

OFFICER-INVOLVED DEATH CRIMINAL JUSTICE SYSTEM RESPONSE

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2013 Wisconsin Act 348 became effective on April 25, 2014, setting forth new requirements for law enforcement agencies if one of its officers is involved in an officer-involved death. The following is a summary of the statutory requirements for agencies involved in such cases.

I. OFFICER-INVOLVED DEATH DEFINED:

An officer-involved death is defined by law as a death of an individual that results directly from an action or an omission of a law enforcement officer while the law enforcement officer is on duty or while the law enforcement officer is off duty but performing activities that are within the scope of his or her law enforcement duties.

See Wis. Stat. § 175.47(1)(c).

II. THE OBLIGATION OF A LAW ENFORCEMENT AGENCY IF ITS OFFICERS ARE INVOLVED IN AN OFFICER-INVOLVED DEATH:

Every law enforcement agency must implement a policy providing that at least two investigators, who are not employed by the law enforcement agency that employs a law enforcement officer involved in the officer-involved death, will conduct the officer-involved death investigation. If the death is traffic-related, a state law enforcement agency may allow an investigation involving a law enforcement officer employed by that state agency to use a crash reconstruction unit from the same state agency.

See Wis. Stats. § 175.47(2) and Wis. Stat. § 175.47(3)(a) and (b).

III. THE OBLIGATION OF INVESTIGATORS THAT INVESTIGATE AN OFFICER-INVOLVED DEATH:

The investigators from the outside agency/agencies must provide a complete report in an expeditious manner to the district attorney of the county in which the officer-involved death occurred.

See Wis. Stat. § 175.47(5)(a).

IV. INTERNAL INVESTIGATION OF AN OFFICER-INVOLVED DEATH:

Each law enforcement agency has a policy and procedure manual which should be consulted for information about internal procedures after an officer-involved death. State law allows the agency that employs a law enforcement officer involved in the officer-involved death to conduct its own internal investigation of the death, but this does not replace the external investigation and it must not interfere with the required outside investigation, described above.

See Wis. Stat. § 175.47(3)(c).

V. INFORMATION AVAILABLE TO THE PUBLIC:

1. There are many factors which could affect the type of information that can be shared, at what stage in the investigation it can be shared, and with whom it can be shared. For example, if there was some type of incident or crime that led to the officer-involved death, those circumstances must be investigated. It may not be clear in the beginning stages of these investigations if a crime was committed and if so, by whom; or, if there are any victims who are entitled to special rights and services by statute.
2. The agency that has custody of a record has a responsibility to determine, according to Wisconsin's public records law, whether a record is released entirely, released with redaction, or withheld. The release of information will be determined on a case-by-case basis.
3. If the district attorney determines there is no basis to charge the officer(s) with a crime after receiving the investigators' report of the officer-involved death, the investigators shall release the investigative report. *See Wis. Stat. § 175.47(5)(b).*
 - The lead investigator with the responsibility to release the investigative report should do so through his or her agency's public information office/record's custodian to ensure compliance with Wisconsin's public records law.
 - The agency with custody of the report will determine what information is released, released with redaction, or withheld. This determination is made using the 'balancing test' which is a fact-intensive analysis that must be performed on a case-by-case basis.
 - The records custodian must consider all relevant factors to determine whether permitting access to the record, or portions of the record, would result in harm to the public interest that outweighs the strong public interest in allowing access. *See Wis. Stat. § 19.35(1)(a).*

For more information about the balancing test and compliance with Wisconsin's public records law, see the *Attorney General's Public Records Law Compliance Outline*, available online at: www.doj.state.wi.us (click on "Open Government") and Wis. Stat. § 19.31 – 19.35.

VI. THE ROLE OF THE DISTRICT ATTORNEY:

1. The investigators investigating the officer-involved death shall present their report to the district attorney of the county in which the death occurred. The district attorney must determine whether the officer(s) involved in the death acted legally. If the district attorney determines there is no basis to charge the officer(s) with a crime, the investigators shall release the investigative report.
See Wis. Stat. § 175.47(5)(b).

2. If the district attorney determines the officer(s) involved in the death did not act legally, the case will proceed through the criminal justice process when the district attorney files charges against the officer(s).

VII. POSSIBLE OPTIONS IF A DISTRICT ATTORNEY DECLINES TO ISSUE CRIMINAL CHARGES:

In Wisconsin, the district attorney of the county in which the crime is alleged to have occurred is primarily responsible for the decision of whether to charge someone with a crime. There are many factors that go into that decision and they are generally given great latitude. Generally these decisions are not subject to review by any other agency or authority. There are, however, some limited exceptions to that process under Wisconsin law.

In addition to the written notice of their rights as crime victims, as required under Wis. Stat. § 950.08 (2g), victims of an officer-involved death must be provided with information about such exceptions pursuant to Wis. Stat. § 950.08 (2g)(h). Providing the following information satisfies that duty.

1. Complaint Filed by a Circuit Judge Under Wis. Stat. § 968.02

- 1.1 If a district attorney refuses or is unavailable to issue a complaint, a circuit judge may permit the filing of a complaint, if after holding a hearing, he or she finds there is probable cause to believe that the person to be charged has committed an offense.
- 1.2 If the district attorney has refused to issue a complaint, he or she shall be informed of the hearing and may attend.
See Wis. Stat. § 968.02(3).
- 1.3 Although a judge may issue a criminal complaint a special prosecutor would need to be appointed to actually prosecute the case. The special prosecutor is not bound by the decision of the judge and may decline to prosecute the matter.

2. Complaint Filed Under a John Doe Proceeding Wis. Stat. § 968.26(2)

- 2.1 If a person who is not a district attorney complains to a judge that he or she has reason to believe that a crime has been committed within the judge's jurisdiction, the judge shall refer the complaint to the district attorney or, if the complaint may relate to the conduct of the district attorney, to another prosecutor.
See Wis. Stat. § 968.26(2)(am).
- 2.2 The district attorney to whom the judge refers the complaint is required to issue charges or refuse to issue charges within 90 days of receiving the

referral. If the district attorney refuses to issue charges, he or she must give the judge all law enforcement investigative reports on the matter in the district attorney's custody, his or her records and case files on the matter, and a written explanation why he or she refused to issue charges.

See Wis. Stat. § 968.26(2)(b).

- 2.3 The judge may require that a law enforcement agency provide him or her any investigative reports that the law enforcement agency has on the matter. The judge may consider the law enforcement investigative reports, the records and case files of the district attorney, and any other written records that the judge finds relevant when determining if a proceeding is necessary to determine if a crime has been committed.

See Wis. Stat. § 968.26(2)(b).

- 2.4 In a proceeding convened by the judge to determine if a crime has been committed, he or she shall subpoena and examine under oath the complainant and any witnesses that the judge determines to be necessary and appropriate to ascertain whether a crime has been committed and by whom committed.

See Wis. Stat. § 968.26(2)(c).

- 2.5 The judge may issue a criminal complaint if the judge finds sufficient credible evidence to warrant a prosecution of the complaint.

See Wis. Stat. § 968.26(2)(d).

- 2.6 Although a judge may issue a criminal complaint a special prosecutor would need to be appointed to actually prosecute the case. The special prosecutor is not bound by the decision of the judge and may decline to prosecute the matter.

3. Complaint Filed Under Wis. Stat. § 979.05 – Inquest

- 3.1 An inquest is conducted to inquire and determine when and in what manner and means a person died.

- 3.2 An inquest is conducted by a circuit judge or a circuit court commissioner before a jury, unless the district attorney, coroner, or medical examiner requests that the inquest be conducted before the judge or circuit court commissioner only.

See Wis. Stat. §979.05(1) and (2).

- 3.3 The judge or circuit court commissioner conducting the inquest may order that proceedings be secret if the district attorney so requests or concurs.

See Wis. Stat. §979.05(6).

- 3.4 The inquest jury's verdict shall be in a form to permit the following findings:

- a) Whether the deceased came to his or her death by criminal means and, if so, the specific crimes committed and the name of the person or persons, if known, having committed the crimes.
- b) Whether the deceased came to his or her death by natural causes, accident, suicide or an act privileged by law.

See Wis. Stat. §979.08(3)(a) and (b).

- 3.5 An inquest verdict, with the record of the inquest, is sent to the district attorney after being signed by the judge or circuit court commissioner.

See Wis. Stat. §979.08(6).

- 3.6 The verdict delivered by the inquest jury is advisory and does not preclude or require the issuance of any criminal charges by the district attorney.

See Wis. Stat. §979.08(5).