

# Can Confidentiality Policies be Effective in Light of the Public Records Law?

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Confidentiality policies are a common feature in both private and public employment settings in order to protect the use and disclosure of sensitive information maintained by an employer. In the public sector, however, the need for confidentiality must be balanced with the need for public accountability. This article explores the interaction between county confidentiality policies and the Wisconsin Public Records Law.<sup>1</sup>

## The Use of Confidentiality Policies by Counties

All counties are legally obligated to protect the confidentiality of certain sensitive information held by the county. For example, reports of elder abuse or neglect may not be released by a county agency unless one of the limited exceptions applies.<sup>2</sup> Child welfare agencies generally cannot release records regarding children in the agency's care.<sup>3</sup> Health care records related to people counties serve and county employees must be kept confidential under both state and federal law.<sup>4</sup> These are but a few of the mandated confidentiality obligations imposed by law.

There are also many county positions in which the employee's professional responsibilities require protecting confidential information. For example, county social workers are required by administrative rule to maintain the confidentiality of client information.<sup>5</sup> Similarly, county corporation counsel are required by professional rules of conduct to maintain the confidentiality of privileged attorney-client communications.<sup>6</sup>

Beyond situations where the law requires that certain information be maintained in confidence, many counties enact confidentiality policies to not only reinforce statutory confidentiality requirements but to also protect information that the county has determined should not be made public. For example, given the reputational interests at stake, there may be a need to treat certain personnel information as confidential.

Counties have the administrative home rule authority to enact confidentiality policies as long as the policies are consistent with the law. For example, a confidentiality policy covering social workers cannot prevent a social worker from reporting suspected child abuse as required by Wis. Stat. § 48.981(2). Unless disclosure of confidential information is required by law or protected by law (such as a county employee witness disclosing confidential information in a court proceeding), counties generally have the ability to impose disciplinary action against employees who violate confidentiality policies.

## Interaction Between Confidentiality Policies and the Public Records Law

The Public Records Law gives the public broad access to records created or kept by government "authorities," including counties. The public policy expressed in the Public Records Law presumes that a requester has the right to access public records.<sup>7</sup>

There are certain instances where a records custodian may deny access to public records despite the strong presumption in favor of access. If a state or federal law specifically exempts a record from disclosure, such as health care records, the record is exempt from disclosure under the Public Records Law.<sup>8</sup> Court decisions may also exempt certain records from disclosure, such as attorney-client privileged communications.<sup>9</sup> Finally, a record may be exempt from disclosure under the balancing test where the records custodian weighs the public interest in disclosure of the record against the public interest favoring nondisclosure.<sup>10</sup>

In cases where a county's confidentiality policy is consistent with laws specifically exempting certain information from disclosure, there is little debate that the information cannot be disclosed pursuant to a public records request. A records custodian can deny access to a confidential record based upon express statutory authority to withhold the record.

In cases where a county's confidentiality policy covers information that is not expressly exempt from disclosure by law, however, the records custodian cannot solely rely on the confidentiality policy as the basis to deny access to the record. In *Hempel v. City of Baraboo*,<sup>11</sup> the Wisconsin Supreme Court stated that an authority may not avoid the operation of the Public Records Law simply by enacting its own policy providing a blanket exemption from disclosure.<sup>12</sup>

However, it is important to recognize that the confidentiality policy may reflect an underlying public policy interest in maintaining the confidentiality of the information. A record custodian may consider the underlying public policy interest favoring nondisclosure when performing the balancing test. For example, in *Hempel*, the Court weighed the city's policy of maintaining the confidentiality of witnesses in a harassment investigation as a factor favoring nondisclosure under the balancing test.<sup>13</sup> The Court agreed that complainants and witnesses will become less likely to make candid statements if they know that the accused may access their statements through an open records request. In weighing the confidentiality policy under the balancing test, the Court implicitly found that the public had an interest in protecting the confidentiality of witnesses to avoid a chilling effect on sexual harassment complaints.

Unfortunately, issues arising out of the intersection of the public records law and a county's confidentiality policy are incapable of "bright line rule" resolution. Application of the balancing test is necessarily a case-by-case process. Therefore, a county should take care to ensure that the underlying reasons surrounding the need for the confidentiality policy would support a finding that the public has an interest in avoiding the disclosure of the protected information.

## **Conclusion**

Confidentiality policies are an important tool for counties to protect against the unauthorized use and disclosure of sensitive information, especially information which is required by law to be kept confidential. At a minimum, confidentiality policies should cover sensitive county records in which the public has an interest in maintaining confidentiality.

Even though the Public Records Law may provide access to certain sensitive information, confidentiality policies prevent individual employees from releasing information without the county's approval. Confidentiality policies also provide a basis for disciplinary action if an employee violates the policy.

As a complementary policy to confidentiality policies, counties should establish protocols to respond to public records requests, including review by corporation counsel. By establishing a protocol for public records requests, counties can ensure that sensitive records are only released by an authorized records custodian after a complete analysis under the Public Records Law. Public records policies also reinforce to employees that only record custodians, not individual employees, have the authority to release sensitive county information.

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<sup>1</sup> Wis. Stat. §§ 19.31-19.39

<sup>2</sup> Wis. Stat. § 46.90(6).

<sup>3</sup> Wis. Stat. § 48.78

<sup>4</sup> Wis. Stat. § 146.82; 45 C.F.R. parts 160 and 164.

<sup>5</sup> Wis. Admin. Code § MPSW 20.02(10)

<sup>6</sup> SCR 20:1.6

<sup>7</sup> Wis. Stat. § 19.31

<sup>8</sup> Wis. Stat. § 19.36(1)

<sup>9</sup> Wis. Stat. § 19.35(1)(a); *George v. Record Custodian*, 169 Wis. 2d 573, 582, 485 N.W.2d 460, 464 (Ct.App. 1992)

<sup>10</sup> *State ex rel. Journal Co. v. Cnty. Court for Racine Cnty.*, 43 Wis. 2d 297, 305, 168 N.W.2d 836, 839 (1969)

<sup>11</sup> 2005 WI 120, ¶ 71, 284 Wis. 2d 162, 197, 699 N.W.2d 551.

<sup>12</sup> Similarly, settlement agreements providing that the terms will remain confidential will not necessarily override disclosure requirements under the Public Records Law. *Journal/Sentinel, Inc. v. Sch. Bd. of Sch. Dist. of Shorewood*, 186 Wis. 2d 443, 458-59, 521 N.W.2d 165, 172 (Ct. App. 1994)

<sup>13</sup> 2005 WI 120, ¶¶ 71-73.

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