

## Open Records Law: The Buck STILL Stops with Municipalities!

By: Jodi S. Yin

Last year, *Wisconsin Insurance Law Alert* featured a court of appeals decision, *WIREData, Inc. v. Village of Sussex and Village of Sussex Custodian*, which warned municipalities against the practice of responding to open records requests for electronically stored raw data with documents in hard copy and/or in PDF format. This year, the Wisconsin Supreme Court (the “Court”) reviewed the appellate court’s decision and warned municipalities to read each request carefully before settling on the appropriate format for a response. Responding with documents in hard copy or in PDF format may be appropriate in some cases, but not others. The Court also made it clear that municipalities cannot avoid liability for failing to respond to an open records request—no matter how complicated—by outsourcing the request to an independent contractor. When it comes to a violation of Wisconsin’s open records law, the buck *still* stops with the municipalities.

The plaintiffs (“WIREData”) in *WIREData, Inc. v. Village of Sussex and Village of Sussex Custodian* filed initial open records requests with three municipalities in April 2001, seeking detailed records maintained by the assessor for the municipalities in an “electronic/digital” format. In each case, the municipality’s assessor inputted raw data regarding property appraisals into a computer software program, called Market Drive, which was developed and copyrighted by Assessment Technologies of WI, LLC. Each municipality had licensing privileges for read-only access of the Market Drive software. In response to WIREData’s initial open records requests, each municipality offered WIREData paper copies of the information and referred WIREData to the municipality’s independent contractor assessor and/or the private computer programming firm hired by Assessment Technologies to program the Market Drive software.

Without waiting for a response to these initial requests, WIREData submitted enhanced requests for more detailed real estate assessment records in the same format created and maintained by each municipality’s independent contractor assessor. The enhanced requests dictated responses in a particular computerized format, which included 49 specific fields of data per property. WIREData submitted the enhanced open records requests directly to the independent contractor assessors and not the municipalities.

WIREData also filed three separate mandamus actions against the municipalities, appraisers, and software developer. The Court decided each of the following issues: (1) whether the mandamus actions against each municipality was commenced prematurely before WIREData’s open records requests were denied; (2) whether WIREData submitted valid open records requests; (3) whether independent contractor assessors were responsible statutory authorities and proper recipients of open records requests under the open records law; (4) whether the municipalities could avoid liability under the open records law by contracting with independent contractor assessors; and (5) whether the municipalities complied with the open records law by producing records in PDF format.

The Wisconsin Supreme Court ultimately agreed with the appellate court that the buck stops with the municipalities where the open records law is concerned. The municipalities—not the independent contractors—are the responsible authorities under Wisconsin’s open records law and are liable for violations of the law. Potential liability under the open records law only extends to requests submitted directly to the municipality. WIREData submitted its initial requests directly to each municipality but not its enhanced requests. The initial requests were for records in an “electronic/digital” format. PDF documents complied with these requests. Because WIREData did not submit its enhanced requests to the municipalities, but rather to the municipalities’ independent contractor assessors, the Court did not decide whether a response in PDF format satisfied WIREData’s enhanced requests for detailed electronic raw data.

The *WIREData* decision still serves as a cautionary tale for all of Wisconsin’s municipalities. Responding to an open records request requires municipalities to carefully read each request before deciding on the appropriate format for a response. The open records law does not require municipalities to produce confidential data that is not subject to disclosure under the open records law or to produce data in a format that may damage a municipality’s database. However, the *WIREData* decision requires municipalities to respond on a case-by-case basis to each request it receives in a timely manner. This may require municipalities to structure contracts and licensing agreements with independent contractors to allow for quick access of public records in a wide range of databases. ■

**Advertising Injury:** Coverage existed under insurance policy for “advertising injury” caused by insured’s trademark and copyright infringement because coverage for “infringement of title” extended to trademark infringement, insured was engaged in advertising with respect to copyright and trademark infringement claims, and insured’s advertising contributed materially to its infringement of software

company’s copyrights and trademarks. *Acuity v. Bagadia*, 2008 WI 62 (June 18, 2008).

**Worker’s Compensation Act; Negligence:** Where out-of-state employer sends out-of-state employee to Wisconsin and employee is injured in Wisconsin in the course of employment, Wisconsin’s Worker’s Compensation Act provides the employee’s exclusive remedy for co-worker’s negligence. *Estate of Torres ex rel. Torres v. Morales*, (Ct. App. June 18, 2008).

**Condemnation:** Lessee of parking lot acquired by city could not rely on provision of condemnation statute requiring comparable replacement property be made available to a displaced person in order to seek comparable replacement property or damages. *C. Coakley Relocation Sys. v. City of Milwaukee*, 2008 WI 68 (June 25, 2008).

**Governmental Immunity:** Governmental contractor was immune from suit filed by estate of individual who died when her vehicle hit bridge abutment that was under construction because work was completed pursuant to reasonably precise governmental specifications, the contractor’s actions conformed to those specifications, and the contractor warned the governmental officials about possible dangers associated with those specifications. *Estate of Brown v. Mathy Constr. Co.*, (Ct. App. June 26, 2008).

**Economic Loss Doctrine:** Economic loss doctrine barred home purchaser’s claim against vender for alleged misrepresentations made about home’s sewer line prior to home’s sale because transaction was for residential real estate, loss was purely economic, and fraud-in-the-inducement exception did not apply. *Below v. Norton*, 2008 WI 77 (July 1, 2008).

**Duty to Defend:** Insurer breached its duty to defend insured where PCG homeowner’s policy provided significantly broader coverage than CGL policy, allegations in complaint were sufficient to allege an injury and an occurrence under broad definition of “personal injury” in PCG policy, and no allegation of intent to harm triggered intentional acts exclusion. *Liebovich v. Minnesota Ins. Co.*, 2008 WI 75 (July 1, 2008).

**Open Records Request:** Copies of statements regarding emergency detention in police department’s possession were exempt from disclosure under open records statute. *Watton v. Hegerty*, 2008 WI 74 (July 1, 2008).

**Municipal Employment Relations Act:** School board’s decision to prohibit teachers from posting “attract and retain” signs in student-occupied locations violated MERA because teachers’ action constituted “lawful concerted activity within the protection of Wis. Stat. § 111.70(2).” *Milwaukee Bd. of Sch. Dir. v. WERC*, (Ct. App. July 1, 2008).

**Zoning Ordinance:** “No permitted uses” town zoning ordinance violated substantive due process where generalized standards for obtaining conditional use permits were provided, ordinance arbitrarily precluded any use as of right in the district, and limitation bore no substantial relation to public health, safety, morals, or general welfare. *Town of Rhine v. Bizzell*, 2008 WI 76 (July 1, 2008).

**Default Judgment:** Professional liability insurer’s default in medical malpractice action subjected it to a default judgment for plaintiff’s damages even though its insured denied liability of all defendants. *Estate of Otto v. Physicians Ins. Co. of Wis., Inc.*, 2008 WI 78 (July 3, 2008).

**Duty to Defend; Intentional Acts Exclusion:** Insured’s intentional acts of traveling to underage drinking party to fight with and punch victim in the face were not accidental and were not an “occurrence” under the policy; because the duty to defend arises only out of the allegations within the four corners of the complaint, insureds’ affirmative defense of “self defense” was not relevant to the duty to defend analysis. *Sustache v. American Family Mut. Ins. Co.*, 2008 WI 87 (July 10, 2008).

**CGL Coverage; ATCP Violation:** CGL policy did not provide coverage for misrepresentations made by contractor in violation of ATCP 110; the CGL policy contained a business risk exclusion applicable to the property damage suffered such that the policy did not cover the damages awarded. *Stuart v. Weisflog’s Showroom Gallery*, 2008 WI 86 (July 10, 2008).

**Open Meetings; Disclosure of Closed Session Discussions:** The exemptions for closed session meetings in Wis. Stat. § 19.85 do not create an evidentiary privilege shielding the discussions during closed sessions from discovery requests in subsequent litigation. *Sands v. Whitmall*, 2008 WI 89 (July 11, 2008).

**Open Meetings; Open Records:** A development corporation, whose exclusive function was to promote economic development in and around the city, was a quasi-governmental corporation which was subject to open meetings and open records laws. *State v. Beaver Dam Area Dev. Corp.*, 2008 WI 90 (July 11, 2008).

**Intentional Acts Exclusion:** Intentional acts exclusion in a homeowner’s policy barred coverage for intentional sexual assault of a child because damages arose out of an intentional act, and no insured would reasonably expect liability coverage for damages arising out of intentional sexual assault. *J. G. v. Wangard*, 2008 WI 99 (July 16, 2008).

**Employer’s Failure to Warn:** Plaintiff could not state a negligence claim against the Diocese for failure to take action to prevent future abuse by parochial school teacher; regardless, public policy bars such claim because recognizing such a claim could result in requiring all employers to warn all unforeseen potential future employers of all problems related to any former employees. *Hornback v. Archdiocese of Milwaukee*, 2008 WI 98 (July 16, 2008).

**Peer Review Civil Immunity:** Participants in peer review process are entitled to civil immunity for negligent actions and defamatory statements made in good faith during health care service reviews. *Rechsteiner v. Hazelden*, 2008 WI 97 (July 16, 2008).

**Commercial Crime Insurance Policy:** Policy did not cover funds that were embezzled from checking account that was not specifically owned by and held in the same name as the named insured. *Meriter Health Servs. v. Travelers Cas. and Sur. Co. of Am.*, (Ct. App. July 17, 2008).

**Riparian Rights:** Agreements by riparian owners (one who owns land on certain bodies of water) granting perpetual use piers, docks, or boat slips to non-riparian owners (through easement or access agreement) are invalid and will not be enforced; such agreements constitute unlawful transfer of riparian rights in violation of Wis. Stat. § 30.133(1). *Anchor Point Condo. Owners Ass’n v. Fish Tale Prop., LLC*, (Ct. App. July 3, 2008); *Berkos v. Shipwreck Bay Condo. Ass’n*, (Ct. App. July 17, 2008).

**Sufficient Evidence:** In toxic chemical litigation, evidence that businesses dumped waste at various times, but speculation only that the waste caused damage to the plaintiff’s water, was not sufficient to create an issue of fact for the jury. *Dyer v. Blackhawk Leather, LLC*, (Ct. App. July 30, 2008).

**Residential Real Estate:** In a residential real estate transaction, the seller was required to either return the earnest money and sue for actual damages or keep the earnest money as liquidated damages; by retaining the earnest money, the sellers selected the remedy of liquidated damages only. *Osborn v. Dennison*, (Ct. App. Aug. 6, 2008).

**Punitive Damages:** Plaintiff pedestrian was not entitled to punitive damages against defendant driver who hit the plaintiff, fled the scene, and pled guilty to reckless driving and hit and run, even though there was some evidence the defendant was intoxicated. *Henrikson v. Strapon*, (Ct. App. Aug. 21, 2008).

**“Drive Other Owned Auto” Exclusion:** Plaintiff injured as the passenger in a motorcycle accident was not precluded from collecting UIM benefits by the exclusion in her policy for an auto owned by her, since a question of fact existed as to whether she was the owner of motorcycle for the purpose of the exclusion, even though the motorcycle was titled in the plaintiff’s name, her boyfriend made the payments, and she was the “owner” while he was going through a divorce. *Young v. West Bend Mut. Ins. Co.*, (Ct. App. Aug. 21, 2008).

**Safe Place Law:** Evidence that hotel complied with fire protection code and had no notice of any other violations or deficiencies was insufficient to sustain jury’s verdict that hotel violated Safe Place Statute. *Scalacinski v. Campbell*, (Ct. App. Sept. 3, 2008).

# WISCONSIN INSURANCE LAW ALERT

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The Wisconsin Insurance Law Alert is published by the Litigation Practice Group of Axley Brynelson, LLP. Since its founding in 1885, Axley Brynelson, LLP has been a leading insurance defense law firm in Wisconsin. The firm’s offices are on the Capitol Square in Madison, Wisconsin.

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