

Public Records, Privileges, and Related Issues

Wisconsin Department of
Justice

Office of Open Government

Wisconsin Department of
Justice Confidentiality and
Privileges CLE

November 12, 2020

The Important of Transparency

- ◇ Transparency is the cornerstone of democracy.
 - ◇ The Wisconsin Public Records Law, Wis. Stat. §§ 19.31 to 19.39, furthers transparency by ensuring citizens have access to the records of government authorities.
- ◇ Wis. Stat. § 19.31: The public records law “shall be construed in every instance with **a presumption of complete public access, consistent with the conduct of government business**. The denial of public access generally is contrary to the public interest, and only in an exceptional case may access be denied.”
 - ◇ This is one of the strongest public policy statements found in the Wisconsin statutes.



Public Records Request Process

- ◇ PRR received and forwarded to authority's records custodian
- ◇ Authority begins search for records
- ◇ Any responsive records are reviewed:
 - ◇ **Presumption that they will be disclosed unless** they are exempt from disclosure pursuant to:
 - ◇ **Statute**
 - ◇ **Common law**
 - ◇ **Public records balancing test**



The Balancing Test

- ◇ Weigh the **public interest in disclosure** of the record **against** the **public interest** and public policies **favoring nondisclosure**
 - ◇ Public policies favoring nondisclosure may found in other statutes, court decisions, Wis. Stat. § 19.85(1) closed session exemptions, evidentiary privileges, and elsewhere
- ◇ Fact intensive; “blanket rules” disfavored
- ◇ Must conduct on **case-by-case basis** taking into consideration the totality of circumstances
- ◇ Generally, the identity of the requester and the purpose of the request are not considered



Redaction

- ◇ Wis. Stat. § 19.36(6): If part of a record is disclosable, must disclose that part and redact non-disclosable portions

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Evidentiary Privileges

- ◇ Wis. Stat. ch. 905 enumerates evidentiary privileges, including lawyer-client, health care-provider-patient, husband-wife, clergy penitent, and others.
 - ◇ Public policies expressed through recognized evidentiary privileges may be considered in applying the balancing test.
- ◇ Alone, evidentiary privileges do **not** provide sufficient justification to deny a PRR.
 - ◇ However, they **reflect public policies** in favor of protecting the confidentiality of certain kinds of information
- ◇ **Important:** Unlike the other privileges, the lawyer-client privilege **does** provide sufficient grounds to deny access without needing to apply the balancing test.



Lawyer-Client Privilege

- ◆ A statutory and common law exception to disclosure
- ◆ Wis. Stat. § 905.03(2): “A **client has a privilege** to refuse to disclose and to prevent any other person from disclosing **confidential communications** made for the **purpose of facilitating the rendition of professional legal services** to the client.
- ◆ Applies to communications between:
 - ◆ Client or the client’s representative and the client’s lawyer or the lawyer’s representative
 - ◆ Client’s lawyer and the lawyer’s representative
 - ◆ Client or the client’s lawyer to a lawyer representing another in a matter of common interest
 - ◆ Representatives of the client or between the client and a representative of the client
 - ◆ Lawyers representing the client.
- ◆ The privilege is **absolute unless waived by the client** or another exception under ch. 905 applies.
- ◆ *George v. Records Custodian*, 169 Wis. 2d 573, 582, 485 N.W.2d 460 (Ct. App. 1992); *Wisconsin Newspress, Inc. v. School Dist. of Sheboygan Falls*, 199 Wis. 2d 768, 782-83, 546 N.W.2d 143 (1996).



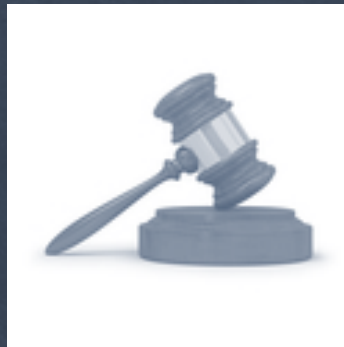
Attorney Work Product

- ◇ A statutory and common law exception to disclosure
- ◇ Wis. Stat. § 804.01(2)(c)1.
 - ◇ In discovery, the court “shall protect against disclosure of the **mental impressions, conclusions, opinions**, or **legal theories** of an attorney or other representative of a party concerning the litigation”
 - ◇ Only applies to materials **prepared in anticipation of litigation or for trial**
- ◇ *Seifert v. Sch. Dist. of Sheboygan Falls*, 2007 WI App 207, ¶¶ 27-28, 305 Wis. 2d 582, 740 N.W.2d 177
 - ◇ “The common law long has recognized the privileged status of attorney work product, including the material, information, mental impressions and strategies an attorney compiles in preparation for litigation.”
- ◇ Attorney work product falls under the “Except as otherwise provided by law” provision of the public records law. *See* Wis. Stat. § 19.35(1)(a).



Criminal Prosecutions

- ◆ Common law exception for a prosecutor's files
 - ◆ A prosecutor's files are **not** subject to public inspection under the public records law. *State ex rel. Richards v. Foust*, 165 Wis. 2d 429, 436, 477 N.W.2d 608 (1991).
 - ◆ Applies whether the case is open or closed.
 - ◆ The records in the prosecutors' file must be **integral** to the criminal investigation and the prosecution process.
 - ◆ Includes historical data leading up to the prosecution.
 - ◆ *Nichols v. Bennett*, 199 Wis. 2d 268, 275 n.4, 544 N.W. 2d 428 (1996).



Investigations Involving Employees

- ◇ Ongoing investigations of employees
 - ◇ Wis. Stat. § 19.36(10)(b)
 - ◇ Information relating to the **current** investigation of a possible criminal offense or possible misconduct connected with employment by an employee prior to the disposition of the investigation is exempt from disclosure.
- ◇ Closed investigations of employees
 - ◇ Once the investigation concludes, such records are subject to disclosure



Ongoing Criminal Investigations

- ◆ Subject to the balancing test; *Foust* does **not** apply
- ◆ Other than Wis. Stat. § 19.36(10)(b), the public records law does **not** include any other provisions exempting the disclosure of records related to ongoing investigations
- ◆ For ongoing criminal investigations, possible balancing test considerations could include whether the release of all or part of the records would:
 - ◆ Adversely impact the investigation or prosecution
 - ◆ Influence the testimony of witnesses
 - ◆ Influence the jury pool
 - ◆ Impact the defendants' ability to have a fair trial
 - ◆ Undermine the ability to determine if a witness is telling the truth



Closed Criminal Investigations

- ◆ Subject to the balancing test; *Foust* does **not** apply
- ◆ There are several possible factors to consider. *See Linzmeyer v. Forcey*, 2002 WI 84, ¶¶ 30, 32, 39, 41, 254 Wis. 2d 306, 646 N.W.2d 811.
 - ◆ Crime victim rights expressed in statutes, constitutional provisions, and case law
 - ◆ Consideration of the family of crime victims
 - ◆ Marsy's Law
 - ◆ Protection of witnesses
 - ◆ Including “chilling” future cooperation with law enforcement
 - ◆ Confidential informants (Wis. Stat. § 19.36(8))
 - ◆ Children and juveniles (Wis. Stat. §§ 48.396 and 938.396)
 - ◆ Officer safety
 - ◆ Confidential law enforcement techniques



Closed Criminal Investigations, continued

- ◇ When analyzing the risk of threats, harassment, harm, or reprisals, any such possibility is accorded appropriate weight depending on the likelihood.
 - ◇ Safety concerns should be particularized
 - ◇ Generally, there must be a **reasonable probability** of harm
 - ◇ *See John K. MacIver Inst. for Pub. Policy, Inc. v. Erpenbach*, 2014 WI App 49, 354 Wis. 2d 61, 848 N.W.2d 862



Civil Investigations and Litigation

- ◆ Subject to the balancing test
- ◆ Is the investigation or litigation open or closed?
- ◆ A records custodian may possibly weigh many of the same factors considered for records of open and closed criminal investigations
- ◆ *Foust* does **not** apply to civil matters
- ◆ Records may contain lawyer-client privileged communications or attorney work product



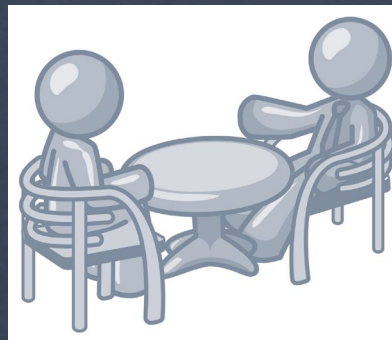
Settlement Agreements

- ◆ Subject to the balancing test; generally, settlement agreements are disclosed
- ◆ Agreements with confidentiality provisions
 - ◆ Still subject to the balancing test
 - ◆ Parties **cannot contract around** the public records law
 - ◆ When applying the balancing test, courts usually find that the public interest in disclosure outweighs any public interest in keeping settlement agreements confidential



Settlement Negotiations

- ◇ Distinction between settlement *agreements* and settlement *negotiations*.
- ◇ However, also subject to the balancing test
 - ◇ Considerations:
 - ◇ Public interest in encouraging settlements
 - ◇ Settlements are cost-effective and benefit judicial efficiency
 - ◇ Parties negotiating freely in confidence may facilitate more effective negotiations
 - ◇ Presumption of complete public access to records



Crime Laboratory Privilege

- ◊ Wis. Stat. § 165.79(1):
 - ◊ **Evidence, information, and analyses of evidence** obtained from law enforcement officers by the Crime Laboratory **is privileged** and not available via a public records request.
- ◊ Wis. Stat. § 165.79(2):
 - ◊ Upon the **termination or cessation** of the criminal proceedings, the privilege **may be waived** in writing by:
 - ◊ Prosecutor involved in the proceedings
 - ◊ DOJ



Further Information

- ◇ Download DOJ Compliance Guides and other resources at <https://www.doj.state.wi.us/office-open-government/office-open-government>
- ◇ Contact the Office of Open Government:
 - ◇ PROM Help Line: (608) 267-2220
 - ◇ Email: fergusonpm@doj.state.wi.us



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