Brad D. Schimel
Wisconsin Attorney General

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

NEWS FOR IMMEDIATE RELEASE

February 28, 2018

Wisconsin Stat. § 19.77 Annual Summary

MADISON, Wis. – The following is a summary of public records case law-related decisions for 2017, 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

Voces de la Frontera, Inc. v. Clarke, 2017 WI 16, 373 Wis. 2d 348, 891 N.W.2d 803

This case addressed whether federal law exempted the disclosure of immigration detainer (I-247) forms containing information about individuals detained in the Milwaukee County Jail.

Voces de la Frontera (Voces) submitted a public records request to Milwaukee County Sheriff David Clarke (Clarke) requesting copies of all I-247 forms received by Clarke from Immigration and Customs Enforcement (ICE) since November 2014. Clarke provided redacted copies of twelve forms. Voces filed a writ of mandamus in Milwaukee County Circuit Court seeking full disclosure of the items redacted from the forms. The records custodian testified that she only applied redactions after deferring to ICE and being told to do so.

The circuit court granted Voces' request for the writ of mandamus. The court recognized that it was the records custodian's burden to show that the public interest

favoring redaction outweighed the presumption in favor of disclosure and found that "there was never a very good reason given as to why that information should be redacted other than ICE . . . believes it should be redacted." The circuit court ordered Clarke to produce the unredacted forms, and on appeal, the Wisconsin Court of Appeals affirmed that decision.

The Supreme Court of Wisconsin, however, reversed the lower courts. A federal regulation, 8 C.F.R. § 236.6, precludes the release of the I-247 forms and any information contained therein pertaining to individuals detained in a state or local facility. Wisconsin Stat. § 19.36(1)-(2), in turn, states that any record specifically exempted from disclosure under federal law is also exempt under Wisconsin public records law. Read together, those provisions meant that the I-247 forms were statutorily exempt from disclosure, and the public records balancing test did not apply. Therefore, the authority could not be compelled to produce the records, and the records were required to be withheld under the statutory exemption.

***Teague v. Schimel*, 2017 WI 56, 375 Wis. 2d 458, 896 N.W.2d 286**

This case addressed the applicability of Wis. Stat. § 19.70, which provides statutory authorization for an individual to challenge the accuracy of a record containing personally identifiable information.

The plaintiff in this case had been a victim of identity theft. As consequence of that identity theft, the plaintiff's name was associated with the criminal record of another person, because that person had used the plaintiff's name as one of his aliases. The plaintiff sued the Wisconsin Department of Justice (DOJ) when DOJ continued to release the criminal record of the other person in response to criminal background checks submitted under the plaintiff's name, even though DOJ purportedly knew the criminal record would likely be incorrectly associated with the plaintiff.

With respect to the public records law, the Wisconsin Supreme Court first ruled the criminal background check report generated by DOJ was a "record," and that the record was inaccurate when DOJ released it in response to searches for the plaintiff's name. The court further ruled that, under Wis. Stat. § 19.70, the background check report generated by searches for the plaintiff's name was subject to correction.

With respect to due process, the Wisconsin Supreme Court first ruled that the plaintiff's due process rights were violated upon release of the criminal background check report, because the report falsely ascribed criminality to an innocent person, thereby defaming him and creating stigma. Moreover, the report also imposed a tangible burden on the plaintiff's ability to obtain or exercise a variety of rights recognized by state law. The court further ruled that DOJ's "innocence letter" procedure was an insufficient procedural safeguard to protect the plaintiff's due process rights, even after he corrected the record under Wis. Stat. § 19.70. As the

court explained, the "innocence letter" procedure would still require the plaintiff to monitor and track each instance that a criminal background check report defamed him, and would also require him to track each time the other individual committed a new crime. Therefore, the court found that the plaintiff's due process rights had been violated.

The Wisconsin Supreme Court, however, determined that it did not have enough information to decide what remedy should be afforded to the plaintiff as a result of these due process violations. Therefore, the court remanded the case back to the circuit court so the circuit court could decide the nature and extent of prospective relief that would be sufficient to protect the plaintiff's rights.

***Animal Legal Defense Fund v. Board of Regents of the University of Wisconsin*, No. 2016AP869, 2017 WL 4750694 (Wis. Ct. App. Oct. 19, 2017) (unpublished)**

This case addressed whether notes transcribed at a committee meeting were "records" and therefore subject to disclosure under Wisconsin's public records law.

Animal Legal Defense Fund (ALDF) made a public records request of the authority's record custodian seeking certain records related to the Institutional Animal Care and Use Committee (IACUC) regarding research on non-human primates. The authority responded to the request by producing a 105-page document, while also withholding some documents. ALDF made a second request for additional documents, including handwritten notes taken at IACUC meetings. The authority denied the request on the grounds that the notes were intended for personal use only, and therefore, were not "records" subject to disclosure under the public records law.

ALDF filed a mandamus action seeking to compel the production of the notes. The circuit court held that the documents in question were notes "prepared for the originator's personal use" and were not "records" as defined by Wis. Stat. § 19.32(2). The majority of the documents were entirely handwritten, and the final pages of the documents were typed with handwritten notes scribbled throughout. The circuit court also found the notes were not distributed to others for the purpose of memorializing agency activity.

In an unpublished opinion reversing the circuit court's decision, the court of appeals held that the notes were not solely for personal use, and therefore did not fit the "notes" exception in the public records law. The court explained that some of the notes were not for personal use, because the drafter gave her notes to another person, who then used the notes to create a draft of meeting minutes. Therefore, those notes were "distributed to others for the purpose of communicating information," making them "records."

Similarly, the court further explained that other notes were not "personal," because the drafter was "obligated to take the notes . . . as part of her employment" to memorialize agency activity. Therefore, those notes were also "records" under the public records law. The court of appeals remanded to the circuit court, and ordered the circuit court to enter summary judgment in favor of ALDF, thereby requiring the authority to release the records.

***Hagen v. Board of Regents*, No. No. 17-CV-389 (Wis. Cir. Ct. Winnebago Cty. Sept. 28, 2017), on appeal, No. 2017AP2058-AC (Wis. Ct. App.)**

This case involved 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 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 filed his notice of intent to seek judicial review of the university's decision to release the records. Hagen then initiated this lawsuit under Wis. Stat. § 19.356(3), seeking to restrain the release of the records. 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 has now appealed the circuit court's order, and the case is currently being briefed in the court of appeals.

***Moustakis v. DOJ*, No. 14-CV-41 (Wis. Cir. Ct. Lincoln Cty. Jan. 16, 2018)[1]**

This case is a continuation of Moustakis v. State of Wisconsin Dep't of Justice, 2016 WI 42, 368 Wis. 2d 677, 880 N.W.2d 142, involving the applicability of the Wis. Stat. § 19.356 notification provisions to a former elected district attorney.

In Moustakis, the Wisconsin Supreme Court ruled that the notification provisions in Wis. Stat. § 19.356(2)(a)1 did not apply to former Vilas County District Attorney, Albert Moustakis, because he was not an "employee" as defined by Wis. Stat. § 19.32(1bg). Specifically, Wis. Stat. § 19.32(1bg) excludes from the definition of "employee" any individual "holding local public office or a state public office," because

[1] This case is being included in the 2017 summary because the circuit court's oral ruling for the case occurred on December 20, 2017. The circuit court's written order, however, was not filed until January 16, 2018. On February 26, 2018, the plaintiff filed a notice of appeal of the circuit court's order.

it is established that district attorney is a "state public office." Therefore, the Wisconsin Supreme Court ruled that Moustakis could not bring a judicial review action under Wis. Stat. § 19.356(4) challenging the release of investigatory records pertaining to him, and affirmed the circuit court's order dismissing Moustakis' action under the public records law.

The Wisconsin Supreme Court, however, did not rule on Moustakis' 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 has now granted the Department of Justice's motion to dismiss those remaining claims.

II. ATTORNEY GENERAL OPINIONS

In 2017, the Attorney General issued no formal or informal opinions within the scope of Wis. Stat. § 19.77.