

Access to Online Court Records and the Risk to the Innocent

*State of Wisconsin Joint Legislative
Counsel's Special Committee on Review
of Records Access of Circuit Court
Documents*

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Overview

- } Wisconsin Open Records Law and Exceptions to Open Records Law.
- } Access vs. Publication of Court Records.
- } The relationship between WCCA (CCAP) and Wisconsin's expungement law.
- } Harm to the innocent.

Wisconsin Open Records Law

- } Premised upon entitlement to “the greatest possible information regarding the affairs of government[.]”
- } Strong presumption, but not absolute. *Hempel v. City of Baraboo*, 284 Wis.2d 162, 699 N.W.2d 551 (2005).



Wisconsin Open Records Law Request

- } Request to an “authority.”
- } Request does not have to be in writing.
- } Requester does not have to identify herself.
- } Requester does not need to be state purpose of the request.
- } Request must be reasonably specific.

Wisconsin Open Records Law Response

- } Must be made "as soon as practicable and without delay."
- } There is an opportunity to object to a denial or partial denial.
 - Mandamus action.
 - Seek prosecution by DA for concealment of public records with intent to injure or defraud.
 - John Doe complaint.

Open Records – Records which are available and unavailable

“Absolute” Right of Access

- } Uniform traffic accident reports.
- } Books and paper required to be kept by the sheriff, clerk of circuit court, register of deeds, county register, register of probate, county clerk and county surveyor.

Absolute Denial of Access

- } Home address, home e-mail address, home telephone number or social security number of an employee.
- } Information related to current information of a possible criminal offense or possible misconduct prior to conclusion of investigation.
- } Information pertaining to employment examination (except for examination score).
- } Trade secrets.
- } Identities of law enforcement informants/contract witnesses.
- } Patient health care records.
- } Pupil records.
- } Over 180 additional examples.

Even “Absolute” Right of Access Isn’t Absolute

- } Wisconsin Supreme Court “has recognized that this absolute right to examine documents [subject to disclosure under Wis. Stat. Ch. 59] is not without exception” and that the exceptions that allow documents to “be closed to public examination” are:
 - (1) “when there is a statute authorizing the sealing of otherwise public records” or
 - (2) when “disclosure must yield if it infringes on a constitutional right” or
 - (3) that “the circuit court may limit public access to judicial records when the administration of justice requires it.”
 - State ex rel. Schultz v. Bruendl, 168 Wis. 2d 101, 108, 483 N.W.2d 238 (Ct. App. 1992).

Access to Records through Wisconsin Open Records Law compared to publication of limited information on WCCA

- } Wisconsin Open Records Law provides for access to government records.
- } WCCA, commonly called CCAP, receives an estimated 2.3 million hits per day. Wisconsin Legislative Reference Bureau, State of Wisconsin Blue Book at 177 (2005-2006 ed.).
- } Before WCCA, court records were accessible when one went to the courthouse and asked to see a particular file. With WCCA, (limited) case details are now published by the court system and (limited) case details become accessible to interested parties.

Misuse or Misunderstanding of Court Records Can Cause Harm to Wisconsin Residents

- } Princeton University sociology professor Devah Pager has summarized research on the “experimental approach to the study of criminal stigma” and found:

The most notable in this line of research is a classic study by Richard Schwartz and Jerome Skolnick in which the researchers prepared four sets of résumés to be presented to prospective employers for an unskilled hotel job. The four conditions included: (1) an applicant who had been convicted and sentenced for assault; (2) an applicant who had been tried for assault but acquitted; (3) an applicant who had been tried for assault, acquitted, and had a letter from the judge certifying the applicant’s acquittal and emphasizing the presumption of innocence; and (4) an applicant who had no criminal record. Employers’ interest in candidates declined as a function of the severity of the criminal record, though in all three criminal conditions - even with a letter from the judge “certifying the finding of not guilty and reaffirming the legal presumption of innocence” - applicants were less likely to be considered by employers than the non-criminal control. The findings of this study suggest that mere contact with the criminal justice system can have significant repercussions, with records of “arrest,” “conviction,” and “incarceration” conveying a stigma differing in degree but not kind. Several later studies, both in the United States and in other countries, have extended Schwartz and Skolnick’s design. Each of these studies reports a similar finding that, all else being equal, contact with the criminal justice system leads to worse employment opportunities.

- Devah Pager, *Marked: Race, Crime, and Finding Work in a Era of Mass Incarceration*, 49 - 50 (The University of Chicago Press, 2007)(emphasis supplied).

Access to Court Records (at the courthouse and online) has limits

- } Wisconsin law prohibits discrimination based upon “arrest record” or “conviction record” in employment or licensing (Wis. Stat. § 111.321) with some exceptions (see Wis. Stat. § 111.335). The “arrest record” protection includes individuals who were arrested for a crime though the charges were later dismissed, or those who were acquitted of the charged offense.
- } An individual who was adjudicated delinquent may petition the judge for expunction of the juvenile record, once the age of 17 is reached. Wis. Stat. § 938.355.
- } Individuals, under 25 years of age, may have misdemeanor and some felony convictions expunged if the sentence is successfully completed and “the court determines the person will benefit and society will not be harmed.” Wis. Stat. § 973.015. The determination is made at a public hearing.

Access to Court Records (at the courthouse and online) harms the innocent

- } There is no statutory authority for expungement of a court record for an individual for whom criminal charges were dismissed or who was acquitted at trial.
- } Thus, individuals who were never convicted of a crime may continue to be harmed by accessible online court records.
- } Given higher arrest rates for racial minorities, this is even more troubling. Especially given that a criminal record of arrest (without conviction) causes a negative impact on people of color for a longer period of time. Death Pager, *Marked: Race, Crime, and Finding Work in a Era of Mass Incarceration* (The University of Chicago Press, 2007).

Protection of the Innocent Ought be a Legislative Priority

- } "The principle that there is a presumption of innocence in favor of the accused is the undoubted law, axiomatic and elementary, and its enforcement lies at the foundation of the administration of our criminal law." *Coffin v. United States*, 156 U.S. 432 (1895)
- } The presumption of innocence is the "bedrock" principle of this Country's criminal law. In *Re Winship*, 397 U.S. 358, 363 (1970).
- } The presumption of innocence "is one of the fundamentals of the law" and "is not to be minimized or denied to any one accused of crime." *Dodson v. United States*, 23 F.2d 401, 403 (4th Cir. 1928).

How to address the problem?

This Committee may choose to recommend that the expungement statute ought also encompass criminal cases which have resulted in dismissal or acquittal if “the court determines the person will benefit and society will not be harmed.”

The State Bar of Wisconsin Board of Governors unanimously supported a Wisconsin Supreme Court petition finding that a circuit court may expunge records in such circumstance with its inherent and equitable authority. In the Matter of: The Petition of the State Bar of Wisconsin to Modify Chapter 72 of the Supreme Court Rules, No. 09-07 (Oct. 27, 2009). This Petition is pending and the next hearing is on October 4, 2010.

The Committee may also choose to recommend that identifying information of the accused be redacted on WCCA in cases of acquittal or dismissal.

