



WISCONSIN LEGISLATIVE COUNCIL ACT MEMO

2015 Wisconsin Act 64
[2015 Senate Bill 43]

John Doe Proceedings

2015 Wisconsin Act 64, “the Act,” makes a variety of changes to Wisconsin’s John Doe law. A John Doe proceeding is conducted by a judge to investigate whether a crime has been committed and by whom, and to decide whether sufficient credible evidence exists to warrant prosecution of the crime. A judge’s role is both investigative and judicial, and the extent to which to proceed in the investigation is within the judge’s discretion.

BACKGROUND

Initiation of Proceeding

A John Doe proceeding may be convened either upon the request of a district attorney, or upon a complaint to the judge by a person who has reason to believe that a crime was committed if, after referral of the complaint to the district attorney, the district attorney has declined to issue charges. If the request came from a district attorney, the law requires the judge to convene a John Doe proceeding. If the request for the proceeding came from a citizen complaint, the judge may choose to convene the proceeding if the judge determines that a proceeding is necessary to determine if a crime has been committed.

Factfinder

Wisconsin law requires a judge to conduct a John Doe proceeding, and to ascertain whether a crime has been committed and by whom. For this process, the law allows the judge to subpoena and examine any witnesses.

Manner of Inquiry

At the judge’s discretion, a John Doe proceeding may be conducted in secret. If a proceeding is secret, the record of the proceeding and all testimony is closed to inspection by

This memo provides a brief description of the Act. For more detailed information, consult the text of the law and related legislative documents at the Legislature’s Web site at: <http://www.legis.wisconsin.gov>.

anyone other than the district attorney, although portions of transcripts that are relevant to the charge may be used at the preliminary hearing or trial of the person accused.

Any person who appears before a judge in a John Doe proceeding may choose to have an attorney be present, and may consult with the attorney, during the appearance. However, the attorney is not allowed to examine the person, cross-examine other witnesses, or make any argument to the judge.

Any person who appears before a judge in a John Doe proceeding may be compelled to answer all questions, if the district attorney files a motion to compel testimony and if the court grants the motion. The law provides that a person who is compelled to provide self-incriminating testimony or evidence is immune from prosecution based on that testimony or evidence or based on evidence derived from that testimony or evidence.

Issuance of Criminal Charges

In a John Doe proceeding petitioned by someone other than the district attorney, the judge may issue a criminal complaint formally accusing a person of committing a crime if he or she finds sufficient credible evidence to warrant a prosecution of the complaint. If a judge issues a criminal complaint, criminal proceedings then proceed in the same manner as any criminal charge, including a preliminary hearing to determine if there is probable cause to believe the person committed the crime.

THE ACT

Crimes Investigated

Under **prior law**, a John Doe proceeding could be used to investigate any crime, which is defined as conduct that is prohibited by state law and punishable by fine or imprisonment or both. Conduct that is punishable only by a forfeiture is not a crime.

The Act specifies the crimes that may be investigated under a John Doe proceeding. Very generally, these crimes include the following:

- Any Class A, B, C, or D felony in the chs. 940 to 948 and 961, Stats.
- Specified Class E, F, G, H, or I felonies.
- Felony murder.
- Racketeering or continuing a criminal enterprise, if the underlying activity being investigated is one of the above-listed crimes and is listed in the definition of “racketeering activity” in s. 946.82 (4), Stats.
- A solicitation, conspiracy, or attempt to commit any of the above crimes.
- Any crime committed by an on-duty law enforcement officer, correctional officer, or state probation, parole, or extended supervision officer.

Eligibility to Conduct Proceedings

Under **prior law**, only a judge could conduct a John Doe proceeding. For these purposes, “judge” means a judge of a court of record, including reserve judges. A “permanent reserve judge” is a judge appointed by the chief justice to serve an assignment for a period of six months. Permanent reserve judges perform the same duties as other judges and may be reappointed for subsequent periods. A “temporary reserve judge” is a judge appointed by the chief justice to serve specified duties on a day-by-day basis as the chief justice directs. To be eligible to serve as a reserve judge, a person must have either served a total of six or more years as a Supreme Court justice, court of appeals judge, or a circuit court judge, or, the person must have been eligible to serve as a reserve judge before May 1, 1992.

The Act prohibits a permanent reserve judge or temporary reserve judge from conducting a John Doe proceeding.

Search Warrants

The Act specifies that a search warrant relating to a John Doe proceeding may only be issued by a judge that is not presiding over that proceeding.

Secrecy of Proceedings

Under **prior law**, at a judge’s discretion, a John Doe proceeding could be conducted in secret. As noted above, if a proceeding is secret, the record of the proceeding and all testimony is closed to inspection by anyone other than the district attorney, although portions of transcripts that are relevant to the charge may be used at the preliminary hearing or trial of the person accused.

The Act specifies that a judge may enter a secrecy order upon a showing of good cause by the district attorney and provides that the order may only apply to the judge, a district attorney or other prosecutor participating in the proceeding, law enforcement personnel admitted to a proceeding, an interpreter participating in the proceeding, or a reporter who makes or transcribes a record of the proceeding. The Act specifically prohibits a secrecy order from applying to any other person. Under the Act, any person who violates a secrecy order is subject to a fine not to exceed \$10,000 or imprisonment not to exceed nine months, or both.

The Act also sets forth ways a secrecy order may be terminated. Under the Act:

- A secrecy order is automatically terminated at the initial appearance, if a criminal complaint is filed.
- A judge must terminate a secrecy order, if any person applies to the judge for the termination and establishes that good cause no longer exists. If a judge terminates a secrecy order, the identity of the subject of the proceeding may not be disclosed without the subject’s consent, unless a criminal complaint has been filed.
- A secrecy order in effect on the Act’s effective date may only apply to the judge, a district attorney or other prosecuting attorney participating in the proceeding, law enforcement personnel admitted to a proceeding, an interpreter participating in the

proceeding, or a reporter who makes or transcribes a record of the proceeding. The Act terminates all secrecy orders covering other persons.

Length of Proceedings

Prior law did not limit the length of time that a John Doe proceeding may last.

Under **the Act**, a John Doe proceeding may not last longer than six months from either the day that the district attorney requests the judge to convene the proceeding, or from the day that the district attorney forwards to the judge all reports, records and case files, and an explanation of his or her refusal. This six-month period may only be extended if a majority of the judicial administrative district chief judges¹ find good cause for the extension. Each judge's vote must be available to the public. A John Doe proceeding may be extended through this procedure an unlimited number of times, but no extension may last more than six months.

Scope of Proceedings

Prior statutes did not limit the scope of a John Doe proceeding to investigating crimes that were a part of the original request or complaint for the proceeding. The Wisconsin Supreme Court has stated that the scope of a John Doe investigation "is essentially limited to the subject matter of the complaint upon which the John Doe is commenced. The John Doe judge has no authority to ferret out crime wherever he or she thinks it might exist." [*State v. Washington*, 83 Wis.2d 808, 822 (1978).]

Under **the Act**, a John Doe proceeding may only investigate a crime that was part of the original request or complaint, unless a majority of the judicial administrative district chief judges find good cause to add specified crimes and the identification of each judge's vote is available to the public. An unlimited number of specified crimes may be added to the scope of a proceeding, but for each additional crime, a majority of judicial administrative district chief judges must find good cause and the identification of the vote of each judge must be made available to the public.

Return of Seized Property

Wisconsin law allows a person to apply to the circuit court for the return of property that has been seized pursuant to a criminal investigation. Once an application is received, the court must: (1) provide such notice as it deems adequate to be given to the district attorney and all persons who have or may have an interest in the property; and (2) hold a hearing to hear all claims to the property's true ownership. With certain exceptions, if the right to possession is proved to the court's satisfaction, it must order the property to be returned if: (1) the property is not needed as evidence or, if needed, satisfactory arrangements can be made for its return for subsequent use as evidence; or (2) all proceedings in which it might be required have been completed.

¹ The state is divided into 10 judicial administrative districts for the purpose of administering the court system. Each district includes all the circuit courts within the district. [See s. SCR 70.17.]

In addition to the procedures described above, **the Act** provides that a judge conducting a John Doe proceeding must, at the close of the proceeding, order notice as he or she determines to be adequate to all persons who have or may have an interest in any property seized during the course of the proceeding. In addition, the Act allows a judge to commence a hearing on its own initiative to return property seized pursuant to a John Doe proceeding.

Expenditure Records

Wisconsin's Open Records Law governs public requests for government information. Records held by a governmental authority are generally required to be available for inspection and copying by the public. A "record" is any material which bears information, regardless of form and which was created or is being kept by a custodian. The Wisconsin Open Records Law does not, generally, require an authority to create a new record by extracting information from existing records and compiling the information in a new format.

The Act provides that records reflecting the costs of a John Doe proceeding and investigation are subject to Wisconsin's Open Records Law. If a request to inspect or copy a record is received, but no record exists, the recipient of the request must provide a summary amount of the costs.

Effective date: **Act 64** took effect on October 25, 2015.

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