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## Records Custodians Not Required To Produce Identical Copies of Open Records

In a decision recommended for publication, the court of appeals has held that records custodians are not required to produce identical copies of open records along with the original records. *Stone v. Board of Regents*, Appeal No. 2006 AP 2537 (September 13, 2007).

Stone was employed by U.W. - Madison. Believing that he was being slated for termination, Stone served an open records request on his supervisor's supervisor seeking any documents held by certain employees referring to him by name. The employees responded that they had no responsive hard copy documents that were not available electronically. They printed out copies of the responsive materials and then had photocopies made. On reviewing the documents that were produced, Stone suspected that the employees had destroyed some responsive documents. He then brought a mandamus action under the Open Records law. On summary judgment, the employees averred that they had destroyed some extra copies of responsive documents, but that they were identical to the documents that were produced. Stone had no evidence that the documents were not identical.

Stone argued that the employees should be held to have violated section 19.35(5) by destroying responsive documents. He asserted that allowing

custodians to destroy documents would place too much control in their hands to determine what constituted identical documents and would prevent requesters from examining the documents to verify that custodians had not wilfully or inadvertently eliminated responsive records. The court rejected this argument, explaining that these risks are present in every records response and are not unique to the determination of what documents are identical. Requiring custodians to produce identical documents would be burdensome and provide no additional information to the requester.

While siding with the records custodians in this case, the court of appeals was careful to point out that records that are destroyed must be truly identical to those being produced. Determining what is identical may depend upon the context, but the court noted as examples that records which contain additional information about recipients of the documents, or handwritten notes in the margins would not be identical to documents containing the same text but without this information. In short, the court is relying on the common sense of custodians to destroy only responsive documents that are truly identical, not just similar to documents that are produced.

—Mark J. Steichen

## FERC WATCH

### **AEP Complaint Threatens PJM-MISO Transmission Rate Compromise**

In a complaint filed in September by American Electric Power Service Corporation (“AEP”), the company seeks to alter the existing transmission rate designs in the combined footprints of the PJM Interconnection, LLC (“PJM”) and Midwest Independent Transmission System Operator, Inc. (“MISO”) regional grids. In filings submitted in August 1, 2007 to the Federal Energy Regulatory Commission (“FERC”), the vast majority of PJM and MISO transmission owners voiced support for permanently keeping the zonal rate system for cross-border service that had been approved by FERC as a temporary measure in 2006. Under that system, transactions that go between MISO and PJM are charged to load serving entities in the region where the power is delivered. AEP did not support the filings because it owns a huge amount of transmission facilities in the PJM region and thus allegedly pays a disproportionate share of the interregional service. AEP’s complaint threatens to overturn that system and, if successful, threatens to cause massive shifts in the allocation of sunk costs for existing facilities throughout the combined PJM/MISO region. The dispute, which has been brewing for several years, is being closely watched by all transmission customers.

### **Supreme Court to Review Power Contract Cases**

Despite FERC’s pleadings to the contrary, the United States Supreme Court decided last month to take on the issue of FERC’s authority to modify existing power contracts. The Court’s review will center on a 9th Circuit Court of Appeals decision which found that FERC had improperly refused to modify contracts for power sales to Public Utility District No. 1 of Snohomish County, Washington and other wholesale customers. The contract dispute stemmed from the 2000-2001 energy crisis in the Western region. At stake is the extent to which the so-called “public interest” standard can protect contracts from modification subsequent to execution. The 9th Circuit decision stated that the “public interest” standard does not absolve FERC from its obligation to permit contract modifications where improperly functioning markets allow energy prices to exceed the “zone of reasonableness.” The Supreme Court’s decision will be closely watched by wholesale customers and providers alike.

### **FERC Proposes Rulemaking on RTO Competition**

In June, FERC issued advanced notice on a proposed rulemaking on competition in markets run by regional transmission organizations (“RTOs”) such as PJM and MISO. The notice has provoked a flurry of comments from a variety of stakeholders, including the American Public Power Association (“APPA”). Among the issues raised most frequently are the question of whether to impose price caps, how to facilitate the development of long term wholesale power contracts, and how to improve the accountability of RTO management. APPA’s comments, representing the interest of municipal utilities, in particular urged FERC to launch a more fundamental investigation into whether RTOs are in fact producing unjust and unreasonable rates.

— Richard A. Heinemann

## **Appeals Court Authorizes Public Records Custodian Denial of Overly Broad and Burdensome Records Request**

A Dane County property owner engaged in a protracted zoning battle filed public records requests with five separate departments of the County. The requests asked for copies of all emails sent to or from nearly three dozen officials or staff members in the various departments over two years. A second part of the requests asked for all emails on all department computers that contained specific names and/or topics. The lists of such names and topics included 185 entries, many of which were so generic as to cover content totally unrelated to the controversies involving the individual making the requests and his pertinent lands.

The County offices declined to fulfill the public records requests on grounds that the requests were not reasonably limited as to subject matter or length of time, citing section 19.85(1)(h) of the Statutes. The Circuit Court and the Court of Appeals upheld the County actions, finding that the open ended, “fishing expedition” nature of the requests would unduly burden the departments to the point of severely impairing their ability to function and serve the public. Satisfying the requests would inevitably force the County to generate huge quantities of emails that had nothing to do with the zoning matter that gave rise to the records requests.

*State ex rel. Gebl v. Connors*, No. 2006AP2455, (Wis. Ct. App. Oct. 18, 2007).

## Wisconsin Attorney General: Federal Medical Privacy Laws Do Not Prohibit Release of Ambulance Records

On September 27, 2007, Wisconsin Attorney General J.B. Van Hollen released an informal opinion concluding that the Federal Health Insurance Portability and Accountability Act (HIPAA) does not categorically prohibit the release of records of calls made by Wisconsin ambulance service providers.

Attorney General Van Hollen issued the informal opinion in response to correspondence received from George Stanley, Vice President and Managing Editor of the Milwaukee Journal Sentinel. Mr. Stanley contacted the Attorney General after a reporter from the Milwaukee Journal Sentinel asked the City of Waukesha Fire Department for the report of an ambulance dispatched from the fire department and received a heavily redacted copy of the ambulance report in response.

Writing that the issues raised in Mr. Stanley's letter "recur with regularity," and that "record custodians and the public alike are in need of guidance," Attorney General Van Hollen undertook a review of federal HIPAA law, state law involving the public's access to records, recent case law, and guidance from the United States Department of Health and Human Services.

Attorney General Van Hollen noted that HIPAA prohibits health care providers from using or disclosing protected health information except as required by law. Wisconsin law provides that ambulance service providers may release certain basic information about ambulance calls, namely: the identity of the ambulance service provider and emergency medical technicians involved; the date of the call; the dispatch and response times; the reason for the dispatch; the location to which the ambulance was dispatched; the destination, if any, to which the patient was transported; and the name, age and gender of the patient. Wisconsin law prohibits the release of the medical history, condition, or emergency treatment of any patient.

Ultimately, Attorney General Van Hollen concluded that fire departments in Wisconsin cannot deny access to ambulance records by simply referring to HIPAA, as HIPAA does not impose a blanket prohibition on the release of ambulance records. Instead, in deciding whether to release information about ambulance calls, records custodians must apply the "common law balancing test" required by the state's public records law. That is, custodians must determine whether the public policy interests favoring non-disclosure outweigh the presumption of disclosure recognized in state law. Records custodians must engage in this balancing test analysis despite the more restrictive general provisions of the HIPAA privacy rule.

Compliance with this opinion will prevent fire departments from routinely refusing to release information about those treated by emergency personnel based on an overly broad reading of HIPAA regulations.

— Mark A. Neuser

### Garfoot Serves As A Reminder To Follow Your Own Rules

*Garfoot v. Town of Springdale*, 2007 Wisc. App. LEXIS 691 (4th Dist. 2007) (unpublished opinion, subject to further editing), reminds us of the cost of failing to follow one's own rules. Mr. Garfoot recorded a certified survey map (CSM) after complying with the county's requirements, but he failed to comply with the local ordinance of the Town of Springdale. Springdale responded by recording an affidavit by which it refused to recognize the validity of the CSM. Mr. Garfoot sought a declaratory judgment upholding the validity of his CSM and voiding the Town's recorded affidavit.

Springdale had an ordinance requiring an applicant like Mr. Garfoot to file 12 copies of the proposed CSM and to pay a filing fee. Although he had done neither, Mr. Garfoot introduced affidavits demonstrating that Springdale's informal custom and practice was to act on CSMs that had been forwarded by county officials without requiring the filing of 12 copies, and to collect the filing fee later. If no action was taken by the town within 90 days, then the CSM was deemed to be approved. Mr. Garfoot contended that for the town to enforce the ordinance against him after it had failed to enforce it against others amounted to selective enforcement of the law, which was arbitrary, capricious, discriminatory and, therefore, in violation of his fundamental rights to due process.

However, in this case, Mr. Garfoot had followed neither Springdale's formal ordinance nor its informal custom and practice, having failed to ever pay the filing fee and having recorded the CSM after only 68 days (rather than 90 days) had expired. So even though Springdale failed to follow its own rules in the past, the courts were unable to conclude that its actions resulted in the type of selective enforcement of the town's laws that violated Garfoot's fundamental rights. Thus, his case was dismissed. Under these facts, the cost of the failure to follow its own rules was the cost of defending a lawsuit that could have been prevented. Under different facts, the cost may be greater.

— John P. Starkweather

# MUNICIPAL LAW NEWSLETTER

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