Wisconsin Supreme Court
9:45 a.m.
Thursday, Nov. 3, 2016

2015AP1152 Voces de la Frontera, Inc. v. Clark

Supreme Court case type: Petition for Review
Court of Appeals: District I
Circuit Court: Milwaukee County, Judge David L Borowski affirmed
Long caption: Voces De La Frontera, Inc. (Voces) and Christine Neuman Ortiz, Petitioners-Respondents-Respondents, v. David A. Clarke, Jr., Respondent-Petitioner-Appellant-Petitioners

Issues presented:

- Does the Wisconsin Open Records Law require the records custodian of a local law enforcement agency to produce federal immigration detainer hold documents (I-247s) received from U.S. Immigration and Customs Enforcement (ICE), despite the specific prohibition contained in 8 C.F.R. § 236.6?
- In the alternative, does the balancing test set forth under the Wisconsin Open Records Law weigh in favor of the non-production of these same federal immigration detainer hold documents received by a local law enforcement agency from Immigration and Customs Enforcement (ICE)?

Some background: On Feb. 5, 2015, Voces de la Frontera, Inc. submitted an open records request to Milwaukee County Sheriff David A. Clarke Jr. for copies of all I-247 forms he had received from ICE since November of 2014. On April 2, 2015, Clarke provided redacted copies of 12 I-247 forms. Records custodian Cpt. Catherine Trimboli redacted subject ID, event number, file number, nationality, and a series of boxes pertaining to immigration status.

On April 7, 2015, Clarke produced revised redacted forms, this time disclosing the nationality of the detainees. Voces filed a writ of mandamus in Milwaukee County Circuit Court seeking full disclosure of the redacted items under Wisconsin's open records law. The circuit court held a hearing on May 6, 2015 at which Trimboli testified she determined that the I-247 forms were records, and none of the statutory exceptions to the disclosure of the forms applied. She said she understood that she needed to conduct a balancing test and that she deferred to ICE to make the determination on whether and what to redact.

On June 3, 2015, the circuit court granted Voces' writ, noting Wisconsin's "long history of favoring openness in government, ..." The court noted it was the sheriff's burden to show that the public interest favoring redaction outweighed disclosure, and the court found "there was never a very good reason given as to why that information should be redacted other than ICE . . . believes it should be redacted."

The Court of Appeals affirmed. The appellate court said from the plain language of both the I-247 form itself and 8 C.F.R. § 287.7, it was clear that DHS merely sought custody with a "request," not an order, for a 48-hour hold after the alien was to be released from state custody. It said this conclusion was also supported by the fact that 8 C.F.R. § 287.7(e) makes clear on its face that the detainer itself is only a request. It said the statute provides, "No detainer issued as a result of a determination made under this chapter I shall incur any fiscal obligation on the part of the Department, *until actual assumption of custody by the Department*[.]" 8 C.F.R. § 287.7(e).

Clarke successfully sought an emergency stay from the Wisconsin Supreme Court while he petitioned for review. Clarke argues that the forms were protected from disclosure because information about detainees who are being held for the federal government is specifically exempt from disclosure under 8 C.F.R. § 236.6, and principles of the Freedom of Information Act (FOIA).

Clarke says the court of appeals "misconstrued and misapplied federal regulation 8 C.F.R. § 236.6 and the federal Freedom of Information Act (FOIA) to Wisconsin's Open Records law." He argues because the documents at issue were federal documents that contained both law enforcement information and sensitive and confidential information relating to immigration detainees, principles contained both in Wisconsin's open records law and the federal FOIA supported the conclusion that the balance should be struck in favor of non-production.

According to Clarke, the language in the regulation is clear that it applies to inmates being detained in state, local, or private facilities on behalf of the federal government and there is no need for actual federal custody.

Voces contends the court of appeals correctly held that only those federal laws that specifically exempt or require the redacted information to be withheld from public access are passed through by virtue of §§ 19.36(1) and (2) as exceptions to the open records mandate. It says by its explicit terms, 8 C.F.R. § 236.6 does not apply to information about prisoners who are not actually in custody of the United States.