Josh Kaul
Wisconsin Attorney General

P.O. Box 7857
Madison, WI 53707-7857

NEWS FOR IMMEDIATE RELEASE

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Wisconsin Stat. § 19.77 Annual Summary

MADISON, Wis. – The following is a summary of public records case law-related decisions for 2022, which the Wisconsin Department of Justice is required to compile pursuant to Wis. Stat. § 19.77.

The statute says that annually, the Attorney General shall summarize case law and attorney general opinions relating to due process and other legal issues involving the collection, maintenance, use, provision of access to, sharing or archiving of personally identifiable information by authorities. The Attorney General shall provide the summary, at no charge, to interested persons.

I. CASE LAW

Bernegger v. Wisconsin Department of Natural Resources, No. 21-CV-1388 (Wis. Cir. Ct. Dane Cty. Oct. 25, 2022)

This case addressed whether a records custodian must respond to a public records request when no records exist.

Peter Bernegger (Bernegger) submitted a public records request to the Wisconsin Department of Natural Resources (DNR) for "documents showing the State has title to flooded private lands or otherwise showing that the State 'has the legal right to access' his family's property." After multiple communications with Bernegger, the DNR determined that Bernegger "merely wanted to argue the issues with DNR or seek a legal opinion from DNR." The DNR informed Bernegger that his "'request' was deemed a request for a legal opinion" and not a public records request. Bernegger then filed a petition for writ of mandamus. At trial it was determined that no responsive records existed.

The circuit court stated that the DNR "should have" recognized Bernegger's initial correspondence as a public records request and it may have avoided this lawsuit "by taking the reasonable step of responding" to Bernegger "in writing" that no records exist. Additionally, the circuit court acknowledged that the Wisconsin Supreme Court has held that "a record custodian does not need to respond at all when no records exist that are responsive to a public records request." The circuit court denied Bernegger's petition for writ of mandamus and dismissed the case with prejudice.

***Cronwell v. City of Glendale*, No. 21-CV-6740 (Wis. Cir. Ct. Milwaukee Cty. June 21, 2022)**

This case addressed whether the balancing test justified non-disclosure of a personal phone number, personal email address, and date of birth in records responsive to a public records request.

Robert Cronwell (Cronwell) made a verbal public records request to the City of Glendale (City) for a copy of an Original Alcohol Beverage Retail License and Application (Application) filed by Nicholas Marking (Marking). The City provided a copy of the Application with redactions of Marking's personal phone number, personal email address, and date of birth. Cronwell then submitted a written public records request for an unredacted copy of the Application and additional application materials. The City denied the request for an unredacted copy of the Application stating it "do[es] not provide personally identifying information that can be employed for other purposes." Cronwell then requested the Schedule of Appointment and the City provided the record with redactions of the same personally identifiable information. Cronwell filed a petition for writ of mandamus seeking unredacted copies of the application materials.

The circuit court stated that the City identified a "specific public policy reason" for redacting portions of the record, but also stated that "[w]ether the public safety threat is sufficient under the balancing test to justify non-disclosure in this instance is a separate question." In applying the balancing test, the circuit court stated, "the City has failed to establish that permitting inspection of the unredacted application materials would result in harm to the public interest that outweighs the legislative policy recognizing the public interest in inspection." The court concluded that due to the lack of "specific, concrete evidence of likely misuse of the information in this instance," it "cannot conclude the presumption of complete public access is overcome." The circuit court granted Cronwell's motion for summary judgment and ordered the City to provide unredacted records in response to Cronwell's public records request.

The City appealed the circuit court's order, the case has been briefed in the court of appeals, and the decision is pending.

***Friends of Frame Park, U.A. v. City of Waukesha*, 2022 WI 57, 403 Wis. 2d 1, 976 N.W.2d 263**

This case addressed whether a requester prevailed in whole or substantial part in their mandamus action to the extent that they would be entitled to attorney's fees.

Friends of Frame Park (Friends) submitted a public records request to the City of Waukesha (City) for "information about the City's plan to bring amateur baseball to Waukesha." The City provided documents responsive to Friends' request with the exception of a draft contract with Big Top Baseball. The City temporarily withheld the contract because it was in "draft form" and releasing it would compromise the City's negotiating and bargaining position. Friends filed a petition for writ of mandamus seeking the draft contract and attorney's fees and costs. Two days later the City released the draft contract and explained that there was no longer a need "to protect the City's negotiation and bargaining position." Friends amended their complaint stating that the draft contract was improperly withheld. The City filed a motion for summary judgment. The circuit court concluded the City "properly withheld certain public records temporarily" and "appropriately relied on Wis. Stat. § 19.85(1)(e) as the basis for doing so under the circumstances of this case." The circuit court also concluded that Friends was not entitled to attorneys' fees and costs.

Friends appealed and the court of appeals reversed the circuit court's decision concluding that the City improperly relied on the negotiation and bargaining exception which "led to an unreasonable delay in the record's release." The court of appeals determined that Friends was "entitled to some portion of its attorney's fees," and remanded the case to the circuit court to determine an appropriate amount.

The City petitioned the Wisconsin Supreme Court for review. The Court granted the petition and ultimately reversed the court of appeals' decision concluding that the City "properly applied the balancing test" in its decision to temporarily withhold the draft contract until after consultation with the common council. The Court held that "to 'prevail[] in whole or substantial part,' [] means the party must obtain a judicially sanctioned change in the parties' legal relationship." Without this "judicially sanctioned change," attorney's fees are "not recoverable" under Wis. Stat. § 19.37(2)(a)." Friends did not "obtain a judicially sanctioned change in the parties' legal relationship" and therefore did not prevail "in whole or substantial part."

Friends filed a Motion for Reconsideration of the Supreme Court's decision which the Court denied.

***Gierl v. Mequon-Thiensville School* District, 2023 WI App 5**

This case addressed the application of the public records balancing test.

Mark Gierl (Gierl) submitted a public records request to the Mequon-Thiensville School District (School District) for a list of all the email addresses that received an invitation for a district-sponsored webinar regarding privilege and race. The School District provided the staff distribution list but denied access to the parent distribution list. Gierl filed a petition for writ of mandamus. The School District argued that releasing the parent email distribution list would cause a chilling effect on parents providing this contact information. The circuit court stated that the School District had not provided any support for this argument, granted Gierl's motion for summary judgment, and ordered the School District to produce the parent distribution list.

The School District appealed the circuit court's order. The court of appeals affirmed stating that the circuit court "did not err in applying the balancing test" and the School District "has failed to meet its burden" to show that the public interest in keeping the parent email distribution list private outweighed "the strong public policy in favor of releasing these public records." The School District is a government entity that "uses government resources" to gather parent email addresses and then uses the distribution list "to promote and advance" matters of interest to School District personnel. It is of public interest to know who the government is "attempting to influence."

The School District petitioned the Wisconsin Supreme Court for review and the Court's response is pending.

***Hying v. Barrett*, No. 2022AP45 (Wis. Ct. App. Aug. 9, 2022) (unpublished)**

This case addressed whether an appeal of a dismissed petition for writ of mandamus was frivolous.

Martin Hying (Hying) filed a public records request with then Milwaukee County Clerk of Circuit Court John Barrett (Barrett) for records related to his divorce case. Hying then filed a petition for writ of mandamus pro se stating that Barrett's office had not responded to his request in a timely manner. The circuit court issued an alternative writ directing Barrett to respond to Hying's request. Milwaukee County Corporation Counsel, on Barrett's behalf, informed the court that Barrett's office responded to Hying's request approximately one week after the petition was filed. The circuit court then declared Hying's mandamus action moot and dismissed the case. Hying appealed the circuit court's dismissal of his petition.

The court of appeals affirmed the circuit court's decision stating that the appeal was "wholly without merit and frivolous." The court of appeals stated that Hying filed an appeal "even after he was provided with the information he requested" and "should have known" that his appeal was meritless. The court of appeals remanded the case to the circuit court to determine a reasonable amount of costs and fees to be awarded to Barrett.

***Journal Sentinel, Inc. v. Milwaukee County Sheriff's Office*, 2022 WI App 44, 404 Wis. 2d 328, 979 N.W.2d 609**

This case addressed who is considered a "record subject" under the public records law.

Journal Sentinel, Inc. (Journal Sentinel) submitted a public records request to the Milwaukee County Sheriff's Office (MCSO) for surveillance video footage of Kenneth Freeman in a hospital and hospital parking garage "two-plus-hours" prior to an attack on a nurse in the parking garage. MCSO denied the request stating that "the public interest in treating" the victim's family "with respect for their privacy" outweighed the "public interest in disclosure" of the video footage prior to the attack." Journal Sentinel filed a petition for writ of mandamus asking the court to compel disclosure of the video surveillance footage prior to the attack. The circuit court issued an alternative writ of mandamus ordering MCSO to produce the video footage or explain why production is not possible. MCSO and intervenor Froedtert Health, Inc. (Froedtert) filed motions to quash the alternative writ. The circuit court denied MCSO and Froedtert's motions to quash and ordered MCSO to produce the video footage to Journal Sentinel. Froedtert appealed.

The court of appeals affirmed the circuit court's decision holding that the "requested surveillance video of [the] hospital parking ramp constituted [a] public record, under public records law," that was "kept by a public authority." Froedtert does not have "the right to block release of the requested footage" because the "hospital did not qualify as a 'record subject.'" Only an "individual about whom personally identifiable information is contained in a record" qualifies as a "record subject." The court of appeals concluded that "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 MSCO from providing the Journal [Sentinel] with access to the requested video footage."

***Weidner v. City of Racine*, No. 2021AP329 (Wis. Ct. App. July 6, 2022) (unpublished)**

This case addressed whether the attorney-client privilege justified withholding a record responsive to a public records request.

Alderperson Sandra Weidner (Weidner) attended a closed meeting of the City of Racine's (City) executive committee in which the city attorney presented a PowerPoint presentation seeking an advisory opinion from the City's Ethics Committee "about a potential response to allegations against one or more members of the common council, including Weidner." After the meeting, Weidner submitted a public records request for a copy of the PowerPoint presentation. The city attorney denied the request stating that it was being withheld due to attorney-client privilege. Weidner filed a petition for writ of mandamus. During litigation it was discovered that there was a "slightly different" version of the PowerPoint and that the city attorney was not sure which version was presented at the closed meeting but that the differences between the two were "non-material" and "minor." The circuit court determined that both were protected by attorney-client privilege and dismissed the case. Weidner appealed.

The court of appeals stated that the City waived the attorney-client privilege by voluntarily showing the PowerPoint at the meeting where Weidner was present and that the "waiver of privilege" regarding one PowerPoint then applies to the second one, "as the disclosure of substantially all of the material in one allows for waiver of the remainder of the material in the other." The court of appeals reversed the circuit court's decision and remanded to the circuit court to direct the City to provide both PowerPoint presentations to Weidner.

***Wisconsin Manufacturers and Commerce v. Evers*, 2022 WI 38, 977 N.W.2d 374**

This case addressed the applicability of Wis. Stat. § 19.356(1) in responding to public records requests.

The Milwaukee Journal Sentinel (Journal Sentinel) submitted a public records request to the Wisconsin Department of Health Services (DHS) for documents related to the COVID-19 pandemic. Before releasing the records DHS provided a courtesy notice to Wisconsin Manufacturers and Commerce and two other trade associations (WMC) of the "list of all Wisconsin businesses with more than 25 employees that had two or more employees test positive for COVID-19 or that had close contacts investigated by contact tracers." WMC filed a declaratory action seeking to prevent release of the list alleging this information was private medical information and therefore cannot be disclosed. The circuit court granted WMC's motion for a temporary injunction. DHS and Journal Sentinel requested leave to appeal the circuit court's order denying their motion to dismiss. The court of appeals reversed the circuit's court's decision stating that WMC had "failed to state a claim upon which relief could be granted."

WMC petitioned the Wisconsin Supreme Court for review. The Court affirmed the court of appeal's decision holding that "[WMC] lacked statutory or common-law right to pre-release judicial review of [the] decision to release the documents, even if the review were by declaratory judgment." The Court stated that the Declaratory Judgments Act "does not explicitly authorize an action to enjoin the release of a record" and that "it says nothing at all about records." The legislature has authorized pre-release judicial review in "narrower contexts elsewhere in the statutes." The Court concluded that "WMC's complaint fails to state a claim upon which relief may be granted because its claim is barred by § 19.356(1)."

II. ATTORNEY GENERAL OPINIONS

In 2022, the Attorney General issued no formal or informal opinions within the scope of Wis. Stat. § 19.77.