# CAUTION:

# The Public Records Law May Require Disclosure Even if a Communication Involves Your Lawyer

*Weidner v. City of Racine*

*by Andy Phillips and Matt Thome, Attolles Law, s.c.*

Imagine for a moment this hypothetical situation:

You are a board supervisor in the County of Greengold and your county is dealing with a sensitive potential ethics issue involving a few members of the county board. The Greengold County Board's executive committee wants to discuss the allegations with corporation counsel to determine if any action on the allegations is warranted. Of course, the executive committee would like to have this discussion in closed session and such a closed session is, based upon this scenario, likely justified under Wis. Stat. 19.85(1)(e), (f), (g), or (h) (depending upon the particulars).[1]

One of the Greengold county board members involved in the potential ethics issue, Ray Nitschke, is also a member of the executive committee, cannot be excluded from the meeting and will not agree to remove himself from the meeting. During the meeting, corporation counsel distributes some written discussion points relating to the potential ethics issue containing both statements of fact (the conduct that gave rise to the potential ethics issue) and analysis of the applicable legal standards. Corporation counsel retrieved all copies of the written materials she distributed during the meeting at the end of the closed session, i.e., nobody other than corporation counsel retained a copy of the discussion points. Shortly after the meeting, Supervisor Nitschke makes a public records request for the discussion points document. How do you respond?

The situation above was not so hypothetical to the Racine City Common Council, which led to the case Weidner v. City of Racine. In short, the Court of Appeals determined that the city needed to produce the requested records (in that case, a PowerPoint presentation) in a summary disposition order, which means the case does not serve as binding precedent. Nonetheless, the court's analysis of the issues provides guidance to counties and other public agencies as public records custodians work through the difficult issues surrounding when written materials distributed by a lawyer in closed session are truly "off the record."

Working through the response to a public-records request similar to the hypothetical and that confronted the city of Racine requires analysis of the state's Public Records and Open Meetings Laws and attorney-client privilege. And the analysis is not as simple as "we were talking to our lawyer in a valid closed session, so anything in writing was privileged."

Anytime a county intends to deny access to a record

*The question of whether materials distributed by counsel and retrieved by counsel at the end of the meeting are protected by attorney-client privilege* ***is completely independent of the closed session analysis.***

because the document was shared in closed session (whether the attorney representing the entity is present or not), the records custodian must make "a specific demonstration that there was a need to restrict public access at the time that the request to inspect or copy the record was made."[2] It is not enough to simply respond by indicating the meeting was closed to the public and providing the statutory citation to the reason for the meeting being held in closed session.[3] Instead, the response must provide the specific public policy justifications for refusing to release the records. For example, if a requester is denied access to records disclosed in a closed session under Wis. Stat. 19.85(1)(e), in addition to citing the statute, the response should indicate why the public's interest is better served by denying access to records that will compromise a county's negotiation position on a particular project (if that is indeed the case).

The question of whether materials distributed by counsel and retrieved by counsel at the end of the meeting are protected by attorney-client privilege is completely independent of the closed session analysis. As a fundamental point, courts have recognized that denying access to records because of the attorney-client privilege codified in Wis. Stat. 905.03 does not require application of the balancing test.[4] So unlike the analysis employed in evaluating whether a closed session exemption provides a basis to deny access to the requested records, a denial founded upon the attorney-client privilege is automatic if the requested records are actually privileged communications.

In Weidner v. City of Racine, the court was required to evaluate whether the written materials distributed in closed session (a PowerPoint presentation) were subject to the attorney-client privilege and thereby, exempt from disclosure under the Public Records Law. The court began its analysis by noting that the attorney-client privilege is to be narrowly construed — merely showing a communication was from a client to an attorney (or vice versa) is not enough.[5] To determine whether a particular communication is privileged requires a court to inquire as to both the nature of the relationship and the nature of the information sought.[6] The court then discussed the nature of the attorney-client privilege in terms of it being construed narrowly:

> …[the privilege] does not protect communications from the lawyer to the client unless disclosure of the lawyer-to-client communications would directly or indirectly reveal the substance of the client's confidential communications to the lawyer. 2 Jack Weinstein & Margaret Berger, WEINSTEIN'S EVIDENCE, ¶503(b)[03] n.5 at 503-56 to 503-57 (1991); In re Sealed Case, 737 F.2d 94, 98-99 (D.C.Cir.1984); United States v. United Shoe Mach. Corp., 89 F.Supp. 357, 358-359 (D.Mass.1950).[7]

But a comprehensive review of what parts, if any, of a written communication may be privileged may not be necessary in many circumstances involving communications between corporation counsel or another lawyer for the county and a county board or board committee because the attorney-client privilege may be deemed waived in certain circumstances. In the Weidner v. City of Racine case, the court found the privilege had been waived because (a) the document (PowerPoint) was prepared for the city's client representatives (the members of the common council); (b) any member of the common council could have attended

*Continued on page 46*

*Continued from page 45*

the meeting and viewed the PowerPoint; (c) the member of the common council who was the subject of the meeting was present for the closed session; and (d) showing the document to the council was deliberate (not inadvertent). In other words, disclosing a record that may otherwise be considered privileged to a group of persons representing a county, i.e., a committee of a county board, risks waiver of the privilege if a person present at the meeting later requests a copy of the record under the Public Records Law.

As indicated above, the Weidner v. City of Racine case is not binding precedent. To date, the Supreme Court has not determined the scope of the attorney-client privilege in circumstances similar to the hypothetical example above nor has the court examined the question of waiver upon which the Court of Appeals relied in this case. Nonetheless, there are a few important points to remember as counties work with their attorneys on sensitive matters:

1. To the extent feasible, communications between a lawyer and county boards or county board committees should be verbal. If written documents are distributed at a meeting and a member of the board or committee later requests a copy of the materials, there is a chance a court would find the materials must be disclosed under the Public Records Law.
2. Counties should consider rules and procedures to address removal of board members from committee meetings if the board member is not a member of the committee. Wis. Stat. 19.89 allows a county to maintain a rule allowing for the exclusion of board members from committee meetings, but in the absence of such a rule, the board member has a right to attend even closed session portions of a meeting. The particulars of the rule and the procedures to be followed are left to the discretion of the particular county.
3. Think through these issues and confer with corporation counsel well in advance of meetings where situations such as that presented in the hypothetical situation or the Weidner v. City of Racine case may arise. Corporation counsel is best equipped to develop a strategy for preserving confidentiality of discussions and maintaining the attorney-client privilege.

If you have any questions surrounding the interpretation and application of the Public Records Law, please consult with corporation counsel and feel free to contact the authors of this article. And as always, the association stands ready, willing and able to assist counties in navigating the sometimes difficult issues surrounding compliance with our state's open government requirements. ■

*Attolles Law, s.c. works on behalf of Wisconsin counties, school districts and other public entities across the state of Wisconsin. Its president and CEO, Andy Phillips, has served as outside general counsel to the Wisconsin Counties Association for nearly 20 years.*

1. Whenever a county board is considering a closed session for a situation like this, it is critical to consult with corporation counsel to ensure there is an appropriate legal basis to proceed in closed session.
2. Wisconsin Public Records Law Compliance Guide (2019), Wisconsin Department of Justice, Attorney General Josh Kaul, p. 41 (emphasis in original); Wis. Stat. 19.35(1)(a).
3. *Id.*
4. Id. at p. 40, citing Wisconsin Newspress, Inc. v. School District of Sheboygan Falls, 199 Wis. 2d 768 (1996).
5. City of Racine at p. 6 citing Jax v. Jax, 73 Wis. 2d 572, 581 (1976).
6. Id. citing Franzen v. Children's Hosp. of Wis., Inc., 169 Wis. 2d 366, 386 (Ct. App. 1992)(further citations omitted).
7. *Id.*

***Corporation counsel is best equipped** to develop a strategy for preserving confidentiality of discussions and maintaining the attorney-client privilege.*