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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 2021, 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

***Allen v. Selje, Records Custodian*, No. 2020AP1309 (Wis. Ct. App. Jan. 21, 2021) (unpublished)**

This case addressed a denial of a public records request.

Gregory Allen (Allen) submitted a public records request for a copy of the audio of a phone call he had while incarcerated at the New Lisbon Correctional Institution. The records custodian denied his request, and he filed a writ of mandamus in circuit court. The circuit court entered an alternative writ requiring the records custodian to produce all “non-confidential, unprivileged, and available information” in the requested record. The records custodian filed a motion to quash stating the call could not be produced because doing so would violate the Wisconsin Electronic Surveillance Control Law. The circuit court granted the records custodian’s motion to quash and the case was dismissed.

On appeal, Allen argued that the electronic surveillance control law does not apply to his public records request and, therefore, the records custodian must provide him with the record he requested. The records custodian ultimately waived her argument in support of the motion to quash and stated that she did not oppose the court of appeals summarily reversing the circuit court's order for dismissal. The court of appeals summarily reversed the circuit court's order and remanded the case, directing the circuit court to deny the motion to quash and for further proceedings in which the records custodian will have an opportunity to file a return.

***Gannett Co., Inc. v. Brown County*, No. 20-CV-646 (Wis. Cir. Ct. Brown Cty. Sept. 21, 2021)**

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

Doug Schneider (Schneider) submitted a public records request to Brown County (County) for records "relating to the County's COVID-19 investigations of businesses in Brown County." Schneider specifically requested the names of businesses and a breakdown of cases at each business. The County provided records with the names of businesses redacted pursuant to the public records balancing test. The breakdown of cases at each business and the type of business were not redacted. Gannett Co., Inc. (Gannett) and Schneider filed a summons and complaint seeking a writ of mandamus for the unredacted names of the businesses. The County and Gannett filed motions for summary judgment.

The circuit court concluded the County correctly redacted the names of the businesses pursuant to the balancing test. The circuit court stated that nondisclosure was appropriate because 1) non-employee COVID-19 cases can be linked to a business and publicly reporting these cases as part of a County investigation could have a negative impact on the reputation of the reporting business; 2) "COVID-19 cases can be linked to a business even where the employee got the virus elsewhere"; 3) "neither the public nor the County can deduce what percentage of employees of a particular business have COVID-19 or were exposed to COVID-19 from a non-employee" because "the County does not know the number of employees in a target business"; and 4) providing the names of the businesses "would have a negative effect on the local economy." The circuit court summarized, "the balancing test weighs in favor of nondisclosure as the harm to the public outweighs the public's interest in the disclosure of the names of business being investigated for COVID-19." The circuit court denied Gannett's motion and granted the County's motion for summary judgment.

***Gierl v. Mequon-Thiensville School District*, No. 20-CV-240 (Wis. Cir. Ct. Ozaukee Cty. Oct. 29, 2021), on appeal, No. 2021AP2190 (Wis. Ct. App.)**

This case addressed whether a school district properly applied the balancing test in response to a public records request for a copy of its distribution list of parents' email addresses.

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. The circuit court referred to the School District's actions as "community outreach" and stated that if the School District "is trying to influence the public in any way, shape, or form, it's of the public interest to know who government is attempting to influence." The circuit court ordered the School District to produce the parent distribution list to Gierl.

The School District appealed the circuit court's order, and the case is being briefed in the court of appeals.

***Journal Sentinel, Inc. v. Milwaukee County Sheriff's Office*, No. 20-CV-5445 (Wis. Cir. Ct. Milwaukee Cty. March 25, 2021), on appeal, No. 2021AP615 (Wis. Ct. App.)**

This case addressed the application of the public records balancing test with regard to a request for video surveillance of a criminal defendant prior to a deadly attack.

A Journal Sentinel, Inc. (Journal Sentinel) reporter submitted a public records request to the Milwaukee County Sheriff's Office (MCSO) for footage of an attack caught on Froedtert Hospital's (Froedtert) surveillance video. MCSO denied the request because the criminal case was still pending. The reporter made a second request for video footage of the criminal defendant, Mr. Freeman, "in the hours prior to the attack." 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 asking MCSO to produce the video footage or explain why production is not possible. MCSO and intervenor Froedtert filed motions to quash the alternative writ.

In conducting the public records balancing test, the circuit court stated 1) "the disclosure of the video footage would not cause public harm to the degree that the presumption of openness is overcome"; 2) the public has a right to inspect video records in the state's possession; 3) protecting the privacy of the victim's family is important, however, "their privacy concerns do not override the public's right to access the video footage of Mr. Freeman"; 4) the video footage does not contain information about the victim, but instead shows the actions of Mr. Freeman prior to the crime; and 5) "the public has

significant interest” in the video footage because it raises security concerns at Froedtert that night. The circuit court concluded that “Wisconsin law favors the disclosure of the video footage requested by Journal Sentinel.” The circuit court denied MCSO and Froedtert’s motions to quash the alternative writ of mandamus and ordered MCSO to produce the video footage to Journal Sentinel.

Froedtert moved for a stay of enforcement and appealed the circuit court’s order, the case has been briefed in the court of appeals, and the decision is pending.

Karcher v. WI Dept. of Health Services Division of Public Health, No. 2020AP211 (Wis. Ct. App. Feb. 17, 2021) (unpublished)

This case addressed a public records request for records when there are no records to produce.

Scott Karcher (Karcher) submitted a public records request to the Wisconsin Vital Records Office which is within the Wisconsin Department of Health Services (DHS). State Registrar Lisa Walker responded to Karcher’s request stating, “DHS has no responsive records.” Karcher then filed an “Application for Alternative Writ of Mandamus” pro se. DHS responded stating that it could not “provide review of a file or records which it does not have.” At a telephone status conference, the court stated DHS had been responsive to Karcher’s request, and although Karcher felt that records must exist, DHS’s response was “the end of this analysis from [the court’s] perspective legally.” The circuit court denied Karcher’s writ and dismissed the case.

Karcher appealed the circuit court’s decision. The court of appeals affirmed the circuit court’s decision stating that the circuit court properly dismissed the action “because there are no public records responsive to Karcher’s request.” The court stated that mandamus provisions cannot be triggered when an authority does not have responsive records because an authority “can neither withhold nor delay access to nonexistent records.”

Karcher petitioned the Wisconsin Supreme Court for review, and the Court denied his Petition for Review on June 16, 2021.

Mastel v. School District of Elmbrook, 2021 WI App 78, 399 Wis. 2d 797, 967 N.W.2d 176

This case addressed the application of Wis. Stat. § 19.36(7) regarding identities of applicants for public positions in responding to a public records request.

Cheri Mastel (Mastel) submitted a public records request to the School District of Elmbrook (District) for a list of all applicants or for copies of the applications of all applicants for the vacant school board position. The District provided the applications for the top five finalists, pursuant to Wis. Stat. § 19.36(7), with redactions, but withheld

three applications that were not “final candidates.” Mastel filed a petition for writ of mandamus alleging the District unlawfully withheld the three applications and that certain redactions made pursuant to Wis. Stat. § 19.36(11) were unlawful. The District filed a motion to dismiss stating the petition “failed to state a claim upon which relief can be granted.” The circuit court granted the District’s motion to dismiss.

Mastel appealed the circuit court’s dismissal. First, the court of appeals held that the District erred in its denial of the three applications that were not “final candidates.” The court stated that Wis. Stat. § 19.36(7) did not apply because the three applicants did not inform the District in writing that they wished to have their identities kept confidential. Second, the court of appeals held that the District unlawfully redacted personal information, including e-mail addresses, phone numbers, and addresses, from the records because Wis. Stat. § 19.36(11) only applies to individuals holding a local public office or a state public office. Third, the court of appeals held that professional contact information of individuals that do not hold a local public office is not exempted by Wis. Stat. § 19.36(11) and, therefore, the District erred in its redaction of this information. The court of appeals reversed the circuit court’s decision on these three issues and remanded the case for further proceedings.

***Meinecke v. Thyges*, 2021 WI App 58, 399 Wis. 2d 1, 963 N.W.2d 816**

This case addressed whether the petitioner prevailed in substantial part in her mandamus action, and therefore, was entitled to attorney fees and costs.

Village of Grafton Trustee Susan Meinecke (Meinecke) submitted multiple public records requests to Village of Grafton employees Jesse Thyges and William Rice for email records. She received many responsive records, but did not receive all of the documents she requested. Meinecke filed a mandamus action alleging the village officials had unlawfully withheld five categories of records. The circuit court ordered the village officials to turn over some of the requested records, but denied Meinecke’s request for fees “finding that she had not prevailed in substantial part as required under Wis. Stat. § 19.37(2) for an award of fees.”

Meinecke appealed the circuit court’s denial of her request for fees. The court of appeals held that Meinecke “prevailed in substantial part” in her mandamus action because she obtained access to “improperly withheld public records” through a court order and was therefore entitled to fees. A requester does not need to gain access to all requested records in order to be successful in their mandamus action. Once it is determined that a requester is eligible for fees, it is up to the circuit court’s discretion to determine an appropriate fee award. The court of appeals reversed and remanded to circuit court to calculate the amount of reasonable fees to be awarded to Meinecke.

***Milwaukee Deputy Sheriffs' Association v. County of Milwaukee County Clerk*, 2021 WI App 80, 399 Wis. 2d 769, 967 N.W.2d 185**

This case addressed the application of the public records balancing test with regard to records subject to disclosure.

A reporter for WISN-TV ABC submitted a public records request to the Milwaukee County Sheriff's Office (MCSO) for disciplinary records for Deputy Joel Streicher (Streicher) that included records regarding a motorist who was killed when Deputy Streicher ran a red light while on duty. MCSO determined the records were subject to disclosure and notified Streicher of its intent to release the records with necessary redactions. The estate for the motorist also submitted a public records request to MCSO for personnel and discipline files of Streicher and for records related to Stinson's death. Streicher sought an order to restrain MCSO from releasing the records. The circuit court granted the release of one file but denied access to the second file because of concerns "related to the prosecutor's case planning" and confidential informants' information in the file and because additional significant redactions would be needed. The circuit court also noted that Streicher's discipline is part of the record, but that "he was only 'a very minor player' in a larger investigation," and therefore, the circuit court did not "see a strong public interest in disclosure." The estate appealed the circuit court's order denying the release of the second file.

The court of appeals concluded that Streicher and the Milwaukee Deputy Sheriff's Association (MDSA) did not fulfill their "burden to show that the public interest in the nondisclosure of [the second file] outweighs the strong public interest in disclosure." The court also stated that the need for redactions to certain records prior to release does not justify nondisclosure of the entire file and that the public has a strong interest in the investigations of police misconduct despite the level of misconduct. The court of appeals reversed the circuit court's order and remanded with instructions that the circuit court complete a careful review of the documents to "determine what additional redactions are needed and grant the release of the file in compliance with Wisconsin's public records law."

***Seymer v. City of Franklin*, No. 20-CV-3506 (Wis. Cir. Ct. Milwaukee Cty. Sept. 10, 2021)**

This case concerned the City of Franklin's policy of redacting the name of individuals who file property complaints.

The circuit court determined the city's policy was not permissible, and their balancing test rationale for withholding the names did not outweigh the public interest in access to the records.

***State ex. rel. Socha v. Simono*, No. 2020AP1455 (Wis. Ct. App. May 25, 2021) (unpublished)**

This case addressed whether the petitioner substantially prevailed in his mandamus action, and therefore was entitled to costs and fees.

Thomas Socha (Socha) submitted multiple public records requests to Forest County District Attorney Charles Simono (Simono). Socha did not receive the requested records, and he filed a mandamus action “seeking to compel Simono ‘to produce’” a requested proffer agreement and also the additional records sought in his fourth request. The circuit court issued a writ of mandamus compelling Simono to respond. Simono produced records to Socha, however, he explained “the proffer agreement does not exist in the files within my office.” Socha asked the circuit court to award him costs and fees. The circuit court denied the motion and dismissed the case.

Socha appealed the circuit court’s denial of his motion for costs and fees. The court of appeals noted that Simono produced records within five days of being served with the writ of mandamus. The court concluded that Socha’s mandamus action was a “substantial factor” in Simono’s production of records, therefore, Socha “prevailed, in substantial part, on the mandamus action.” The court of appeals reversed the circuit court’s order and remanded directing the circuit court to enter an amended judgment awarding Socha costs and fees.

***Wisconsin Manufacturers and Commerce v. Evers*, 2021 WI App 35, 398 Wis. 2d 164, 960 N.W.2d 442**

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

Wisconsin Manufacturers and Commerce, Muskego Area Chamber of Commerce, and New Berlin Chamber of Commerce and Visitors Bureau (collectively, the Associations) brought a declaratory action to enjoin the release of records by the Wisconsin Department of Health Services (Department). The requested records consisted of a list of “all Wisconsin businesses with over twenty-five employees that have had at least two employees test positive for COVID-19 or that have had close case contact that were investigated by contract tracers.” The Associations contended this information was private medical information and therefore cannot be disclosed. The circuit court granted the Associations’ motion for a temporary injunction. The Department and intervenor Journal Sentinel requested leave to appeal the circuit court’s non-final order. The circuit court granted the request and the appeals were consolidated.

The court of appeals concluded that the Associations lacked standing to bring the action on behalf of the businesses and failed to show the businesses had a “legally protectable interest” that could justify objection to release of the requested records. The court of appeals also stated that there was no applicable exception to Wis. Stat. § 19.356(1)

which provides that, except 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.” The court of appeals reversed and remanded instructing the circuit court to “dismiss the complaint with prejudice and to vacate the temporary injunction order.”

The Associations petitioned the Wisconsin Supreme Court for review, the Court granted the Petition for Review and oral argument was held on February 14, 2022, and the decision is pending.

***Wisconsin State Journal v. Blazel*, No. 20-CV-764 (Wis. Cir. Ct. Dane Cty. June 30, 2021), on appeal, No. 2021AP1196 (Wis. Ct. App.)**

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

The Wisconsin State Journal (WSJ) filed a complaint which included a writ of mandamus against the Wisconsin State Assembly (the Defendants). WSJ had requested records regarding an investigation into allegations of sexual harassment of a legislative employee by then Representative Staush Gruszynski. The Defendants initially asserted that the records were withheld pursuant to the public records balancing test, taking into account the employee’s wishes to not have information released regarding the incident. After the Defendants learned that the employee had provided details of the incident to a news organization, redacted records were released. The Defendants concluded that the employee no longer wished to keep many of the details of the incident private. The Defendants again asserted that the records were initially denied pursuant to the balancing test and that the delay in release of records and the redactions made did not violate the public records law. Both parties filed motions for summary judgment.

The circuit court concluded that the Defendants “misapplied the balancing test” when they initially denied access to the records. At a minimum, redacted records should have been produced in response to the initial request. The circuit court stated that access to the information contained in the records “serves the public’s interest in assessing the performance of the [Legislative Human Resources Office], the extent and quality of the investigation, the serious misconduct of an elected public official, the effect of that misconduct on employees and the adequacy of the response to the substantiated complaint.” The Defendants also “misapplied the balancing test” when redacting Rep. Gruszynski’s statement. The circuit court stated that Rep. Gruszynski is an elected public official and that “there is strong public interest in knowing what an elected official said during an investigation about his conduct.” Lastly, the Defendants “misapplied the balancing test” when they redacted non-witnesses names. The circuit court granted WSJ’s motion for summary judgment and awarded full attorney fees and costs.

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

II. ATTORNEY GENERAL OPINIONS

In 2021, the Attorney General issued no formal or informal opinions within the scope of Wis. Stat. § 19.77.