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OAG–02–18

Attorney Grant F. Langley, et al.
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Dear Mr. Langley:

The Wisconsin Department of Justice is in receipt of your September 6, 2016 letter, co-signed by nine other city attorneys and corporation counsel, in which you requested my opinion on the administration of Wis. Stat. § 19.356, part of the Wisconsin Public Record Law, Wis. Stat. §§ 19.31 to 19.39. Section 19.356 requires an authority to provide notice and an opportunity for judicial review of an authority's decision to release a public record. Section 19.356 applies to a narrow class of record subjects.

The public records law authorizes requesters to inspect or obtain copies of "records" created or maintained by an "authority." The public records law contains one of the strongest public policy statements found in the Wisconsin Statutes. The public records law "shall be construed in every instance with a presumption of complete public access, consistent with the conduct of governmental business." Wis. Stat. § 19.31. While records are presumed to be open to public inspection and copying, the public's right to access is not absolute. Statutes, the common law, and the public policy balancing test, which weighs the public interest in disclosure of a record against the public interest in nondisclosure, provide exceptions to the presumption. *Portage Daily Register v. Columbia Cty. Sheriff's Dep't*, 2008 WI App 30, ¶ 11, 308 Wis. 2d 357, 746 N.W.2d 525, 529 (citing *Hathaway v. Joint Sch. Dist., No. 1,* 116 Wis. 2d 388, 397, 342 N.W.2d 682 (1984)).

Wisconsin Stat. § 19.356 establishes a general rule that an authority need not provide notice to a record subject prior to releasing a record in response to a public records request. It states, in part,

> 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.

Wis. Stat. § 19.356(1).

Wisconsin Stat. § 19.356(2) and (9) provide the exceptions to this general rule. Wisconsin Stat. § 19.356(2) requires an authority to serve written notice on "any record subject to whom the record pertains, either by certified mail or by personally serving" the record subject. Wis. Stat. § 19.356(2)(a). "Record subject" is defined as "an individual about whom personally identifiable information is contained in a record." Wis. Stat. § 19.32(2g). Not every person mentioned in a record must receive notice. Record subjects entitled to notice must be a focus or target of the requested record in some direct way. *See* OAG 1-06 (Aug. 3, 2006), at 2-3.

Such notice only applies in three specific circumstances. Your questions concern the circumstance identified in Wis. Stat. § 19.356(2)(a)1, therefore, this opinion will not address the remaining two circumstances. Section 19.356(2)(a) states,

> Except as provided in pars. (b) to (d) and as otherwise authorized or required by statute, if an authority decides under s. 19.35 to permit access to a record specified in this paragraph, the authority shall, before permitting access and within 3 days after making the decision to permit access, serve written notice of that decision on any record subject to whom the record pertains, 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 subs. (3) and (4). This paragraph applies only to the following records:

> 1. 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.

Wis. Stat. § 19.356(2)(a)1. Upon receiving notice, the record subject has an opportunity to challenge the release of the record. Wis. Stat. § 19.356(3)-(5).

Wisconsin Stat. § 19.356(9) provides that prior to permitting 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 must serve written notice of that decision on the record subject, either by certified mail or by personal service. Wis. Stat. § 19.356(9)(a). The record subject then has an opportunity to augment the record to be released within five days after receipt of the notice. Wis. Stat. § 19.356(9)(b).

Some ambiguity exists in the language of Wis. Stat. § 19.356. I agree that proper administration of Wis. Stat. § 19.356 is a statewide concern, and guidance in this area will benefit authorities throughout Wisconsin. Your request seeks answers to four specific questions related to Wis. Stat. § 19.356, which I will address in turn.

QUESTION ONE

> Does Wis. Stat. § 19.356(2)(a)1. apply if the record contains information related to a *former* employee? Or does Wis. Stat. § 19.356(2)(a)1. only apply if the record contains information related to a *current* employee?

The public records law's definition of "employee" does not contain a direct reference to "former employee." However, the Attorney General's longstanding interpretation is that Wis. Stat. § 19.356(2)(a)1. applies if the record contains information related to a record subject who is a current or former employee.

The Wisconsin Supreme Court has outlined the general framework for statutory interpretation in Wisconsin. The court has said, "We assume that the legislature's intent is expressed in the statutory language." *State ex rel. Kalal v.*

Circuit Court for Dane Cty., 2004 WI 58, ¶ 44, 271 Wis. 2d 633, 681 N.W.2d 110. "[T]he purpose of statutory interpretation is to determine what the statute means so that it may be given its full, proper, and intended effect." *Id*. The Wisconsin Supreme Court has "repeatedly held that statutory interpretation 'begins with the language of the statute. If the meaning of the statute is plain, we ordinarily stop the inquiry.'" *Id*. ¶ 45 (citation omitted). "Statutory language is given its common, ordinary, and accepted meaning, except that technical or specially-defined words or phrases are given their technical or special definitional meaning." *Id*.

The court has also stated that context is important. "[S]tatutory language is interpreted in the context in which it is used; not in isolation but as part of a whole; in relation to the language of surrounding or closely-related statutes; and reasonably, to avoid absurd or unreasonable results." *Id*. ¶ 46

"Statutory language is read where possible to give reasonable effect to every word, in order to avoid surplusage. 'If this process of analysis yields a plain, clear statutory meaning, then there is no ambiguity, and the statute is applied according to this ascertainment of its meaning.'" *Id*. (citations omitted). If statutory language is unambiguous, there is no need to consult extrinsic sources of interpretation, such as legislative history. *Id*. The court has stated clearly that in "construing or interpreting a statute the court is not at liberty to disregard the plain, clear words of the statute." *Id*. (citation omitted). Finally, the court favors "an interpretation that fulfills the statute's purpose." *Moustakis v. State Dep't of Justice*, 2016 WI 42, ¶ 18, 368 Wis. 2d 677, 880 N.W.2d 142 (citation omitted).

The statute defines "employee" as "any individual *who is* employed by an authority, other than an individual holding local public office or a state public office, or any individual *who is* employed by an employer other than an authority." Wis. Stat. § 19.32(1bg) (emphasis added). In reading this in the context of Wis. Stat. § 19.356(2)(a), it follows that the records subject entitled to notice is one who is employed at the time the record is created, regardless of whether they are employed currently.[1] *See Local 2489, AFSCME, AFL-CIO v. Rock Cty*., 2004 WI App 210, ¶¶ 5–6, 25–28, 277 Wis. 2d 208, 689 N.W.2d 644 (post-Wis. Stat. § 19.356 case

[1] This interpretation also addresses some practical considerations. For instance, a terminated employee who successfully grieves their termination and is reinstated would be entitled to notice regardless of whether the records request was received before or after his or her termination or reinstatement. This interpretation avoids inconsistency such as would occur under a different interpretation in a scenario in which a number of employees are terminated based on group conduct, and the timing of the terminations and public records requests vary such that only certain employees, who have yet to be terminated, would be entitled notice.

involving notice provided to a group of current and former employees in which the court did not distinguish notice to current employees from that of former employees).

The statute is written in the present tense. It states, "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 . . . ." Wis. Stat. § 19.356(2)(a)1. The use of the phrase "is created" implies that the status of the record subject should be consistent with when the record was created. Therefore, if the record subject is an employee at the time the record is created, he or she is entitled to notice even if the employee is no longer employed by the authority at the time the authority receives the request.

QUESTION TWO

> Does Wis. Stat. § 19.356(9)(a) apply if the record contains information related to a *former* officer or employee holding a local or state public office? Or does Wis. Stat. § 19.356(9)(a) only apply if the record contains information related to a *current* officer or employee holding a local or state public office?

Following the statutory interpretation framework outlined by the Wisconsin Supreme Court, I conclude that Wis. Stat. § 19.356(9) does not apply when a record contains information relating to a record subject who is an officer or employee who *formerly* held a local or state public office. The provision only applies when an officer or employee of the authority *currently* holds a local or state public office.

First, the plain language of the statute must be examined. The statute refers 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." Wis. Stat. § 19.356(9)(a) (emphasis added). Here, unlike in Wis. Stat. § 19.356(2)(a)1., the language is more clear. The legislature used the present tense to describe a record subject who *is* a state or local public office holder.

"Where statutory language is unambiguous, there is no need to consult extrinsic sources of interpretation . . . ." *Kalal,* 271 Wis. 2d 633, ¶ 46. The language

of Wis. Stat. § 19.356(9)(a) is clear, and I must interpret it so as not to "disregard the plain, clear words of the statute." *Id.* (citation omitted).

The language of Wis. Stat. § 19.356 shows that the legislature intended to create two separate notice procedures. Section 19.356(2)(a)1. applies to employees, and section 19.356(9) applies to local and state public office holders. Each notice provision fulfills a separate purpose. The interpretation contained herein is consistent with the purpose of Wis. Stat. § 19.356(9) in that it permits a current local or state public office holder to explain him or herself to the public while the official continues to serve the public.

QUESTION THREE

> If Wis. Stat. § 19.356(2)(a)1. and Wis. Stat. § 19.356(9)(a) do apply to records containing information related to former employees, or former officers or employees holding local or state public offices, what should a custodian do if he or she cannot locate the former employee or officer? Is the Authority prohibited from providing access to the requested records? Or, after a number of attempts to provide notice by certified mail and/or personal service, should the authority provide access to the requested records?

Wisconsin Stat. § 19.356(2)(a)1. and (9)(a) both require service of notice by certified mail or personal service. The statute is silent on what an authority must do should service via certified mail and personal service fail. The legislature should address this silence. However, in the absence of guidance in the public records law, I can offer some best practices.

Best practices include following other service of process laws that are consistent with the public records law's purpose. Wisconsin Stat. § 801.11 governs

service of process in Wisconsin.[2] The statute requires that service must be made with "reasonable diligence."[3] Wis. Stat. § 801.11(1). The statute requires personal service, or "[i]f with reasonable diligence the [individual] cannot be served [by personal service], then by leaving a copy of the summons at the [individual's] usual place of abode." Wis. Stat. § 801.11(1)(b). "If with reasonable diligence the [individual] cannot be served [by personally serving or by leaving a copy of the summons at the usual place of abode], service may be made by publication . . . ." Wis. Stat. § 801.11(1)(c).

Wisconsin Stat. § 801.11(1) appears reasonable and consistent with the public records law's purposes with the exception of the publication requirement. To require an authority to provide service by publication in every such instance where a record subject could not be located would frustrate one of the public records law's purposes. Several provisions of the public records law make it evident that public access is to be provided without unnecessary delay. *See Local 2489, AFSCME, AFL-CIO*, 277 Wis. 2d 208, ¶ 14 ("[T]he language of Wis. Stat. § 19.356 evinces a legislative intent that public records be promptly disclosed to a requester, even if their release is challenged by an employee."). The law requires an authority to fill or deny a request "as soon as practicable and without delay." Wis. Stat. § 19.35(4). It provides for short

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[2] Wisconsin Stat. § 801.11(1)(b) states, "If with reasonable diligence the defendant cannot be served under par. (a), then by leaving a copy of the summons at the defendant's usual place of abode:"

> 1. In the presence of some competent member of the family at least 14 years of age, who shall be informed of the contents thereof;
> 1m. In the presence of a competent adult, currently residing in the abode of the defendant, who shall be informed of the contents of the summons; or
> 2. Pursuant to the law for the substituted service of summons or like process upon defendants in actions brought in courts of general jurisdiction of the state in which service is made.

[3] The Wisconsin Court of Appeals has described "reasonable diligence" as follows:

> [D]iligence to be pursued and shown . . . which is reasonable under the circumstances and not all possible diligence which may be conceived. Nor is it that diligence which stops just short of the place where if it were continued might reasonably be expected to uncover an address . . . of the person on whom service is sought.

Loppnow v. Bielik, 2010 WI App 66, ¶ 10, 324 Wis. 2d 803, 783 N.W.2d 450 (third alteration in original) (citation omitted). The court also stated, "Although case law defining 'reasonable diligence' is sparse, § 801.11 requires the pursuit of any 'leads or information reasonably calculated to make personal service possible.'" *Id.* (citation omitted).

timeframes for records subjects to challenge or augment records. Wis. Stat. § 19.356(3)-(5), (9)(b). It also accelerates the timetable for adjudication of such matters. *See* Wis. Stat. § 19.356(7)-(8).

An authority should exercise reasonable diligence to locate and effectuate service to those entitled to notice.[4] In light of the guidance offered by the general service statute, and the language and purpose of the public records law, it is reasonable that should service fail in the manner specifically required by the public records law after reasonable diligence, the alternatives to personal service provided by the legislature elsewhere in the statutes may be used to provide notice to record subjects. Therefore, should service by certified mail or personal service fail after reasonable diligence, an authority may choose to use two of the alternative methods of service available in the general service statute.[5]

First, an authority may leave a copy of the notice at the record subject's usual place of abode in a manner substantially similar to Wis. Stat. § 801.11(1)(b). Second, if the record subject's usual place of abode cannot be located after reasonable diligence, an authority may leave a copy of the notice at the record subject's usual place of business in a matter substantially similar to Wis. Stat. § 801.11(4)(b). If, after reasonable diligence, the authority is unable to effectuate service according to the public records law's provisions and other alternatives to personal service that are consistent with the public records law's purpose, the authority may release the records. The authority should accomplish these steps as soon as practicable and without delay.

QUESTION FOUR

> Assuming Wis. Stat. § 19.356 is applicable, do authorities have to provide notice to a record subject if the record being requested was introduced into evidence at a public hearing or proceedings, has been published, or is otherwise already a publicly available record?

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[4] Some examples of reasonably diligent locating include contacting an authority's human resources department for a record subject's last known address, consulting with current employees who may be aware of updated contact information, or use of the internet or telephone directory.

[5] These alternative methods of service are not required and not exclusive. Other alternative methods of service may also be used in such circumstances.

Wisconsin Stat. § 19.356 was enacted as a result of the Wisconsin's Supreme Court's recognition of a record subject's privacy and reputational interests. By enacting Wis. Stat. § 19.356, the legislature sought to limit the extent to which notice was required while recognizing an interest in the privacy and reputation of certain record subjects.

"We assume that the legislature's intent is expressed in the statutory language." *Kalal,* 271 Wis. 2d 633, ¶ 44. As stated, the supreme court has "held that statutory interpretation 'begins with the language of the statute. If the meaning of the statute is plain, we ordinarily stop the inquiry.'" *Id.* ¶ 45 (citation omitted). In interpreting this provision of the public records law, I am not at liberty to "disregard the plain, clear words of the statute." *See id.* ¶ 46 (citation omitted). With these statutory interpretation principles in mind, I must presume that had the legislature intended to create an exception to the notice requirements for records already introduced into evidence at a public hearing or proceedings, published, or otherwise already publicly available, the legislature would have expressly provided for such an exception in the statute.[6] The public's access to certain records may be accelerated and government efficiency improved by the inclusion of such an exception. However, such an exception must come from the legislature.

If the records were previously released pursuant to Wis. Stat. § 19.35, no additional notice to record subjects is required. Section 19.356(2)(a) states that notice is required "if an authority decides *under s. 19.35 to permit access* to a record specified in this paragraph." Wis. Stat. § 19.356(2)(a) (emphasis added). With the exception of certain personally identifiable information released pursuant to Wis. Stat. § 19.35(1)(am), records released pursuant to the public records law are public records. Permitting access by one requester to records is equivalent to permitting access by the entire public to the records. *See Democratic Party of Wisconsin v. Wisconsin Department of Justice*, 2016 WI 100, ¶ 19, 372 Wis. 2d. 460, 888 N.W.2d 584 ("releasing the [record] to one effectively renders it public to all"). Therefore, once an authority, having complied with any necessary notice requirements, fulfils a requester's public records request, the authority has permitted access to the record

[6] It should be noted that, pursuant to Wis. Stat. § 19.32(2), a record does not include "published materials in the possession of an authority other than a public library that are available for sale, or that are available for inspection at a public library." Consequently, statutory notice is not required since published materials are not records.

for the purposes of Wis. Stat. § 19.356. No additional notice to records subjects is required for future requests of the same record.[7]

The public records law is essential in helping to ensure government openness and transparency. However, the language of the public records law does not address every situation or circumstance. While the Attorney General may respond to requests for advice as to the applicability of the public records law pursuant to Wis. Stat. § 19.39, the legislature has the ability to best address the circumstances posed in your questions. You may wish to contact your legislators to request that they address these areas.

Very truly yours,

BRAD D. SCHIMEL
Wisconsin Attorney General

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[7] Although, if, in response to future public records requests, an authority releases a record that a record subject augmented with written comments and documentation pursuant to Wis. Stat. § 19.356(9), the authority should also release the written comments and documentation.