

# The WIREdata Case and its Implications for Wisconsin Geospatial Data

by Lea A. Shanley



On June 25, 2008, the Wisconsin Supreme Court issued an opinion in *WIREdata Inc. v. Village of Sussex* (2008 WI 69), after nearly seven years of litigation between WIREdata, Inc. and the villages of Sussex and Thiensville, and the city of Port Washington. The litigation touches on Wisconsin state public records law and its application to electronic databases.

Specifically, the Supreme Court considered the scope, timing, and procedure for making public records requests, the cost and format of the electronic records requested, and the authorities responsible for responding to these requests. This publication summarizes the WIREdata case, and highlights the potential impact of the decision on access to geospatial data maintained by government agencies.

## Background

In order to assess values for property-tax purposes, Wisconsin municipalities collect and maintain data about properties within their jurisdiction, such as the property's location, owner's name, square footage of improvements, assessed valuation, number and type of rooms, and other property characteristics.

All three municipalities involved in this case hired private, independent contractor assessors to complete their property

assessments. The contracted assessors entered the data they collected from site visits into "Market Drive," a searchable electronic database developed and copyrighted by Assessment Technologies (AT). Municipal tax officials may view and analyze their assessment data using Market Drive or Microsoft Access.

In 2001, the WIREdata Corporation, a wholly-owned subsidiary of Milwaukee Metropolitan Multiple Listing Service, Inc., made a series of public records requests seeking copies of the raw property assessment data with the intent of repackaging and selling it in a form that is useful to the real estate community. In its requests to the villages of Sussex and Thiensville, WIREdata asked for the information in an "electronic/digital" format. Fearing that they might violate their license agreement with AT, all three municipalities offered WIREdata paper copies of the handwritten notes compiled by the contractor assessors.

## U.S. District Court for the Eastern District of Wisconsin

In order to obtain the assessment data in electronic form, WIREdata sued the municipalities. In response, Assessment Technologies filed a lawsuit against WIREdata in the U.S. District Court for the Eastern District of Wisconsin (D.C. No. 01-C-789), claiming that the assessment data could not be extracted from its Market Drive software without infringement of its copyright or theft of its trade secrets.

The U.S. District Court determined that AT owned the copyright and was protected as to "Market Drive and its derivative works." On the basis of AT's copyright infringement claim alone, the U.S. District Court issued a permanent injunction in 2002 to stop WIREdata from accessing digital copies of the Market Drive assessment databases. The trade secret claim was not addressed.

## What is a record?

"Record" means any material on which written, drawn, printed, spoken, visual or electromagnetic information is recorded or preserved, regardless of physical form or characteristics, which has been created or is being kept by an authority. "Record" includes, but is not limited to, handwritten, typed or printed pages, maps, charts, photographs, films, recordings, tapes (including computer tapes), computer printouts and optical disks. "Record" does not include drafts, notes, preliminary computations and like materials prepared for the originator's personal use or prepared by the originator in the name of a person for whom the originator is working; materials which are purely the personal property of the custodian and have no relation to his or her office; materials to which access is limited by copyright, patent or bequest; and published materials in the possession of an authority other than a public library which are available for sale, or which are available for inspection at a public library [Wis. Stat. §19.32 (2)].

"In light of the WIREdata decision, public agencies may wish to consult with their attorneys in order to determine whether their geospatial database constitutes a record."



## U.S. Court of Appeals for the Seventh Circuit on Copyright

In 2003, the U.S. Court of Appeals for the Seventh Circuit, however, reversed the District Court's decision. See *Assessment Technologies of WI, LLC v. WIREdata, Inc.*, 350 F.3d 640 (7th Cir. 2003). The Seventh Circuit found that Market Drive satisfied the minimal originality required to hold a valid copyright in the database compartmental structure and in the software used to sort the data into compartments.

Nevertheless, the Seventh Circuit also held that extracting the raw data from the Market Drive software database did not violate federal copyright law. The Seventh Circuit noted that WIREdata did not want the copyrighted Market Drive compilation, but rather the raw data collected by the contractor assessors, which are in the public domain. "But," the Seventh Circuit asked, "how are the data to be extracted from the database without infringing the copyright?" *Id.* at 643.

One solution, noted the Seventh Circuit, would be to extract only raw data – *without the Market Drive compilation* – using Microsoft Access, although the scope of the Market Drive license would remain a consideration.

Nevertheless, the Seventh Circuit stated that even if the "data and the format in which they were organized could not be disentangled" without copying the Market Drive compilation, WIREdata and the municipalities could still legally extract copies of the public-domain property data because "the only purpose of the copying would be to extract non-copyrighted material, and not to go into competition with AT by selling copies of Market Drive." *Id.* at 645.

The Seventh Circuit also rejected AT's argument that WIREdata does not need the data in digital form. First, the handwritten notes of the assessors did not reflect the full set of data collected. Second, as the Seventh Circuit stated, AT had no ownership or other legal interest in the data collected, and therefore had no grounds for making the acquisition of the data more costly. *Id.*

Finally, the Seventh Circuit suggested that AT's attempts to prevent the municipalities from revealing their own data might be construed as "copyright misuse." Elaborating, the Seventh Circuit stated that "for a copyright owner to use

an infringement suit to obtain property protection, here in data, that the copyright law clearly does not confer, hoping to force a settlement or even achieve an outright victory over an opponent that may lack the resources or the legal sophistication to resist effectively," might be considered an abuse of copyright. *Id.* at 647. The Seventh Circuit added that if it had not rejected AT's interpretation of its license agreement, the municipalities would not be permitted to show each other their data "even for the purpose of comparing or coordinating their assessment methods."

Although the Seventh Circuit did not answer the question as to whether AT's conduct rose to the level of actual copyright misuse, it did hold that AT's case had little merit. Thus, in a subsequent case, it ordered AT to pay WIREdata a total of \$91,765.28 in attorney's fees. In this decision, the Seventh Circuit also noted, discussing federal copyright law, "[t]he public interest in [nonexclusive access to the intellectual public domain] is as great as the public interest in the enforcement of copyright" *Assessment Technologies of WI, LLC v. WIREdata, Inc.*, 361 F.3d 434, 436 (7th Cir. 2004).

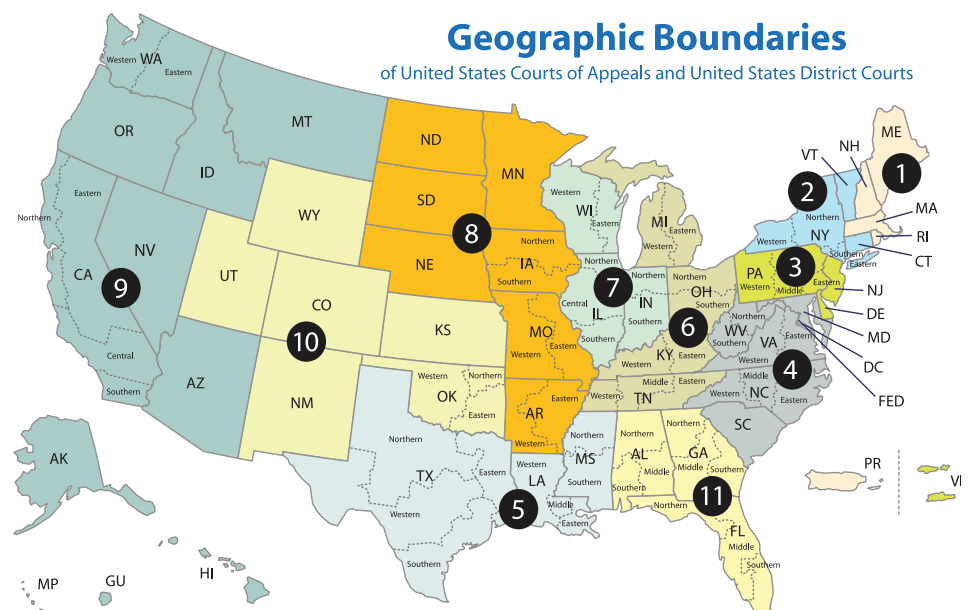
The municipalities eventually provided WIREdata with copies of their assessment information in an electronic portable document file (PDF) format. Nevertheless, all parties filed motions for summary judgment in Wisconsin circuit court, which resulted in very disparate

decisions and subsequent review in the Wisconsin appellate courts.

## Wisconsin Court of Appeals Decision

The Wisconsin Court of Appeals considered these cases together in 2007. See *WIREdata, Inc v. Village of Sussex*, 2007 WI App 22, 298 Wis. 2d 743, 729 N.W.2d 757. The Court of Appeals ruled that the public records law allows WIREdata to access the database in order to examine and copy the property assessment records, and that the municipalities violated state public records law when they denied WIREdata access.

The private contractors and village of Sussex objected to this decision, contending that it "places tremendous technological and financial burdens on municipalities and independent contractors working for the municipalities when confronted with increasingly complex public records requests." Thus, they asked the Wisconsin Supreme Court to review the decision of the appellate court. Specifically, they asked the Court to address whether the municipalities denied the public records requests, whether the private contractors are the proper recipients of such requests, whether an additional fee might be charged for responding to a request for electronic records databases, and whether some portion of the information should be considered confidential.



## Wisconsin Supreme Court on Electronic Databases and Public Records Law

The Wisconsin Supreme Court issued its opinion on the WIREdata case on June 25, 2008 (WIREdata, 2008 WI 69). The Court acknowledged the decision of the United States Court of Appeals for the Seventh Circuit. The Seventh Circuit had held that extracting the raw data that WIREdata sought from the Market Drive software's database did not violate federal copyright law, and that there was no copyright restriction on WIREdata receiving a simple, electronic version of the database. WIREdata, 2008 WI 69, ¶ 24. The Wisconsin Supreme Court did not reconsider the same federal law copyright issues considered by the Seventh Circuit, but instead focused its attention on Wisconsin public records law issues.

The Wisconsin Supreme Court then reviewed and affirmed in part and reversed in part the 2007 decision of the Court of Appeals of Wisconsin, and sent it back to the trial court for consideration. The Supreme Court stated, "We reverse in part and affirm in part the decision of the court of appeals. WIREdata, Inc. v. Village of Sussex, 2007 WI App 22, ¶¶2, 3, 67-70, 298 Wis. 2d 743, 729 N.W.2d 757. In

order to assist the reader in understanding our determinations, in relation to that decision, we disagree with the court of appeals' specific holdings as follows: that the three municipalities denied the public records requests of WIREdata and, thus, violated the public records law; that the PDFs were insufficient to

comply with such public records requests; that the public records law requires access to the computerized database; that the "enhanced" demands did not require the creation of new records; and that WIREdata is entitled to fees and costs from each of the municipalities. However, we agree with the court of appeals' specific holdings as follows: that the municipalities are the responsible authorities under the public records law; that such responsibility cannot

be shifted to independent contractor assessors; and that the initial written requests of WIREdata were valid and, thus, were not insufficient as to subject matter and length of time." WIREdata, 2008 WI 69, ¶ 5.

First, the Wisconsin Supreme Court held that a municipality's independent contractor assessor is not an "authority" subject to the public records law. Consequently, an independent contractor assessor is not the proper recipient of a public records request. Instead, the municipality is the responsible authority to which a public records request should be directed. WIREdata, 2008 WI 69, ¶¶ 73-78.

Second, the Court ruled that "a municipality may not avoid liability under public records by contracting with an independent contractor assessor for the collection, maintenance, and custody of its property assessment records and by then directing any requester of those records to the independent contractor assessor who has custody of the sought after records." WIREdata, 2008 WI 69, ¶¶ 82-89.

This is a significant holding as public agencies in Wisconsin are increasingly delegating the creation and maintenance of property assessment databases, as well as of geospatial databases, to private contractors. The WIREdata decision does not prohibit this practice, but means that public agencies need to make appropriate arrangements with

their contractors for provision of records necessary to respond to public records requests received by the public agencies.

Third, the Court confirmed that an agency cannot "make a profit on its response to a public records request." Initially, a subcontractor for Assessment Technologies informed WIREdata they would need to pay a one-time fee of \$6,600 to program, test, and export the data for all three municipalities. An additional fifty cents per parcel fee would be

charged for the "enhanced" file request, as well as a fee for each redistribution of the data. This cost estimate was later revised to \$3,132 for just "a digital property record card". This revised fee included 89.5 hours of labor at \$35 per hour.

Because no fees were actually charged to WIREdata for the information provided in PDF format, the Court held that the municipalities did not violate the

public records law. The Court noted that the public records law allows government agencies to charge a fee "for the location, reproduction or photographic processing of the

requested records, but the fee may not exceed the actual, necessary and direct cost of complying with the public records requests," unless a state statute sets a different fee (Wis. Stat. § 19.35(3)(a); see also, Osborn v. Bd. of Regents, 2002 WI 83, ¶ 46, 254 Wis. 2d 266, 647 N.W.2d 158).

While the Court did not address what an appropriate fee might have been for the provision of "enhanced" digital copies of the assessment databases, it specifically noted "that nothing in this opinion should be viewed as changing or modifying our prior case law..." Thus, while a government agency may recoup its actual, necessary and direct costs of reproduction, it may not use public records requests to generate revenue (see also DOJ Letter, October 13, 2006). Furthermore, the WI Department of Justice's 2008 Public Records Law Compliance Outline states, "[a]n offer of compliance, but conditioned on unauthorized costs and terms, constitutes a denial" of a public records request. WIREdata, Inc. v. Vill. of Sussex 2007 WI App 22, ¶ 57, 298 Wis. 2d 743, ¶ 57, 729 N.W.2d 757, ¶ 57.

Fourth, the Court ruled that the data provided in PDF format satisfied WIREdata's initial public records request for "electronic/digital" copies of the property assessment data. This decision is based on the wording of WIREdata's request, which was broad enough to encompass PDF format. "[D]espite the fact that the PDF files did not have all of the characteristics that WIREdata wished (that is, WIREdata could not easily manipulate the data), the PDF files did fulfill WIREdata's initial re-

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quests as worded.” WIREdata, 2008 WI 69, ¶ 96. The public records law requires a sufficient request to reasonably describe the requested record or information.

The Court did not address WIREdata’s subsequent requests for “enhanced” data because these requests were made directly to the private contractors, who were not considered responsible authorities under public records law. Thus, the Court did not address whether providing a PDF would satisfy a more specific request, such as for “enhanced” comma delimited copy of data or for a copy of a searchable database, such as a geospatial data set.

Nevertheless, the Wisconsin Supreme Court cautioned that allowing “direct access to the electronic databases of an authority would pose substantial risks. For example, confidential data that is not subject to disclosure under the public records law might be viewed or copied.” The Court stated that “it is sufficient for the purposes of the public records law for an authority, as here, to provide a copy of the relevant data in an appropriate format.” WIREdata, 2008 WI 69, ¶ 97.

In its published opinion, the Wisconsin Supreme Court acknowledged, but did not revisit the U.S. Court of Appeals for the Seventh Circuit’s opinion, which held that federal copyright law did not prevent public records law access to public agencies’ property assessment data. The Seventh Circuit’s ruling underscores the idea that copyright in electronic databases, such as geospatial datasets, resides in the small amount of originality required for the “selection, coordination, or arrangement” of the data, and not in the factual data themselves (Onsrud, 2004).

The Wisconsin Supreme Court sent the case back to the lower court for actions consistent with the principles put forth by the Supreme Court.

## Summary

This case illustrates why electronic records database issues are so complicated; each case must be evaluated individually as per the type of software used, the scope of the license agreement, the means of extricating the data, and so forth. It also highlights the need for specificity when making public records requests.

As noted above, the Wisconsin Supreme Court decision was based on the wording of WIREdata’s initial request for an “electronic/digital copy,” which was

broad enough to encompass the PDF format; it did not address whether providing a PDF would satisfy a more specific request, such as for a copy of geospatial database.

Finally, the Wisconsin Supreme Court’s decision is significant because public agencies in Wisconsin are increasingly delegating the creation and maintenance of property assessment databases, as

well as of geospatial databases, to private contractors. The WIREdata decision does not prohibit this practice; but ultimately, public agencies are responsible for answering these requests, and therefore will need to make appropriate arrangements with their contractors for the provision of records necessary to respond to public records requests. ☹

## An Editorial: What does WIREdata really mean for geospatial professionals?

*Jim Lacy, Associate State Cartographer*

While the WIREdata case addresses some topics that geospatial professionals have debated for years, many questions remain unanswered regarding the relationship between geospatial data and Wisconsin’s public records law.

The public records issue in Wisconsin, and elsewhere for that matter, is often intertwined with the desire for state and local governments to generate revenue to support geospatial data development projects. Tough economic times, and in some cases specific directives by governing boards, has forced public agencies to develop creative cost recovery models as a way to share costs with other jurisdictions, and non-government organizations.

Some advocates of open data sharing policies cite cost recovery as a clear violation of public records, and as inappropriately charging taxpayers “twice” for geospatial data. In contrast, proponents of user fees view this as smart government, where the burden of maintenance is placed upon those who most frequently benefit from the service. Both sides have valid arguments. Regardless, the debate begs a series of important questions:

- When, or under what circumstances, do geospatial data constitute a “record” in the eyes of the public records law?
- If a government organization charges for data, could a specific public records request circumvent those fees?
- By charging a fee for geospatial data, is the organization exceeding the “actual, necessary, and direct cost of reproduction and transcrip-

tion of the record” referenced in the public records law? [Sec 19.35(3)(b), Wis. Stats.]

- Can geospatial data be protected by copyright, and if so, does this insulate the data from a public records request?
- If geospatial data are treated as a product for sale, does that mean they are not subject to public records requests?

The intent of all public records laws is to ensure transparency and accountability in government. But, to what lengths must government go to satisfy open access to records? For example, do public Web mapping sites satisfy the intent of the law? Is an organization required to make geospatial data available in its original format, or does a paper map or digital PDF suffice as a proxy?

Given the legal ramifications, and the lack of case law that addresses these specific questions, some would argue that state and local governments are best served by eliminating all cost recovery policies, and placing all geospatial data in the public domain. While beneficial to consumers, this would not address the very real economic problems faced by government today.

The true solution to this ongoing debate requires both an analysis of public records law and court cases that test the law, but also the development of intelligent and sustainable funding programs that support Wisconsin’s spatial data infrastructure. These, along with continued education of policymakers, may finally put the public records debate to rest for the geospatial community.

## References and Further Reading

### WIREData Court Documents

Wisconsin Supreme Court opinion:

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### WIREData News Articles

WIREData Decision Favorable but Public Records Requests Remain Municipal Responsibility (League of Wisconsin Municipalities, August 2008 Note)

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Wisconsin Supreme Court Issues Ruling in Open Records Case (JS Online, June 25, 2008)

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### Wisconsin Public Records Law

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<http://nxt.legis.state.wi.us/nxt/gateway.dll?f=templates&fn=default.htm&d=stats&jd=ch.%2019>

Wisconsin Public Records Law, Compliance Outline (WI Dept. of Justice)

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### Legal Discussions

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