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Appellate Court Rules Milwaukee May Enforce Its Residency Ordinance

In a July 21, 2015 decision, the Wisconsin Court of Appeals ruled that the City of Milwaukee may enforce its residency ordinance and that the ordinance was not "trumped" by Wis. Stat. § 66.0502, the law enacted in 2014 that abolished local residency requirements. *Black v. City of Milwaukee*, Appeal No. 2014AP400 (July 21, 2015). Milwaukee adopted its residency ordinance, which requires all City employees to live within the City, pursuant to its home rule authority under the Wisconsin Constitution Article XI, § 3.(1). That provision states that "[c]ities and villages organized pursuant to state law may determine their local affairs and government, subject only to this constitution and to such enactments of the legislature of statewide concern as with uniformity shall affect very city or every village." As the court explained, an ordinance created pursuant to a city's constitutional home rule authority trumps any state law that conflicts with the ordinance unless the state law involves a matter of statewide concern and affects every city and village with uniformity.

In reaching its conclusion, the court first determined that Wis. Stat. § 66.0502 did not involve a matter of statewide concern, despite the legislative finding that "public employee residency requirements are a matter of statewide concern." The court made clear that such unsubstantiated statements by the legislature are insufficient to support a finding that the statute deals with a matter of statewide concern. On the contrary, courts are charged with making such determinations on a case-by-case basis by examining the facts in the record. Here, those facts came from a Legislative Fiscal Bureau paper that made clear that the goal of the statute was to target the City of Milwaukee. According to the court, nearly every portion of the Bureau's analysis explains in great detail how Milwaukee, but no other city or village, will be negatively affected by the proposed legislation.

Having concluded that Wis. Stat. § 66.0502 does not involve a matter of statewide concern, the court next considered whether the statute uniformly affects every city or village. In short order, the court concluded that the statute would have a disparate impact on the City of Milwaukee. According to the court, while the statute does not explicitly single out Milwaukee, "the facts in the record make clear that only one city – Milwaukee – will be deeply and broadly affected." Moreover, the court opined that "the notion that a statute purports to gut the tax bases and compromise neighborhood integrity of *all* municipalities would pass both houses of the legislature defies logic."

In sum, the court concluded that Wis. Stat. § 66.0502 does not apply to the City of Milwaukee's residency requirement. Because the decision was based upon Wisconsin's constitutional home rule provision as opposed to the statutory home rule provision, the court's ruling likely does not impact the applicability of § 66.0502 on local residency requirements unless they were enacted as a municipal charter ordinance.

— Anita T. Gallucci

New Open Records Court Cases Are Relevant for Municipalities

In June 2015, the Wisconsin Supreme Court and the Wisconsin Court of Appeals issued decisions involving the Wisconsin Public Records Law that provides significant guidance for municipalities. In both cases, the courts ruled in favor of actions taken by the records custodian. This article will briefly discuss each case and then consider the impact of these cases on municipalities.

"Notes" Compiled During Investigation Are Not Subject to Disclosure

In *Voice of Wisconsin Rapids, LLC v. Wisconsin Rapids Public School District*, Case No. 2014AP1256 (June 4, 2015), the Wisconsin Rapids Public School District received a request for records related to allegations of impropriety surrounding a school athletic program. The District had conducted an investigation into these allegations, including interviews conducted by district employees. The employees took notes during the interviews.

In response to the request, the District withheld documents for various reasons, including that the requested documents did not qualify as "records" under the Public Records Law because they were "notes" that are excluded from the definition of a "record." A "record" does not include "drafts, notes, preliminary computations and like materials prepared for the originator's personal use." The District noted that the withheld documents were created for the personal use of district employees since they were never exchanged, shared with anyone, or otherwise available to anyone other than the person drafting the notes.

The Wisconsin Court of Appeals concluded that the documents were "notes" and, therefore, were not "records" subject to disclosure under the law. According to the court, the term "notes" covers a broad range of frequently created, informal writings. The "notes" in this case were mostly handwritten and at times barely legible, included copies of post-it notes and telephone message slips, and reflected hurried, fragmentary, and informal writing. In light of the above, the court concluded that the writings were in the nature of notes created for and used by their drafters as part of their preparation for, or as part of their processing after, interviews that they conducted.

After the court determined that the documents were "notes," it then focused on whether the "notes" were "prepared for the originator's personal use." In its analysis, the court noted that the exclusion of material "prepared for the originator's personal use" is to be construed narrowly. Typically, this exclusion is properly utilized when a person takes notes for the sole purpose of refreshing his or her recollection at a later time. Such notes continue to fall within the exclusion even if the drafter later confers with others for the purpose of verifying the correctness of the notes and the sole purpose for such verification and retention continues to be to refresh the drafter's recollection at a later time. However, if the notes are distributed to others for the purpose of communicating information, or if they are retained for the purpose of memorializing agency activity, the notes would go beyond mere personal use and would, therefore, not be excluded from the definition of a "record." The Court held that based on the specific facts of this case, the interview notes taken by the employees were for their personal use and, therefore, were not "records."

No Unlawful Denial or Delay By Municipality When No Record Existed

In *Journal Times v. City of Racine Board of Police and Fire*, 2015 WI 56 (June 18, 2015), the Wisconsin Supreme Court reviewed whether the City of Racine Board of Police and Fire Commission unlawfully denied or delayed disclosure of meeting minutes. The newspaper had requested the results of a vote taken in a closed session meeting during which the Commission had decided to reopen the process of hiring a police chief.

No records existed at the time of the request since the person who normally took notes and drafted minutes did not attend the meeting and, therefore, no minutes of that meeting

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Prevailing Wage Law for Municipal Construction Projects Eliminated Beginning in 2017

The prevailing wage law applicable to local governments is completely repealed as of January 1, 2017. The repeal is included in 2015 Wisconsin Act 55, the Wisconsin budget.

The budget bill also included a sales tax exemption for materials sold to construction contractors for incorporation into a public project. This provision, however, was vetoed by the Governor. In his veto message, the Governor stated that he "supports a sales and use tax exemption for goods sold to a construction contractor, while fulfilling a real property construction activity, when the goods are transferred to Wisconsin elementary and secondary school districts, municipalities or nonprofit entities if such goods will be a part of a facility located within the state," but that the language included in the budget is much broader than the intended scope. He encourages separate legislation to enact the intended exemption.

— Lawrie Kobza

Legislature Limits Kenosha's Ability to Deny Extension of Municipal Water or Sewer Service

In its last action before sending the budget bill to the full Legislature, Wisconsin's Joint Finance Committee approved Motion 999, including Item 66, which limits a municipality's ability to deny municipal water or sewer service extensions to a neighboring municipality. Under Item 66, a municipality (including a town) that is currently receiving water or sewer service from a neighboring municipal utility in a portion of the municipality may request additional water or sewer service extensions from that neighboring municipal utility. The requesting municipality may specify the point on the neighbor's municipal utility's system from which service is to be extended. The neighboring municipal utility must approve or disapprove of the request in writing within 45 days, and may only disapprove a request if the utility does not have sufficient capacity to serve the area that is the subject of the request or if the request would have a significant adverse effect on the utility. A requesting municipality may appeal any decision denying the extension. Item 66 overrides any enacted ordinance or agreement specifying that the municipality is not obligated to provide utility service beyond the area covered by the ordinance or agreement.

Municipal utility organizations strongly opposed Item 66 and asked legislators to remove Item 66 from the budget. Rather than remove it from the budget completely, however, Item 66 was amended to apply only to municipalities located in Kenosha County. The budget as passed, and as signed by the Governor, includes this provision on the extension of water and sewer in Kenosha County as Wis. Stat. § 66.0813(5m).

Based upon newspaper reports, the impetus of the legislation was a particular development in the Town of Somers adjacent to the City of Kenosha. An existing water and sewer agreement between Kenosha and Somers requires Kenosha to provide water and sewer service anywhere in Somers provided service is taken at certain specified master-meter locations. However, there apparently was interest from a developer or property-owner in the Town of Somers in obtaining service at a different location. Rather than seeking to negotiate a revision to the existing water and sewer agreement to allow service at this other location, legislation was sought and obtained to override the agreement.

The passage of this legislation should be of concern to municipalities for multiple reasons. First, this legislation which was limited to municipalities in Kenosha County could easily be extended to municipalities anywhere in Wisconsin. Second, it is disturbing that the Legislature was willing to adopt legislation to override a previously negotiated agreement between two municipalities. If the terms of a negotiated agreement can be overridden so easily, it calls into question the binding nature of all intergovernmental agreements. Third, the Legislature's willingness to dictate how a municipality is to use its municipal assets is also troubling. This raises a question of the extent of a municipality's authority to control its own municipal assets, and how easily the Legislature can supersede that municipal control.

— Lawrie Kobza

New Open Records Court Cases Are Relevant for Municipalities

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had been drafted. However, the Commission denied the request based on policy reasons. The newspaper filed a complaint alleging a violation of the Open Records Law, at which point an attorney for the Commission informed the newspaper of the vote taken during the closed session. However, the newspaper did not drop the lawsuit; instead, it argued that it was entitled to attorney fees because the Commission unlawfully denied or delayed the release of the minutes.

The Supreme Court concluded that the newspaper was not entitled to its requested relief. The court based its decision, in part, on the fact that no responsive record existed at the time of the request and that a reasonable interpretation of the request was that it was for "information," rather than a specific record. Further, the Commission responded to the newspaper with reasonable diligence and released the requested information, even though it was not required to provide the information in response to the request. As a result, the newspaper was not entitled to attorney fees because it did not prevail in substantial part in the lawsuit.

Important Considerations for Records Custodians

Both of these cases provide good reminders for records custodians related to the initial steps in responding to any records request.

One is to determine whether any "records" exist that are within the scope of the request. If no "record" exists, then the records custodian can simply reply to the requester that no record exists that is within the scope of the request. The Public Records Law does not require municipal officials to create records by extracting information from existing records and compiling it into a new format, nor does it require responses to requests for information that is not in a record.

Another step is to determine whether the documents within the scope of the request are actually "records" as that term is defined by the Public Records Law. Some documents may fall outside of the definition of "records" because they are "notes," "drafts" or purely personal in nature. A careful examination of the documents and the circumstances surrounding the creation of them is important before making any determination to disclose the documents.

— Richard F. Verstegen

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