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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 2019, which the Wisconsin Department of Justice (DOJ) 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

***Forbes v. University of Wisconsin – Platteville, et al.*, No. 19-CV-380 (Wis. Cir. Ct. Grant Cty. Oct. 18, 2019)**

This case addressed a request for a court order enjoining the release of the records pursuant to Wis. Stat. § 19.356.

The University of Wisconsin – Platteville (UW-Platteville) received a public records request from CNN for records related to Michael Forbes' (Forbes) employment as an Associate Professor in the music department. When Forbes left UW-Platteville, the parties signed a settlement agreement, which allowed for the removal of any records from his personnel file that "related to the investigations and related charges that led up to the Notice of Charges and Dismissal." When CNN requested records, Forbes filed this action and requested the circuit court enjoin UW-Platteville from releasing records. He claimed that according to the settlement agreement, the records removed from his personnel file were no longer records.

Forbes first argued that the court was required to prohibit disclosure because UW-Platteville had not provided specific reasons for its release of records. The court rejected this argument and said a "records custodian must give reasons only when it denies a request, not when it grants one."

In order to determine whether there were any reasons not to disclose the records, the court applied the balancing test, which balances "the public interest in access to government records against the public interest in keeping the record confidential." The court concluded that the public interest in disclosure of records into a disciplinary investigation—an investigation that ultimately led to Forbes' separation from employment—was "paramount." Moreover, the court found that "to the extent the investigation was ill-founded and/or poorly conducted and/or wrongly concluded, the public has an interest in knowing the investigatory practices and policies of public institutions."

The court also concluded that the settlement agreement to remove records from Forbes' personnel file "may not be used to prohibit open records disclosure." The records were not destroyed, and the university was required to keep them under the pertinent records retention statutes, regulations, and policies. The court reasoned that "[p]arties cannot contract away the public's right to public information," but did not rule on whether the university's retention of the records breached the settlement agreement, calling that "another issue for another day."

Therefore, the circuit court denied Forbes' request to enjoin disclosure of the records related to his employment and ordered UW-Platteville to redact all identifying information relating to students prior to disclosure.

***Hying v. Stensberg*, No. 2018AP2379 (Wis. Ct. App. Nov. 27, 2019) (unpublished)**

This case addressed whether a court commissioner's memorandum to the Wisconsin Supreme Court is subject to release under the public records law.

Martin Hying (Hying) submitted a public records request to the office of supreme court commissioners for a copy of court commissioners' memoranda to the justices in three appeals cases. Wisconsin Supreme Court commissioners assist the Wisconsin Supreme Court in deciding whether to accept a petition for review by providing a commissioner's memorandum as part of the Wisconsin Supreme Court's deliberative process. The records custodian, Dean Stensberg (Stensberg), denied the request stating that the memoranda were the court's legal work product. Hying then filed a writ of mandamus. The circuit court granted Stensberg's motion for summary judgment and denied Hying's writ of mandamus.

Hying appealed the circuit court's order. The court of appeals summarily affirmed the circuit court's decision concluding that 1) Stensberg properly denied Hying's public records request under Wis. Stat. § 19.35(1)(a) because a supreme court commissioner's

memorandum is "exempt from disclosure as 'material that is created during the judicial workday for the purpose of carrying out judicial duties'"; 2) the memorandum is not subject to disclosure under Wis. Stat. § 19.35(1)(am) because the record "was collected or maintained in connection with a court proceeding"; and 3) the circuit court's decision to deny Hying's mandamus action without conducting an in-camera review was proper because "the memoranda are not subject to disclosure based on the nature of the records."

***Lueders v. Krug*, 2019 WI App 36, 931 N.W.2d 898, 388 Wis. 2d 147**

This case addressed whether a records custodian is required to produce records "in electronic form" when the requester asks for copies of electronic records.

Bill Lueders (Lueders) submitted a public records request to Representative Scott Krug (Krug) for copies of citizen correspondence on certain water policy topics. Krug produced responsive records as printed paper copies and made the records available to Lueders for review and copy for a charge. Lueders inspected the printouts and obtained copies of some of the e-mails. Lueders then clarified his request asking for the records in electronic form. Krug declined to provide the records in electronic form stating that the previously provided paper printouts satisfied the requirements of the public records law because they were "substantially as readable" as the e-mails themselves. Lueders then filed a writ of mandamus seeking an "electronic, native copy of the requested records." The circuit court granted Lueders' motion and ordered Krug to produce electronic copies of the requested records.

Krug appealed the circuit court's order. The court of appeals affirmed the circuit court's decision holding that Lueders was "entitled to the e-mails in electronic form" when he specifically requested e-mail "records in electronic form." The court stated that it was undisputed that the electronic copies of the e-mails, as received and stored on Krug's computer, contained the same information as the e-mails themselves, but that "substantive information" was missing from the printed-out copies of those e-mails. Therefore, the court held that paper copies of the e-mails did not fulfill Lueders' request for electronic copies of the e-mails. However, copying e-mails onto a flash drive would have contained all the information, including metadata, that the original e-mails themselves contained.

The court also stated that Wis. Stat. 19.35(1)(b), which allows the authority to provide records "substantially as readable as the original" to a requester "[i]f a requester appears personally to request a copy of a record," does not apply to this case because it was undisputed that Lueders did not appear personally to make his requests.

***Moustakis v. State of Wisconsin Department of Justice*, No. 2018AP373, 2019 WL 1997288 (Wis. Ct. App. May 7, 2019) (unpublished)**

This case addresses Moustakis's constitutional claims of equal protection and due process as they relate to the public records law.

DOJ received a public records request from The Lakeland Times for records concerning Albert Moustakis (Moustakis), a former elected district attorney. Moustakis was provided a courtesy notice of the proposed responsive records prior to release, and subsequently filed an action seeking to enjoin DOJ from releasing the records. Moustakis then filed an amended complaint adding two additional claims in which he sought: 1) a writ of mandamus to require DOJ to "properly apply the balancing test or significantly further redact" the records; and 2) a declaration that Wis. Stat. § 19.356 "infringed upon his fundamental rights to access the court system and to privacy" and denied him "equal protection of the law."

The circuit court dismissed Moustakis's initial claim concluding that the notification provisions in Wis. Stat. § 19.356(2)(a)1. did not apply to Moustakis. The court found that because he was not an "employee" as defined by Wis. Stat. § 19.32(1bg), Moustakis could not bring a judicial review action under Wis. Stat. § 19.356(4) challenging the release of investigatory records pertaining to him. In *Moustakis v. State of Wisconsin Dep't of Justice*, 2016 WI 42, 368 Wis. 2d 677, 880 N.W.2d 142 (*Moustakis I*), the Wisconsin Court of Appeals and the Wisconsin Supreme Court both affirmed.

The Wisconsin Supreme Court, however, did not rule on Moustakis's other claims, including constitutional claims of equal protection and due process, and remanded the case back to the circuit court for consideration of those claims. The circuit court then granted DOJ's motion to dismiss those remaining claims.

Moustakis appealed the circuit court's order. The court of appeals affirmed the circuit court's decision concluding that the circuit court properly dismissed the remaining claims for failure to state a claim upon which relief can be granted. The court said, "Moustakis is neither entitled to a common law writ of mandamus directing the DOJ to 'redo' its balancing test nor to a declaration that Wis. Stat. § 19.356 is an unconstitutional violation of Moustakis's equal protection rights." As the court reasoned, Moustakis had not proffered any "relevant considerations he believed the records custodian ignored when determining disclosure was warranted" under the balancing test. Further, Moustakis's constitutional equal protection claims lacked merit because Wis. Stat. § 19.356 has a rational basis in law.

Moustakis petitioned the Wisconsin Supreme Court for review, and the Court denied his Petition for Review on September 3, 2019. Moustakis then petitioned the United States Supreme Court for review, and the Supreme Court denied his Petition for Writ of Certiorari on January 21, 2020.

***Pesta v. Board of Regents of the University of Wisconsin System, et al.*, No. 18-CV-1123 (Wis. Cir. Ct. Brown Cty. Sept. 3, 2019)**

This case addressed a request for a court order preventing the release of the records pursuant to Wis. Stat. § 19.356.

Kathleen McQuillan (McQuillan), records custodian for the University of Wisconsin-Oshkosh, received a public records request from Professor Roberta Maguire for records "related to" an investigation of James Pesta (Pesta) into a complaint filed by a student regarding comments Pesta made in a university classroom. McQuillan provided statutory notice to Pesta of her intent to release certain records.

Pesta then provided written notice of his intent to seek a court order preventing the release of the records, and subsequently filed this action. Specifically, Pesta argued that, under the public records law balancing test, the records should not be released because releasing them would violate his privacy rights, would have an adverse effect on his reputation, would result in an increased level of embarrassment, and could result in a potential "chilling" effect on candid employee assessments in personnel records.

The circuit court rejected all of Pesta's arguments, stating that Pesta's arguments were speculative, and Pesta, as a professor at a public university, is subject to a greater degree of public scrutiny. Therefore, the court found that Pesta had "not offered a clear statutory exception, a limitation under common law, or an overriding public interest that would require the Court to prevent the disclosure of the information." The court then denied his request for statutory injunction pursuant to Wis. Stat. § 19.356.

***State ex rel. Flynn v. Kemper Center, Inc.*, 2019 WI App 6, 924 N.W.2d 218, 385 Wis. 2d 811**

This case addressed whether a tax-exempt charitable organization was a quasi-governmental corporation and thus subject to the public records law.

Annette Flynn (Flynn) submitted a public records request to Kemper Center, Inc.'s president, Gary Vaillancourt, (Kemper Center) for various records. The Kemper Center denied the request stating it was not a quasi-governmental corporation and thus not subject to the public records law. Flynn filed a lawsuit alleging the Kemper Center was subject to the public records law and requested mandamus relief. The circuit court granted summary judgment to Flynn.

The Kemper Center appealed the circuit court's decision. The court of appeals analyzed the factors set forth in *State v. Beaver Dam Area Dev. Corp.*, 2008 WI 90, 312 Wis. 2d 84, 752 N.W.2d 295, in determining whether the Kemper Center was a quasi-governmental corporation subject to the public records law: "(1) whether the entity's funding comes from predominately public or private sources; (2) whether the entity serves a public function; (3) whether the entity appears to the public to be a government

entity; (4) the degree to which the entity is subject to governmental control; and (5) the amount of access governmental bodies have to the entity's records." Based on the totality of the circumstances, the court held that Kemper Center was not a quasi-governmental corporation, and therefore not an authority subject to the public records law, because the Kemper Center "does not resemble a governmental corporation in 'function, effect, or status.'" Accordingly, the court reversed the circuit court's decision to grant summary judgment and remanded with directions to dismiss the complaint.

II. ATTORNEY GENERAL OPINIONS

In 2019, the Attorney General issued no formal or informal opinions within the scope of Wis. Stat. § 19.77.