

Confidentiality in Juvenile Cases

Hon. Jason Rossell
Kenosha County Circuit Court
Kenosha

Background

Statutes "...which mandate confidentiality of the records as the general principle and disclosure as the exception, express the legislature's determination that the best interests of the child and the administration of the juvenile justice system require protecting the confidentiality of police, court and social agency records relating to juveniles"

State ex rel Herget, 84 Wis.2d 435, 450-51 (1978)

Background

- Confidentiality is essential to the goal of rehabilitation
- Juvenile court operates on a family rather than due process model
- Confidentiality is promised to encourage the furnishing of information which might not be disclosed in an adversarial or open proceeding
- Confidentiality reduces the stigma to youth (Shame)

Starting Point

- Assume that confidential information cannot be shared in any manner without:
 - ▶ Statutory Exception
 - ▶ Written Authorization
 - ▶ Court Order

State Statutes

- 48.293
- 48.371
- 48.38
- 48.396
- 48.432
- 48.433
- 48.48
- 48.57
- 48.78
- 48.93
- 48.98
- 48.981
- 51.30
- 118.125
- 146.82
- 938.396
- 938.78



Process

- WHAT type of records are being sought?
 - ✓ Court, Agency, School, Law Enforcement, Mental Health
- WHO is seeking the record?
 - ✓ Parent, GAL, Attorney, Child, or Public
- WHEN/WHY are they seeking record?
 - ✓ Discovery, research, nosey
- HOW do they get the record?
 - ✓ Notice, Procedure, Standards

What Records?

- Juvenile Court Records
- Agency Records
- Law Enforcement Records
- Mental Health Records

Court Records

What Records?

- Records of the court assigned to exercise juvenile court jurisdiction including all filings [§§ 48.396(2)(a) & 938.396(2)(a)]
 - ▶ CHIPS, UCHIPS, TPR, Ch. 48 guardianships, JIPS, delinquency, minor Ch. 51, juvenile injunctions, some ordinances
 - ▶ The Juvenile Court is the custodian of the records
 - ▶ §§ 48.396 & 938.396 would apply unless another chapter or section provides a more specific procedure
 - ▶ Records retention governed by Supreme Court Rule 72
 - ✓ CHIPS, UCHIPS, JIPS, delinquency: 4 years after 18th birthday
 - ✓ Minor guardianships & Ch. 51: 7 years after 18th birthday
 - ✓ TPR & adoption: 150 year
 - ✓ If felony or firearm restriction: 75 years

What Records?

- Note about Parental Consent for Abortion records:
 - ✓ All confidential except for action for Abortion without Parental Consent cases and Child Abuse/Neglect Investigation
- Note about Adoption records:
 - ▶ Different standard/restrictions (addressed in future slide)

Starting Point

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Statutory Exception: Request to Inspect Juvenile Court Records (JD-1738A)

- Statutes provide list of individuals who may inspect the juvenile court records under specific circumstances
 - ▶ See §§ 48.396(2) and 938.396(2g)
- Court order is not required unless requesting copies
 - ▶ Exception for monitoring federal requirements & CCIP research
 - ▶ Some counties have local practice of obtaining court order regardless
- Court reports, permanency plans, AODA or mental health evaluations, and other records that contain "sensitive personal information" of the juvenile/family cannot be open for inspection for requests based on Serious Juvenile Offender or Repeat Offender status

STATE OF WISCONSIN, CIRCUIT COURT, _____ COUNTY	
IN THE INTEREST OF	Request to Inspect Juvenile Court Records
Name _____	Case No. _____
Date of Birth _____	
<input type="checkbox"/> 1. I am requesting to inspect the court records relating to the child/juvenile. I am a(n): <ul style="list-style-type: none"> <input type="checkbox"/> Authorized representative of a law enforcement agency investigating alleged criminal activity or activity that may result in a court exercising jurisdiction under §938.12 or 938.13(12). §938.396(2g)(c), Wis. Stats. <input type="checkbox"/> Authorized representative of a court of criminal jurisdiction requesting information for the purpose of conducting or preparing for a proceeding in that court. §§48.396(2)(e) and 938.396(2g)(d), Wis. Stats. <input type="checkbox"/> Authorized representative of the district attorney requesting information to perform his or her official duties in a proceeding in a court of criminal jurisdiction. §§48.396(2)(e) and 938.396(2g)(d), Wis. Stats. <input type="checkbox"/> Authorized representative of a court of civil jurisdiction or the attorney for a party to a proceeding in that court requesting information to impeach a witness under §906.09. §938.396(2g)(d), Wis. Stats. <input type="checkbox"/> Attorney, or authorized representative of the attorney, for the person whose records are requested, to prepare that client's defense. §938.396(2g)(dm), Wis. Stats. <input type="checkbox"/> Authorized representative of the Department of Corrections or any other person preparing a presentence investigation. §48.396(2)(dr) and §938.396(2g)(dr), Wis. Stats. <input type="checkbox"/> Authorized representative of the Department of Corrections reviewing court records on a juvenile who has been adjudicated delinquent or found not responsible by reason of mental disease or defect, for a sexually violent offense and is a registered sex offender. §938.396(2g)(em), Wis. Stats. <input type="checkbox"/> Victim-witness coordinator enforcing the constitutional and statutory rights of a victim. §938.396(2g)(f), Wis. Stats. <input type="checkbox"/> Insurer of the victim to learn the amount of restitution, if any, ordered by court. §938.396(2g)(fm), Wis. Stats. <input type="checkbox"/> Authorized representative of court having jurisdiction over actions affecting the family, attorney responsible for support enforcement, or a party, a party's attorney or the juvenile's guardian ad litem, to a paternity action requesting information relating to paternity for purpose of determining, or rebutting presumption of, paternity of the child/juvenile. §§48.396(2)(dm) and 938.396(2g)(g), Wis. Stats. <input type="checkbox"/> Authorized representative of any court assigned to exercise jurisdiction under chapters 48 and 938, municipal court exercising jurisdiction under §938.17(2), Wis. Stats., district attorney, corporation counsel, or city, village, or town attorney requesting review of court records for the purpose of any proceedings in that court. §§48.396(2)(g) and 938.396(2g)(gm), Wis. Stats. <input type="checkbox"/> Attorney or guardian ad litem for a party to a chapter 48 or 938 proceeding in this court requesting a review of court records for the purpose of this proceeding. §§48.396(2)(g) and 938.396(2g)(gm), Wis. Stats. <input type="checkbox"/> Authorized representative of the court having jurisdiction over actions affecting the family, an attorney for a party or guardian ad litem in an action affecting the family, requesting a review of court records for the purpose of considering the custody of the child/juvenile. §§48.396(2)(h) and 938.396(2g)(h), Wis. Stats. 	

Authorized representative of the court assigned probate jurisdiction, attorney general, personal representative, special administrator, attorney performing services for the estate, a person interested as defined in §851.21, attorney, attorney-in-fact, guardian ad litem or guardian of the estate of a person interested, requesting review of court records for the purpose of determining whether any juvenile was adjudicated delinquent on the basis of unlawfully and intentionally killing a person. §938.396(2g)(i), Wis. Stats.

Representative of a fire investigator under §165.55(15) Wis. Stats., requesting the review of court records for the purpose of pursuing an investigation. §938.396(2g)(j), Wis. Stats.

Authorized representative of the Department of Corrections, the Department of Health Services, the Department of Justice, or a district attorney for use in the prosecution of any proceeding or any evaluation conducted under ch. 980. §938.396(10), Wis. Stats.

2. I am requesting to inspect and obtain copies of the court records relating to the child/juvenile. I am an:

Authorized representative of Department of Children and Families, Department of Corrections, or a federal agency monitoring and conducting periodic evaluations of activities under 45 CFR 1355, 1356, and 1357. §§48.396(2)(b)1. and 938.396(2g)(b)1., Wis. Stats.

Authorized representative of an entity engaged in bona fide research, monitoring, or evaluation of activities conducted under the Children's Court Improvement Program [42 USC 629f], as determined by the Director of State Courts. §§48.396(2)(b)2. and 938.396(2g)(b)2., Wis. Stats.

3. For any requester not listed above:

The juvenile is alleged to be delinquent for committing a violation specified as a Serious Juvenile Offender Crime. §938.396(2g)(k), Wis. Stats.

The juvenile is alleged to have committed a violation that would be a felony, and has previously been adjudicated delinquent. §938.396(2g)(l), Wis. Stats.

IF A REQUEST IS MADE UNDER #1 OR #3, RECORDS MAY BE INSPECTED BUT SHALL NOT BE COPIED UNLESS ORDERED BY THE COURT.

IF A REQUEST IS MADE UNDER #3, THE COURT REPORTS UNDER §938.33, WIS. STATS., EXAMINATIONS UNDER §938.295, WIS. STATS., AND OTHER RECORDS THAT DEAL WITH SENSITIVE PERSONAL INFORMATION OF THE JUVENILE AND THE JUVENILE'S FAMILY SHALL NOT BE OPEN FOR INSPECTION.

4. Other: _____

Person Making Request _____
 Name Printed or Typed _____
 Address _____
 Email Address _____ Telephone Number _____
 DSN# _____ DSN# BSM No. (if any) _____

DISTRIBUTION:
 1. Court
 2. Person making request

Statutory Exception: Discovery (§§ 48.293 & 938.293)

- WHO's Asking?
 - ✓ Attorney/GAL for any party or CASA
- WHEN?
 - ✓ Open to requester at least 48 hours prior to the proceeding
- WHAT?
 - ✓ All records relating child/juvenile relevant to subject matter of the proceeding
 - ✓ Copies permitted with permission of custodian or court order
 - ✓ AV recordings of children's statements (prior to Fact-Finding Hearing)
 - ✓ Civil discovery (Ch. 804) also applies to Ch. 48 proceedings

Statutory Exception: DNA Collection & Firearm Restrictions

- WHO's Asking?
 - ✓ Department of Justice
- WHY?
 - ✓ To determine whether juvenile required to submit DNA (Ch. 165) or has firearm restriction (§ 938.396(2g)(n))
- WHAT?
 - ✓ DNA: confirm probable cause, failure to appear, or an adjudication status
 - ✓ Firearm Restriction
 - Send notice of firearm restriction (GF-220) at time of felony adjudication
 - Confirm whether felony adjudication/firearm restriction post-adjudication

Authorization: Request & Authorization to Open Juvenile Court Records (JD-1739A)

- Child (14 or older), parent, guardian, or legal custodian requests or authorizes another person to have access to his/her juvenile court records
 - ▶ Does not include an "alleged" father
 - ▶ See §§ 48.396(1b) & (1d) and 938.396(2g)(ag) & (2g)(am)
- Court order is required under all circumstances
 - ▶ If court finds disclosure would not result in imminent danger to anyone=grant inspection
 - ▶ If court finds disclosure may result in imminent danger to someone=hold hearing
- Court would need to specifically permit copies in order
 - ▶ Use "Other" section in request and order

Herget Procedures

1. Individual seeking records must provide the juvenile court with:
 - ✓ Description of the information sought,
 - ✓ Basis for the belief that the information is in the child's/juvenile's records,
 - ✓ Relevance of the information to the court action,
 - ✓ Probable admissibility of the information as evidence at trial,
 - ✓ Efforts made to obtain the information elsewhere, and
 - ✓ Any hardship to the individual if the records are not released
2. Court sends notice of request to the parties and provides child/juvenile with an opportunity to respond (See sample letter.)
 - ✓ Child/juvenile whose confidentiality interests are at stake must be represented

Herget Procedures

3. Court must conduct an in-camera inspection of the records
 - ✓ If court determines certain information is essential to the petitioner's cause and cannot be obtained with reasonable effort from other sources, the court must then determine whether the need for that information outweighs society's/child's/juvenile's interest in protecting its confidentiality
4. If, after balancing these interests, the juvenile court judge determines that certain information should be disclosed, the court must carefully tailor the order to permit disclosure of only as much information as is necessary

Adoption Court Records

- § 48.93(1d) governs adoption court records
- Records are closed unless:
 - ▶ Enumerated exception pursuant to §§ 48.93 (1g), (1r), (1v), or (1w), 48.432, s. 48.433, 48.434, 48.48 (17) (a) 9., or 48.57 (1) (j); OR
 - ▶ By order of the court for good cause shown
- **New Forms:** Request to Disclose Adoption Court Records (JD-1740) and Order on Request to Disclose Adoption Court Records (JD-1741)
- Copies would be allowed at the discretion of the judge
- These provisions also apply to requests made by DCF

Agency Records

Starting Point

- Assume that confidential information cannot be shared in any manner without:
 - ▶ Statutory Exception
 - ▶ Written Authorization
 - ▶ Court Order

What Records?

- ▶ Confidential records kept or any information received by the DCF, county department, licensed child welfare agency, or DOC about an individual in its care or legal custody [§§ 48.78(1) & 938.78]
- ▶ Custodian is the department or agency having the records
- ▶ Statutory Exceptions [§§ 48.78 & 938.78]
- ▶ Records Retention
 - ✓ State agencies & counties establish pursuant to §§ 16.61 & 19.21
 - ✓ DCF: <https://publicrecordsboard.wi.gov/Documents/437-042022.pdf>
 - ✓ Local: <https://publicrecordsboard.wi.gov/Pages/GRS/LocalUnit.aspx>

What Records?

- ▶ Note about CPS reports:
 - ✓ There are many exceptions regarding the disclosure however many of the exceptions exclude the information regarding the identifying reporter
 - ✓ There is a penalty provision for violating the disclosure law (\$1,000 or 6 months)
 - ✓ See § 48.981(7)

Agency Records

- WHO's Asking?
 - ▶ Parent/Child (age 14 or older)
 - ✓ WHEN?
 - Anytime
 - ✓ WHAT?
 - Inspection of file unless agency determines that inspection would result in imminent danger
 - Written request for another person requires identification of **specific document**
 - See §§ 48.78(2)(ag),(aj),(am), (ap) & 938.78(2)(ag),(am)

Agency Records

- WHO's Asking?
 - ▶ Other Courts
- HOW?
 - ✓ No specific statutory exception like court records or law enforcement reports
 - ✓ *In Interest of K.K.C. (DeLeu)*, 143 Wis. 2d 508, 422 N.W.2d 142 (Ct. App. 1988).
 - ✓ Juvenile Court must review before criminal court may inspect in-camera for *Shiffra/Green/Richie* matters

Agency Records

- WHO's Asking?
 - ▶ Parent's or Juvenile's Attorney/GAL
- HOW?
 - ▶ No specific statutory exception
 - ▶ May receive the information in accordance the discovery statute [§§ 48.293 & 938.293]

Agency Records

- WHO's Asking?
 - ▶ Attorneys in other cases
 - ✓ Typically as a result of a subpoena to the agency
- HOW?
 - ✓ Have to apply the *Herget* procedure the same as with court records

Law Enforcement Records

Starting Point

- Assume that confidential information cannot be shared in any manner without:
 - ▶ Statutory Exception
 - ▶ Written Authorization
 - ▶ Court Order

What Records?

- Law Enforcement Records are the confidential records of juveniles maintained by the agency separate from the adult files
- The law enforcement agency is the custodian of the records
 - ▶ Records Retention [§ 19.21]
 - ✓ Sheriff departments:
<https://publicrecordsboard.wi.gov/Documents/County%20General%20Schedule.xls>
 - ✓ Local police agencies:
 - May vary by agency
 - Generally, 7 years unless Public Records Board sets shorter period or specific statutory provision

Statutory Exception: Discovery (§§ 48.293 & 938.293)

- WHO's Asking?
 - ✓ Attorney/GAL for any party or CASA
- WHEN?
 - ✓ Prior to Plea Hearing
- WHAT?
 - ✓ Copies of all law enforcement reports and statements
 - ✓ Confidential Informant may be withheld pursuant to § 905.10
 - ✓ Provided by corporation counsel/district attorney

Law Enforcement Records

- WHO's Asking
 - ▶ Parent or Child (age 14 or older)
- WHEN?
 - ▶ Anytime
- WHAT?
 - ▶ Copy of report subject to agency policy
 - ▶ Written request for another person requires identification of **specific report**
 - ▶ See §§ 48.396(1b),(1d), 938.396(1)(c)1. and 2.

Law Enforcement Records

- WHO's Asking
 - ▶ Attorneys in other cases
- WHY?
 - ▶ Typically as a result of a subpoena
- HOW?
 - ▶ No statutory exception
 - ▶ *Herget* case
 - ✓ Plaintiff's in civil damages case sought records regarding the Juvenile's vandalism
 - ✓ *Herget* case factors were codified in §§ 48.396(5) & 938.396(1j)(a)

Law Enforcement Records

- WHO's Asking
 - ✓ Media
- WHAT?
 - ✓ May provide information about the case without identifying the juvenile's identity
 - ✓ See 48.396(1)/938.396(1)(a)

So, Now I have the Records, What Can I do with them?

Redisclosure

- Just because you KNOW something, does not mean you can SAY something
 - ▶ Ethical Conflict Confidentiality vs. Client fidelity!
- Each person who inspects must have a consent, a statutory exception, or a court order
 - ▶ There is no statute permitting redisclosure!
- *KCC* and *Courtney F* cases, the juvenile court goes first on disclosure of confidential information under *Herget* and then the other court (TPR/CRIMINAL/CIVIL/TPR) determines the admissibility under that law

Resources

- Guide to Confidentiality Laws Applicable to CHIPS Proceedings:
www.wicourts.gov/courts/programs/docs/ccipwcpconfiguide.pdf
- CCIP E-Learning Project:
<https://wicciptraining.com/>

Questions or Comments?