Josh Kaul
Wisconsin Attorney General

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

FOR IMMEDIATE RELEASE

February 12, 2019

Wisconsin Stat. § 19.77 Annual Summary

MADISON, Wis. – The following is a summary of public records case law-related decisions for 2018, which the 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

***Hagen v. Board of Regents of University of Wisconsin System*, 2018 WI App 43, 383 Wis. 2d 567, 916 N.W.2d 198**

This case addressed the applicability of Wis. Stat. § 19.356 to records pertaining to employee misconduct.

The requester, in his capacity as a reporter for a newspaper at the University of Wisconsin-Oshkosh, sought various personnel records pertaining to Willis Hagen (Hagen), a business professor at the university. The university determined that Hagen was entitled to statutorily-required notice under Wis. Stat. § 19.356(2), because some of the records contained information related to investigations of employee misconduct and related employee discipline.

After Hagen received notice of the university's intent to release the records, Hagen sought to restrain the release of the records under Wis. Stat. § 19.356(4). The circuit court denied Hagen's motion under the public records balancing test, finding that the

strong public interest in knowing about public employee misconduct outweighed Hagen's reputational concerns, and ordered the disclosure of the records.

Hagen appealed the circuit court's order. The court of appeals affirmed the circuit court's decision, and held that (1) there is no statutory exception to disclosing records of a closed misconduct investigation about an employee; (2) the strong public interest in knowing about disciplinary proceedings in a public institution outweighed any harm to Hagen; and (3) an intervening requester in a Wis. Stat. § 19.356 action may request to view the disputed documents under a protective order.

***Hying v. Stensberg*, No. 18-CV-1605 (Wis. Cir. Ct. Dane Cty. Nov. 29, 2018), on appeal, No. 2018AP2379 (Wis. Ct. App.)**

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

Martin Hying (Hying) submitted a public records request to Dean Stensberg (Stensberg) for a copy of a court commissioner's memorandum and recommendation to the Wisconsin Supreme Court regarding three consolidated 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. Stensberg denied the request stating that the memorandum and recommendation was 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, stating "under both case law and/or the balancing test utilized under the open records law, the memorandum at issue here should not be disclosed." The court said that the memorandum provides an open exchange of information and opinions about a case and is an important piece of the confidential decision making process in whether to grant a petition. The court also said that confidentiality is essential and making these memoranda publicly available would significantly decrease their value to the decision making process.

Hying appealed the circuit court's order, and the case is currently being briefed in the court of appeals.

***Lakeland Printing Co., Inc. v. DOJ*, No. 17-CV-1737 (Wis. Cir. Ct. Dane Cty. Nov. 28, 2018)**

This case addressed whether the Wisconsin Department of Justice (DOJ) properly applied the balancing test in its reasoning for redactions in employee disciplinary records prior to release.

Lakeland Printing Co., Inc. d/b/a The Lakeland Times (Lakeland Times) submitted a public records request to the DOJ for all disciplinary records for DOJ employees from 2013 through 2016, including the names of the employees disciplined. Pursuant to the public records balancing test, DOJ redacted employee names from 18 disciplinary letters, a county name from one record, and an employee that was mentioned but not the subject of a disciplinary report, prior to releasing the requested records.

Lakeland Times filed a writ of mandamus, and both sides filed motions for summary judgment. The circuit court granted Lakeland Times' motion, ordering DOJ to release the records without redactions of the disciplined employee names and the substantive redactions from the discipline letters. DOJ had not shown there to be an "exceptional" circumstance that justified their redactions of the records.

The circuit court expressed its concerns that some of DOJ's justifications for redactions, withholding the names because the misconduct was not criminal conduct and limiting access because the employees were low-level employees, could lead to blanket exceptions to disclosure. The court also found that DOJ had not shown that releasing the records would deter supervisors from investigating misconduct or imposing discipline.

With regard to reputational interests, the circuit court said that "[r]eleasing names due to potential embarrassment does not relate to the safety of employees nor is there a protection established by law in withholding the information." DOJ did not show "how personal reputation concerns relate to the larger public interest."

***Lueders v. Krug*, No. 16-CV-2189 (Wis. Cir. Ct. Dane Cty. Jan. 19, 2018), on appeal, No. 2018AP431 (Wis. Ct. App.)**

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 over 1,500 pages of responsive records as printed paper copies, and made the records available to Lueders for review and copy for a charge. Lueders made a second narrowed request for the records in electronic form. After consulting with the Assembly Chief Clerk, Krug responded to the second request stating, "[W]e have provided you with access to review the records you have requested and the ability to receive copies of those records that are substantially as readable as the original."

Construing Krug's response as a denial, Lueders filed a writ of mandamus. In its decision, the circuit court stated that when a public records request is made, the custodian is "obligated" to produce a copy that is "substantially as good" as the original. The custodian should also consider the needs and resources of the requester, and whether the requester has indicated a preferred format for receiving the records. The court further stated the custodian should produce a copy in the format requested, unless

doing so would be overly burdensome. The circuit court granted Lueders' motion and ordered Krug to produce electronic copies of the requested records. The court denied Lueders' request for punitive damages.

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

***Madison Teachers, Inc. v. Scott*, 2018 WI 11, 379 Wis. 2d 439, 906 N.W.2d 436**

This case addressed whether there is a public interest in elections remaining "free from voter intimidation and coercion" that is sufficient to outweigh public interest in favor of openness of public records.

Madison Teachers, Inc. (MTI) made two public records requests to James Scott (Scott), chairman of the Wisconsin Employment Relations Commission, for the names of Madison Metropolitan School District (MMSD) employees that had voted in the annual certification election as of the date of each request. Certification elections are done by secret ballot pursuant to Wis. Stat. § 111.70(1)(e), and a non-vote is essentially a "no" vote because the elected representative must receive a minimum of 51 percent of all of the votes of all of the employees in the bargaining unit. Therefore, Scott denied the requests based on his determination that, during the election, the public interest that elections remain "free from voter intimidation and coercion" outweighed the public interest in favor of open public records. After the election MTI made a third request to which Scott promptly responded because he determined the public interest in openness was satisfied by releasing the requested records as soon as the election was over.

MTI filed a mandamus action regarding the two denied requests, and also requested punitive damages, attorney's fees, and costs. The circuit court granted MTI's motion, stating that Scott violated the public records law in performing the balancing test, and awarded MTI costs and attorney's fees.

Scott appealed and petitioned the Wisconsin Supreme Court for bypass. The Court granted Scott's petition, and ultimately reversed the circuit court's decision, holding that Scott properly balanced the public interests in denying MTI's requests for voter names during the election. The Court said that every voter has a "fundamental right to cast his or her vote without intimidation or coercion," and the "public has a significant interest in fair elections." Therefore, "the public interest in elections that are free from intimidation and coercion outweighs the public interest in favor of open public records" in this case.

***Media Placement Services, Inc. v. Wisconsin Department of Transportation*, 2018 WI App 34, 382 Wis. 2d 191, 913 N.W.2d 224**

This case addressed whether the Wisconsin Department of Transportation (DOT) may charge a fee for online access to vehicle accident reports.

For several years, Media Placement Services, Inc. (Media Placement) had inspected accident reports free of charge at the Milwaukee Police Department's Third District Police Station (MPD). In June 2013, MPD informed Media Placement that subsequent requests would need to be made through the DOT, the custodian of the accident reports. Media Placement subsequently made a request to the DOT for City of Milwaukee accident reports. DOT informed Media Placement of the options for requesters seeking accident reports, including the fees for individual reports and a weekly subscription service.

Media Placement filed a mandamus action seeking free access to motor vehicle accident reports from the DOT web portal. Both sides filed summary judgment motions. Media Placement argued that DOT's practices were unfairly limiting access to accident report data. DOT argued there are multiple methods of access available to the public, and that Wis. Stat. § 343.24(2m) authorizes the DOT to charge a fee for online access to reports. The circuit court granted DOT's motion. Media Placement appealed, and the court of appeals affirmed.

The court of appeals, having established that the Wisconsin public records law authorizes records custodians to charge certain fees related to requests, held that Wis. Stat. § 343.24(2m) specifically authorizes DOT to charge a furnishing fee for inspection of accident reports. The court further ruled that Media Placement was not entitled to free web access to inspect accident reports because of the potential security and privacy risks associated with allowing a requester to access a database directly.

***Scott v. University of Wisconsin System Board of Regents*, No. 2015AP1244, 2018 WL 1179711 (Wis. Ct. App. March 6, 2018) (unpublished)**

This case addressed whether documents maintained by the University of Wisconsin-Milwaukee (UWM) are education records under the Family Education Rights and Privacy Act (FERPA), and thus require redactions prior to release in response to a public records request.

Scott, a former UWM student, submitted a public records request to UWM for communications to or from another student and to or from the Vice Chancellor. UWM denied this request, and Scott expanded his prior request to include the Dean of Students. Scott later filed a mandamus action, and UWM released over 2000 pages with student names redacted from the records prior to release, citing FERPA for the redactions. UWM also withheld some records, citing the attorney-client privilege. Scott asked the circuit court to order the records released without redaction or to allow for an *in camera* review of the redacted documents. The court denied Scott's motion and his writ of mandamus, and Scott appealed.

The court of appeals affirmed the circuit court's decision, concluding that documents maintained by UWM are education records under FERPA if they contain a student's

name. The court also stated that the circuit court properly denied Scott's request for an *in camera* review, because there is no need for an *in camera* review if a document falls within a statutory or common law exception to the public records law.

Scott petitioned the Wisconsin Supreme Court for review, and the Court denied his Petition for Review on June 11, 2018.

II. ATTORNEY GENERAL OPINIONS

OAG-02-18 (Feb. 23, 2018)

This formal opinion addressed four issues regarding the administration of Wis. Stat. §§ 19.356(2)(a)1. and 19.356(9), provisions of the Wisconsin public records law pertaining to notice.

Milwaukee City Attorney Grant Langley and nine other city attorneys and corporation counsel requested the Attorney General's opinion on four issues regarding the administration of Wis. Stat. § 19.356. Section 19.356 requires an authority to provide notice and an opportunity for judicial review of an authority's decision to release a public record.

First, the public records law's definition of "employee" does not contain direct references to "current employee" or "former employee." However, the Attorney General's longstanding interpretation is that Wis. Stat. § 19.356(2)(a)1. applies if the record contains information related to a record subject who is a current *or* former employee. Therefore, if the record subject "is" an employee at the time the record "is created," he or she is entitled to notice even if the employee is no longer employed by the authority at the time the authority receives the request.

Second, the notification provisions in Wis. Stat. § 19.356(9)(b) do *not* apply to records containing information relating to a record subject who is an officer or employee of an authority who *formerly* held a local or state public office. The provision only applies when an officer or employee of the authority *currently* holds a local or state public office.

Third, Wisconsin Stat. § 19.356 is silent on what an authority must do should service via certified mail and personal service fail. Best practices include following other service of process laws that are consistent with the public records law's purpose to fill or deny a records request as soon as possible and without delay. Under Wis. Stat. § 801.11(1), the statute governing service of process for individuals, personal service is required. But if personal service under Wis. Stat. § 801.11(1) cannot be made with reasonable diligence, then service can be accomplished by leaving a copy of the summons at the individual's usual place of abode pursuant to Wis. Stat. § 801.11(1)(b). Similarly, under Wis. Stat. § 801.11(4), the statute governing service of process for corporations and corporate officers, service can be accomplished by leaving a copy of the summons at the usual place of business. If, after reasonable diligence, the authority is unable to

effectuate service according to the public records law's provisions and other alternatives to personal service that are consistent with the public records law's purpose, the authority may release the records.

Fourth, whether notice is required when the requested records have already been made public depends on why, or how, the records have been made public. There are two primary ways in which records might have already been made public: 1) a previous release of the same records under the public records law; and 2) records that are made public at a public hearing or proceeding, or are otherwise already publicly available.

If records were previously released pursuant to a public records request, no additional notice to record subjects is required for future requests for the same record. Once an authority, having complied with any necessary notice requirements, fulfills a requester's public records request, the authority has permitted access to the record for the purposes of Wis. Stat. § 19.356. If, in response to future public records requests, an authority releases a record that a record subject has augmented with written comments and documentation pursuant to Wis. Stat. § 19.356(9), the authority should also release the written comments and documentation.

If the records are otherwise publicly available, such as those records made public at a public hearing or proceeding, the notice provisions under Wis. Stat. § 19.356 are still presumed to apply. Therefore, the authority should provide notice, because the legislature did not expressly provide an exception to the notice requirements for those records.