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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 2023, 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, 2021AP1820 (Wis. Ct. App. May 11, 2023) (unpublished)

This case addressed the circuit court's discretion to determine which disbursements are necessary and can be awarded as costs to a prevailing party in a mandamus action.

Gregory Allen (Allen) prevailed in his public records case and the circuit court awarded him some of the costs that he had requested. The circuit court did *not* award him costs for "'copies,' 'postage,' and 'stamped envelopes,'" and Allen appealed this portion of the circuit court's decision. The court of appeals affirmed the circuit court's decision stating that the circuit court "may, in its discretion, determine that the requested item of cost was not a 'necessary' disbursement, and deny a party costs on that basis." Allen also argued that he should also have been awarded punitive damages. The court of appeals stated that punitive damages are allowed "only if there

is first an award of actual damages." In this instance "there was no award of actual damages" and therefore Allen "may not receive punitive damages."

***Gierl v. Mequon-Thiensville School* District, No. 2022AP1941 (Wis. Ct. App. Dec. 6, 2023) (unpublished)**

This case addressed whether an authority's withholding of records was unlawful.

Mark Gierl (Gierl) submitted a public records request to the Mequon-Thiensville School District (the District) for email distribution lists and any electronic communications with alumni, recreation department participants, and newsletter recipients. The District denied Gierl's request stating the request contained "no limitation as to the subject matter" and was "unduly burdensome." In response, Gierl limited his request to the last six months. Gierl did not receive a response to his amended request and filed a petition for writ of mandamus asking the circuit court to order the records be produced. The District subsequently provided six months of emails with redacted email addresses. Gierl stated the District's "initial refusal to provide the email messages and continued refusal to provide the email addresses were illegal." The circuit court granted summary judgment to Gierl concluding that "even though the District had since provided Gierl with the requested email messages, this did not make the improper-withholding issue moot." The circuit court determined that the initial denial of email messages was illegal and that the District's reasons for denial of the email addresses were "woefully inadequate."

The District appealed the circuit court's order stating that its initial denial of records was moot because the District provided records to Gierl in response to his amended request. The court of appeals disagreed stating that the records were not provided until after Gierl filed the mandamus action. The District also stated that "Gierl's interest was not implicated in the records; that there was no subject-matter limitation on the request; that the request would likely require the production of voluminous records; that it would be burdensome for the District to review the records for confidentiality concerns; and that there was ongoing litigation." The court of appeals affirmed the circuit court's decision concluding that "these reasons, without more, are legally insufficient to justify a refusal to withhold the records in this case." The court stated that there was "no indication the District engaged in any balancing test in its denial" and that the District did not provide any "specific legal or policy basis" to support their claim that the records were protected from disclosure. The District's reasonings for withholding the email messages and email addresses did not "outweigh the strong public policy in favor of disclosure."

***State ex rel. LaFaive v. Records Custodian Waukesha County District Attorney*, No. 2022AP871 (Wis. Ct. App. May 24, 2023) (unpublished)**

This case addressed whether the circuit court properly dismissed a petition for writ of mandamus per *Foust*.

Terrence LaFaive (LaFaive) submitted a public records request to the Waukesha County District Attorney's Office for communications, specifically text messages, between Assistant District Attorney Boese (ADA) and his defense attorney regarding his criminal cases. When he did not receive a timely response to his request, he filed a petition for writ of mandamus seeking an order from the court requiring the ADA to provide him with the documents he requested. The ADA filed a motion to quash/dismiss the petition. The circuit court granted the motion stating the requested communications were part of plea negotiations between the ADA and his defense attorney. The circuit court stated that these communications would fall under *Foust* as "materials that are integral to the prosecutorial process" and therefore are not subject to release. LaFaive appealed, pro se, the circuit court's denial of his petition for writ of mandamus.

The court of appeals affirmed the circuit court's dismissal of LaFaive's petition for a writ of mandamus stating, "[l]ittle could be more 'integral to the … prosecution process' than communications between defense counsel and the prosecutor related to plea negotiations." The court agreed that "under *Foust*, such records are not open for public inspection" because they are part of the prosecutor's file.

LaFaive petitioned the Wisconsin Supreme Court for review which the Court denied.

***State ex rel. Robinson v. Records Custodian*, 2022AP1310 (Wis. Ct. App. Oct. 5, 2023) (unpublished)**

This case addressed whether a requester prevailed in whole or substantial part in their mandamus action to the extent that they would be entitled to costs and fees.

Tyrone Robinson (Robinson) submitted a public records request to the Dane County District Attorney's Office (DA) for records related to his 2009 criminal case. Robinson filed a petition for writ of mandamus when he did not receive a response to his request. The circuit court issued an alternative writ of mandamus ordering the DA to produce "all of the nonconfidential, unprivileged and available information" contained in the records. The DA filed a motion to quash the subpoena stating that it did not have the requested records but had been working on obtaining them through Robinson's criminal case. At the motion hearing, the DA stated that the report had been obtained and provided to Robinson pursuant to an order in his criminal case.

Robinson stated he had received the requested records, however, he asked for his costs and fees related to the mandamus action. The circuit court denied Robinson's request stating he had received the records pursuant to an order in his criminal case, not the mandamus action, and dismissed his mandamus action as moot. Robinson appealed, pro se, the circuit court's dismissal claiming that the mandamus action caused the DA to obtain and produce the report.

The court of appeals affirmed the circuit court's dismissal agreeing that the proper test for whether a requester prevails in a mandamus action is "whether the party 'obtain[ed] a judicially sanctioned change in the parties' legal relationship." This test is only applicable if a violation of the public records law has occurred. The court concluded that "Robinson has not established violations of the public records law, and therefore did not and could not prevail in whole or substantial part in the mandamus action."

***Wisconsin State Journal v. Blazel*, 2023 WI App 18, 991 N.W.2d 450, 407 Wis. 2d 472**

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

Various media outlets (the newspapers) submitted a public records request to the Wisconsin State Assembly (the Assembly) for records regarding an allegation of sexual harassment of a legislative employee by then Representative Staush Gruszynski. The Assembly initially denied the request asserting that the records were withheld pursuant to the public records balancing test. The newspapers filed a complaint seeking release of the records and an award of their costs and fees. After the Assembly learned that the employee had anonymously provided details of the incident to a news organization, redacted records were released. The newspapers filed an amended complaint claiming that the Assembly's initial denial of records and subsequent release of redacted records were violations of the public records law. Both parties filed motions for summary judgement. The circuit court concluded that the Assembly "misapplied the balancing test" when it initially denied access to the records and when it later released redacted records. The circuit court granted the newspapers' motion for summary judgment and awarded full attorney fees and costs. The Assembly appealed the circuit court's order.

The court of appeals affirmed the circuit court's order concluding that the Assembly violated the public records law when it initially withheld records stating that the denial "effectively amounted to a blanket denial of public access to records of investigations or misconduct complaints against elected legislators," the Assembly did not address why "redactions would not suffice" to protect confidentiality interests, and the Assembly did not apply the "fact-specific inquiry required" by the public

records balancing test to each record. The court also concluded that when the Assembly subsequently released redacted records it again violated the public records law stating that all redactions except for one regarding private health care information were improper. The court rejected the Assembly's argument that the action was moot because the Assembly had not provided records until after the mandamus action had been filed. The court determined that the newspapers were "entitled to attorney fees as a prevailing party in a public records action."

II. ATTORNEY GENERAL OPINIONS

In 2023, the Attorney General issued no formal or informal opinions within the scope of Wis. Stat. § 19.77.