2024 Public Records Law Legal Update

Attorneys Kyle J. Gulya, Mark Kapocius & Ryan Heiden

von Briesen

The Government Law Group at von Briesen & Roper, s.c.

www.vonbriesen.com/government

WHEN IT COMES TO GOVERNMENT LAW,

WE DO IT ALL.

CONTRACTS AND PROCUREMENT

CONSTRUCTION & CONSTRUCTION-RELATED LITIGATION

TAX ASSESSMENT AND LITIGATION

EMPLOYEE DISCIPLINE & INVESTIGATIONS

TIF DISTRICT CREATION & DEVELOPMENT

LABOR CONTRACTS

PUBLIC FINANCE

DISCRIMINATION

EMPLOYEE BENEFITS

EMINENT DOMAIN

ENVIRONMENTAL

IMMIGRATION

LITIGATION

LAND USE

von Briesen

The Government Law Group at von Briesen & Roper, s.c.

www.vonbriesen.com/government

What is the Public Records Law About?

Statement of Policy. Section 19.31, Wis. Stat. states:

[I]t 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 employees who represent them. Further, providing persons with such information is declared to be an essential function of representative government and an integral part of the routine duties of officers and employees whose 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 exceptional cases may access by denied.

What is a Record Subject to Disclosure?

- "Except as otherwise provided by law, any requester has a right to inspect any record." Wis. Stat. § 19.35(1)(a).
- Requester gets to see records unless disclosure is barred by:
  - Statute;
  - Common law; or
  - Public Policy Balancing Test. Whether the public's strong interest in disclosure is overcome by the public's greater interest in nondisclosure. Wisconsin's Supreme Court has held that in every case, the public's interest in disclosing the record weighs heavily. *Newspapers, Inc. v. Breier*, 89 Wis.2d 417, 279 N.W.2d 179 (1979).

Personal Accounts, Personal Devices and Social Media

- It's the Content, not the Format.
- The Definition of "Record" is broad.
- War Stories. From Sarah Palin to Hillary Clinton. Many other examples throughout the country at the local government level, typically furthering the high costs of fallout from a political or an employment dispute.

Personal Accounts, Personal Devices and Social Media

- Personal email communications. *Schill v. Wi. Rapids Sch. Dist.*, 2010 WI 86.
- Department of Justice's Position. *December 27, 2021 Letter to Grant Johnson from Assistant Attorney General Paul Ferguson*:
    - However, despite the lead opinion in *Schill*, DOJ's position is that purely personal emails sent or received on government email accounts are records under the public records law, and therefore, such emails are subject to disclosure. In *Schill,* the court held 5-2 that the public records law did not require an authority to disclose such emails. Three justices reached this decision by concluding such emails were not "records." The remaining four justices concluded the emails were "records," but two agreed they did not need to be disclosed under the balancing test. While this area of the law is unsettled, it is reasonable to conclude that should the court again take up the question of whether personal emails sent or received on government email accounts are records, a majority will hold that such emails are records subject to disclosure.

The Scope of the Request

- **Wis. Stat. 19.35(1)(h)**: A request under pars. (a) to (f) is deemed sufficient if it reasonably describes the requested record or the information requested. However, a request for a record without a reasonable limitation as to subject matter or length of time represented by the record does not constitute a sufficient request. A request may be made orally, but a request must be in writing before an action to enforce the request is commenced under s. 19.37.

The Scope of the Request

- ***What about overbroad requests? How to handle?***
  - ***Clarification***
  - ***Fees***
  - ***Uncle***

So What about Woznicki Notices?

<u>Wis. Stat. 19.356</u> Notice and rights to challenge or augment the release of records.

This paragraph applies only to the following records:

1. A record containing information relating to an employee that is created or kept by the authority and that is the result of an investigation into a disciplinary matter involving the employee or possible employment-related violation by the employee of a statute, ordinance, rule, regulation, or policy of the employee's employer.

2. A record obtained by the authority through a subpoena or search warrant.

3. A record prepared by an employer other than an authority, if that record contains information relating to an employee of that employer, unless the employee authorizes the authority to provide access to that information.

So What About Woznicki?

- ***Wisconsin Manufacturers and Commerce v. Evers*, *2022WL2035806 (Wis. Sup. Ct. June 7, 2022).***

¶15 Section 19.356(1), however, clearly and unambiguously abrogated the common law rights created in Woznicki and Milwaukee Teachers. See United Am., LLC v. DOT, 2021 WI 44, ¶15, 397 Wis. 2d 42, 959 N.W.2d 317. The statute provides in no uncertain terms that "[e]xcept as authorized in this section or as otherwise provided by statute ... no person is entitled to judicial review of the decision of an authority to provide a requester with access to a record." Section 19.356 does not distinguish between different categories of individuals or records; it states a general rule that applies to all claims for pre-release judicial review and provides two types of exceptions. The first are those contained in § 19.356(2)-(9), and allow for pre-release notice and judicial review when the types of records at issue in Woznicki and Milwaukee Teachers are involved, subject to heightened rules and expedited procedures. The second exception is for all other instances in which a statute "otherwise provide[s]" for pre-release notice or judicial review. This statutory language——a general prohibition subject to statutorily enumerated exceptions——cannot coexist with a common-law entitlement to pre-release notice or judicial review. **Therefore, we hold that § 19.356(1) clearly and unambiguously eliminated the common-law rights on which WMC relies.**

So What About Woznicki?

- ***WMC Cont.***

¶17 . . . "In contrast, the legislature has adopted several statutes specifically creating a right to block the release of certain types of records. For example, the parties agree that Wis. Stat. § 146.84(1)(c) authorizes a patient to obtain pre-release judicial review when their confidential health records are in danger of being released. See Wis. Stat. § 146.84(1)(c) ("An individual may bring an action to enjoin any violation" of certain confidentiality provisions).[10] Similarly, Wis. Stat. §§ 51.30(9)(c), 46.90(9)(c), 55.043(9m)(c), and 196.135 also explicitly provide for injunctive relief barring the release of records. E.g., § 51.30(9)(c) (providing that "[a]n individual may bring an action to enjoin any violation of this section," which generally prohibits the disclosure of certain types of medical treatment records). Section 196.135 is even more direct, expressly referencing § 19.356 and authorizing both pre-release notice and an opportunity for judicial review of a planned records response. See § 196.135(4)(b)."

So What About Woznicki?

- ***WMC Cont.***

¶18 Unlike these statutes, the Declaratory Judgments Act does not explicitly authorize an action to enjoin the release of a record. Indeed, it says nothing at all about records. As explained above, however, other statutes address the issue, strongly suggesting that the Act is not a statute that "otherwise provide[s]" for pre-release judicial review. . . .

¶19 Moreover, concluding that the Declaratory Judgments Act "otherwise provide[s]" for pre-release judicial review of a public records response would effectively repeal § 19.356(1). As discussed previously, the legislature enacted § 19.356 to limit the rights to pre-release notice and judicial review that this court created in Woznicki and Milwaukee Teachers.[11] See Moustakis, 368 Wis. 2d 677, ¶27, 880 N.W.2d 142. Although those rights may have been enforceable via a declaratory judgment action while they existed, the legislature abrogated them when it adopted § 19.356. WMC cannot use the Act to circumvent either § 19.356 or the other statutorily authorized routes for obtaining that review.

So What About Woznicki?

***Milwaukee Journal Sentinel v. Milwaukee County Sheriff's Office*, *Nop.2021AP615 (July 6, 2022 Wis. Ct. App)*.** Reaffirming that privately created records of another held by a records custodian can constitute public records. "Froedtert contends that the records fall under the third exception, WIS. STAT. § 19.356(2)(a)3. The problem, however, is that Froedtert does not qualify as a "record subject" under the statutes. A "record subject" is defined as "an individual about whom personally identifiable information is contained in a record." WIS. STAT. § 19.32(2g) (emphasis added). Froedtert is not an individual about whom personally identifiable information is contained in the record. The statutes do not define a "record subject" as an employer, like Froedtert. Thus, because Froedtert is not a "record subject," it does not have a right under the statutes to notice or to maintain an action to restrain MCSO from providing the Journal with access to the requested video footage."

So What About Woznicki?

***Mattioli v. City of Milwaukee Police Department*, (Ct. App. Dec. 20, 2022)**

- ¶19 Instead, Mattioli's request for injunctive relief is properly analyzed as a general request under WIS. STAT. § 19.35(1)(a).
- ¶20 To the extent that Mattioli's concerns are personal embarrassment, the public records law provides no shield. "This public interest is *not* equivalent to an individual's personal interest in protecting his or her own character and reputation."
- ¶21 The circuit court crafted a solution to Mattioli's public policy concern for a fair trial.

Discipline Records

- ***Milwaukee Deputy Sheriffs' Association and Joel Streicher v. County of Milwaukee Clerk et al.***, (Ct. App. Oct. 12, 2021).
  - In February 2020, the Milwaukee County Sheriffs' Office received a records request from the media for Joel Streicher's personnel file, inclusive of any investigation files related to Joel Streicher. This request was submitted after Streicher was involved in an on-duty accident.
  - Streicher filed a formal challenge in court contesting this decision to release the records, arguing neither investigation should be released because one investigation was outdated and the other minorly related to him, among other reasons.

Discipline Records

- ***Streicher (cont.)***.
  - Neither investigation report was entirely barred from disclosure, because the public has a strong interest in knowing about public employees' misdeeds and misconduct. The Court noted this interest is particularly strong with police officers who must be subject to public scrutiny.
  - The Court stated: "Thus, here, where the police improperly entered a person's home in the course of their investigation, the public has a compelling interest in accessing the documents relevant to the misconduct and the extent to which it was investigated."

Discipline Records

- ***Streicher (cont.).***
  - The Court dismissed Streicher's claim that the investigation reports must be fully withheld from disclosure to safeguard law enforcement and prosecutorial techniques from identification because no risk existed to undermine those investigatory and prosecutorial tactics.

Discipline Records

- ***Streicher (cont.).***
  - The Court dismissed Streicher's argument that, because he was only minorly involved in the second internal affairs investigation, it should not be disclosed. The Court noted that one's level of involvement in a particular investigation has no bearing on whether the public has an interest in the underlying records and to reach such a holding would allow for government to improperly shield misconduct.

Investigation Records

- ***Wisconsin State Journal V. Blazel, March 9, 2023 Wis. Ct. App.:***
  - the Assembly argues that, even so, disclosure of redacted versions of the records would chill future investigations of harassment or misconduct because the complainant and witnesses "believed" that their identities would be discovered if redacted versions of the records were released. Allowing such beliefs to block release, even when the custodian determines that redactions would suffice to protect the complainant's and witnesses' identities, would essentially exempt the Assembly from ever being subject to the presumption in favor of disclosure. It would also hold the presumption of public access hostage to the subjective beliefs of complainants and create just the sort of blanket exception that our supreme court has long rejected.

Investigation Records

- ***Rejecting arguments about revictimization, the Blazel court stated:***
  - The complainant here is neither a child, a victim of a sex extortion plot, nor identified as a crime victim. We do not minimize the serious and possibly long-lasting effects that an act of sexual harassment can have on the harassed person. However, the reasoning in ***Democratic Party of Wis.*** turned on the special circumstances in that case.

Investigation Records

- ***When conducting the balancing test, the Blazel court stated:***
  - The Assembly suggests that it did not need to address in any detail the public interest in disclosure because "the public interest favoring disclosure is already established by the Public Records law." However, this assertion misrepresents the legal standard. The custodian must consider "all relevant factors," when applying the balancing test. This necessitates a careful consideration of any specific aspects of the public interest in disclosure (in addition to consideration of the general "strong presumption of openness") in order to determine whether "the facts are such that the public policy interests favoring nondisclosure outweigh the public policy interests favoring disclosure, *notwithstanding* the strong presumption favoring disclosure."

Pending Criminal Inv. Records

- ***Kuhnke v. Waupaca County, March 5, 2024 Wis. Ct. App.***

Wis. Stat. 19.35(1)(am)1: Any record containing personally identifiable information that is collected or maintained in connection with a complaint, investigation or other circumstances that may lead to an enforcement action, administrative proceeding, arbitration proceeding or court proceeding, or any such record that is collected or maintained in connection with such an action or proceeding.

Kuhnke argues that the Sheriff's Office "merely recite[d] a blanket reason" for declining to disclose the records he requested and that the office did "not give a sufficient reason why documents pertaining to Mr. Kuhnke could not be released to him, when it is [another person] who was the suspect being prosecuted, not Mr. Kuhnke." However, the statute does not limit the exception to open complaints or investigations focused on requesters. Our supreme court has explained that exceptions to WIS. STAT. § 19.35(1)(am) "should not be narrowly construed." Thus, we do not read § 19.35(1)(am)1. to mean that disclosure is barred only when there is an open complaint or investigation focusing on the requester, but rather when there is any open complaint or investigation of the type described in § 19.35(1)(am)1.

Liquor License Applicants

- ***Cronwell v. City of Glendale, March 5, 2024 Wis. Ct. App. Requiring release of birthdates, addresses and phone numbers of liquor license applicants***
  - "PrimeTime and Marking as its appointed agent chose to engage the City and submit an application for a license to sell alcohol beverages. By so doing, we consider that PrimeTime and Marking consented to a certain level of inspection by the public by virtue of its own choice to sell alcohol beverages. . . . As is evident from WIS. STAT. ch. 125, there are several requirements the legislature sought fit to impose on an applicant that seeks to sell alcohol beverages, including a licensing requirement to ensure that the applicant—or its agent when relevant—has attained the legal drinking age, does not have an arrest or conviction record, and has overall demonstrated a certain fitness to sell alcohol beverages."
  - The Court rejected "chilling effect" and risk of harm from disclosure of this economically valuable information.

Identities of Applicants

Wis. Stat. 19.36(7)(a) In this subsection:

1. “Final candidate” means each applicant who is seriously considered for appointment or whose name is certified for appointment, and whose name is submitted for final consideration to an authority for appointment, to any of the following:

. . . .

b. A local public office.

. . . .

2. “Final candidate” includes all of the following, but only with respect to the offices and positions described under subd. 1. a. and b.:

a. Whenever there are at least 5 applicants for an office or position, each of the 5 applicants who are considered the most qualified for the office or position by an authority.

b. Whenever there are fewer than 5 applicants for an office or position, each applicant.

c. Whenever an appointment is to be made from a group of more than 5 applicants considered the most qualified for an office or position by an authority, each applicant in that group.

. . . .

Identities of Applicants

- (b) Every applicant for a position with any authority may indicate in writing to the authority that the applicant does not wish the authority to reveal his or her identity. Except with respect to an applicant whose name is certified for appointment to a position in the state classified service or a final candidate, if an applicant makes such an indication in writing, the authority shall not provide access to any record related to the application that may reveal the identity of the applicant.

Identities of Applicants

Mastel v. School District of Elmbrook, 399 Wis. 2d 797 (Ct. App. 2021).

- Wis. Stat. 19.36(7) does not apply to protect the identities of the three applicants [for the school board vacancy] who were not final candidates if they did not provide such a written indication to the District, as the petition alleges is the case here.
- Wis. Stat. 19.36(11) only prohibits release of home addresses and other specific information of the person who holds the office, not just candidates.

Email Addresses of those Influencing Officials

JOHN K. MACIVER INSTITUTE v. Erpenbach, 848 NW 2d 862 - Wis: Court of Appeals 2014.

- After the Act 10 legislative changes, the Institute sought Sen. Erpenbach's emails related to the collective bargaining changes.
- Erpenbach redacted personal contact information including last names and email addresses. Upon a clarification, Erpenbach responded that he would not provide the "public e-mail addresses of state employees and other public employees."

Email Addresses of those Influencing Officials

JOHN K. MACIVER INSTITUTE v. Erpenbach, 848 NW 2d 862 - Wis: Court of Appeals 2014.

- Erpenbach argued that the communications were "purely personal" under *Schill*.
- Erpenbach asserted that the public interest in nondisclosure of the information outweighed the public interest in disclosure because nondisclosure protects
  - against the "potential for threats, harassment and reprisals"
  - against e-mail senders, respects senders' privacy and rights to free speech and to petition the government, and
  - guards against the potential "chilling effect" of disclosure on future citizen communications.

  Court: There is no law supporting his suggestion that legislator-custodians should be afforded deference in their disclosure decisions that is not afforded to nonlegislator-custodians.

Email Addresses of those Influencing Officials

- Erpenbach has identified no statutory or common law exception to disclosure of this identifying information, but contends the information has "no connection" to his "`official acts' ... [or] to his `government function,'" and, therefore, is not subject to disclosure. The Institute argues that "who" is attempting to influence a legislator is an "integral part" of the communication itself and relates to the affairs of government and Erpenbach's official acts, and it further asserts that from "where" the e-mails were sent is also of interest to the public.
- Public awareness of "who" is attempting to influence public policy is essential for effective oversight of our government.
- It is also of public interest to know from "where" the sender is attempting to influence public policy.

Email Addresses When Government is the one Influencing

Gierl v. Mequon-Thiensville School District, Ct. of Appeals, No. 2021AP2190.

- School district collected parent email addresses for school-related purposes, and also "used the list to engage in other communication that really may stray from what traditionally would be considered school related…district's commitment to educating the community on race inequity."
- District argued that releasing the email addresses would have a "chilling effect" on parents' willingness to provide emails, and therefore stifle communications
- Court: that's a speculative argument and insufficient to overcome the strong presumption of openness.
- Court: "If the District had the discipline to limit itself to emails about bus schedules, enrollment, office closures and the like, the public interest in accessing this Distribution List would not be as high…the balancing test does not tolerate utilizing taxpayer resources for an ideological or political monopoly."

2024 Act 253

- Went into effect April 1, 2024
- Applies to law enforcement's redaction of audio and video files when required to comply with statutory, case law, or constitutional provisions
- Open question if it applies to redaction of audio and video files made by non-law enforcement

2024 Act 253

- Although the intent of Act 253 is in line with a need law enforcement has faced over the past decade or so, the final language within Act 253 contains a number of exceptions that may limit the law's actual impact.

2024 Act 253

Specifically, Act 253 contains the following exceptions:

- A redaction fee may not be imposed for a request for records containing audio or video content if the requester meets all three of the following criteria:

  (1) an individual;

  (2) who provides written certification to the authority that they will not use the audio or video content for financial gain (not including civil damages); and

  (3) who has not made more than 10 requests in the same calendar year to the authority for records containing audio or video content, including the current request.

2024 Act 253

- Specifically, Act 253 contains the following exceptions:
  - A redaction fee may not be imposed for a request for records containing audio or video content if the requester was directly involved in the event to which the requested records relate
  - A redaction fee may not be imposed for a request for records containing audio or video content if the request involves audio or video records related to officer-involved shootings.

2024 Act 253

- If an authority wishes to recoup qualifying redaction costs for records containing audio or video content, then prior to fulfilling the request, the authority must provide the requester with a written estimate of the redaction fee to be charged.
- Similar to location costs, consider the scope of the request and whether limitations exist with regard to who can assist with redaction.

2024 Act 253

- Consider creating a checklist that is utilized for requests falling under 2024 Act 253, which may include considerations such as:
  - Is there a recorded audio or video record that is responsive to the request for records?
    - Has the requester provided sufficient information for the authority to determine whether requested recordings contain audio or video content? If not, consider seeking clarification from the requester before proceeding.
    - If no recorded audio or video content is responsive to the request, then no redaction costs cannot be recouped.
    - If there is recorded audio or video content responsive to the request, then the requester should be provided the form for completion so that the authority may determine whether an exception applies to the imposition of redaction fees.

2024 Act 253

- Consider creating a checklist that is utilized for requests falling under 2024 Act 253, which may include considerations such as:
  - Do the records contain recorded audio or video content related to a shooting involving an officer of a law enforcement agency?
  - If yes, then no fees may be charged.
  - If no, then consider the identity and motivations of the requester.
  - Has the requester completed the form and provided certification as to the requirements of Wis. Stat. § 19.35(3)(h)3a asserting that the requester will not use the recorded audio or video content for financial gain, not including an award of damages in a civil action ?

2024 Act 253

- Consider creating a checklist that is utilized for requests falling under 2024 Act 253, which may include considerations such as:
  - Has the requester provided sufficient information for the authority to determine whether the requester has made more than 10 requests in a calendar year wherein there may be recorded audio or video records responsive to the request as identified in Wis. Stat. § 19.35(3)(h)3b?
  - The estimate of costs should be prepared for purposes of determining estimated costs to be recouped for redaction if constitutional, statutory, or common law considerations require redaction. To best prepare an estimate, a brief review of the responsive records should occur upon receiving a proper request to estimate time of redaction required.
  - Has the requester paid the estimate of redaction costs? No further work should be undertaken to review or redact the recorded audio or video content until the estimate is paid in full.

2024 Act 253

- Consider creating a checklist that is utilized for requests falling under 2024 Act 253, which may include considerations such as:
  - Has the requester provided sufficient information for the authority to determine whether the requester has made more than 10 requests in a calendar year wherein there may be recorded audio or video records responsive to the request as identified in Wis. Stat. § 19.35(3)(h)3b?
  - The estimate of costs should be prepared for purposes of determining estimated costs to be recouped for redaction if constitutional, statutory, or common law considerations require redaction. To best prepare an estimate, a brief review of the responsive records should occur upon receiving a proper request to estimate time of redaction required.
  - Has the requester paid the estimate of redaction costs? No further work should be undertaken to review or redact the recorded audio or video content until the estimate is paid in full.

2024 Act 253

- Act 253 contains several ambiguities:
  - First, what may an authority do if the requester refuses to identify themselves?
  - Second, what constitutes redaction time for purposes of recouping costs?
  - Third, when does the recorded audio or video content relate to a shooting involving an officer of a law enforcement agency under Wis. Stat. § 19.35(3)(h)5?
  - Fourth, when does the recorded audio or video content relate to the incident that the requester was directly involved under Wis. Stat. § 19.35(3)(h)4?

2024 Act 253

- Act 253 contains several ambiguities:
  - Fifth, what constitutes “financial gain” under Wis. Stat. § 19.35(3)(h)3a?
  - Sixth, who bears the burden of determining whether an individual requester has not exceeded the 10-request threshold per calendar year?

Parting Thoughts

- One Size Does Not Fit All. Application of the Public Records law requires thoughtfulness and creativity and individualized analysis.
- Be Prepared. There are new sources of challenges out there. The law, the litigators, and the judicial decisions.
- Don't be afraid to get help. The public records law is an area of the law that is counterintuitive and tricky. Use the resources at your disposal.

Discussion