Wisconsin Freedom of Information Council

DEVOTED TO PROTECTING WISCONSIN'S TRADITION OF OPEN GOVERNMENT

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Dear Assistant Attorney General Potter,

I am writing in my capacity with the Wisconsin Freedom of Information Council to request that your office exercise its authority under 19.39, Wisconsin Statutes, to review an area of the public records law and provide guidance as to its correct interpretation.

The statute in question is 19.356, enacted in 2003. I recently became aware that some state records custodians are interpreting subsection (9) of the statute to mean that advance notification and a five-day delay is required before releasing any record that relates in any way to any person holding local or state public office. It is my belief that this interpretation is possibly erroneous and certainly problematic, as it goes beyond the drafters' legislative intent, and creates delays that are in most cases neither necessary nor prudent. Of particular concern is that it adds unduly to the burden of records custodians.

19.356(9) states: "(a) Except as otherwise authorized or required by statute, if an authority decides under s. 19.35 to permit access to a record containing information relating to a record subject who is an officer or employee of the authority holding a local public office or a state public office, the authority shall, before permitting access and within 3 days after making the decision to permit access, serve written notice of that decision on the record subject, either by certified mail or by personally serving the notice on the record subject. The notice shall briefly describe the requested record and include a description of the rights of the record subject under par. (b).

"19.356(9)(b) ... Within 5 days after receipt of a notice under par. (a),

a record subject may augment the record to be released with written comments and documentation selected by the record subject. Except as otherwise authorized or required by statute, the authority under par. (a) shall release the record as augmented by the record subject."

Another subsection of the same section of the statute, 19.356(2)(a), spells out three categories of records to which the section concerning employees applies: "A record containing information relating to an employee that is created or kept by the authority and that is the result of an investigation into a disciplinary matter involving the employee or possible employment-related violation by the employee of a statute, ordinance, rule, regulation, or policy of the employee's employer"; "A record obtained by the authority through a subpoena or search warrant"; and "A record prepared by an employer other than an authority, if that record contains information relating to an employee of that employer, unless the employee authorizes the authority to provide access to that information."

Additionally, the statute sets forth, in 19.356(1): "Except as authorized in this section or as otherwise provided by statute, no authority is required to notify a record subject prior to providing to a requester access to a record containing information pertaining to that record subject, and no person is entitled to judicial review of the decision of an authority to provide a requester with access to a record."

This statute was drafted to codify and clarify how records custodians should implement the review mandate created by the Wisconsin Supreme Court in *Woznicki v. Erickson* (1996). It set forth a process for dealing with the narrow category of records deemed to affect the "privacy or reputational interests" of public employees. The rationale in creating a different process for persons who hold local or state public office was that such individuals should be held to a higher, not a lesser, standard. Unlike rank and file employees, public officials may not seek judicial intervention to block access to these records; rather, they may merely provide supplemental information.

It is my contention that the Legislature never intended to apply this right to advance notice and supplementation to literally every "record containing information relating to a record subject who is an officer or employee of the authority holding a local public office or a state public office." This would extend its application to an absurdly broad category of records, potentially everything from basic salary information to records of per diem payments to routine communications on matters of public policy.

And what about campaign finance reports and statements of economic interest? Are holders of state and local public office entitled to notice before this information is provided to? What if a member of the Legislature is

arrested for driving under the influence? Must he or she get notice before the police report is released?

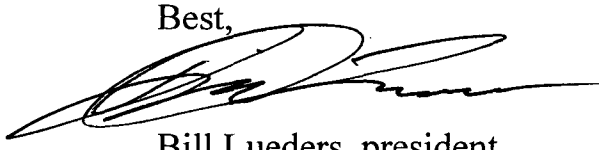
I believe that 19.356(1) and 19.356(2)(a) can be read in tandem as limiting the category of records for which advance notice is required. In other words, record subjects holding state and local public office should only be notified if the category of records release fall under 19.356(2)(a)1.-3. I believe this is also how the drafters intended the statute to be read.

But if your review should find that the Legislature, in the actual wording it crafted, inadvertently created a broader right than anyone intended, I would urge you to recommend that the law be amended to apply to a more appropriate category of records.

The records custodians of the state of Wisconsin work hard enough without being tasked with serving written notice every time a record of any sort pertaining to a person holding public office is about to be released. In most cases, this is time that could and should be put to better use.

The Wisconsin Freedom of Information Council does not question the value or legitimacy of allowing those who hold local or state public office to know of a records release that affects their reputation or careers. In fact, we are pleased that there is an avenue for records subjects to provide supplemental information in such cases. But we do not think it makes sense to delay the release of every record, regardless or whether the information legitimately prompts these concerns.

Best,



Bill Lueders, president
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