

870 PRIVILEGE: CONDUCT IN GOOD FAITH AND IN AN APPARENTLY AUTHORIZED AND REASONABLE FULFILLMENT OF DUTIES OF A PUBLIC OFFICE — § 939.45(3)

[INSERT THE FOLLOWING AFTER THE ELEMENTS OF THE CRIME ARE DEFINED BUT BEFORE THE CONCLUDING PARAGRAPHS.]

Privilege Of A Public Office

The privilege of fulfillment of the duties of a public office is an issue in this case. The law provides that a person is privileged to engage in conduct that would otherwise be criminal if:

- First, the defendant acted in good faith.

“Good faith” means that the defendant believed that (his) (her) conduct was an authorized and reasonable fulfillment of (his) (her) duties as a (specify the public office).¹

- Second, the defendant’s conduct was an apparently authorized and reasonable fulfillment of the duties of a public office.

The duties of a (specify the public office) include: (specify duties).²

“Apparently authorized” means that a reasonable person would believe that the defendant had the authority to act in the manner (he) (she) did.

“Reasonable fulfillment” of duties means that the defendant’s conduct was necessary and proportional in responding to the interests at stake.³

State’s Burden of Proof

The State must prove by evidence which satisfies you beyond a reasonable doubt that the defendant did not act lawfully within the scope of the privilege of a public office.

Jury’s Decision

If you are satisfied beyond a reasonable doubt that all _____ elements of _____⁴

have been proved and that the defendant did not act lawfully within the scope of the privilege of fulfillment of the duties of a public office, you should find the defendant guilty.

If you are not so satisfied, you must find the defendant not guilty.

COMMENT

Wis JI-Criminal 870 was approved by the Committee in April 2014. This revision was approved by the Committee in August 2023; it corrected formatting errors.

This instruction is drafted for the privilege set forth in § 939.45(3).

The privilege has been discussed in two published appellate decisions. State v. Stoehr, 134 Wis.2d 66, 396 N.W.2d 177 (1986) involved a district director for a state technical institute charged with violating § 946.13(1)(b), private interest in a public contract. State v. Trentadue, 180 Wis.2d 670, 510 N.W.2d 727 (Ct. App. 1993), involved a police officer charged with violating § 941.20(1)(c), intentionally pointing a firearm at or toward another.

1. The Committee concluded that the standard for “good faith” was a subjective one – the focus should be on whether the defendant actually believed that what he or she was doing was an authorized and reasonable fulfillment of the duties of his or her office.

2. The duties of some public offices are set forth in the Wisconsin Statutes or Administrative Code or may be established by reference to other legal standards. When that is the case, the Committee suggests using the sentence in parentheses and describing the duties in the blank. The Committee has concluded that the jury may be informed of the law that declares what a person’s official duties are without running the risk of directing a verdict on an element of the crime. It is still for the jury to determine whether the person was performing the duty in the particular case. But see State v. Jensen, 2007 WI App 256, 306 Wis.2d 572, 743 N.W.2d 468; and State v. Schultz, 2007 WI App 257, 306 Wis.2d 598, 743 N.W.2d 823.

3. This is based on the following from the Wisconsin Supreme Court decision in State v. Stoehr, 134 Wis.2d 66, 86, 396 N.W.2d 177 (1986):

The statutory privilege defense is designed to provide a justification for conduct which “must be in accord with the actor’s function as a public servant, and must be necessary and proportional to the protection and furtherance of the interests at stake.” 2 Robinson, *Criminal Law Defenses*, sec. 149(a), p. 216 (1984).

4. In the two blanks provided, insert the number of elements that the crime has and the name of that crime, where the crime has a convenient short title. For example, for a case involving simple battery under § 940.19(1), the sentence would read as follows: “. . . that all four elements of battery have been proved . . .” See Wis JI-Criminal 1220A. If the crime does not have a convenient short title, use “this offense”

instead. For example, for a case involving substantial battery under § 940.19(2), the sentence would read: “that both elements of this offense were proved, . . .” See Wis JI-Criminal 1222A.