The Important of Transparency

◊ Transparency is the cornerstone of democracy.

◊ The Wisconsin Public Records Law, Wis. Stat. §§ 19.31 to 19.39, furthers transparency by ensuring citizens have access to the records of government authorities.

◊ Wis. Stat. § 19.31: The public records law “shall be construed in every instance with a presumption of complete public access, consistent with the conduct of government business. The denial of public access generally is contrary to the public interest, and only in an exceptional case may access be denied.”

◊ This is one of the strongest public policy statements found in the Wisconsin statutes.
Public Records Request Process

- PRR received and forwarded to authority’s records custodian
- Authority begins search for records
- Any responsive records are reviewed:
  - Presumption that they will be disclosed unless they are exempt from disclosure pursuant to:
    - Statute
    - Common law
    - Public records balancing test
The Balancing Test

◊ Weigh the **public interest in disclosure** of the record against the **public interest** and public policies favoring nondisclosure

◊ Public policies favoring nondisclosure may found in other statutes, court decisions, Wis. Stat. § 19.85(1) closed session exemptions, evidentiary privileges, and elsewhere

◊ Fact intensive; “blanket rules” disfavored

◊ Must conduct on **case-by-case basis** taking into consideration the totality of circumstances

◊ Generally, the identity of the requester and the purpose of the request are not considered
Wis. Stat. § 19.36(6): If part of a record is disclosable, must disclose that part and redact non-disclosable portions
Evidentiary Privileges

- Wis. Stat. ch. 905 enumerates evidentiary privileges, including lawyer-client, health care-provider-patient, husband-wife, clergy penitent, and others.
  - Public policies expressed through recognized evidentiary privileges may be considered in applying the balancing test.
- Alone, evidentiary privileges do not provide sufficient justification to deny a PRR.
  - However, they reflect public policies in favor of protecting the confidentiality of certain kinds of information
- **Important:** Unlike the other privileges, the lawyer-client privilege does provide sufficient grounds to deny access without needing to apply the balancing test.
Lawyer-Client Privilege

◊ A statutory and common law exception to disclosure

◊ Wis. Stat. § 905.03(2): “A **client has a privilege** to refuse to disclose and to prevent any other person from disclosing **confidential communications** made for the **purpose of facilitating the rendition of professional legal services** to the client.

◊ Applies to communications between:
  ◊ Client or the client’s representative and the client’s lawyer or the lawyer’s representative
  ◊ Client’s lawyer and the lawyer’s representative
  ◊ Client or the client’s lawyer to a lawyer representing another in a matter of common interest
  ◊ Representatives of the client or between the client and a representative of the client
  ◊ Lawyers representing the client.

◊ The privilege is **absolute unless waived by the client** or another exception under ch. 905 applies.

Attorney Work Product

- A statutory and common law exception to disclosure

- Wis. Stat. § 804.01(2)(c)1.

  - In discovery, the court “shall protect against disclosure of the mental impressions, conclusions, opinions, or legal theories of an attorney or other representative of a party concerning the litigation”

  - Only applies to materials prepared in anticipation of litigation or for trial

- Seifert v. Sch. Dist. of Sheboygan Falls, 2007 WI App 207, ¶¶ 27-28, 305 Wis. 2d 582, 740 N.W.2d 177

  - “The common law long has recognized the privileged status of attorney work product, including the material, information, mental impressions and strategies an attorney compiles in preparation for litigation.”

- Attorney work product falls under the “Except as otherwise provided by law” provision of the public records law. See Wis. Stat. § 19.35(1)(a).
Criminal Prosecutions

- Common law exception for a prosecutor’s files
  - A prosecutor’s files are **not** subject to public inspection under the public records law. *State ex rel. Richards v. Foust*, 165 Wis. 2d 429, 436, 477 N.W.2d 608 (1991).
    - Applies whether the case is open or closed.
  - The records in the prosecutors’ file must be **integral** to the criminal investigation and the prosecution process.
    - Includes historical data leading up to the prosecution.
Investigations Involving Employees

◊ Ongoing investigations of employees
  ◊ Wis. Stat. § 19.36(10)(b)
    ◊ Information relating to the current investigation of a possible criminal offense or possible misconduct connected with employment by an employee prior to the disposition of the investigation is exempt from disclosure.

◊ Closed investigations of employees
  ◊ Once the investigation concludes, such records are subject to disclosure
Ongoing Criminal Investigations

- Subject to the balancing test; *Foust* does **not** apply
- Other than Wis. Stat. § 19.36(10)(b), the public records law does **not** include any other provisions exempting the disclosure of records related to ongoing investigations
- For ongoing criminal investigations, possible balancing test considerations could include whether the release of all or part of the records would:
  - Adversely impact the investigation or prosecution
  - Influence the testimony of witnesses
  - Influence the jury pool
  - Impact the defendants’ ability to have a fair trial
  - Undermine the ability to determine if a witness is telling the truth
Close Criminal Investigations

♢ Subject to the balancing test; *Foust* does not apply

♢ There are several possible factors to consider. *See Linzmeyer v. Forcey*, 2002 WI 84, ¶¶ 30, 32, 39, 41, 254 Wis. 2d 306, 646 N.W.2d 811.

♢ Crime victim rights expressed in statutes, constitutional provisions, and case law
  ♢ Consideration of the family of crime victims
  ♢ Marsy’s Law

♢ Protection of witnesses
  ♢ Including “chilling” future cooperation with law enforcement

♢ Confidential informants (Wis. Stat. § 19.36(8))

♢ Children and juveniles (Wis. Stat. §§ 48.396 and 938.396)

♢ Officer safety

♢ Confidential law enforcement techniques
Closed Criminal Investigations, continued

- When analyzing the risk of threats, harassment, harm, or reprisals, any such possibility is accorded appropriate weight depending on the likelihood.
  - Safety concerns should be particularized
  - Generally, there must be a **reasonable probability** of harm
- See John K. MacIver Inst. for Pub. Policy, Inc. v. Erpenbach, 2014 WI App 49, 354 Wis. 2d 61, 848 N.W.2d 862
Civil Investigations and Litigation

✧ Subject to the balancing test
✧ Is the investigation or litigation open or closed?
✧ A records custodian may possibly weigh many of the same factors considered for records of open and closed criminal investigations
✧ *Foust* does **not** apply to civil matters
✧ Records may contain lawyer-client privileged communications or attorney work product
Settlement Agreements

◊ Subject to the balancing test; generally, settlement agreements are disclosed
◊ Agreements with confidentiality provisions
  ◊ Still subject to the balancing test
    ◊ Parties **cannot contract around** the public records law
    ◊ When applying the balancing test, courts usually find that the public interest in disclosure outweighs any public interest in keeping settlement agreements confidential
Settlement Negotiations

- Distinction between settlement *agreements* and settlement *negotiations*.
- However, also subject to the balancing test
- Considerations:
  - Public interest in encouraging settlements
    - Settlements are cost-effective and benefit judicial efficiency
  - Parties negotiating freely in confidence may facilitate more effective negotiations
  - Presumption of complete public access to records
Crime Laboratory Privilege

◊ Wis. Stat. § 165.79(1):

◊ **Evidence, information, and analyses of evidence** obtained from law enforcement officers by the Crime Laboratory is privileged and not available via a public records request.

◊ Wis. Stat. § 165.79(2):

◊ Upon the **termination or cessation** of the criminal proceedings, the privilege **may be waived** in writing by:

◊ Prosecutor involved in the proceedings

◊ DOJ
Further Information

✧ Download DOJ Compliance Guides and other resources at https://www.doj.state.wi.us/office-open-government/office-open-government

✧ Contact the Office of Open Government:
  ✧ PROM Help Line: (608) 267-2220
  ✧ Email: fergusonpm@doj.state.wi.us
Public Records, Privileges, and Related Issues

Wisconsin Department of Justice
Office of Open Government
Wisconsin Department of Justice Confidentiality andPrivileges CLE
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