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## **NEWS RELEASE**

### **Wisconsin Stat. § 19.77 Annual Summary**

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MADISON, Wis. – The following is a summary of public records case law-related decisions for 2016, 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**

***Animal Legal Defense Fund v. Board of Regents of the University Wisconsin and Richard Lane, No. 14-CV-2874 (Wis. Cir. Ct. Dane Cty. March 9, 2016).***

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

Petitioner Animal Legal Defense Fund (Petitioner) made a public records request of Respondent Richard Lane seeking certain records related to the Institutional Animal Care and Use Committee (IACUC) regarding research on non-human primates. Lane responded to the request by producing a 105-page document, while also withholding some documents. Petitioner made a second request for additional documents, including handwritten notes taken at IACUC meetings. Lane denied the request on the grounds that the notes were intended for personal use only and therefore not a “record” subject to disclosure under the public records law. Petitioner filed a mandamus action seeking to compel the production of the notes.

The 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 court found the notes barely legible and observed that abbreviations and symbols were used throughout. The authors testified that the notes were used solely to assist in the drafting of meeting minutes. No other IACUC members requested to review the documents. The court found the notes were not distributed to others for the purpose of memorializing agency activity, and Respondents were not required to disclose the documents.

***Beloit Daily News v. School Dist. of Beloit*, No. 15-CV-663 (Wis. Cir. Ct. Rock Cty. March 4, 2016).**

This case addressed whether a school district properly withheld a letter written by a former superintendent in the interest of protecting the privacy of a former assistant superintendent.

The Beloit Daily News submitted a public records request seeking a letter written by a former superintendent of the School District of Beloit, Steve McNeal. The letter addressed allegations of misconduct brought against McNeal by three former board members, and included McNeal's personal evaluation of the former employees. The School District denied access to the letter because it believed that it would unfairly damage the reputation of the subjects, would be inconsistent with public policy intended to maintain confidentiality of personnel records, and would frustrate the public interest in evaluating the performance of public employees.

The court rejected these arguments on the grounds that the public has the right to consider the actions of elected school board members. The court noted that the public interest in protecting an individual's privacy and reputation arises only out of the public effects of the failure to honor the individual's privacy interest. The court noted that Wis. Stat. § 19.356(9) provides recourse for the subjects of the letter by giving them the opportunity to give their side of the story and prepare a document to be released with the McNeal letter. The court ordered release of the McNeal letter with redactions to be applied to purely personal information unrelated to job duties.

***Democratic Party of Wisconsin & Cory Liebmann, Petitioners-Respondents, v. Wisconsin Dep't of Justice & Kevin Potter, Respondents-Appellants-Petitioners.*, 2016 WI 100**

The issue in this case is whether reasons given by a record custodian for nondisclosure sufficiently demonstrated that the presumption in favor of disclosure was outweighed by the public harm that would result from disclosure.

The Wisconsin Department of Justice (DOJ) received a public records request from the Democratic Party of Wisconsin, seeking recordings of training programs by then Waukesha County District Attorney Brad Schimel presented at Wisconsin State Prosecutors Education and Training conferences. DOJ responded explaining that two records responsive to the request had been identified. The videos were recorded and stored solely for prosecutors who were not able to attend the conferences; the videos had not been made available to the public. In declining to release the videos, DOJ explained that, after applying the public records balancing test, the public interest in nondisclosure outweighed the general presumption favoring release.

The circuit court granted Petitioners writ of mandamus compelling DOJ to disclose the two recordings and the court of appeals affirmed.

The Supreme Court accepted DOJ's position that withholding the videos protected prosecution strategies for online child exploitation cases and maintained respect for the privacy of crime victims. The victims described in the videos were all children who deserve special treatment and protection with an emphasis on keeping their identities confidential. Petitioners' argument that disclosure would help parents protect their children was found to be unconvincing, as the Court determined there to be other useful resources for parents including online material provided by DOJ. The Court also noted that the reason for the initial request, an effort to substantiate allegations of misconduct, had been ruled out by all parties involved and both lower courts. The Court determined that the balancing test weighed in favor of nondisclosure and reversed the decision of the court of appeals.

***Lakeland Printing Co., Inc. et al vs. Oneida County Sheriff's Office et al, Oneida County Case Number 2015CV000053***

This case addressed whether certain records were subject to disclosure pursuant to Wis. Stat. § 19.36(10).

The Lakeland Times submitted three public records request seeking records related to an investigation into allegations of misconduct by an employee of the Oneida County Sheriff's Office. The sheriff's office withheld certain documents citing statutory exemptions.

The court ordered the release, with redactions, of records concerning a past incident of alleged employee misconduct. The court also held that the sheriff's office appropriately withheld certain pre-employment documents, including background check materials and evaluations, under the staff management planning exception found in Wis. Stat. § 19.36(10)(d). The court noted that the sheriff's office properly withheld records relating to an ongoing investigation pursuant to Wis. Stat. § 19.36(10)(b). The court further ordered the sheriff's office to notify Plaintiffs when the investigation was complete and either release the investigation records or provide Plaintiffs with the reasons for withholding the records.

***Moustakis v. State of Wisconsin Dep't of Justice, 2016 WI 42, 368 Wis. 2d 677, 880***

The issue in this case is whether 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).

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). Moustakis sought review in the Supreme Court of Wisconsin.

Under the public records law, generally, no person is entitled to judicial review of an authority’s decision to provide a requester with access to a requested record. Wis. Stat. § 19.356(2)(a)1, one of a few narrow exceptions to this general rule, requires an authority to provide pre-release notice to an employee who is the subject of disciplinary-related investigation records. Then, the employee-record subject has an opportunity to challenge the release of the record. The Court found that because Moustakis held the elective office of Vilas County District Attorney, he was not an “employee” as defined by statute. Therefore, none of the exceptions applied to the records at issue, and Moustakis could not maintain an action under Wis. Stat. § 19.365(4) seeking a court order to keep the DOJ from providing access to the requested records. The Supreme Court affirmed the decision of the court of appeals and the circuit court’s order dismissing the action brought by Moustakis under the public records law.

***New Richmond News v. City of New Richmond*, 2016 WI App 43, 370 Wis. 2d 75, 881 N.W.2d 339**

This case involved 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 court concluded that the Police Department was permitted to release unredacted copies of the accident reports, pursuant to the DPPA exception allowing disclosures specifically authorized under state law. Wisconsin law specifically requires release of accident reports upon

request. The court, however, found that the DPPA prohibits the Police Department from releasing an unredacted copy of the incident report. Disclosure of the unredacted incident reports would not serve any department function. The court determined that responding to public records requests is not, as defined by statute, a “function” of the Police Department for purposes of the DPPA’s agency functions exception. The agency functions exception to the DPPA cannot be interpreted to permit the disclosure of personal information based solely on the fact that a public records request was submitted. However, the DPPA only applies to information obtained—not verified—from the DMV. The court remanded to the circuit court to determine whether the redacted information in the incident report was obtained from the DMV records or, if obtained from another source, was substantively altered upon verification to conform to information in the DMV records. If so, the information is subject to the DPPA, and the circuit court must determine whether its disclosure would have served any function of the Police Department, beyond compliance with the public records law. The Court of Appeals affirmed in part; reversed in part and remanded cause with directions.

***Teague v. Van Hollen*, 2016 WI App 20, 367 Wis. 2d 547, 877 N.W.2d 379, review granted sub nom. *Teague v. Schimel*, 2016 WI 81, 371 Wis. 2d 610, 887 N.W.2d 894**

This case addressed whether the DOJ should take the substance of “innocence letters” into account when responding to name-based criminal history requests submitted by members of the public.

Dennis Teague appealed a judgment of the circuit court dismissing his claims alleging statutory and constitutional violations. Teague claimed that DOJ knowingly disclosed inaccurate information about Teague each time it produced a criminal history report in response to a request from a member of the public. Teague obtained an “innocence letter” from DOJ certifying that as of 2009 Teague has no criminal convictions and that Teague should not be confused with another individual, “ATP,” who has a criminal history. The potential for confusion arose because ATP gave Teague’s name to authorities as an alias, a fact reflected in DOJ’s database as a reference contained in ATP’s criminal history record. Teague sought to prevent DOJ from responding to background checks with the ATP criminal history in which Teague’s name appeared as an alias, without any reference to the innocence letter. Teague contended that if DOJ provides that response, Teague’s reputation and opportunities for employment, housing, etc. could be impaired. Teague’s complaint alleged that DOJ incorrectly performed the public records balancing test before releasing criminal history referring to Teague; violated Wis. Stat. § 19.70 by failing to correct its records or allow the filing of a concise written statement setting forth the reasons for disputing the record; and violated Teague’s federal and state constitutional rights to equal protection of the laws and his rights to substantive and procedural due process. The circuit court dismissed both of Teague’s statutory claims and the equal protection challenge. The circuit court held a trial on the remaining constitutional claims and subsequently entered a judgment dismissing the case.

The Court of Appeals determined Wis. Stat. § 19.356(1) precluded judicial review of Teague’s public records claim. The court further stated that Teague was not entitled to relief under Wis. Stat. § 19.70 because he did not challenge the accuracy of any record maintained by DOJ, and instead sought to avoid misinterpretations of records that are accurate but ambiguous. The court

held that Teague seeks not a correction (which Wis. Stat. § 19.70 allows for) but an explanation that contains additional information. In consideration of the equal protection portion of Teague's complaint, the court asserted that its role was to determine whether it might "construct a rationale" under which DOJ's practices meet a legitimate purpose. The court declined to address Teague's claim to a violation of substantive due process rights as it found Teague's arguments undeveloped. The court rejected the claim that the DOJ report would damage Teague's reputation, violating his right to procedural due process. The court agreed with the circuit court that "Teague did not show that he has been stigmatized in a manner that has altered or eliminated a right or status previously recognized under state law." The Wisconsin Court of Appeals affirmed the judgment of the circuit court. The Supreme Court of Wisconsin granted petition for review.

***Tetzlaff v. County of Green Lake*, No. 2015AP1120, 2016 WL 3064641 (Wis. Ct. App. June 1, 2016) (unpublished).**

The issue in this case is whether statutory or common-law exceptions barred a county from disclosing an investigative report to a county supervisor.

Jana Tetzlaff brought an action under Wis. Stat. § 19.356 to bar Green Lake County from disclosing to a county supervisor an investigative report in which Tetzlaff was named. Tetzlaff managed the Clinical Services Unit (CSU) of the County's Department of Health and Human Services. CSU employees lodged complaints with the county board that CSU management created a hostile work environment. The county hired an attorney to investigate the allegations. Upon completing the investigation, the subsequent report concluded that the actions of CSU management did not constitute illegal hostile environment discrimination under state or federal law. The county supervisor requested a copy of the report, and Tetzlaff received notice of the request and the decision to release the report. After in camera inspection of the record, the circuit court concluded that Tetzlaff had identified no statutory or common-law exception to disclosure. The circuit court further concluded this was not an "exceptional case" warranting nondisclosure and granted the county's motion to dismiss the action.

Tetzlaff first argued that the county failed to give proper notice of its decision to release the requested record to all "record subjects." The court held that the report resulted from an investigation into a possible disciplinary matter or violation involving CSU management. Notice to others interviewed in the course of the investigation was not required, as they were not "subjects" of the record. Tetzlaff next complained that the circuit court erred when it concluded that no common-law exemptions applied, specifically the attorney-client and attorney work-product privileges. The county contended that the privilege did not apply, and nevertheless formally waived any privilege. The attorney hired to complete the investigation also filed an affidavit averring that she waived any right to assert work-product privilege. The court held that Tetzlaff had no standing under Wis. Stat. § 19.35(1)(am) as that section applies only to a requester. Furthermore, the circuit court did not err in not applying a full two-step balancing test, as this is only necessary on review of a custodian's denial of access to a record. The Court held that the circuit court did not err in denying Tetzlaff's requests for an evidentiary hearing as only a record requester may commence a mandamus action subject to civil procedure statutes. The court of appeals affirmed the decision of the circuit court. The court of

appeals received the record and briefs under seal, and ordered that the record remain sealed for 30 days following its decision to allow Tetzlaff the opportunity to petition the Supreme Court for review should she wish to do so.

***Voces De La Frontera, Inc. v. Clarke*, 2016 WI App 39, 369 Wis. 2d 103, 880 N.W.2d 417 review granted**, 2016 WI 81, 371 Wis. 2d 610, 887 N.W.2d 894.

This case addressed whether federal law exempted disclosure of immigration detainer forms.

Voces de la Frontera, Inc. submitted an open records request to Milwaukee County Sheriff David Clarke requesting copies of all immigration detainer forms (I-247) forms received by Sheriff Clarke from 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 he filed a Notice of Appeal.

The Court of Appeals found that the redacted portions of the I-247 forms were not exempted from disclosure under federal law. The court agreed with Voces that the federal statute only applies to a state or local government entity that holds any detainee on behalf of the Service. The court found that receipt of an I-247 form by a local law enforcement agency did not convert a state prisoner into a federal detainee in the custody of ICE. If Sheriff Clarke was correct in his interpretation of the statutes that the filing of an I-247 makes the hold federal, then he was in error to provide any part of the form at all, redacted or otherwise, including the names of the prisoners. The court further held that the balancing test favored disclosure. It is the burden of the party seeking nondisclosure to show that the public interest favoring secrecy outweighs those favoring disclosure. The court found Clarke failed to develop his argument with any facts, and relied on speculation instead. The Sheriff's sole public policy argument against disclosure was not one of public policy, but rather it focused on hypothetical injury to the individual. The court of appeals affirmed the judgment of the circuit court. The Supreme Court of Wisconsin granted petition for review.

***Ctr. For Media Democracy et al v. Scott Walker et al*, No. 15-CV-1289 (Wis. Cir. Ct. Dane Cty. May 27, 2016).**

The issue in this case was whether withheld documents were properly identified as non-record "drafts" not subject to disclosure under the public records law.

This is a consolidated case stemming from two public records requests. Both requests sought information regarding the 2015-17 Executive Budget Bill's changes to Chapter 36 of the Wisconsin Statutes. CMD requested documents from the Office of the Governor, and Kathleen

Lounsbury requested documents from the Wisconsin Department of Administration (DOA). DOA provided documents and withheld 60 pages. The Governor's office provided documents and withheld 35 pages plus a 167 page attachment. Both DOA and the Governor's office, in final responses to the requesters, cited draft and balancing test exemptions as reasons for withholding the documents. Plaintiffs filed separate complaints that the circuit court later consolidated into one case.

In the court's view, Defendants' definition of "drafts" was overly broad and could conceal records from the public relating to any and all deliberations made by public employees. It was not enough that a withheld document be related to the drafting process for an executive Budget Bill in order to constitute a draft. In determining whether a document is a non-record "draft," the court noted an important term used both in 77 Op. Att'y Gen. 100 (1988) and in Wis. Stat. § 19.32(2): "in the name of." For each withheld document, Defendants must have shown that the document was drafted or prepared "in the name of" a superior, in this case in the name of the Governor. The court found all disputed emails to be final versions of communications between senders and recipients. The court found that all of the withheld emails constituted records. The court found that three of the withheld attachments constituted non-records and were therefore properly withheld. The court also found that the balancing test favors disclosure with regard to all of the remaining withheld documents. The court declined to essentially adopt a deliberative process privilege. Unlike federal law and law in other states, Wisconsin has not recognized a deliberative process privilege. The court found Defendants did not establish an overriding public interest supporting nondisclosure for the withheld documents. The court granted Plaintiffs' Motions for Summary Judgment in part and denied it in part, and granted Defendants' Motion for Summary Judgment in part and denied it in part, and mandamus issued as to the erroneously withheld documents.

## **II. ATTORNEY GENERAL OPINIONS**

In 2016, the Attorney General issued no formal or informal opinions within the scope of Wis. Stat. § 19.77.

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<sup>i</sup> *Lakeland Printing Co., Inc. et al vs. Oneida County Sheriff's Office et al*, Oneida County Case Number 2015CV000053 was added to the 2016 Wisconsin Stat. § 19.77 Annual Summary on February 21, 2017.