

Newspaper Wins Records Battle For Emails Seized in John Doe Investigation

By Steven Mandell, Steven Baron, and Natalie Harris

In May 2010, the Milwaukee County District Attorney initiated a secret John Doe proceeding to investigate allegations that public employees and officials were misusing public resources for political purposes in connection with the gubernatorial campaign of then-Milwaukee County Executive, Scott W. Walker.

In Wisconsin, a John Doe is an investigative proceeding in which the judge has the power to subpoena and examine witnesses under the cloak of a secrecy order to ascertain whether a crime has been committed. (*See* Wis. Stat. § 968.26.)

During the John Doe investigation, the Milwaukee County District Attorney seized “secret” e-mails exchanged among County employees as well as the electronic equipment they used to keep those communications under the radar. Under the Wisconsin Public Records Law, those seized communications are “records” subject to “a presumption of complete public access”. (Wis. Stat. §§ 19.31 and 19.32(2).)

However, Milwaukee County failed to provide *Milwaukee Journal Sentinel* reporter David Umhoefer access to certain requested records covered by the John Doe seizure, presumably because those records remained in the exclusive custody of the District Attorney who had been leading the John Doe investigation.

The John Doe investigation led to the conviction of six individuals, including three former aides of then-County Executive Scott Walker. On February 13, 2013, the John Doe proceedings were closed, but the secrecy order remained in place.

Following the closure of the John Doe proceedings, David Umhoefer made a renewed public records request for certain seized records—this time directed to the John Doe judge. The John Doe judge denied the request citing the previously-entered secrecy order.

Shortly thereafter, the *Milwaukee Journal Sentinel* wrote a letter to current Milwaukee County Executive Chris Abele,

requesting that he take action to restore the Milwaukee County records seized in the John Doe to the county’s possession. The Milwaukee County Executive failed to take any action to restore the records, effectively relegating them to a “black hole” beyond the public’s reach, indefinitely.

On September 18, 2013, the *Milwaukee Journal Sentinel*, Journal Sentinel, Inc. and David Umhoefer (the “Newspaper”) filed a motion to intervene in the John Doe proceeding for the purpose of requesting that the sealed records be returned to Milwaukee County.

While the Newspaper’s motion was pending, one convicted former aide filed an appeal and the Wisconsin Court of Appeals ordered certain records seized in the John

Doe related to her prosecution unsealed. The unsealed records—representing only a small portion of the seized Milwaukee County records—confirmed that numerous Milwaukee County employees, including former Milwaukee County Executive Scott Walker, his former Chief of Staff, former Deputy Chief of Staff and numerous others, used personal e-mail accounts and/or a “secret router” to conduct official Milwaukee County business..

The Newspaper supplemented their motion with information gleaned from the unsealed records and requested a public hearing.

In response to the Newspaper’s motion, the Milwaukee County District Attorney argued, among other things, that the Wisconsin intervention statute does not apply to John Doe proceedings and that the Newspaper lacked standing to challenge the scope of the John Doe secrecy order or demand return of the records to the Milwaukee County Executive.

On May 21, 2014, the John Doe judge convened the first public session of the proceedings. Following extensive oral arguments on behalf of the Newspaper, Milwaukee County Executive and Milwaukee County District Attorney, the John Doe judge issued a ruling from the bench, granting the Newspaper’s motion in its entirety.

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As a result, the seized records are no longer subject to the John Doe secrecy order and the Milwaukee County District Attorney must return them to the office of the Milwaukee County Executive. At long last, Milwaukee County records that have been cloaked in secrecy will be available to the public in accordance with Wisconsin Public Records law. That law states that “a representative government is dependent upon an informed electorate,” and the ruling upholds the public’s right “to the greatest possible information regarding the affairs of government and the

official acts of those officers and employees who represent them”. (Wis. Stat. § 19.31)

The Milwaukee Journal Sentinel, Journal Sentinel, Inc. and David Umhoefer are represented by Steven Mandell, Steven Baron, and Natalie Harris of Mandell Menkes LLC, Chicago. Milwaukee County District Attorney John Chisholm is represented by Milwaukee County Assistant District Attorney Bruce J. Landgraf and Deputy District Attorney James J. Martin, Milwaukee. Milwaukee County Executive Chris Abele is represented by Milwaukee County Deputy Corporation Counsel Mark A. Grady, Milwaukee.



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