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Metadata is a Public Record: What Does This Mean for Municipalities?

The Wisconsin Court of Appeals issued a decision on June 5, 2019, *Leuders v. Krug,* No. 2018AP431, that impacts the way that municipalities must respond to records requests for electronic files.

Review of Public Records Law

Records maintained by municipalities are subject to Wisconsin's Public Records Law. The Public Records Law permits access to certain records by the public upon request. The presumption is that any record is available to the public, unless there is a basis for nondisclosure, such as if a specific exception to disclosure applies or if application of the balancing test provides a basis for nondisclosure. Some exceptions include: records protected by attorney-client privilege, records that are confidential under federal or state law, and records that are purely personal.

When a municipality receives a records request, the municipality's records custodian locates the record and determines how the municipality will respond to the request, including determining if the record is subject to disclosure. If only part of the record is subject to disclosure, the records custodian must redact the part of the record subject to the exception and generally must produce the remaining portion of the record. The records custodian must provide the requested record(s) to the requestor as soon as practicable and without delay. The municipality may charge the requestor for the cost of copying and locating the record, but may not charge the requestor for the cost of redacting the record. Any redactions or denials of written requests must be accompanied by an explanation that will be the justification in any court case if a challenge is filed, and because public bodies are limited in any court case to the reasons stated in the initial denial, it's best to be complete.

The Case

Bill Leuders, editor of *The Progressive* magazine and president of the Wisconsin Freedom of Information Council, requested State Representative Scott Krug's correspondence with constituents related to water conservation. Krug's office promptly responded to the records request with printed copies of the relevant emails. Two days after viewing the email printouts, Leuders made a second request, "to receive

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the records in electronic form." Krug declined this request because he believed that the paper printouts previously provided fulfilled his duty under the Public Records Law. Leuders filed suit in court to order Krug to deliver an "electronic, native copy of the requested records."

The court directed Krug to deliver the native email files, as Leuders had requested. The court held that the Public Records Law required Krug to produce an actual copy of the records requested. In response to Leuders' first request for "correspondence," Krug fulfilled his duty by providing printed email copies. However, Krug failed to properly provide records in response to Leuders' second, enhanced request for the native email files. Leuders specifically stated he wanted to look at the metadata so he could see who sent emails and when. The court held that the native email files contain important metadata that is not present in printed copies, and that metadata is also a record. Accordingly, the court held that Krug must honor the request specifically for electronic files so that the metadata is accessible.

In this case, Krug did not claim that the metadata Leuders requested was not subject to disclosure or subject to redaction under any applicable exception or under the balancing test. However, the issue of metadata or other information potentially being subject to redaction can be crucial for municipalities when complying with records requests.

What is Metadata?

Metadata is data about data. Every electronic resource—email, text document, Google search, social media post, text message, phone call, spreadsheet, or photograph—contains metadata. As an analogy, if the text of a book is the "data," the title, author, table of contents, publisher, and index are the "metadata." There are programs available that can "scrub" the metadata from the electronic resources before it is sent to others, just as the cover and title page of a book can be torn off.

For an electronic resource, metadata is typically not physically present on a print-out of the resource, but still contains information about that resource. The metadata is accessible only from the original electronic or "native" file. For example, the metadata in a text document can include: the identity of the "owner" of the document; the dates the document was created, accessed, or modified (thus some of the information could be considered a "draft," which is usually not subject to disclosure); all "tracked changes," including the order of the changes and comments; identities of document editors; the file location; and the file size. The metadata within email files can include: the email addresses of the senders and recipients, including those Bcc'd on the email; the date and time the email was sent and received; the sender and recipient's IP addresses; the electronic "path" that the email took to go from the sender to the recipient; and if any documents were attached to the email.

Implications for Municipalities

As just one potential example, imagine that a municipality receives a records request for a contract between the municipality and a vendor, in its native, electronic Word document form (prior to being printed out and signed by the parties). The municipality's lawyer reviewed the contract, and throughout the process used the "track changes" function on the Word document to make comments and suggest alterations to the contract. The comments included the lawyer's candid assessment of the potential legal risk that could arise under the contract. The municipality accepted the lawyer's changes and finalized the contract. Disclosure of the native Word document could potentially provide the requestor with access to metadata in the form of the "track changes" that contain attorney-client privileged information. If the municipality discloses that portion of the metadata, the attorney-client privilege could be waived with respect to the lawyer's advice regarding that contract. Therefore, the municipality may be able to object under the Public Records Law to the disclosure of that portion of the metadata.

This type of scenario will likely create challenges for municipalities. How should municipalities respond to these records requests for electronic copies of files containing metadata, like "tracked changes" or comments on a Word document, that are protected under attorney-client privilege? Can just the metadata containing protected information be redacted through scrubbing? If not, can all the metadata associated with a document be scrubbed without violating the Public Records Law? Can municipalities provide the metadata in a non-electronic format (such as in a screenshot) and then redact that screenshot?

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Wisconsin Legislature Considers Senate Bill 105 to Exempt Municipalities From Fair Dealership Law

In June 2017, the Wisconsin Supreme Court expanded the Wisconsin Fair Dealership Law ("WFDL") to apply to municipalities by holding that municipalities fell within the law's definition of "person". *Benson v. City of Madison,* 2017 WI 65 (*"Benson")*. The decision marked the first time that any court in the country had applied fair dealership law to a local government body. Recently, the Wisconsin legislature introduced Senate Bill 105 ("S.B. 105"), which would overturn the Court's decision in Benson by amending the definition of "person" under the WFDL to exclude municipalities.

In *Benson* the Court reviewed the contractual relationship between City of Madison ("City") and four golf pros to determine whether their relationship was subject to the WFDL. The City contracted with the golf pros to operate and manage four city-owned, public golf courses. Under the agreements between the City and the golf pros, the golf pros managed clubhouse operations at the golf courses by performing tasks such as colleting green fees, hiring attendants, selling concessions, and teaching lessons while the City maintained the physical golf course. The agreements provided that the City would pay each golf pro a base contract payment and the golf pros would receive a percentage of revenue from concessions, merchandise sales, golf instruction, and golf cart and club rentals.

A few months before their contracts were set to expire, the City informed the golf pros that golf operations were not sustainable and asked them to submit new proposals for clubhouse operations for the next contract term. The golf pros submitted proposals; however, the City decided to internalize clubhouse operations and informed the golf pros that it would not be renewing their contracts. Subsequently, the golf pros sued the City alleging that the City violated the WFDL when it failed to renew their contracts. The circuit court held that the relationship between the City and the golf pros was not a dealership under the WFDL and the Court of Appeals affirmed.

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Wedding Barn Alcohol Licensing Update: Evers Administration Not Requiring Wedding Barns to Hold Alcohol Licenses

In March, Governor Tony Evers stated that his administration does not interpret Wisconsin's alcohol licensing law as requiring owners of wedding barns to hold alcohol licenses for private events where alcohol is not sold by the owner. This is counter to former Attorney General Brad Schimel's November 16, 2018, informal analysis that concluded wedding barns are "public places" subject to alcohol licensing laws. AG Schimel's analysis sparked confusion among municipalities and businesses, and a lawsuit by wedding barn owners against Governor Evers and Attorney General Josh Kaul, which is ongoing as of this writing.

Because Governor Evers' position is consistent with prior Department of Revenue practices, there should be little regulatory impact to municipalities from the announcement—at least as far as wedding barns are concerned. In news releases, the Tavern League of Wisconsin continues to believe that wedding barns should be required to hold alcohol licenses. The Tavern League views the Evers Administration's position as allowing a "licensing loophole" that also may be used by restaurants and taverns to own adjacent but unlicensed private event rooms that may be rented out for carry-in alcohol consumption. It is possible that the Tavern League's opinion may spark businesses holding alcohol licenses to request changes to their licensed premises.

The Department of Revenue appears to be working on a new Fact Sheet (Fact Sheet 3111) for when a person must obtain an alcohol beverage retail license. The comment period closed on April 10, 2019, and the draft Fact Sheet is no longer available on the DOR website. As presented for comment, the draft Fact Sheet supported both the Evers Administration's position on wedding barns and the Tavern League's interpretation allowing separate but unlicensed premises adjacent to licensed premises. Municipalities should continue to pay attention to this issue as it unfolds.

— Jared W. Smith

ABCs on CBD

In what feels like the blink of an eye, one can now find countless products containing CBD being sold everywhere throughout the State of Wisconsin. Municipal employees may be wondering about the substance, its legality, and whether villages, towns, and cities can and should take any steps to regulate retail sales within their territory. This article provides a big-picture overview for those that may not be familiar with the topic.

CBD is one of the chemical compounds found in cannabis. CBD does not appear to have any psychotropic effects associated with THC found in marijuana (that is, it does not cause a "high"), but it may offer relief for patients suffering from a range of maladies, including epilepsy, PTSD, and insomnia. Indeed, in 2018 the FTC approved the drug Epidiolex, which is a CBD oral solution for the treatment of rare seizure disorders.

The Agriculture Improvement Act of 2018 (better known as the "2018 Farm Bill") removed hemp and its byproducts from the Controlled Substances Act, as long as the hemp-based product contains no more than 0.3 percent THC on a dry-weight basis. But that does not mean the legal status of CBD is clear. To the contrary, the Food and Drug Administration maintains that the federal Food, Drug, and Cosmetic Act prohibits the addition of CBD to food products or dietary supplements sold in interstate commerce, and the Alcohol and Tobacco Tax and Trade Bureau of the U.S. Department of the Treasury has recently announced that it will not currently approve the use of CBD as an ingredient in wine, beer, or liquor. That said, the FDA is actively exploring the issue in rulemaking proceedings and may provide greater clarity soon regarding federal law.

Products containing THC are not legal to sell or possess in Wisconsin, but possession of CBD is legal under very limited circumstances. Specifically, someone needs to have a certification from a physician that the CBD is being used to treat a medical condition. And the State has created an "industrial hemp" program to be administered by the Wisconsin Department of Agriculture, Trade, and Consumer Protection ("DATCP"), requiring DATCP to promulgate rules "to maximize opportunity for a person to plant, grow, cultivate, harvest, sample, test, process, transport, transfer, take possession of, sell, import, and export industrial hemp to the greatest extent authorized by federal law." Wis. Stat. § 94.55(2). Former Attorney Brad Schimel issued a statement indicating that the sale of products made from industrial hemp are lawful and will not be subject to prosecution, and current Attorney General Josh Kaul has not given any indication that he intends to take the opposite view.

This confusing legal landscape may make it difficult for municipalities to determine the best way to proceed in order to promote the public health and safety of its residents. Local public nuisance and zoning laws might be available tools that could restrict where retail stores selling CBD may be located and place other reasonable regulations on the business, but municipalities should consult with an attorney to determine the best course for their individual needs and circumstances. And this area is likely to see lots of development and change in the coming years. Rest assured, if the CBD craze has not landed in your home town yet, it is likely just a matter of time.

— Barry J. Blonien

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Municipalities faced with such conundrums should consult with their IT departments or vendors to discuss exactly what kind of metadata may be available in the requested electronic files, and determine what appropriate methods may be available for redacting/scrubbing electronic metadata. They should also consult with their legal counsel to determine whether any or all of the metadata is subject to disclosure. The court did not consider these issues as they were not raised in this case. However, records custodians for public entities now have at least one additional step they must take to ensure that they do not accidentally disclose protected information and yet remain compliant with their duties under the Public Records Law.

Also of note: In May 2019 the Wisconsin Department of Justice updated its Wisconsin Public Records Law Compliance Guide and its Wisconsin Open Meetings Law Compliance Guide. These can be very valuable resources for municipalities who have to navigate these laws.

— Brian P. Goodman

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In a case of first impression, the Court held that the contractual relationship between the City and the golf pros was a dealership under the WFDL. In relevant part, the WFDL defines a dealership as a "contract or agreement . . . between 2 or more persons, by which a person is granted the right to sell or distribute goods or services." Wis. Stat. § 135.02(3)(a). The Court reasoned that a municipality was a "person" as defined by the WFDL because the WFDL's definition of person included corporations and statutes and court decisions referred to a municipality as a "body corporate" and a "municipal corporation." Therefore, the Court concluded that a municipality was a corporation subject to the WFDL.

As discussed in Justice Abrahamson's dissent in *Benson*, the majority opinion greatly limited a municipality's ability to contract government services to independent contractors. The decision forced municipalities to review both existing and future contracts to determine whether the contractual relationship was a dealership. If the relationship was a dealership, the WFDL would require the municipality to give 90-day notice and good cause before terminating the contract. Because the WFDL does not consider insufficient capital to be good cause, the WFDL would force a municipality with inadequate financial resources to be bound to a contract or face a lawsuit for violating the WFDL if it terminated the contract. With this reality, municipalities had to weigh the costs of being subject to the WFDL against the expense of providing certain municipal services. Rather than be subject to the WFDL, the Court's decision forced some municipalities to decide not to contract out certain municipal services even though third-party operation would be more efficient than municipal operation and, in some cases, may have caused municipalities to decide not to provide certain municipal services.

Earlier this year, the Wisconsin legislature introduced S.B. 105, which would amend the WFDL's definition of "person" to exclude "a unit or instrumentality of the federal government, the state, a local government." Co-sponsors from both the Senate and Assembly introduced this bill. The Senate passed S.B. 105 on June 5, 2019, and the Assembly received it on the same day. If the legislature passes S.B. 105, municipalities will be exempt from the WFDL and will not have to worry about the ramifications of the WFDL when entering into third-party contracts for municipal services.

— Catherine E. Wiese

Boardman Clark Welcomes Attorneys Eric Hagen and Catherine Wiese

Boardman & Clark LLP is pleased to announce Eric Hagen has joined the firm. Eric is an experienced transactional attorney and general practitioner, and he will work primarily with the firm's municipal and school practice groups. Eric's general municipal practice includes land use and zoning policy, ordinance drafting and implementation, contract drafting, municipal prosecution, and municipal related labor and employment matters. Eric will work primarily out of Boardman's Fennimore office and is assisting with the representation of numerous municipalities located throughout Southwestern Wisconsin. Eric received his J.D. from the Marquette University Law School.

Boardman Clark is also pleased to announce that Catherine Wiese has joined the firm as an associate. Catherine graduated cum laude in May 2019 from University of Wisconsin Law School. She graduated summa cum laude in 2015 from St. Norbert College in De Pere, Wisconsin with a degree in Political Science. During law school, Catherine clerked for Boardman Clark and worked as a law clerk at the Office of the City Attorney in Madison, Wisconsin. Catherine will be working in the municipal law practice group, as well as a number of other areas in the firm, including real estate and land use law.

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