Limiting Public and Individual Access to Sexual Harassment Internal Investigation Records

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Municipal administrators, police chiefs, school district administrators and personnel professionals are charged with the responsibility of conducting thorough and detailed internal investigations into allegations of employee misconduct. Internal investigations notoriously lead to the creation of documentation including the initial complaints, investigation interview notes, tapes and transcripts, witness statements, investigation resolutions, and other evidence. Many of these documents are records subject to disclosure under Wisconsin's Public Records Law. Often, the press and the taxpayers learn of these investigations and demand these records to learn the intricate details of government investigations into employee misconduct.

After a series of court decisions suggesting that public-sector employers could withhold very few personnel investigation records, the Wisconsin Supreme Court recently provided some restraint to the trend of providing limitless access to certain personnel documents. In *Hempel v. City of Baraboo*, 2005 WI 120, 699 N.W. 2d 551, the court held that an individual employee, who was the subject of a sexual harassment complaint and investigation was not entitled to receive unredacted copies of certain investigation records pursuant to a request for records under Subsections 19.35(1)(am) and (a), Wis. Stats., because disclosure of such investigation records would expose the identities of individuals who were promised confidentiality for their cooperation in an internal sexual harassment investigation. Personnel professionals and records custodians should be aware of the legal and practical implications emanating from this decision.

BACKGROUND

This case is not the run-of-the-mill public records case involving a request for internal investigation records. Normally, public records litigation involves employees challenging the records custodian's decision to release internal investigation records to the public. This case is just the opposite — the employee challenged the custodian's decision to not disclose internal investigation records.

City of Baraboo Police Officer Hal Hempel was a subject of an internal investigation involving sexual harassment allegations by female City of Baraboo police officers. The Department conducted a thorough investigation. Hempel received an unredacted copy of the complaint, and he was afforded the opportunity to provide a response to the complaint. He also received unredacted documents containing the names of at least 21 witnesses.

After determining that discipline was not warranted, the Department issued a memorandum to Hempel describing the Department's resolution of the complaint. Chief of Police Lobe wrote to Hempel stating: "The complaint . . . has been resolved to the mutual satisfaction of the parties and the Department. . . . No further action will be taken on this complaint. If another complaint of a similar nature is received, this complaint will be considered at that time. This memo is intended to be documentary only and is not disciplinary."

Five months later, Hempel served a written public records request to the Department seeking all materials gathered in connection with the complaint. Hempel sought the remaining investigation records so that he could conduct his own investigation, including interviewing witnesses previously interviewed by the Department. On January 31, 2001, Chief Lobe responded to a part of Hempel's request and provided him with the nondisciplinary memorandum retained in his personnel file. Investigation documents were not retained in his personnel file. Chief Lobe instructed Hempel that he would respond to the remainder of Hempel's request in a separate correspondence. Chief Lobe then retired.

New Chief of Police Kluge responded to Hempel the following day. Chief Kluge determined that Hempel's request must be treated as if it was a request from any member of the public, such as the news media. Chief Kluge released several of the records in redacted form. However, Kluge denied part of the request for records and provided six reasons as part of the balancing analysis, including:

1. The City harassment policy provides for confidential investigations.
2. Disclosure would interfere with the City's ability to conduct thorough, confidential, internal investigations.
3. Disclosure would interfere with and hamper the City's ability to ensure employees an opportunity for satisfying careers and fair treatment, and would impinge upon the City's right and opportunity to retain competent law enforcement personnel.
4. Disclosure would undermine the City's ability to protect the privacy rights of individuals who cooperated in the investigation and to protect them from harassment or retaliation.
5. Nondisclosure is required to prevent loss of morale, and disclosure could cause officers to choose other employment thereby inhibiting the City's ability to hire and retain competent personnel.
6. Disclosing documents that may contain unsubstantiated or untrue information might cause unwarranted personal or economic harm.

Two months later, Hempel served a second public records request for additional documentation related to the complaint. The Department again denied his request.

Hempel filed a mandamus action to procure full disclosure of the records. The circuit court agreed with the Chief's balancing analysis and dismissed Hempel's claim. The court of appeals affirmed the circuit court's decision, reasoning that the public's right to access records "[m]ust give way to the important public policy of encouraging victims and witnesses of employment discrimination to cooperate in internal investigations of such conduct." However, the dissenting Judge found that the Department should have released the records, because Wisconsin municipalities should not hide evidence of discrimination and harassment behind the shield of nondisclosure. Hempel appealed to the Wisconsin Supreme Court.

Wisconsin Supreme Court's Decision

Hempel contended that he had the right to access these internal investigation records under two provisions of Wisconsin's Public Records Law. In a four-to-three decision, the Wisconsin Supreme Court rejected Hempel's request to receive the investigation records under either statutory provision.

First, the court analyzed Hempel's request under Subsection 19.35(1)(am), Wis. Stats. Paragraph (am) entitles an individual to review records containing the individual's personally identifiable information. The individual is given this opportunity to inspect records to determine what information is maintained about him or her, and whether the information is accurate. These records will be disclosed to the individual unless the surrounding factual circumstances fall within a specific statutory exception outlined in Subsections 19.35(1)(am)1–3, Wis. Stats. These statutory exceptions do not need to be narrowly construed by a records custodian. Additionally, requests for records under paragraph (am) are not subject to the balancing test. If the records are not subject to disclosure to the individual under paragraph (am), then the individual can still request the records under paragraph (a) or under civil and criminal discovery statutes.

The court determined that two statutory exceptions precluded Hempel from accessing these records. First, the records were part of a complaint and ongoing investigation. The statutes bar disclosure of records containing personally identifiable information if the records were "collected or maintained in connection with a complaint, investigation or other circumstances that may lead to an enforcement action." WIS. STAT. § 19.35(1)(am)2a (2003–2004). The nondisciplinary memorandum issued by the Chief to Hempel stated that the Department would consider the circumstances of this complaint if another similar complaint was filed against him. Therefore, the court determined that the investigation was still "ongoing" at the time of Hempel's request for records.

The court also rejected disclosure of these records, because disclosure would identify a "confidential informant." Statutory exceptions preclude disclosure of records containing personally identifiable records if such disclosure would "[i]dentify a confidential informant." Id. § 19.35(1)(am)2b. The court determined that nondisclosure of these records was necessary to protect the identities of informants who cooperated and provided statements as part of the Department's investigation in exchange for a promise of confidentiality.

The court subsequently analyzed Hempel's request pursuant to the general public records request procedure under paragraph (a). Under this process, the records custodian must determine whether statutory or common-law exceptions preclude disclosure of the records. If no statutory or common-law exceptions preclude disclosure, then the records custodian must balance the public's interest in nondisclosure against its interest in disclosure.

The court stated that the public has a "very strong interest in being informed about public officials who have been derelict in their duty." The court, however, relied on the records custodian's public policy reasons and determined that the public's interest in preserving confidentiality of witnesses and complainants identified in sensitive internal investigations overcame the public's interest in disclosure of these particular investigative documents. Therefore, Hempel could not receive the remaining internal investigation documents.

The court approved of each of the public policy considerations addressed by Chief Kluge. The court gave weight to the custodian's concern that victims and witnesses may be less likely to provide candid and forthright information if they believe their identities would be revealed. Additionally, free and open access to employee personnel files could damage morale in the Department, and could undermine the Department's ability to attract quality candidates for rank-and-file law enforcement positions. Moreover, the court noted that investigations may contain some information that is factually inaccurate, and releasing inaccurate information could unduly damage a person's reputation. Finally, the court found that supervisors may provide less-candid assessments of employees if personnel documentation were easily accessible to the public.

The Dissent

Justice Abrahamson's dissent in this decision should not be overlooked. This was a close four-to-three decision and any change in the facts or public policy perspectives offered by the records custodian could have changed the outcome of this case. Moreover, the composition of the court over the next few years may very well determine where the next decision directs records custodians and personnel directors.

The dissent expressed significant concerns about the majority's decision to withhold certain investigation records, and the dissent attacked the majority opinion on many levels. Specifically, the dissent alleged that the public policy reasons offered in this case were generic reasons, and the reasons did not demonstrate that this case was in any way "exceptional." The dissent dubbed the records custodian's reasons as the "Exceptional Six." The dissent stated that each of these public policy reasons "applies to almost every file involving some sort of investigation at every government entity." The dissent predicted that police departments and other government agencies would freely use the "Exceptional Six" to adopt blanket exceptions to preclude disclosure of investigation records.

The dissent, however, did not demand that all investigation records be fully disclosed. Rather, the dissent repeatedly stated that custodians should disclose redacted records when warranted, and in this case, the records custodian's disclosure of more investigation records in redacted form would have better addressed the dissent's concerns.

Discussion

Without a doubt, records custodians must still interpret the Public Records Law with the presumption of complete public access to records. Only the exceptional case justifies nondisclosure, and *Hempel* does not change this principle. Moreover, the facts and circumstances in Hempel are clearly uncommon, and the court's opinion is very fact driven and hinges on the strength of the public policy considerations offered by the records custodian.

The *Hempel* decision also provides significant guidance that records custodians and personnel professionals must evaluate when conducting internal investigations and determining whether to disclose records. Following are some of the issues emanating from Hempel

Redact Rather than Deny Access. The courts prefer that custodians release as much of a record as they can. The court will recognize and give weight to the custodian's decision to redact certain information if the decision to redact is grounded in statutory or common-law exceptions or a strong public policy consideration such as protecting the privacy and confidentiality of witnesses. The Hempel court took this into consideration when it stated, "We believe that the Department's release of the redacted documents weighs heavily in the balancing test." Custodians should exercise prudence when redacting by only removing information in a tailored fashion as is justified by the public policy reason or the statutory or common law exception.

Confidentiality Policies Do not Create Blanket Exceptions. Confidentiality, while indicative of procuring cooperation and candid responses from witnesses, cannot be used as a blanket exception to disclosure. Employers often rely on confidentiality policies for conducting internal investigations involving sensitive matters. While the facts in this case supported the records custodian's assertion that employees needed confidentiality protections in order to provide candid statements, the same may not be true during other investigations. Sometimes victims and witnesses will speak freely without care for recourse. The necessity of confidentiality in such a case would not be as strong, and those facts may command disclosure of the records.

Rank-and-File Personnel as Opposed to the Higher-Level Government Official. The majority reaffirmed that rank-and-file personnel have a greater expectation of privacy and reputational interests than a prominent public official. If this case involved sexual harassment allegations against a higher-ranking government official instead of a "rank-and-file" law enforcement officer, then the court may have ordered disclosure of more investigation records.

Be Aware of the Type of Records Request. Records custodians are charged with the responsibility of responding to public records requests and having a keen awareness of all possible legal authority and different avenues that employees may use to request records from their employer. For example, employees may request records containing personally identifiable records pursuant to Subsection 19.35(1)(am), personnel records pursuant to Section 103.13, Wis. Stats., and the general public requests records pursuant to Subsection 19.35(1)(a). Records custodians must carefully address and apply the legal intricacies of each law when responding to requests for records. The *Hempel* decision is one of the first notable decisions construing an individual's right to access records containing personally identifiable information under paragraph (am), and even after this decision, many records custodians may still be unfamiliar with this provision of the Public Records Law.

Carefully Use the Exceptional Six, And Use Them Sparingly. The court reaffirmed the validity of several of the law enforcement personnel-specific public policy reasons previously articulated in *Village of Butler v. Cohen*, 163 Wis. 2d 819, 472 N.W.2d 579 (Ct. App. 1991) and *Pangman & Assocs. v. Zellmer*, 163 Wis. 2d 1070, 473 N.W.2d 579 (Ct. App. 1991). The "Exceptional Six" public policy reasons used in this case, however, were subjected to substantial criticism by the dissent. Consistent with the dissent's criticism and the records custodian's general obligation to provide sufficient public policy reasons to support his or her denial of records based on the balancing test, records custodians must be even more careful when applying these six public policy reasons. Public policy reasons should be carefully provided only after the custodian has reviewed each record subject to disclosure and after weighing the policies considered by the courts under the balancing analysis. Moreover, while public policy reasons do not need to be grounded in specific facts, the procurement of strong facts applied to the custodian's public policy reasons will bolster the custodian's argument when it is reviewed by a judge.

While *Hempel* affords some basis for not disclosing certain internal investigation records, records custodiansshould make every attempt to disclose such records in full or redacted form. Justice Abrahamson's prediction about the free and careless use of the "Exception Six" may very well come true, and we may see a similar case before this court yielding an entirely different result.
