389  
Branch 6

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WILLIS L. HAGEN III,

Plaintiff,

v.

Case No. 17-CV-389

BOARD OF REGENTS,  
UNIVERSITY OF WISCONSIN SYSTEM and  
UNIVERSITY OF OSHKOSH,

Defendants.

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**INTERVENOR'S BRIEF IN RESPONSE TO DEFENDANTS'  
MOTION TO REOPEN CASE**

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Intervenor Alex Nemec, by counsel, hereby responds to the Defendants' Emergency Motion to Reopen Case. This Court should deny the motion because there is no further relief the Court can order.

This case was filed under Wis. Stat. § 19.356, which provides certain records subjects a limited opportunity to enjoin the release of records that discuss the record subject. Neither this provision of the Open Records law, nor the general enforcement provisions of Wis. Stat. § 19.37, contain any provisions relating to inadvertent release of records or regulate the conduct of anyone who receives inadvertently released records. The enforcement and penalty provisions of the law only apply to government authorities and records custodians. *See* Wis. Stat. §§ 19.32(1), 19.37. The Open Records law does not provide this Court with any further authority to direct Nemec's conduct, which is the purpose of Plaintiff's Motion to Reopen and both Plaintiff's and Defendants' Motions for Injunction. The Plaintiff's citation to *In re Zhang*, relating to the court's inherent authority to enforce its own orders, is



thus of little help because there is no authority in the underlying law to grant the relief Plaintiff and Defendants seek.

Even if the Court possessed authority to reopen this matter, however, there is still no relief the Court could award. Intervenor Alex Nemec is a journalist, who requested the subject records in the course of reporting a story about Plaintiff Willis Hagen's activities as a University of Wisconsin-Oshkosh professor and state employee. Specifically, Mr. Nemec was reporting on Mr. Hagen's sudden and unexplained removal from the classroom in early 2017 and subsequent reassignment of his classes for the remainder of the semester. *See* Alex Nemec, *The Curious Case of Willis Hagen; UWO Investigates Business Professor, Remains Silent on Reason*, *The Advance-Titan* (Mar. 16, 2017).<sup>1</sup> The records requested related to an earlier, closed investigation of Mr. Hagen.

Because the Defendant released the records to Nemec, this case is no longer governed by the public interest balancing test under the Open Records law.<sup>2</sup> It is governed by decades of First Amendment jurisprudence recognizing that the press cannot be enjoined from or punished for reporting legally obtained, truthful information of public concern absent a state interest of the "highest order." *Smith v. Daily Mail Pub. Co.*, 443 U.S. 97, 103 (1979). This holding has extended to information inadvertently released by government agencies, *e.g.*, *Florida Star v. B.J.F.*, 491 U.S. 524, 526 (1989) (holding rape victim could not recover civil damages against a newspaper that reported her name after it was inadvertently

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<sup>1</sup> Available at <https://advancetitan.com/news/2017/03/16/curious-case-willis-hagen>

<sup>2</sup> The Court may appropriately reconsider its prior decision to affirm certain redactions—a matter clearly within Wis. Stat. §§ 19.356 and 19.37—because Defendants' conduct has caused that decision to be moot or at least substantially altered. *Linzmeier v. Forcey*, 2002 WI 84, ¶ 37, 254 Wis. 2d 306, 646 N.W.2d 811 (finding that if information is already publicly available, that is "germane to the balancing test" and mitigates concerns that are associated with release).

released by a sheriff's department), even when the government or source was legally constrained from releasing it, *Smith*, 443 U.S. 97 (holding state may not punish newspaper for reporting juvenile name lawfully obtained, despite state statute requiring court order prior to release of information); *New York Times Co. v. U.S.*, 403 U.S. 713, 714 (1971) (holding that a newspaper cannot be restrained from publishing classified information it received through a source who lacked authorization).

Wisconsin courts have recognized and applied these holdings, and noted that the consequences of inadvertent release must fall on the custodian who released the records, not the journalist who received them. *E.g.*, *Dumas v. Koebel*, 2013 WI App 152, 352 Wis. 2d 13, 841 N.W.2d 319. In *Dumas*, a school bus driver sued a television station for invasion of privacy when it released her name and misdemeanor conviction for prostitution. *Id.* The plaintiff suggested, but did not prove, that the school district improperly released her name, but that made little difference to the court's decision to reject the driver's claims:

Even if we would have found the bus drivers names to be wrongfully released, *Dumas'* dispute would have been with the [school] district, not with [media] Defendants. *Cf. The Florida Star v. B.J.F.*, 491 U.S. 524, 538, 109 S.Ct. 2603, 105 L.Ed. 443 (1989) ("Where, as here, the government has failed to police itself in disseminating information, it is clear . . . that the imposition of damages against the press for its subsequent publication can hardly be said to be a narrowly tailored means of safeguarding anonymity.").

*Id.* ¶ 23, n.5.

Plaintiff and Defendants in this case focus their injunction motions on Intervenor's conduct, but these requests are either moot (because they request Nemec to delete the records when they have already been deleted), are unconstitutional as a prior restraint on speech (as in the requests to enjoin Nemec from publicly disseminating the redacted information), or are themselves an unprecedented intrusion on news reporting and private

lives (as in Hagen's request that Nemec name all the people with whom he has shared the information). There is no question that Nemec legally obtained the information, and now that he has, "[t]he choice of material to go into a newspaper . . . and treatment of public issues and public officials—whether fair or unfair—constitute the exercise of editorial control and judgment. It has yet to be demonstrated how governmental regulation of this crucial process can be exercised consistent with First Amendment guarantees of a free press as they have evolved to this time." *Miami Herald Publ'g Co. v. Tornillo*, 418 U.S. 214, 258 (1971).

In sum, the Court should deny the motion to reopen, because it cannot award any of the relief Plaintiff or Defendants ultimately seek. Intervenor understands that it is unnecessary at this point to address the merits of the injunction motions, as Friday's hearing is for scheduling purposes, and a response would be scheduled at that time should the motion to reopen be granted.

Respectfully submitted this 17th day of October, 2018.

PINES BACH LLP

*Electronically signed by: Christa O. Westerberg*

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Christa O. Westerberg, SBN 1040530  
Aaron G. Dumas, SBN 1087951

*Attorneys for Intervenor*

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Clerk of Circuit Court

Winnebago County, WI

STATE OF WISCONSIN

CIRCUIT COURT  
BRANCH VIWINNEBAGO COUNTY  
2017CV000389

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WILLIS W. HAGEN II, an individual,

Plaintiff,

-vs-

BOARD OF REGENTS OF THE UNIVERSITY OF  
WISCONSIN SYSTEM and  
UNIVERSITY OF WISCONSIN-OSHKOSH,

Case No. 17-CV-389

Classification Code No. 30704

Defendants,

-and-

ALEXANDER NEMEC,

Intervenor.

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**PLAINTIFF'S NOTICE AND MOTION FOR  
A TEMPORARY RESTRAINING ORDER AND PERMANENT INJUNCTION  
AGAINST INTERVENOR ALEXANDER NEMEC**

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**TO:** Anne M. Bensky, Esq.  
Wisconsin Department of Justice  
17 West Main Street  
P. O. Box 7857  
Madison, WI 53707-7857

Honorable Daniel Bissett  
Winnebago County Circuit Court  
415 Jackson Street  
P. O. Box 2808  
Oshkosh, WI 54903-2808

Christa Westerberg, Esq.  
Pines Bach LLP  
122 West Washington Avenue  
Suite 900  
Madison, WI 53703-2718

Clerk of Circuit Court  
Winnebago County Circuit Court  
415 Jackson Street  
P. O. Box 2808  
Oshkosh, WI 54903-2808

**PLEASE TAKE NOTICE** that at a date and time set by the Court, the Plaintiff, Willis Hagen II, will move the Circuit Court for Winnebago County, the Honorable Daniel J. Bissett presiding, for an emergency temporary restraining order and a permanent injunction enjoining the Intervenor, Alexander Nemec, from (1) publishing confidential information that had been mistakenly released to him under the Wisconsin Public Records Law, (2) requiring him to identify all persons and entities to whom he disclosed the confidential information and records, and (3) requiring him and all those to whom he disclosed the confidential records to permanently and irreversibly destroy the documents that had been erroneously sent to him by the Defendants.

This Motion is based on Wis. Stat. § 813.02 (1)(a), the Court's order dated September 2, 2017, and all other records on file with the Court, along with the following facts to be adduced during an evidentiary hearing to be scheduled by the Court:

1. On May 3, 2017, the Plaintiff commenced an action under Wis. Stat. § 19.356 (4) to enjoin release of certain employee records that Intervenor Alexander Nemec had requested.

2. The records requester, Alexander Nemec, intervened in the action.

3. The court reviewed the records in camera, and, on September 22, 2017, denied the Plaintiff's request to enjoin release of the records and ordered that the "records shall remain in redacted form," except that certain redactions would be eliminated.

4. Plaintiff appealed this decision, and on June 21, 2018, the Wisconsin Court of Appeals upheld this Court's decision. The Wisconsin Court of Appeals issued a remittitur on July 26, 2018, returning the file to this Court.

5. Plaintiff did not petition for Supreme Court review.

6. On Wednesday, August 15, 2018, the records custodian emailed Alexander Nemec the records responsive to the request that were the subject of the action under Wis. Stat. § 19.356.

7. The records custodian mistakenly emailed the unredacted version of the records to Alexander Nemec.

8. The undersigned recently noticed the error and brought the error to the attention of Attorney Jennifer Lattis, Deputy General Counsel for the University of Wisconsin System on or around September 30, 2018.

9. On October 1, 2018, based on information and belief, the records custodian communicated to Alexander Nemec that the records had been released in error, asked Alexander Nemec to delete the unredacted records, and explained she would send the proper redacted version. Nemec stated, "Your mistake is not my problem," and refused to give assurances that he would destroy the unredacted record.

10. On October 5, 2018, the Defendants' attorney proposed a Stipulation that would have disposed of the need for an evidentiary hearing. The proposed Stipulation is attached hereto as **Attachment A**. Alexander Nemec, through his attorney, rejected this Stipulation.

11. On October 10, 2018, the Plaintiff's attorney proposed a Stipulation that would have disposed of the need for an evidentiary hearing. The proposed Stipulation is attached hereto as **Attachment B**. Alexander Nemec, through his attorney, rejected this Stipulation.

12. On October 15, 2018, Alexander Nemec, through his attorney, stated his position as follows:

We obviously don't agree with that characterization, but I don't think we need to for the present purposes. Mr. Nemec lawfully

obtained these records and was not the one who made this mistake. Nonetheless, I can confirm that all copies have now been deleted or destroyed. We do not plan to provide any additional statement from Mr. Nemec. If you still want to go to court to get additional relief, that's up to you. But any further court orders raise significant First Amendment concerns, and we will oppose them on that basis.

13. If Alexander Nemec is not ordered to destroy the original and all copies of the unredacted records, and if he is not ordered to identify to whom he disclosed the original and all copies of the unredacted records along with the confidential information found therein, and does not agree to not publicize their contents, irreparable harm will result, not only for the Plaintiff, but for others whose names are mentioned. This Court already determined that the redactions, as ordered on September 22, 2017, were in the public interest.

14. There would be no adequate legal remedy if the unredacted records are publicized and retained by Nemec and others to whom he may have disclosed or shared the confidential information and records.

15. This Court has jurisdiction to enforce its September 22, 2017, order, and has personal jurisdiction over Alexander Nemec, who has full party status in this action.

16. This court has discretion to issue this temporary restraining order. Waste Mgmt., Inc. v. Wisconsin Solid Waste Recycling Auth., 84 Wis. 2d 462, 466, 267 N.W.2d 659, 662 (1978).

**WHEREFORE**, the Plaintiff asks this Court to enter an order enjoining Alexander Nemec from publicizing, printing, or sharing, in any manner, whether verbally, in writing, or otherwise, the contents of those portions of the records subject to redaction, and further ordering Alexander Nemec to delete and destroy any and all copies of the unredacted records that were sent to him on August 15, 2018, and order that Alexander Nemec take all reasonable efforts to obtain any copies, whether electronic or otherwise, of the unredacted records that he may have sent to others, and further order Alexander Nemec to take action consistent with the **Attachment B**.

**DEMPSEY LAW FIRM, LLP**  
Attorneys for Plaintiff

Electronically signed by Peter J. Culp  
Peter J. Culp  
Wisconsin Bar No. 1022595

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Dated: October 15, 2018



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10-04-2018

Clerk of Circuit Court  
Winnebago County, WI  
2017CV000389

Attorney Christa O. Westerberg  
cwesterberg@pinesbach.com

October 4, 2018

**VIA ELECTRONIC FILING ONLY**

Honorable Daniel J. Bissett  
Winnebago County Circuit Court  
P.O. Box 2808  
Oshkosh, WI 54903-2808

Re: *Willis W. Hagen II v. Board of Regents, et al.*  
Case No. 17-CV-389

Dear Judge Bissett:

We understand the Department of Justice has filed an emergency motion to reopen this matter and motion for injunction. Since we learned of the motions, we have been in discussions with the Department about resolving this matter. We believe reopening the case is premature and the Court's involvement will ultimately be unnecessary. For that reason, we oppose the Department's motion.

Thank you.

Sincerely,

PINES BACH LLP

*/s/ Christa O. Westerberg*

Christa O. Westerberg

COW:hmm

cc: AAG Anne Bensky  
Attorney Peter J. Culp

DEMPSEY

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10-04-2018

Clerk of Circuit Court

Winnebago County, WI

2017CV000389

ALEX R. ACKERMAN

OF COUNSEL:

WILLIAM E. BUCHOLZ  
RYAN M. PLISCH  
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RETIRED:

A. D. (DAN) EDGARTON  
ROBERT V. EDGARTON

October 4, 2018

**VIA E-FILE ONLY**

Honorable Daniel J. Bissett  
Winnebago County Circuit Court  
P. O. Box 2808  
Oshkosh, WI 54903-2808

Re: Willis W. Hagen II v. Board of Regents, et al.  
Case No. 17-CV-389

Dear Judge Bissett

I have received and reviewed the Defendants' Notice and Emergency Motion to Reopen Case that was filed by Attorney Bensky. On behalf of Willis W. Hagen II, I am in full support of the Motion and ask that an order be entered on that Motion at your first and earliest opportunity. Thank you.

Very truly yours,

**DEMPSEY LAW FIRM, LLP**

*Peter J. Culp*

Peter J. Culp

PJC:ask

c: Client (via email)  
Anne Maryse Bensky, Esq. (via e-file)  
Christa Oliver Westerberg, Esq. (via e-file)