Wisconsin Institute for Law and Liberty: Responds to Wisconsin Supreme Court Ruling in Voces de la Frontera v. David A. Clarke, Jr.

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February 24, 2017 – Milwaukee, WI – Today, the Wisconsin Supreme Court denied a request by Voces de la Frontera to obtain unredacted copies of I-247 immigration detainer forms in the possession of Milwaukee County Sheriff David Clarke. The Court's decision turns on the interpretation of a particular federal immigration regulation rather than Wisconsin's own public records law. The regulation in question prohibits the release of any information regarding immigration detainees, but is ambiguous as to whether it applies only to people currently in custody or to anybody who has been in custody. The Court looked to the history and purpose of the regulation, including concern for the privacy of detainees, and determined it applied to all detainees, making the I-247 forms unreleasable under federal law.

Even if one would disagree with the analysis of that regulation (as Justices Shirley Abrahamson and Ann Walsh Bradley did in dissent), the particular scope of this ruling is narrow and doesn't weaken Wisconsin's Open Record Law at all, since it was federal law that prohibited release. Whatever one thinks of today's outcome, it is a bit of a one-off.

Open government advocates may be more troubled, however, by the Court's choice to allow Sheriff Clarke to make a new argument not provided in his initial denial of the request. He never argued this regulation prohibited release until the court of appeals. For decades, a cornerstone of the Open Records Law has been that custodians are limited to relying on the reasons for withholding records they actually put in their initial denial of a request. Otherwise, custodians can either

intentionally sandbag requesters or be negligent and sloppy when considering whether to grant or deny record requests. It encourages custodians to “deny now” and work out a justification later.

While this is the second recent case which seemed to depart from it, today’s decision is unlikely to signal a departure from this salutary practice. It is one thing to strictly enforce a rule of waiver against exceptions rooted entirely in state law. But considerations of federalism and comity make it hard to ignore federal confidentiality requirements. A stringent rule of waiver works less well in that context, but departing from it in deference to a federal requirement does not suggest that the court will be similarly generous in other contexts.