
Wisconsin Legislative Council

STUDY COMMITTEE MEMO



Memo No. 2

TO: MEMBERS OF THE STUDY COMMITTEE ON UNIFORM DEATH REPORTING STANDARDS

FROM: Kelly McGraw, Staff Attorney, and Amber Otis, Senior Staff Attorney

RE: Information in Response to Committee Requests at August 17, 2022 Meeting

DATE: October 10, 2022

During the meeting on August 17, 2022, members of the Study Committee on Uniform Death Reporting Standards requested the following information from Legislative Council committee staff: (1) how an individual's death may impact privacy and record confidentiality requirements; and (2) examples of laws in other states regarding fatality review teams. This memo provides information in response to these requests.

PRIVACY AFTER DEATH

The committee asked whether a right to privacy exists after death. Broadly speaking, the term "privacy" may reference various legal doctrines, depending on the context. Under common law, the personal right to privacy is not generally protected after death, though a decedent's family members may have privacy rights regarding the decedent's information.¹ As relevant to the committee's scope and discussions, the question of "privacy" may primarily arise when access to a decedent's records is requested for certain investigatory, statistical, or public health purposes.

Courts generally focus on applicable statutes instead of interpreting common law when considering privacy after death. Certain federal and state laws address privacy, particularly in the context of records. The remainder of this section provides examples of federal and state laws governing record confidentiality, and the impact of death, if any, on those laws. In short, death may, but does not immediately, impact the confidentiality of records in the example areas of medical, education, and law enforcement records.

Medical Records

Federal law provides for the privacy of medical records under the Health Insurance Portability and Accountability Act (HIPAA). The HIPAA Privacy Rule and corresponding state law generally prohibit covered entities from disclosing protected health information without authorization from the patient. The HIPAA Privacy Rule sets minimum national standards for the disclosure of personal health

¹ Under common law, an invasion of privacy is the unjustifiable intrusion into the personal life of another without consent. The common law right to privacy is often divided into four categories: intrusion on private affairs; public disclosure of private facts; publicity that falsely characterizes; and unauthorized use of a person's identity.

information. States can choose to impose additional privacy protections. Wisconsin statutes regarding the confidentiality of patient information, codified in ch. 146, Stats., largely align with HIPAA standards. [45 C.F.R. Parts 160 and 164; ss. 146.816, 146.82, and 146.83, Stats.]

The HIPAA Privacy Rule applies to individually identifiable protected health information held by covered entities, such as health care providers and health care plans. HIPAA applies for 50 years after a patient's death. Specifically, the definition of protected health information excludes information regarding a person who has been deceased for more than 50 years. Various exceptions in HIPAA may allow access to some information before the person has been deceased for 50 years. For example, covered entities may disclose protected health information to a public health authority² that is authorized by law to collect or receive such information to prevent or control disease, injury, or disability, including the reporting of vital events such as birth or death, and the conduct of public health surveillance, investigations, and interventions. [45 C.F.R. s. 164.512 (b).]

Education Records

Federal law provides for the privacy of educational records under the Family Educational Rights and Privacy Act (FERPA). FERPA provides certain rights for parents regarding their child's education records. When a student reaches 18 years of age or attends an institution of postsecondary education at any age, all rights under FERPA transfer from the parent to the student. Education records are records that are directly related to a student and maintained by an educational institution that receives federal funds. [34 C.F.R. Part 99.]

Under FERPA, a school generally may not disclose personally identifiable information from a student's education records to a third party unless the student's parent has provided prior written consent. If the decedent has not attained 18 years of age at the time of death, then the student's parents continue to have FERPA privacy rights to the education records. If the decedent has attained 18 years of age at the time of death, or has attended an institution of postsecondary education, then the FERPA rights expire upon death.³ [See [U.S. Department of Education's Student Privacy Policy Office FAQ.](#)]

Law Enforcement Records

Certain law enforcement records may contain information about decedents. Because such records are maintained by governmental authorities, Wisconsin's public records law governs access and, in short, does not distinguish access based on whether a record's subject is deceased. By way of background, Wisconsin law generally allows requesters to obtain copies of records maintained by government authorities, subject to certain exceptions. This right to access records must be construed with a presumption of complete public access. However, a records custodian may decide that the harm done to the public by disclosure of a record outweighs the public interest in access to the record. This analysis is commonly called the "balancing test" and is applied at the time the request for access is made. In addition, access may be denied when there is a specific exemption from disclosure under the law for a particular record. [subch. II, ch. 19, Stats.]

With respect to law enforcement records, such records are presumed to be public, though exceptions exist, such as in circumstances involving on-going investigations and confidential informants. [See, s.

² A public health authority is an agency or authority of the United States, a state, a territory, a political subdivision of a state or territory, or an Indian tribe, or some related entity that is responsible for public health matters as part of its official mandate. [45 C.F.R. s. 165.501.]

³ The Wisconsin Pupil Record Law, which also addresses student record privacy, does not address whether death impacts privacy rights under state law. [s. 118.125, Stats.]

19.35 (1) (am), Stats.] In the absence of an explicit exception, a record custodian may determine that the balancing test weighs against, or in favor of, disclosure of the records, depending on the circumstances. According to the Wisconsin Department of Justice's [Wisconsin Public Records Law Compliance Guide](#), privacy and reputation may be a policy interest weighing against disclosure, though other policy interests may favor disclosure, such as public oversight of police and prosecutorial actions, reliability of corroborated evidence, and the degree to which sensitive information already has been made public.

Note, however, that state law maintains the confidentiality of law enforcement records in the context of children under the Children's Code and juveniles under the Juvenile Justice Code. Specifically, current state law requires law enforcement agency records of children and juveniles be kept separate from records of adults, and may not be open to inspection or their contents disclosed unless authorized by a statutory exception or court order. Death of a record's subject is not a distinguishing fact among the laws governing the confidentiality of law enforcement records in this context. [ss. 48.396 and 938.396, Stats.]

FATALITY REVIEW LAWS IN OTHER STATES

The committee also requested examples of other states' laws governing fatality review teams, particularly those that address record access and confidentiality. Almost all states have some type of fatality review teams, though approaches vary in composition of state and local teams, level of state support, placement of administrative leadership, supporting legislation, the types of deaths reviewed, and reporting systems used. [See, National Center for Fatality Review and Prevention, [Keeping Kids Alive; Child Death Review in the United States, 2020](#) (June 2021).]

Many states' laws address a fatality review team's ability to access records and obligation to maintain the confidentiality of those records. For example, Michigan and Indiana are two neighboring states that maintain a county-based system similar to Wisconsin and have laws governing fatality review teams. Specifically, Michigan law codifies optional, county-based child death review teams and provides that information obtained by the child death review team is confidential and may only be disclosed for limited purposes. In another example, an Indiana law codifies optional, county-based suicide and overdose fatality review teams. The Indiana law requires health systems, among other entities, to comply with a records request from a fatality review team. [Mich. Comp. Laws s. 722.627b; Ind. Code s. 16-49.5.]

KAM:AO:ksm