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## FOR YOUR INFORMATION

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January 2008

News For School and Municipal Clients

### **An Update on Records Retention**

On October 18, 2007, the Wisconsin Court of Appeals issued its decision in *State ex rel. Gehl v. Connors*, a case concerning the Wisconsin Public Records Law. In *Gehl*, the Court offered guidance concerning whether the Public Records Law provides a remedy or a penalty to impose on a governmental entity when the entity fails to retain a public record. Ultimately, the Court concluded that the Public Records Law does not provide for any such remedy or penalty.

In this case, a citizen, David Gehl, submitted a written request for records under the Public Records Law to the offices of various Dane County government officials. Gehl was involved in a longstanding dispute with Dane County regarding property that he owned. He requested e-mail correspondence between Dane County employees and agents regarding his property. Upon receiving his request, the County concluded that it was too broad. As a result, the County instructed Gehl to narrow his request and provide more specific information regarding the records he had requested. Once narrowed, the County reviewed Gehl's request and determined that many of the e-mails he requested had been deleted or otherwise discarded. The County explained that the deleted e-mails could be on one or more of the 150 discarded backup tapes that the County had not yet recycled. However, the County asserted that searching

these tapes was above and beyond any legal obligation the County had to locate the records.

Gehl filed a petition for mandamus in circuit court against the County alleging that the County unlawfully deleted e-mails that existed before June 2002. Gehl relied upon Wis. Stat. §§ 19.21 through 19.39, as the basis for his petition. He argued that the County's actions in discarding and deleting the requested records violated the Public Records Law.

The Court agreed with Gehl that, generally speaking, Wis. Stat. § 19.21 requires that governmental entities retain most public records for a period of seven years. However, the Court explained that Wis. Stat. § 19.21 is not part of the Public Records Law; therefore, individuals, including Gehl, may not seek relief for violations of Wis. Stat. § 19.21 under the Public Records Law.

The Court relied on its decision in *Zinngrabe v. School District of Sevastopol*, wherein it held that a governmental entity's failure to create sought-after records may not be attacked under the Public Records Law. Rather, the duty to maintain such records and the enforcement of such duty must be found elsewhere in the law. In *Zinngrabe*, the Court also suggested that a governmental entity's failure to keep sought-after records may not be

attacked under the Public Records Law. Instead, the public records retention statute, Wis. Stat. § 19.21, is primarily enforceable through Wis. Stat. § 19.21(3), which requires persons who violate Wis. Stat. §19.21 to pay a forfeiture of \$25 to \$2,000 into the treasury of the applicable governmental entity. Given Gehl’s mistake in bringing this action under the Public Records Law, the Court declined to penalize the County for deleting and discarding the e-mails Gehl had requested.

Due to Gehl’s jurisdictional error, Dane County was able to avoid liability for deleting and discarding the e-mail correspondence that Gehl had requested. However, other governmental entities may not be so lucky in the future. As such, school districts and other municipalities must be reminded about the obligation to retain public records in accordance with the Wisconsin Statutes and any approved records retention schedule.

The Wisconsin Statutes provide specific guidance to school districts with regard to records retention. Wis. Stat. § 19.21(6) explains that “[t]he period of time a school district record shall be kept before destruction shall be not less than 7 years, unless a shorter period is fixed by the public records board...” Wis. Stat. § 19.21 excludes pupil records from the seven year retention period and allows for a shorter retention period for recordings of public meetings and other records, if approved by the Public Records Board. Thus, Wisconsin law permits the destruction of school district records in less than seven years

only when certain conditions are met. In order to destroy such records before seven years have passed, a school district or other municipality must prepare a schedule for the destruction of records, seek approval of the schedule from the Public Records Board, and receive a proper waiver from the State Historical Society.

In 1990, the Wisconsin Department of Public Instruction, in conjunction with a special task force, developed the Records Retention Schedule for School Districts (RRSSD), which was designed to serve as a records retention schedule that school districts could simply adopt. The RRSSD is properly adopted if approved by the school board and if notice of adoption is given to the State Historical Society. The RRSSD provides for retention periods ranging from less than one year to “permanent.” At this time, the RRSSD only applies to records in paper and microfilm form. School districts may modify the RRSSD to keep records for a longer period of time. They may not, however, shorten a retention period found in the RRSSD to a period less than seven years without the approval of the Public Records Board.

In light of the above, school districts and other municipalities should review their records retention policies and practices to ensure compliance with the Wisconsin Statutes. If a municipality wishes to retain e-mails for less than seven years, the Public Records Board must approve any policy providing for such a shortened retention period.

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