

Public Records, Privileges, and Related Issues
Wisconsin Department of Justice
Confidentiality and Privileges CLE
November 12, 2020

Paul M. Ferguson
Assistant Attorney General
Office of Open Government
Wisconsin Department of Justice
fergusonpm@doj.state.wi.us

- I. Presentation Overview
 - A. This presentation addresses the public records law (PRL), and its intersection with certain privileges and related issues.

- II. The Public Records Law and the Importance of Transparency
 - A. Transparency is the cornerstone of democracy.
 - B. The Wisconsin Public Records Law, Wis. Stat. §§ 19.31 to 19.39
 - 1. Furthers transparency by ensuring citizens have access to the records of government authorities
 - 2. Wis. Stat. § 19.31: Strong public policy statement
 - a) 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.”
 - C. Basic public records request (PRR) process
 - 1. PRR received and forwarded to the authority’s records custodian
 - 2. Authority identifies and reviews responsive records
 - a) Records are presumed to be public unless they are exempt from disclosure pursuant to:
 - (1) Statute
 - (2) Common law
 - (3) Public records balancing test
 - (a) Weighs the public interest in disclosure against the public interest favoring nondisclosure
 - (b) Fact intensive
 - (c) Blanket rules disfavored
 - (d) Conduct on a case-by-case basis
 - (e) Consider the totality of circumstances
 - (f) Generally, the identity of the requester and the purpose of the request are not considered

- D. Redaction
 - 1. Wis. Stat. § 19.36(6):
 - a) If part of a record is disclosable, the authority must disclose that part and redact the non-disclosable portions.

III. Evidentiary Privileges

- A. Wisconsin Stat. ch. 905 enumerates evidentiary privileges, such as lawyer-client, health care provider-patient, husband-wife, clergy-penitent, and others.
- B. Public policies expressed through recognized evidentiary privileges may be considered in applying the balancing test.
- C. Alone, the privileges do not provide sufficient justification to deny a PRR.
 - 1. However, they reflect public policies in favor of protecting the confidentiality of certain information.
 - 2. The balancing test weight accorded to public policies expressed in evidentiary privileges should be greater where other expressions of the same public policy also support denial of access.
 - a) Example: weight of the physician-patient privilege is reinforced by Wis. Stat. § 146.82 (patient health care records confidentiality); HIPAA; Wis. Admin. Code § Med 10.03 (“unprofessional conduct” includes divulging patient confidences)
- D. Important: Unlike the other privileges, the lawyer-client privilege does provide sufficient grounds to deny access without needing to apply the balancing test.
 - 1. Lawyer-client privilege “is no mere evidentiary rule. It restricts professional conduct.” *Armada Broad., Inc. v. Stirn*, 177 Wis. 2d 272, 279 n.3, 501 N.W.2d 889 (Ct. App. 1993), *rev’d on other grounds*, 183 Wis. 2d 463, 516 N.W.2d 357 (1994); *see also* SCR 20:1.6(a).

IV. Lawyer-Client Privilege (Attorney-Client Privilege)

- A. A statutory and common law exception to disclosure under the PRL
- B. Wis. Stat. § 905.03(2)
 - 1. “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.”
 - 2. Applies to communications between:
 - a) Client or the client’s representative and the client’s lawyer or the lawyer’s representative
 - b) Client’s lawyer and the lawyer’s representative
 - c) Client or the client’s lawyer to a lawyer representing another in a matter of common interest
 - d) Representatives of the client or between the client and a representative of the client
 - e) Lawyers representing the client
 - 3. The privilege is absolute unless waived by the client or another exception under ch. 905 applies. *Dilger v. Metro. Prop. & Cas. Ins. Co.*, 2015WI App 54, ¶ 21, 364 Wis. 2d 410, 868 N.W.2d 177.

- C. Cases discussing attorney-client privilege:
 - 1. *George v. Records Custodian*, 169 Wis. 2d 573, 582, 485 N.W.2d 460 (Ct. App. 1992).
 - 2. *Wisconsin Newspress, Inc. v. School Dist. of Sheboygan Falls*, 199 Wis. 2d 768, 782-83, 546 N.W.2d 143 (1996).

V. Attorney Work Product

- A. A statutory and common law exception to disclosure under the PRL
- B. Wis. Stat. § 804.01(2)(c)1.
 - 1. Codifies the common law attorney work product doctrine from *State ex rel. Dudek v. Circuit Ct. for Milwaukee County*, 34 Wis.2d 559, 150 N.W.2d 387 (1967)
 - 2. 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.”
 - a) Only applies to materials prepared in anticipation of litigation or for trial
- C. *Seifert v. Sch. Dist. of Sheboygan Falls*, 2007 WI App 207, ¶¶ 27-28, 305 Wis. 2d 582, 740 N.W.2d 177
 - 1. “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.”
- D. 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).
- E. More information is available in the provided materials.

VI. Criminal Prosecutions

- A. Prosecutor’s Files
 - 1. There is a common law exception that provides that a prosecutor’s files are not subject to disclosure under the public records law. *State ex rel. Richards v. Foust*, 165 Wis. 2d 429, 436, 477 N.W.2d 608 (1991).
 - a) Applies whether the case is open or closed.
 - b) The records in the prosecutors’ file must be integral to the criminal investigation and the prosecution process.
 - c) Includes historical data leading up to the prosecution.
 - d) *Nichols v. Bennett*, 199 Wis. 2d 268, 275 n.4, 544 N.W. 2d 428 (1996).
 - e) *See also Democratic Party of Wisconsin v. Wisconsin Dep’t of Justice*, 2016 WI 100, ¶ 12, 372 Wis. 2d 460, 888 N.W.2d 584.

VII. Investigations of Employees

- A. Ongoing Investigations of Employees
 - 1. Wis. Stat. § 19.36(10)(b)

- a) 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 under the PRL.
- B. Closed Investigations of Employees
 - 1. Once the investigation concludes, such records are subject to disclosure under the PRL.
- C. The public records law does not include any other provisions exempting the disclosure of records related to ongoing investigations.
 - 1. Other ongoing investigations are subject to the balancing test.

VIII. Ongoing Criminal Investigations

- A. Subject to the balancing test; *Foust* does not apply
- B. If ongoing, possible balancing test considerations could include whether the release of all or part of the records would:
 - 1. Adversely impact the investigation or prosecution
 - 2. Influence the testimony of witnesses
 - 3. Influence the jury pool
 - 4. Impact the defendants' ability to have a fair trial
 - 5. Undermine the ability to determine if a witness is telling the truth

IX. Closed Criminal Investigations

- A. Subject to the balancing test; *Foust* does not apply
- B. There are several possible factors to consider. See *Linzmeier v. Forcey*, 2002 WI 84, ¶¶ 30, 32, 39, 41, 254 Wis. 2d 306, 646 N.W.2d 811
 - 1. Crime victim rights expressed in statutes, constitutional provisions, and case law
 - a) Consideration of the family of crime victims
 - b) Marsy's Law (Wisconsin Constitution, Article I, § 9m)
 - 2. Protection of witnesses
 - a) Including "chilling" future cooperation with law enforcement
 - 3. Confidential informants (Wis. Stat. § 19.36(8))
 - 4. Children and juveniles (Wis. Stat. §§ 48.396 and 938.396)
 - 5. Officer safety
 - 6. Confidential law enforcement techniques
- C. When analyzing the risk of threats, harassment, harm, or reprisals, any such possibility is accorded appropriate weight depending on the likelihood.
 - 1. Safety concerns should be particularized
 - 2. Generally, there must be a reasonable probability of harm
 - 3. See *John K. MacIver Inst. for Pub. Policy, Inc. v. Erpenbach*, 2014 WI App 49, 354 Wis. 2d 61, 848 N.W.2d 862
- D. See *Democratic Party of Wis.*, 372 Wis. 2d 460, ¶ 12 ("investigations and data collected are not open for public viewing because disclosure of this information would be 'harmful to the orderly administration of justice'").

- X. Civil Investigations and Litigation
 - A. Disclosure of records subject to the balancing test
 - B. Is the investigation or litigation open or closed?
 - C. Some factors weighed for criminal investigation records could be considered
 - D. *Foust* does not apply to civil matters

- XI. Settlement Agreements and Settlement Negotiations
 - A. Subject to the balancing test; generally, settlement agreements are disclosed
 - 1. Agreements with confidentiality provisions are still subject to the balancing test
 - a) Parties cannot contract around the public records law
 - b) When applying the balancing test, courts usually find that the public interest in disclosure outweighs any public interest in keeping settlement agreements confidential
 - B. Distinction between settlement *agreements* and settlement *negotiations*.
 - 1. However, also subject to the balancing test
 - a) Considerations:
 - (1) Public interest in encouraging settlements
 - (a) Settlements are cost-effective and benefit judicial efficiency
 - (2) Parties negotiating freely in confidence may facilitate more effective negotiations
 - (3) Presumption of complete public access to records

- XII. Crime Laboratory Privilege
 - A. Wis. Stat. § 165.79(1):
 - 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.
 - B. Wis. Stat. § 165.79(2):
 - 1. Upon the termination or cessation of the criminal proceedings, the privilege may be waived in writing by:
 - a) Prosecutor involved in the proceedings, and
 - b) DOJ

- XIII. Further Information
 - A. Download DOJ Compliance Guides and other resources:
 - 1. <https://www.doj.state.wi.us/office-open-government/office-open-government>
 - B. Contact the Office of Open Government:
 - 1. PROM Help Line: (608) 267-2220
 - 2. Email:
 - a) AAG Paul Ferguson: fergusonpm@doj.state.wi.us
 - b) AAG Sarah Larson: larsonsk@doj.state.wi.us