



Open Records Requests for Employee Investigation Records

School district officials occasionally must conduct investigations into alleged misconduct committed by district employees. During such investigations, they will likely collect or create a variety of records concerning the alleged misconduct, including, for example, notes of interviews, mental impressions, strategy and/or witness statements, and a final report. Such investigations often create interest from the media, parents, or other interested citizens who may request records related to the investigation under the Wisconsin Public Records Law (WPRL).

The Wisconsin Department of Justice, which enforces the WPRL, encourages districts which receive such requests to use a four-step inquiry in determining how to respond:

- Is there such a record?
- Is the requester entitled to access the record pursuant to statute or court decision?
- Is the requester prohibited from accessing the record pursuant to statute or court decision?
- Does the balancing test compel access to the record?

This analysis is typically performed by the district's designated records custodian ("custodian").

This *Legal Comment* addresses the custodian's analysis of a public records request for documents generated as a result of a district's internal investigation of employee misconduct

and will review several Wisconsin court cases involving such requests.¹

■ Identification of Records

The first step in responding to a request is to identify any records within the scope of the request. A "record" is defined broadly to include "any material on which written, drawn, printed, spoken, visual, or electromagnetic information or electronically generated or stored data is recorded or preserved, regardless of physical form or characteristics, that has been created or is being kept by [the district]."² Requests for information not contained in a "record" are not governed by the WPRL. Districts are also not required to create a record in response to a request.

The WPRL's definition of "record," excludes, among other things, "drafts, notes, preliminary computations, and like materials prepared for the originator's personal use or prepared by the originator in the name of a person for whom the originator is working, [and] materials that are purely the personal property of the custodian and have no relation to his or her office."³ In district internal investigations, the person assigned to perform the investigation typically takes notes during the process. The question of whether such notes fall within the scope of the statutory exemption of a "record" has been the subject of recent litigation in which a newspaper made a request for documents created during the course of a

district investigation into allegations of impropriety surrounding a school athletic program, including documents created by district officials assigned to do the interviews. *Voice of Wisconsin Rapids, LLC v. Wisconsin Rapids Public School District*.⁴ The district took the position that the officials' interview notes fell within the WPRL's exclusion from disclosure because the notes were prepared for the officials' personal use and, thus, did not constitute a "record." The court of appeals agreed, and its decision is helpful in defining what particular "notes" are exempt from disclosure.

The court initially determined that the documents at issue were "notes." They consisted of handwritten documents, at times barely legible, and included post-it notes, telephone message slips, and short-hand comments of the investigatory interviews that reflected "hurried, fragmentary, and informal writing." The court also concluded that these "notes" were "prepared for the originator's personal use." The court rejected the newspaper's suggestion that the notes were not personal because they were generated in the course of an official district function; namely, a formal investigation. Rather, the court indicated that whether a "note" is personal turns on whether "the notes are distributed to others for purposes of communicating information" and whether they are "retained for the purpose of memorializing agency activity." If so, they are subject to disclosure, as opposed to

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notes which are created and retained for the “sole purpose of ‘refresh[ing] one’s recollection at a later time.”

The court found it significant that these notes were merely raw material for generating the culminating disciplinary document and were not given by their creators to other district officials in the investigation to review, but rather were used during the interviewers’ oral report of their investigation. The notes were kept by the creators and were not placed in any other district file. The notes did not appear to the court to “have been written in a style or format that would ordinarily be used when the originators’ purposes included distribution to others or establishment of formal authority positions or actions.”

■ Statutory Prohibition From Disclosure

If the custodian determines that he or she has “records” subject to disclosure involving an investigation, certain statutes preclude the disclosure of those records. For example, if the record relates to employee conduct with a student, the record may be exempt from disclosure under the federal or state pupil records laws. Also, the WPRL prohibits the disclosure of records containing “information relating to the *current* investigation of possible employee criminal conduct or misconduct connected to employment prior to the disposition of the investigation” other than to the employee or his or her representative.⁵ The application of this prohibition depends on whether the person being investigated is an “employee” and on the time the request is made.

The exception does not apply if the “employee” is a “local public official.” The term “employee” is defined as “any individual employed by a governmental authority, who is not an individual holding a local public office.”⁶ A “local public office” is defined to include various offices listed under the Code of Ethics for Public Officials and Employees, as well as “any appointive office or position of a local government unit in which an individual serves as the head of the department, agency, or division of a

local government unit.”⁷ This category encompasses district administrators, business managers, principals and board members. If an investigative record involves a “local public official,” it is not exempt from disclosure under this provision and any determination to deny access to such records must be based on application of the balancing test.

After an investigation reaches its “disposition,” the custodian can no longer rely on this exemption to deny access to employee investigation records. The timing of when an investigation reaches that point has been the subject of several lawsuits. In *Local 2489, AFSCME v. Rock County*,⁸ the county investigated and disciplined several employees for using county computers to view inappropriate images. The employees filed a grievance under their collective bargaining agreement. Prior to the grievance hearing, a newspaper requested copies of the reports resulting from the county’s investigation. The court of appeals construed the term “investigation” to refer to an investigation conducted by the employer as a prelude to disciplinary action. The fact that the employee had recourse to challenge that action in another forum did not render the records generated during the investigation exempt from disclosure under this exception. Rather, the court concluded that an “investigation” reaches its “disposition” at the time the employer acts to impose discipline on an employee as a result of the investigation. A similar result was reached in *Zellner v. Cedarburg School District*.⁹

The WPRL also precludes from production “(i) nformation relating to one or more specific employees that is used by an authority or by the employer of the employees for staff management planning, including performance evaluations, judgments, or recommendations concerning future salary adjustments or other wage treatments, management bonus plans, promotions, job assignments, letters of reference, or other comments or ratings relating to employees.”¹⁰ The court of appeals rejected an argument that the phrase “staff management planning” creates a blanket

exemption for disciplinary documents generated by an investigation given they would likely be used as a part of future performance evaluations. *Kroepelin v. Wisconsin DNR*.¹¹ In doing so, the court recognized a number of cases which demonstrated a strong public policy of disclosing disciplinary records of public employees and officials where the conduct involves violations of the law or significant work rules. The court concluded that the legislature did not intend to abrogate this policy through an interpretation of “staff management planning” that would create a blanket exemption of disclosure of such records.

■ Balancing Test

If an open records request covers a “record” and does not fall within one of the statutory prohibitions from disclosure, the custodian must engage in a “balancing test” in which the public interest in disclosure of a record is weighed against any public interest in nondisclosure. There is a strong presumption favoring disclosure of public records, in particular disciplinary and investigatory records after the investigation has been concluded.

For example, in *Linzmeier v. Forcey*,¹² a teacher was investigated for possible inappropriate contact with female students. No criminal charges were filed and the district did not initiate any disciplinary action against the teacher. After the investigation was closed, a newspaper filed an open records request for access to the investigation report, a record to which no statutory exception to disclosure applied. The district engaged in the balancing test and took into consideration the fact that releasing the investigation report could potentially harm the teacher’s reputation. It concluded, however, that the public’s right to know about possible misconduct of its government employees, especially those put in positions of trust, outweighed any potential harm to the teacher and decided to disclose the records. This decision was affirmed by the court.

In another case, *Seifert v. School Dist. of Sheboygan Falls*,¹³ a district

hired an attorney to conduct an investigation into allegations that a high school coach had mistreated a student. Prior to the investigation, the student's parents filed a notice of injury against the district. After the investigation, the parents sought access to all records related to the investigation. The district denied the request, based in part on its conclusion that the records were the work product of the attorney and were compiled in connection with a matter that could lead to litigation. After conducting an analysis under the WPRL, the court held that the district's right to prepare for litigation by retaining counsel who generated "records" outweighed the public's right to disclosure of those records.

■ Notice to Record Subjects

If the custodian decides that records related to an investigation must be disclosed, the custodian must determine whether such records require notice to any individuals prior to disclosure. Under the WPRL, in certain instances, the custodian must provide notice to "record subjects" before disclosing the records. A "record subject" is defined as "an individual about whom personally identifiable information is contained in the record."¹⁴

For example, such notice must be provided when the district discloses a record containing information "that is the result of an investigation into a disciplinary matter involving the employee or a possible employment-related violation by the employee or a statute, ordinance, rule, regulation or policy of the employee's employer."¹⁵ In such instances, any "record subject" to whom the record pertains must be provided notice as set forth under the WPRL. This notice must inform the "record subject" that he or she has the right to commence an action in court to prevent the disclosure of the record that pertains to him or her. Thus, the "record subject" has both the right to notice and judicial review.

In contrast, if the "record subject" is a "local public official,"

he or she does not have any statutory right to commence an action to prevent the disclosure of a similar record. Instead, a "local public official" only has the right to notice of disclosure and the right to augment the record before it is disclosed.¹⁶ Because of these differences, the custodian must determine whether any requested record relates to an "employee" or a "local public official." In some cases, the record may relate to both and, in such cases, different notices must be sent to the different record subjects. However, the duty to notify does not extend to every "record subject" who happens to be named in the record, but instead only applies to situations when the record disclosed "pertains to" the record subject.¹⁷

In a recent case, the Wisconsin Supreme Court concluded that an individual who qualified as a "local public official" only had limited rights related to notice and augmentation and nothing more. In *Moustakis v. Wisconsin Department of Justice*,¹⁸ a district attorney argued that he also had the right to file an action under the WPRL to block the release of records of complaints and investigations in which he was the record subject. He asserted that he had this right because he believed that he met the definition of "employee" under the WPRL. The court rejected this argument as contrary to a reasonable reading of the WPRL. Instead, the district attorney, as a "local public official," only had the right to notice and augmentation.

■ Conclusion

Districts face many challenges when responding to requests for investigation records. These include determining whether the request involves a "record," whether that record falls within the prohibition from disclosure, and, if not, whether the presumption in favor of disclosure is outweighed in the particular circumstances. In addition, a legal custodian must follow the notice requirements and ensure that all record subjects are provided proper

notice prior to disclosure of the records. Understanding these principles will not only assist in complying with the WPRL, but will also provide guidance to districts in how it approaches an investigation of employee misconduct. For example, districts should consider at the outset who will do the investigation, what types of documents or notes will be generated, who will receive or review those notes, who will maintain them at the conclusion of the investigation, and when the investigation will conclude. The answer to these questions will determine whether and when such investigatory documents will be disclosed if the district receives an open records request. ■

■ End Notes

1. For additional information related to this topic, see *Wisconsin School News*, "Disclosure of Employee Investigation and Disciplinary Records" (July 2007); "Access to Employee Investigation Records Under the Public Records Law" (September 2005).
2. Wis. Stat. s. 19.32(2).
3. *Id.* (Emphasis added).
4. 2015 WI App. 53, 807 N.W. 2d 825, (Ct. App. 2015).
5. Wis. Stat. s. 19.36(10)(b)(Emphasis added).
6. Wis. Stat. s. 19.32(1bg).
7. Wis. Stat. s. 19.32(1dm).
8. 2004 WI App 210, 277 Wis.2d 208, 689 N.W.2d 644.
9. 2007 WI 53, 300 Wis. 2d 290, 731 N.W.2d 240.
10. Wis. Stat. s. 19.36(10)(d).
11. 2006 WI App 227, ¶20, 297 Wis.2d 254, 725 N.W.2d 286.
12. 2002 WI 84, ¶15, 254 Wis. 2d 306, 646 N.W.2d 811.
13. 2007 WI App 207, 305 Wis. 2d 582, 740 N.W.2d 177.
14. Wis. Stat. s. 19.32(2g).
15. Wis. Stat. s. 19.356(2).
16. Wis. Stat. s. 19.356(9).
17. 2006 Wis. Op. Atty. 1 (August 3, 2006).
18. 2016 WI 42, 368 Wis. 2d 677, 880 N.W.2d 142.

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