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NEWS RELEASE

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Wisconsin Stat. § 19.77 Annual Summary

Following is a summary of public records case law-related decisions for 2015, which the Department of Justice is required to compile pursuant to Wis. Stat. sec. 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

The Journal Times v. City of Racine Board of Police and Fire Commissioners, 2015 WI 56

This case addressed whether a requester prevailed in whole or substantial part in a mandamus action, thereby entitling it to reasonable attorney fees, damages, and other actual costs under the public records law.

The Racine Board of Police and Fire Commissioners (Board) denied *The Journal Times*' public records request for a record of votes taken in a closed session meeting. The Board failed to inform the newspaper that no such record existed at the time of the request. The newspaper argued, in part, that the public records law was violated when the Board failed to comply with the open meetings law by not drafting contemporaneous minutes recording its closed session vote and when it did not inform the newspaper that the requested record did not exist. The Court of Appeals reversed the circuit court's summary judgment in favor of the Board.

The Court held that the newspaper did not prevail in whole or substantial part because the Board did not unlawfully deny or delay release of the records, which did not exist at the time of the request. The public records law does not require an authority to provide requested information if no record exists or to simply answer questions about a topic of interest to the requester. Also, while the public record law does not require an authority to inform a requester that a record does not exist, it might be a better course to do so. Additionally, under the law, a custodian has a reasonable amount of time to respond to a public records request. Furthermore, the Court stated the non-existence of a record is a statutory exemption from disclosure under the public records

law, and an authority may assert a statutory defense to disclosure for the first time in litigation. Whether a record should have existed pursuant to the open meetings law at the time of a request is a question under the open meetings law, not the public records law. A requester cannot seek relief under the public records law for an alleged open meetings law violation.

Moustakis v. State of Wisconsin Dep't of Justice, 2015 WI App 63

The issue in this case is whether the Plaintiff, a district attorney, is an "employee" as used in Wis. Stat. § 19.356(2)(a)1. and defined in Wis. Stat. § 19.32(1bg), such that he may bring an action for judicial review under Wis. Stat. § 19.356(4).

The Wisconsin Department of Justice (DOJ) received a public records request from *The Lakeland Times* seeking records related to any complaints or investigations regarding Vilas County District Attorney Albert Moustakis. DOJ mailed Moustakis a courtesy copy of the records approved for release even though it was not required by law to do so. Moustakis filed an action under Wis. Stat. § 19.356(4) seeking to restrain DOJ from providing access to the requested records. DOJ filed a motion to dismiss the action. The circuit court granted DOJ's motion dismissing the action stating that Moustakis is not an employee under Wis. Stat. § 19.356(2)(a)1. because Wis. Stat. § 19.32(1bg) specifically excludes individuals "holding local public office or a state public office" as an employee, and it is "established that district attorney is a 'state public office.'" Moustakis appealed, and the Court of Appeals affirmed.

The Court of Appeals agreed with the circuit court that Moustakis lacked standing to bring the lawsuit under Wis. Stat. § 19.356(4) because, as district attorney, he holds a state public office and is therefore not an employee under Wis. Stat. § 19.32(1bg). On November 5, 2015, the Supreme Court granted Petition for Review. Oral argument is scheduled for February 4, 2016.

New Richmond News v. City of New Richmond, 2015 WI 106

This case involves whether the federal Driver's Privacy Protection Act (DPPA) prohibits the disclosure of law enforcement agency reports containing personal information when such disclosure is required by state law.

In response to a public records request by the *New Richmond News*, the City of New Richmond Police Department produced three police reports with personal information redacted. The city's response letter stated the DPPA required the redaction of all such information obtained from or verified with the state Department of Motor Vehicles. The newspaper filed a mandamus action under Wisconsin's Public Records Law to compel disclosure of the unredacted reports. The circuit court granted judgment on the pleadings to the newspaper. The circuit court found that the DPPA does not prohibit the disclosure of law enforcement agency reports containing personal information when such disclosure is required by state law. The circuit court found that DPPA's 14th exception applied to all three reports. The exception applies to uses specifically authorized under the law of the state holding the record when such use is related to the operation of a motor vehicle or public safety. It also found two of the three reports did not fit the statutory definition of "personal information" since they were uniform traffic accident reports. The parties jointly petitioned the Supreme Court to bypass the Court of Appeals.

A six justice court split on whether to affirm or reverse the circuit court's judgment. (Justice N. Patrick Crooks passed away prior to the court's decision). As a result, the court vacated its order granting the petition to bypass and remanded the case to the Court of Appeals.

The Voice of Wisconsin Rapids v. Wisconsin Rapids Public School District, 2015 WI App 53
The issue in this case was whether documents created in connection with an investigation into allegations of impropriety involving a school athletic program were subject to disclosure under the public records law.
The Wisconsin Rapids Public School District denied access to documents in response to the public records request of *The Voice of Wisconsin Rapids*. The circuit court denied the newspaper's petition for writ of mandamus by concluding that the documents were not "records" subject to disclosure because the documents were "notes" "prepared for the originator's personal use." The Court of Appeals affirmed.
The newspaper's primary argument was that the notes exception to disclosure does not apply if the notes were created or used in connection with government work and a governmental purpose. The court rejected this argument because it assumed convoluted statutory drafting and a longstanding attorney general opinion contradicts the newspaper's argument. The court noted that, while not controlling, attorney general opinions in this area have a special significance as potential persuasive authority, especially after an extended period of apparent legislative acquiescence. The court noted that creating or retaining notes for the purpose of distributing them to others in order to communicate information or for the purpose of establishing a formal position or action of the authority would take the notes out of the personal use exception.

Wisconsin Prof'l Police Ass'n v. Marquette Cty., 2014 AP 2634, 2015 WL 3766756 (Wis. Ct. App. June 18, 2015) (unpublished)

The issue was whether the County could point to evidence sufficient to survive summary judgment on the issue of whether information that the County redacted is privileged attorney-client communication or protected attorney work product.

The Police Association submitted a public records request seeking attorney bills from two law firms hired by Marquette County to handle issues after the passage of Act 10. The County provided the bills with redactions along with a letter explaining the redactions due to privileged attorney-client communication or attorney work product. The Police Association sought the unredacted bills by filing a petition for writ of mandamus. After an in camera review of the redacted and unredacted bills, the circuit court granted the petition and ordered the release of a majority of the bills unredacted and some with court approved redactions. The County appealed, and the Court of Appeals affirmed.

The Court of Appeals noted that the parties did not dispute that the invoices were "records" under the Public Records Law or that attorney-client privilege and the attorney work product doctrine are recognized exceptions to the general rule of disclosure. The Court of Appeals found that the County failed to explain how the redacted information directly or indirectly revealed the substance of a confidential client communication. As a result, there was insufficient evidence

that the redactions were privileged as attorney-client communication or protected attorney work product.

II. ATTORNEY GENERAL OPINIONS

In 2015, the Attorney General issued no formal or informal opinions within the scope of Wis. Stat. § 19.77.

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