

2001 ASSEMBLY BILL 175

March 7, 2001 – Introduced by Representatives POWERS, HAHN, LA FAVE, KREIBICH, TOWNSEND, SYKORA and REYNOLDS, cosponsored by Senator ERPENBACH. Referred to Committee on Personal Privacy.

1 **AN ACT to amend** 40.07 (1) (intro.), (2) and (3), 230.13 (1) (intro.) and 233.13
2 (intro.); and **to create** 19.32 (1w) and (2g), 19.356 and 19.36 (10) of the statutes;
3 **relating to:** access to public employee personnel records and certain other
4 public records containing personally identifiable information.

Analysis by the Legislative Reference Bureau

Under current law, any requester has a right to inspect or copy any public record unless otherwise provided under statutory or common law or unless, under a “balancing test” derived from common law, the custodian demonstrates that the public interest in withholding access to the record outweighs the strong public interest in providing that access. See s. 19.35 (1), stats., and *State ex rel. Youmans v. Owens*, 28 Wis.2d 672, 682–83 (1965) and *Hathaway v. Green Bay School District*, 116 Wis. 2d 388, 395–96 (1984). If a custodian fails to provide prompt access to a requested record or to make this demonstration, a requester may obtain a court order requiring a custodian to provide access to a record. See s. 19.37 (1), stats.

In *Woznicki v. Erickson*, 202 Wis.2d 178, 192–193 (1996), the Wisconsin supreme court held that a district attorney must notify any individual who is the subject of a record which the district attorney proposes to release to a requester prior to release, and that the individual may appeal a decision to release a record to circuit court, which must determine whether permitting access would result in harm to the privacy or reputational interests of the subject individual that outweigh the public interest in allowing access. In *Milwaukee Teachers Education Assn. v. Milwaukee Bd. of School Directors*, 227 Wis. 2d 779, 799 (1999), the supreme court expanded this

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decision to apply to all public records. There is no statutory basis for these decisions. The decisions also depart from the supreme court's previous decisions, which held that, unless otherwise provided, custodians have no obligation to withhold public records from access and no person may require them to do so. See *Newspapers, Inc. v. Brier*, 89 Wis.2d 417, 431–32 (1979) and *State ex rel. Bilder v. Twp. of Delavan*, 112 Wis.2d 539, 558 (1983).

This bill affirms current statutory law by providing that, unless otherwise specifically provided by statute, no custodian of a public record is required to notify an individual who is the subject of a record prior to providing to a requester access to a record containing information pertaining to that individual and that, unless otherwise provided by statute, no person is entitled to judicial review of the decision of a custodian to provide a requester with access to a public record.

However, the bill also creates a statutory procedure under which individuals who are the subjects of certain public records may seek a court order to restrain state or local government officers or agencies from providing access to those records to third parties if the subject individuals can demonstrate that the harm to their privacy or reputational interests resulting from disclosure of the information contained in those records outweighs the public interest in providing access to those records. Under the bill, if the officer or agency having custody of a public record receives a request to provide access to a record containing personally identifiable information as the result of an investigation by the officer or agency into a disciplinary matter or possible violation of a statute, rule, regulation, or policy of the officer or agency, the officer or agency must, before providing access, provide written notice to each subject individual of the officer's or agency's intent to release the record. If a subject individual notifies the officer or agency, within 5 days, of his or her intent to seek a court order restraining release of the record and files an action seeking such an order within 10 days, the record may not be released unless the court so permits.

The bill also provides that no state or local governmental officer or agency may release certain personnel records and information in response to a request for inspection, except to a public employee or employee's representative to the extent required under current law or an applicable collective bargaining agreement. Affected records include personal medical records; records containing home addresses and telephone numbers, unless an affected employee otherwise permits; records relating to a possible criminal offense or possible misconduct connected with employment by a public employee prior to disposition of the investigation; letters of reference; records of employment examinations, except examination scores if not otherwise prohibited; and other records relating to staff management planning, performance evaluations, salary and wage proposals, management bonus plans, promotions, job assignments, and comments relating to public employees.

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Currently, access to some of these records may be denied under specific laws governing these records or under the common law “balancing test.”

The people of the state of Wisconsin, represented in senate and assembly, do enact as follows:

1 **SECTION 1.** 19.32 (1w) and (2g) of the statutes are created to read:

2 19.32 (1w) “Public employee” means an individual who is employed by an
3 authority, other than an individual holding an elective office.

4 (2g) “Record subject” means an individual about whom personally identifiable
5 information is contained in a record.

6 **SECTION 2.** 19.356 of the statutes is created to read:

7 **19.356 Notice to record subject; right of action. (1)** Except as authorized
8 in this section or as otherwise provided by statute, no authority is required to notify
9 a record subject prior to providing to a requester access to a record containing
10 information pertaining to that record subject, and no person is entitled to judicial
11 review of the decision of an authority to provide a requester with access to a record.

12 (2) If an authority decides to permit access to a record created or maintained
13 by the authority under s. 19.35 (1) as a result of the authority’s investigation into a
14 disciplinary matter or possible violation of a statute, rule, regulation, or policy of the
15 authority, the authority shall, before permitting access and within 72 hours after
16 making the decision to permit access, serve written notice of that decision on any
17 record subject to whom that record pertains, either by registered mail with return
18 receipt signed by the addressee or by personally serving the notice on the subject.
19 The notice shall briefly describe the requested record and include a description of the
20 rights of the record subject under subs. (3) and (4).

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1 **(3)** Within 5 days after receipt of a notice under sub. (2), any record subject may
2 provide written notification to the authority of his or her intent to seek a court order
3 restraining the authority from providing access to the requested record.

4 **(4)** Within 10 days after receipt of a notice under sub. (2), any record subject
5 may commence an action seeking a court order to restrain the authority from
6 providing access to the requested record. If a record subject commences such an
7 action, the record subject shall name the authority as a defendant. The record
8 subject shall also join the requester as a party to the action under s. 803.03.

9 **(5)** An authority shall not provide access to a requested record within 12 days
10 of sending a notice pertaining to that record under sub. (2). In addition, if the record
11 subject commences an action under sub. (4), the authority shall not provide access
12 to the requested record during pendency of the action. If the record subject appeals
13 or petitions for review of a decision of the court or the time for appeal or petition for
14 review of a decision adverse to the record subject has not expired, the authority shall
15 not provide access to the requested record until any appeal is decided, until the
16 period for appealing or petitioning for review expires, until a petition for review is
17 denied, or until the authority receives written notice from the record subject that an
18 appeal or petition for review will not be filed, whichever occurs first.

19 **(6)** If the record subject demonstrates that the harm to his or her privacy or
20 reputational interests caused by disclosure of the information contained in the
21 requested record outweighs the public interest in disclosure of that information, the
22 court shall restrain the authority from providing access to that record under s. 19.35
23 (1).

24 **(7)** The court shall not grant any request by a requester to delay the
25 proceedings. The court shall issue a decision within 10 days after the filing of the

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1 summons and complaint and proof of service of the summons and complaint upon the
2 defendant and the requester, unless a party demonstrates cause for extension of this
3 period. In any event, the court shall issue a decision within 30 days after those filings
4 are complete.

5 **(8)** If a party appeals a decision of the court under sub. (7), the court of appeals
6 shall grant precedence to the appeal over all other matters not accorded similar
7 precedence by law.

8 **SECTION 3.** 19.36 (10) of the statutes is created to read:

9 **19.36 (10) PUBLIC EMPLOYEE PERSONNEL RECORDS.** Unless access is specifically
10 authorized or required by statute, an authority shall not provide access to the
11 following records under s. 19.35 (1), except to a public employee or the employee's
12 representative to the extent required under s. 103.13 or a collective bargaining
13 agreement under subch. IV of ch. 111:

14 (a) Personal medical records of a public employee.

15 (b) Records containing the home address or telephone number of a public
16 employee, if the employee requests the authority to do so.

17 (c) Records relating to the investigation of a possible criminal offense or possible
18 misconduct connected with employment by a public employee prior to disposition of
19 the investigation.

20 (d) Letters of reference pertaining to a public employee.

21 (e) Any record pertaining to an employment examination, except an
22 examination score if access to that score is not otherwise prohibited.

23 (f) Records of any material used by an authority for staff management planning,
24 including performance evaluations, judgments or recommendations concerning
25 future salary adjustments or other wage treatments, management bonus plans,

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1 promotions, job assignments, or other comments or ratings relating to public
2 employees.

3 **SECTION 4.** 40.07 (1) (intro.), (2) and (3) of the statutes are amended to read:

4 40.07 **(1)** (intro.) Notwithstanding any other statutory provision, individual
5 personal information in the records of the department is not ~~a public record and shall~~
6 ~~not be disclosed, unless~~ subject to access under s. 19.35 (1), but access to that
7 information may be provided, unless prohibited under s. 19.36 (10), if:

8 **(2)** Notwithstanding sub. (1), information contained in medical records may be
9 disclosed only when permitted under s. 19.36 (10) and only when a disability
10 application denial is appealed or under a court order duly obtained upon a showing
11 to the court that the information is relevant to a pending court action, but medical
12 information gathered for any one of the benefit plans established under this chapter
13 may be used by any other benefit plan established under this chapter.

14 **(3)** The department shall not furnish lists of participants, annuitants or
15 beneficiaries to any person or organization except as permitted under s. 19.36 (10)
16 and as required for the proper administration of the department.

17 **SECTION 5.** 230.13 (1) (intro.) of the statutes is amended to read:

18 230.13 **(1)** (intro.) Except as provided in sub. (3) and s. ss. 19.36 (10) and 103.13,
19 the secretary and the administrator may keep records of the following personnel
20 matters closed to the public:

21 **SECTION 6.** 233.13 (intro.) of the statutes is amended to read:

22 **233.13 Closed records.** (intro.) Except as provided in s. ss. 19.36 (10) and
23 103.13, the authority may keep records of the following personnel matters closed to
24 the public:

25

(END)