LRB–2119/7
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2001 SENATE BILL 442

February 13, 2002 – Introduced by Senator ERPENBACH. Referred to Committee on Privacy, Electronic Commerce and Financial Institutions.

AN ACT ***to renumber*** 230.13 (3); ***to amend*** 40.07 (1) (intro.) and (3), 230.13 (1) (intro.) and 233.13 (intro.); and ***to create*** 19.32 (1bg), (1de), (1dm), (2g) and (4), 19.345, 19.356, 19.36 (10) and 230.13 (3) (b) of the statutes; **relating to:** access to public records.

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 outweighs 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 extended this

decision to apply to all public records. The decisions differ 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). The rights created by the *Woznicki* and *Milwaukee Teachers* decisions are not currently reflected in the statutes.

This bill affirms current statutory law in part 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.

The bill also creates two exceptions. First, the bill provides that, unless otherwise authorized or required by statute, no state or local governmental officer or agency may release certain information contained in personnel records of public or private employees, other than certain high–ranking officials, in response to a request for inspection, except to an employee or employee's representative to the extent required under current law or to a public employee collective bargaining representative to the extent required to fulfill a duty to bargain or pursuant to an applicable collective bargaining agreement. The information includes home addresses and telephone numbers, unless an affected employee authorizes the officer or agency to provide access to that information; information relating to a current investigation of a possible criminal offense or possible misconduct connected with employment by an employee prior to disposition of the investigation; information relating to employment examinations, except examination scores if not otherwise prohibited; and other information relating to one or more specific employees that is used by the employer of the employees for staff management planning, including performance evaluations, salary and wage proposals, management bonus plans, promotions, job assignments, letters of reference, and comments or ratings relating to employees. Currently, access to some of these records may be denied under specific laws governing these records or under the common law "balancing test."

Secondly, for records other than those described above, the bill creates a statutory procedure under which public or private employees, other than certain high–ranking officials, who are the subjects of certain other 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. Under the bill, the officer or agency having custody of a public record continues to apply the common law balancing test in determining accessibility of public records, unless otherwise provided under statutory or common law. However, with certain exceptions, if the officer or agency receives a request to provide access to a record containing information relating to an employee as the result of an investigation by the officer or agency into a disciplinary matter involving the employee or possible employment–related violation by the employee of a statute, ordinance, rule, regulation, or policy of the employee's employer, or if the officer or agency receives a request to provide access to any record

obtained by the officer or agency through a subpoena or search warrant, 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 five 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 ten days, the record may not be released unless the court so permits. The bill provides that the court shall apply common law principles interpreting the right of access to public records in making its decision.

Under current law, the secretary of employment relations and the administrator of the division of merit recruitment and selection in the department of employment relations may keep the following information closed to the public: examination scores and ranks and other evaluations of applicants; dismissals, demotions, and other disciplinary actions; pay survey data obtained from identifiable nonpublic employers; and the names of nonpublic employers contributing pay survey data. This bill authorizes the secretary and the administrator to provide any state agency with personnel information relating to the hiring and recruitment process, including specifically the examination scores and ranks and other evaluations of applicants.

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

SECTION 1. 19.32 (1bg), (1de), (1dm), (2g) and (4) of the statutes are created to read:

19.32 **(1bg)** "Employee" means an individual who is engaged in employment in this state, other than an individual holding a state public office or a local public office.

(1de) "Local governmental unit" has the meaning given in s. 19.42 (7u).

(1dm) "Local public office" has the meaning given in s. 19.42 (7w), and also includes any appointive office or position of a local governmental unit in which an individual serves as the head of a department, agency, or division of the local governmental unit, but does not include any office or position filled by a municipal employee, as defined in s. 111.70 (1) (i).

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

(4) "State public office" has the meaning given in s. 19.42 (13), but does not include a position identified in s. 20.923 (6) (em) to (gm).

SECTION 2. 19.345 of the statutes is created to read:

19.345 Time computation. In ss. 19.33 to 19.39, when a time period is provided for performing an act, whether the period is expressed in hours or days, the whole of Saturday, Sunday and any legal holiday, from midnight to midnight, shall be excluded in computing the period.

SECTION 3. 19.356 of the statutes is created to read:

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

(2) (a) Except as provided in pars. (b) and (c) and as otherwise authorized or required by statute, if an authority decides to permit access to a record containing information relating to an employee that is created or kept by the authority as a result of an investigation into a disciplinary matter involving the employee or possible employment–related violation by the employee of a statute, ordinance, rule, regulation, or policy of the employee's employer, or if an authority decides to permit access to any record obtained by the authority through a subpoena or search warrant, the authority shall, before permitting access and within 72 hours after making the decision to permit access, serve written notice of that decision on any record subject to whom that record pertains, either by certified mail or by personally serving the notice on the subject. The notice shall briefly describe the requested record and include a description of the rights of the record subject under subs. (3) and (4).

(b) Paragraph (a) does not apply to an authority who provides access to a record pertaining to an employee to the employee who is the subject of the record or to his or her representative to the extent required under s. 103.13 or to a recognized or certified collective bargaining representative to the extent required to fulfill a duty to bargain or pursuant to a collective bargaining agreement under ch. 111.

(c) Paragraph (a) does not apply to access to a record produced in relation to a function specified in s. 106.54 or 230.45 or subch. II of ch. 111 if the record is provided by an authority having responsibility for that function.

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

(4) Within 10 days after receipt of a notice under sub. (2), any record subject may commence an action seeking a court order to restrain the authority from providing access to the requested record. If a record subject commences such an action, the record subject shall name the authority as a defendant. Notwithstanding s. 803.09, the requester may intervene in the action as a matter of right.

(5) An authority shall not provide access to a requested record within 12 days of sending a notice pertaining to that record under sub. (2). In addition, if the record subject commences an action under sub. (4), the authority shall not provide access to the requested record during pendency of the action. If the record subject appeals or petitions for review of a decision of the court or the time for appeal or petition for review of a decision adverse to the record subject has not expired, the authority shall not provide access to the requested record until any appeal is decided, until the period for appealing or petitioning for review expires, until a petition for review is

denied, or until the authority receives written notice from the record subject that an appeal or petition for review will not be filed, whichever occurs first.

(6) The court may restrain the authority from providing access to the requested record. The court shall apply substantive common law principles construing the right to inspect, copy, or receive copies of records in making its decision.

(7) The court shall issue a decision within 10 days after the filing of the summons and complaint and proof of service of the summons and complaint upon the defendant and the requester, unless a party demonstrates cause for extension of this period. In any event, the court shall issue a decision within 30 days after those filings are complete.

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

SECTION 4. 19.36 (10) of the statutes is created to read:

19.36 **(10)** EMPLOYEE PERSONNEL RECORDS. Unless access is specifically authorized or required by statute, an authority shall not provide access under s. 19.35 (1) to records containing the following information, except to an employee or the employee's representative to the extent required under s. 103.13 or to a recognized or certified collective bargaining representative to the extent required to fulfill a duty to bargain under ch. 111 or pursuant to a collective bargaining agreement under ch. 111:

(a) Information maintained, prepared, or provided by an employer concerning the home address or telephone number of an employee, unless the employee authorizes the authority to provide access to such information.

(b) Information relating to the current investigation of a possible criminal offense or possible misconduct connected with employment by an employee prior to disposition of the investigation.

(c) Information pertaining to an employee's employment examination, except an examination score if access to that score is not otherwise prohibited.

(d) Information relating to one or more specific employees that is used by an authority or by the employer of the employees for staff management planning, including performance evaluations, judgments or recommendations concerning future salary adjustments or other wage treatments, management bonus plans, promotions, job assignments, letters of reference, or other comments or ratings relating to employees.

SECTION 5. 40.07 (1) (intro.) and (3) of the statutes are amended to read:

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

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

SECTION 6. 230.13 (1) (intro.) of the statutes is amended to read:

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

SECTION 7. 230.13 (3) of the statutes is renumbered 230.13 (3) (a).

SECTION 8. 230.13 (3) (b) of the statutes is created to read:

230.13 **(3)** (b) The secretary and the administrator may provide any agency with personnel information relating to the hiring and recruitment process, including specifically the examination scores and ranks and other evaluations of applicants.

SECTION 9. 233.13 (intro.) of the statutes is amended to read:

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

(END)