

2003 DRAFTING REQUEST

Bill

Received: **01/28/2003**

Received By: **jkuesel**

Wanted: **As time permits**

Identical to LRB:

For: **Legislative Council - JLC 6-1946**

By/Representing: **Ron Sklansky**

This file may be shown to any legislator: **NO**

Drafter: **jkuesel**

May Contact:

Addl. Drafters: **rchampag**

Subject: **Public Records**

Extra Copies: **GMM - 1**

Submit via email: **NO**

Pre Topic:

No specific pre topic given

Topic:

Access to public records

Instructions:

Per WLC 0040/3.

Drafting History:

<u>Vers.</u>	<u>Drafted</u>	<u>Reviewed</u>	<u>Typed</u>	<u>Proofed</u>	<u>Submitted</u>	<u>Jacketed</u>	<u>Required</u>
/?							
/1	jkuesel 02/12/2003	kgilfoy 03/12/2003	jfrantzc 03/13/2003	_____	sbasford 03/13/2003		
/2	jkuesel 03/14/2003	kgilfoy 03/14/2003	jfrantzc 03/17/2003	_____	sbasford 03/17/2003	sbasford 03/17/2003	sbasford 03/17/2003

FE Scent For: *none needed*

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FE Sent For:

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3/13

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FE Sent For:

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conversion
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FE Sent For:

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1 **AN ACT** to renumber 230.13 (3); to amend 19.34 (1), 19.36 (7) (a), 59.20 (3) (a),
2 61.25 (5), 62.09 (11) (f), 230.13 (1) (intro.) and 233.13 (intro.); and to create 19.32
3 (1bg), (1de), (1dm), (2g) and (4), 19.345, 19.356, 19.36 (10) to (12), 230.13 (3) (b)
4 and 808.04 (1m) of the statutes; relating to: access to public records.

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

JOINT LEGISLATIVE COUNCIL PREFATORY NOTE: This bill is recommended by the Joint Legislative Council's Special Committee on Review of the Open Records Law. The special committee was directed to review the Wisconsin Supreme Court decisions in *Woznicki v. Erickson* and *Milwaukee Teachers' Educational Association v. Milwaukee Board of School Directors* and recommend legislation implementing the procedures anticipated in the opinions, amending the holdings of the opinions, or overturning the opinions. In addition, the special committee was directed to recommend changes in the open records law to accommodate electronic communications and to consider the sufficiency of an open records request and the scope of exemptions to the open records law.

In *Woznicki v. Erickson*, 202 Wis. 2d 178, 549 N.W.2d 699 (1996), the Wisconsin Supreme Court held that there is no blanket statutory or common law exception under the open records law that will prevent public access to public employee disciplinary or personnel records. The court stated that these records are subject to the balancing test under which the custodian of the records determines whether permitting inspection would result in harm to the public interest outweighing the legislative policy recognizing the public interest in record inspection. Because the privacy and reputational interests of the school district employee in this case were implicated by the potential release of records, the court held that the employee had the right to judicial review of the decision to release the records. This conclusion necessitated the holding that the record custodian could not release the records without notifying the employee of the pending release and allowing a reasonable amount of time for the individual to appeal the decision to release the records. In *Milwaukee Teachers' Education Association v. Milwaukee Board of School Directors*, 227 Wis. 2d 779, 596 N.W.2d 403 (1999), the court

formally extended to any public employee the right to notice about, and judicial review of, a custodian's decision to release personnel information implicating the privacy or reputational interests of the individual public employee. However, in these cases, the court did not establish any criteria for determining when privacy or reputational interests are affected or for providing notice to affected parties. Further, the logical extension of these opinions is that the right to notice and the right to judicial review may extend to any record subject, regardless of whether the record subject is a public employee.

This bill partially codifies *Woznicki* and *Milwaukee Teachers'*. In general, the bill applies the rights afforded by *Woznicki* and *Milwaukee Teachers'* only to a defined set of records pertaining to employees residing in Wisconsin. As an overall construct, records relating to employees under the bill can be placed in the following 3 categories:

1. Employee-related records that may be released under the general balancing test without providing a right of notice or judicial review to the employee record subject.
2. Employee-related records that may be released under the balancing test *only* after a notice of impending release and the right of judicial review have been provided to the employee record subject.
3. Employee-related records that are absolutely closed to public access under the open records law.

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

2 19.32 (1bg) "Employee" means an individual who is employed by an authority, other
3 than an individual holding local public office or a state public office, or any individual who
4 is employed by an employer other than an authority.

5 (1de) "Local government unit" has the meaning given in s. 19.42 (7u).

6 (1dm) "Local public office" has the meaning given in s. 19.42 (7w), and also includes
7 any appointive office or position of a local governmental unit in which an individual serves
8 as the head of a department, agency, or division of the local governmental unit, but does not
9 include any office or position filled by a municipal employee, as defined in s. 111.70 (1) (i).

10 (2g) "Record subject" means an individual about whom personally identifiable
11 information is contained in a record.

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

NOTE: This SECTION:

1. Creates a definition of the term "employee" to mean any public sector or private sector employee, other than an individual holding a local public office or a state public office.

2. Creates a definition of the term "local public office" that incorporates the definition of the term "local public office" contained in s. 19.42 (7w), stats. The latter statutory provision states that a "local public office" means any of the following offices:

- a. An elective office of a local governmental unit.
- b. A county administrator or administrative coordinator or a city or village manager.
- c. An appointive office or position of a local governmental unit in which an individual serves for a specified term, except a position limited to the exercise of ministerial action or a position filled by an independent contractor.
- d. The position of member of the board of directors of a local exposition district not serving for a specified term.
- e. An appointive office or position of a local government which is filled by the governing body of the local government or the executive or administrative head of the local government and in which the incumbent serves at the pleasure of the appointing authority, except a clerical position, a position limited to the exercise of ministerial action, or a position filled by an independent contractor.

Section 19.42 (7w), stats., and s. 19.32 (1dm), stats., as created in this bill, specifically refer to certain appointive offices or positions of a local governmental unit. The obvious purpose is to provide that an individual who holds an upper level governmental office or position and who has broad discretionary authority may not seek judicial review in order to prevent the release of records that name that individual. The description of an appointive office or position of a local governmental unit contained in s. 19.32 (1dm), stats., is broader than the description contained in s. 19.42 (7w), stats. For example, unlike the definition contained in s. 19.42 (7w), stats., the definition in the proposed statute includes the offices of police chief and fire chief, positions whose incumbents do not serve for a statutorily specified term, may be removed only for cause, and are not appointed by the governing body of a local government.

Section 111.70 (1) (i), stats., defines the term "municipal employee" to mean an individual employed by a municipal employer other than an independent contractor, supervisor, or confidential, managerial, or executive employee.

3. Creates a definition of the term "record subject" to mean an individual about whom personally identifiable information is contained in a record.

4. Creates a definition of the term "state public office" to mean the numerous agency positions listed in ss. 19.42 (13) and 20.923, stats. However, the provision specifically excludes from the definition a position in the Legislative Audit Bureau, the Legislative Council staff, the Legislative Fiscal Bureau, and the Legislative Reference Bureau. Thus, a person in one of these positions may have a right of judicial review before a record in which the person is named may be released.

1 **SECTION 2.** 19.34 (1) of the statutes is amended to read:

2 19.34 (1) Each authority shall adopt, prominently display and make available for
3 inspection and copying at its offices, for the guidance of the public, a notice containing a
4 description of its organization and the established times and places at which, the legal
5 custodian under s. 19.33 from whom, and the methods whereby, the public may obtain
6 information and access to records in its custody, make requests for records, or obtain copies
7 of records, and the costs thereof. The notice shall also separately identify each position
8 employed by the authority that constitutes a local public office or a state public office. This
9 subsection does not apply to members of the legislature or to members of any local
10 governmental body.

NOTE: Generally, under current law, an authority having custody of a public record must adopt, prominently display, and make available for inspection and display at its offices a notice containing a description of its organization and the established times and places at which the public may obtain information and access to records in the custody of the authority. The notice must also identify the legal custodian of the records and the costs of obtaining copies of the records. Such notice, obviously, is for the guidance of members of the public who may wish to request copies of open records.

This SECTION additionally requires the notice to separately identify each position employed by the authority that in its opinion constitutes a local public office or a state public office as defined in s. 19.32 (1dm) and (4), stats. [See SECTION 1 of the bill.]

1 **SECTION 3.** 19.345 of the statutes is created to read:

2 **19.345 Time computation.** In ss. 19.33 to 19.39, when a time period is provided for
3 performing an act, whether the period is expressed in hours or days, the whole of Saturday,
4 Sunday and any legal holiday, from midnight to midnight, shall be excluded in computing the
5 period.

NOTE: This SECTION provides that Saturday, Sunday, and any legal holiday will be excluded in measuring time periods under the open records law.

6 **SECTION 4.** 19.356 of the statutes is created to read:

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

12 **(2) (a)** Except as provided in pars. (b) and (c) and as otherwise authorized or required
13 by statute, if an authority decides under s. 19.35 to permit access to a record, the authority shall,
14 before permitting access and within 3 days after making the decision to permit access, serve
15 written notice of that decision on any record subject to whom the record pertains, either by
16 certified mail or by personally serving the notice on the record subject. The notice shall briefly
17 describe the requested record and include a description of the rights of the record subject under
18 subs. (3) and (4). This subsection applies only to any of the following:

1 1. A record containing information relating to an employee that is created or kept by
2 the authority that is the result of an investigation into a disciplinary matter involving the
3 employee or possible employment-related violation by the employee of a statute, ordinance,
4 rule, regulation, or policy of the employee's employer.

5 2. A record obtained by the authority through a subpoena or search warrant.

6 3. A record prepared by an employer other than an authority, if that record contains
7 information relating to an employee of that employer, unless the employee authorizes the
8 authority to provide access to that information.

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

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

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

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

1 in the action as a matter of right. If the requester does not intervene in the action, the authority
2 shall notify the requester of the results of the proceedings under this subsection and sub. (5).

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

12 (6) The court, in an action commenced under sub. (4), may restrain the authority from
13 providing access to the requested record. The court shall apply substantive common law
14 principles construing the right to inspect, copy, or receive copies of records in making its
15 decision.

16 (7) The court, in an action commenced under sub. (4), shall issue a decision within 10
17 days after the filing of the summons and complaint and proof of service of the summons and
18 complaint upon the defendant, unless a party demonstrates cause for extension of this period.
19 In any event, the court shall issue a decision within 30 days after those filings are complete.

20 (8) If a party appeals a decision of the court under sub. (7), the court of appeals shall
21 grant precedence to the appeal over all other matters not accorded similar precedence by law.
22 An appeal shall be taken within the time period specified in s. 808.04 (1m).

23 (9) (a) Except as otherwise authorized or required by statute, if an authority decides
24 under s. 19.35 to permit access to a record containing information relating to its employment

1 of a record subject who holds a local public office or a state public office, the authority shall,
2 before permitting access and within 3 days after making the decision to permit access, serve
3 written notice of that decision on the record subject, either by certified mail or by personally
4 serving the notice on the record subject. The notice shall briefly describe the requested record
5 and include a description of the rights of the record subject under par. (b).

6 (b) Within 5 days after receipt of a notice under par. (a), a record subject may augment
7 the record to be released with written comments and documentation selected by the record
8 subject. Except as otherwise authorized or required by statute, the authority under par. (a) shall
9 release the record as augmented by the record subject.

NOTE: This SECTION:

1. Creates s. 19.356 (1), stats., to limit *Woznicki* by stating that, except as otherwise provided, no person is entitled to notice or judicial review of a decision of an authority to provide a requester with access to a record.

2. Creates s. 19.356 (2), stats., to provide that if an authority decides to permit access to certain employee-related records, the authority must, before permitting access and within 3 days after making the decision to permit access, serve written notice (personally or by certified mail) of that decision on any record subject to whom the records pertain. The reference to s. 19.35, stats., indicates that the authority must continue to apply the open records law balancing test before deciding to release the record. The employee-related records to which this notice applies includes only: (a) any record containing information relating to an employee that is created or kept by the authority as the 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; (b) any record obtained by the authority through a subpoena or search warrant; or (c) any record prepared by an employer other than an authority, if that record contains information relating to an employee of that employer, unless the employee authorizes the authority to provide access to that information. The notice requirement is not applicable in the following circumstances:

a. An authority provides access to a record, pertaining to an employee, to the employee who is the subject of the record, to his or her representative, or to his or her bargaining representative.

b. An authority releases a record produced for equal rights, discrimination, or fair employment law compliance purposes.

3. Creates s. 19.356 (3) to (8), stats., to provide that within 5 days after receipt of a notice of the impending release of a record, the record subject may provide written notification to the authority of the record subject's intent to seek a court order restraining release of the record. The legal action must be commenced within 10 days after the record subject receives notice of release of the record. During this time, the authority is prohibited from providing access to the record and must not provide access until any legal action is final. The court must issue its decision within 10 days after the legal action has been commenced, unless a party demonstrates cause for extension of this period. However, the court must issue a decision within 30 days after commencement of the proceedings. Also, a court of appeals must grant precedence to an appeal of a circuit court decision over all other matters not accorded similar precedence by law. An appeal must be taken within 20 days after entry of the judgment or order appealed from. [See SECTION 14.]

4. Creates s. 19.356 (4), stats., to provide that a requester may intervene in the action as a matter of right.

5. Creates s. 19.356 (6), stats., to provide that a court may prevent release of a record by applying substantive common law principles construing the right to inspect, copy, or receive copies of records. In general, this standard often requires a balancing of public harm and public benefit in the release of a record, rather than balancing private harm against public benefit.

6. Creates s. 19.365 (9), stats., to provide that an authority must notify a record subject who holds a local public office or a state public office of the impending release of a record containing information relating to the employment of the record subject. The record subject, within 5 days of the receipt of the notice, may augment the record to be released with written comments and documentation selected by the record subject. The authority shall release the augmented record, except as otherwise authorized or required by statute.

1 **SECTION 5.** 19.36 (7) (a) of the statutes is amended to read:

2 19.36 (7) IDENTITIES OF APPLICANTS FOR PUBLIC POSITIONS. (a) In this section, "final
3 candidate" means each applicant for a position who is seriously considered for appointment

1 or whose name is certified for appointment and whose name is submitted for final
2 consideration to an authority for appointment to any state position, except a position in the
3 classified service, or to any local public office, ~~as defined in s. 19.42 (7w)~~. "Final candidate"
4 includes, whenever there are at least 5 candidates for an office or position, each of the 5
5 candidates who are considered most qualified for the office or position by an authority, and
6 whenever there are less than 5 candidates for an office or position, each such candidate.
7 Whenever an appointment is to be made from a group of more than 5 candidates, "final
8 candidate" also includes each candidate in the group.

NOTE: Section 19.36 (7), stats., generally provides that, if an applicant for a position indicates in writing a desire for confidentiality, an authority may not provide access to any record relating to the application that may reveal the applicants identity. This general provision does not apply to a final candidate for any local public office "as defined in s. 19.42 (7w)". Because the bill expands the definition of the term "local public office" in s. 19.32 (1dm), stats., as created in this bill, this SECTION applies the expanded definition to the issue of confidential applications for purposes of consistency. [For a discussion of the term "local public office" see the note to SECTION 1 of the bill.]

9 **SECTION 6.** 19.36 (10) to (12) of the statutes are created to read:

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

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

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

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

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

11 **(11) RECORDS OF AN INDIVIDUAL HOLDING A LOCAL PUBLIC OFFICE OR A STATE PUBLIC**
12 **OFFICE.** Unless access is specifically authorized or required by statute, an authority shall not
13 provide access under s. 19.35 (1) to records, except to an individual to the extent required
14 under s. 103.13, containing information maintained, prepared, or provided by an employer
15 concerning the home address, home email address, home telephone number, or Social
16 Security number of an individual who holds a local public office or a state public office, unless
17 the individual authorizes the authority to provide access to such information. This subsection
18 does not apply to the home address of an individual who has been elected or to the home
19 address of an individual who, as a condition of employment, is required to reside in a specified
20 location.

21 **(12) INFORMATION RELATING TO CERTAIN EMPLOYEES.** Unless access is specifically
22 authorized or required by statute, an authority shall not provide access to a record prepared
23 or provided by an employer performing work on a project to which s. 66.0903, 103.49, or
24 103.50 applies, or on which the employer is otherwise required to pay prevailing wages, if that

1 record contains the name or other personally identifiable information relating to an employee
2 of that employer, unless the employee authorizes the authority to provide access to that
3 information. In this subsection, "personally identifiable information" does not include an
4 employee's work classification, hours of work, or wage or benefit payments received for work
5 on such projects.

NOTE: This SECTION creates s. 19.36 (10) to (12), stats., to provide that an authority may not provide access to any of the following:

1. Information prepared or provided by an employer concerning the home address, home email address, home telephone number, or Social Security number of an employee, unless the employee authorizes the authority to provide access to the information.
2. 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.
3. Information pertaining to an employee's employment examination, except an examination score if access to that score is not otherwise prohibited.
4. 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.
5. Information maintained, prepared, or provided by an employer concerning the home address, home email address, home telephone number, or Social Security number of an individual holding a local public office or a state public office, unless the individual authorizes the authority to provide access to such information. This provision does not apply to the home address of an individual who has been elected or to the home address of an individual who, as a condition of employment, is required to reside in a specified location.
6. A record prepared or provided by an employer, performing under a contract requiring the payment of prevailing wages, that contains personally identifiable information relating to an employee of that employer, unless the employee authorizes the authority to provide access to that information. The term "personally identifiable information" does

not include information relating to an employee's work classification, hours of work, or wage or benefit payments received for work on such projects.

1 SECTION 7. 59.20 (3) (a) of the statutes is amended to read:

2 59.20 (3) (a) Every sheriff, clerk of the circuit court, register of deeds, treasurer, register
3 of probate, clerk and county surveyor shall keep his or her office at the county seat in the
4 offices provided by the county or by special provision of law; or if there is none, then at such
5 place as the board directs. The board may also require any elective or appointive county
6 official to keep his or her office at the county seat in an office to be provided by the county.
7 All such officers shall keep their offices open during the usual business hours of any day except
8 Sunday, as the board directs. With proper care, the officers shall open to the examination of
9 any person all books and papers required to be kept in his or her office and permit any person
10 so examining to take notes and copies of such books, records, papers or minutes therefrom
11 except as authorized in par. (c) and ~~s.~~ ss. 19.36 (10) to (12) and 19.59 (3) (d) or under ch. 69.

NOTE: Section 59.20 (3) (a), stats., provides that certain county officers must open to the examination of any person all books and papers required to be kept in his or her office and permit any person examining the records to take notes and copies of the books, records, papers, or minutes except as otherwise provided. The officers to which this requirement applies are every sheriff, clerk of the circuit court, register of deeds, treasurer, register of probate, clerk, and county surveyor. This provision has been interpreted by Wisconsin's courts to mean that a requester has the absolute right to inspect records required to be kept by law by these officers unless: (a) there is a statutory exception to this right; (b) there is a constitutional provision preventing release of the record; or (c) a court, exercising its inherent authority over judicial records, prevents access to a record when the administration of justice so requires. [See *State ex rel. Journal Co. v. County Court for Racine County*, 43 Wis. 2d 297, 168 N.W.2d 836 (1969); *State ex rel. Bilder v. Township of Delavan*, 112 Wis. 2d 539, 334 N.W.2d 252 (1983); and *State ex rel. Schultz v. Bruendl*, 168 Wis. 2d 101, 483 N.W.2d 238 (Ct. App. 1992).]

In order to take into account the treatment of employee-related records in this bill, this SECTION amends s. 59.20 (3) (a), stats., to provide that county officers must, to the extent provided by current statutes, keep their records open to inspection, except as provided under proposed s. 19.36 (10) to (12), stats.

1 **SECTION 8.** 61.25 (5) of the statutes is amended to read:

2 61.25 (5) To be the custodian of the corporate seal, and to file as required by law and
3 to safely keep all records, books, papers or property belonging to, filed or deposited in the
4 clerk's office, and deliver the same to the clerk's successor when qualified; to permit, subject
5 to subch. II of ch. 19, any person with proper care to examine and copy any of the same, and
6 to make and certify a copy of any thereof when required, on payment of the same fees allowed
7 town clerks therefor.

NOTE: This SECTION amends s. 61.25 (5), stats., to clarify that a village clerk must comply with all aspects of the open records law, including the provisions of the bill relating to employee-related records.

8 **SECTION 9.** 62.09 (11) (f) of the statutes is amended to read:

9 62.09 (11) (f) The clerk shall keep all papers and records in the clerk's office open to
10 inspection at all reasonable hours subject to subch. II of ch. 19.

NOTE: This SECTION amends s. 62.09 (11) (f), stats., to clarify that a city clerk must comply with all aspects of the open records law, including the provisions of the bill relating to employee-related records.

11 **SECTION 10.** 230.13 (1) (intro.) of the statutes is amended to read:

12 230.13 (1) (intro.) Except as provided in sub. (3) and ~~s.~~ ss. 19.36 (10) to (12) and 103.13,
13 the secretary and the administrator may keep records of the following personnel matters closed
14 to the public:

NOTE: See the note to SEC. 12.

15 **SECTION 11.** 230.13 (3) of the statutes is renumbered 230.13 (3) (a).

NOTE: See the note to SEC. 12.

1 **SECTION 12.** 230.13 (3) (b) of the statutes is created to read:

2 230.13 (3) (b) The secretary and the administrator may provide any agency with
3 personnel information relating to the hiring and recruitment process, including specifically the
4 examination scores and ranks and other evaluations of applicants.

NOTE: Section 230.13, stats., in general provides that the secretary of the Department of Employment Relations and the administrator of the Division of Merit Recruitment and Selection may keep records of the following personnel matters closed to the public:

1. Examination scores and ranks and other evaluations of applicants.
2. Dismissals, demotions, and other disciplinary actions.
3. Pay survey data obtained from identifiable, nonpublic employers.
4. Names of nonpublic employers contributing any pay survey data.

This SECTION and SECS. 10 and 11 amend the statutes to specify that regardless of the discretionary authority to keep certain personnel matters closed to the public, the secretary and the administrator must keep from public access that information listed in s. 19.36 (10) to (12), stats., as created in this bill. However, this SECTION also specifies that 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.

5 **SECTION 13.** 233.13 (intro.) of the statutes is amended to read:

6 **233.13 Closed records.** (intro.) Except as provided in ~~s.~~ ss. 19.36 (10) to (12) and
7 103.13, the authority may keep records of the following personnel matters closed to the public:

NOTE: Section 233.13, stats., provides that the University of Wisconsin Hospitals and Clinics authority may keep records of certain personnel matters closed to the public. These personnel matters include all of those matters specified in the comment to SEC. 12 and include the addresses and home telephone numbers of authority employees.

This SECTION amends the statutes to provide that the authority must keep closed to public access the information listed in s. 19.36 (10) to (12), stats., as created in this bill.

8 **SECTION 14.** 808.04 (1m) of the statutes is created to read:

1 808.04 (1m) An appeal by a record subject under s. 19.356 shall be initiated within 20
2 days after the date of entry of the judgment or order appealed from.

NOTE: Generally, s. 808.04, stats., provides that an appeal to the court of appeals must be initiated within 45 days after entry of a judgment or an order. This SECTION creates s. 808.04 (1m), stats., to provide that an appeal by a record subject under s. 19.356, stats., as created in this bill, must be initiated within 20 days after the date of entry of the judgment or order appealed from.

3

(END)



State of Wisconsin
2003 - 2004 LEGISLATURE

LRB-1820/PT 1

JTK/PG
+RAC

Friday

~~PRELIMINARY DRAFT - NOT READY FOR INTRODUCTION~~

In 2/12

PWF: all amended stats.

(regenerate)

1 AN ACT ~~to renumber 230.13 (3); to amend 19.34 (1), 19.36 (7) (a), 59.20 (3) (a),~~
 2 ~~61.25 (5), 62.09 (11) (f), 230.13 (1) (intro.) and 233.13 (intro.); and to create~~
 3 ~~19.32 (1bg), (1de), (1dm), (2g) and (4), 19.345, 19.356, 19.36 (10) to (12), 230.13~~
 4 ~~(3) (b) and 808.04 (1m)~~ of the statutes; relating to: access to public records.

FOR SENATE
ANALYSIS

Analysis by the Legislative Reference Bureau

~~This is a preliminary draft. An analysis will be provided in a later version.~~

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

JOINT LEGISLATIVE COUNCIL PREFATORY NOTE: This bill is recommended by the Joint Legislative Council's Special Committee on Review of the Open Records Law. The special committee was directed to review the Wisconsin Supreme Court decisions in *Woznicki v. Erickson* and *Milwaukee Teachers' Educational Association v. Milwaukee Board of School Directors* and recommend legislation implementing the procedures anticipated in the opinions, amending the holdings of the opinions, or overturning the opinions. In addition, the special committee was directed to recommend changes in the open records law to accommodate electronic communications and to consider the sufficiency of an open records request and the scope of exemptions to the open records law.

In *Woznicki v. Erickson*, 202 Wis. 2d 178, 549 N.W.2d 699 (1996), the Wisconsin Supreme Court held that there is no blanket statutory or common law exception under the open records law that will prevent public access to public employee disciplinary or

personnel records. The court stated that these records are subject to the balancing test under which the custodian of the records determines whether permitting inspection would result in harm to the public interest outweighing the legislative policy recognizing the public interest in record inspection. Because the privacy and reputational interests of the school district employee in this case were implicated by the potential release of records, the court held that the employee had the right to judicial review of the decision to release the records. This conclusion necessitated the holding that the record custodian could not release the records without notifying the employee of the pending release and allowing a reasonable amount of time for the individual to appeal the decision to release the records. In *Milwaukee Teachers' Education Association v. Milwaukee Board of School Directors*, 227 Wis. 2d 779, 596 N.W.2d 403 (1999), the court formally extended to any public employee the right to notice about, and judicial review of, a custodian's decision to release ~~personal~~ information implicating the privacy or reputational interests of the individual public employee. However, in these cases, the court did not establish any criteria for determining when privacy or reputational interests are affected or for providing notice to affected parties. Further, the logical extension of these opinions is that the right to notice and the right to judicial review may extend to any record subject, regardless of whether the record subject is a public employee.

This bill partially codifies *Woznicki* and *Milwaukee Teachers'*. In general, the bill applies the rights afforded by *Woznicki* and *Milwaukee Teachers'* only to a defined set of records pertaining to employees residing in Wisconsin. As an overall construct, records relating to employees under the bill can be placed in the following 3 categories:

1. Employee-related records that may be released under the general balancing test without providing a right of notice or judicial review to the employee record subject.
2. Employee-related records that may be released under the balancing test *only* after a notice of impending release and the right of judicial review have been provided to the employee record subject.
3. Employee-related records that are absolutely closed to public access under the open records law.

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

19.32 (1bg) "Employee" means ^{any} an individual who is employed by an authority, other than an individual holding local public office or a state public office, or any individual who is employed by an employer other than an authority.

(1de) "Local government 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

1 governmental unit, but does not include any office or position filled by a municipal
2 employee, as defined in s. 111.70 (1) (i).

3 (2g) “Record subject” means an individual about whom personally identifiable
4 information is contained in a record.

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

NOTE: This SECTION:

1. Creates a definition of the term “employee” to mean any public sector or private sector employee, other than an individual holding a local public office or a state public office.

2. Creates a definition of the term “local public office” that incorporates the definition of the term “local public office” contained in s. 19.42 (7w), stats. The latter statutory provision states that a “local public office” means any of the following offices:

a. An elective office of a local governmental unit.

b. A county administrator or administrative coordinator or a city or village manager.

c. An appointive office or position of a local governmental unit in which an individual serves for a specified term, except a position limited to the exercise of ministerial action or a position filled by an independent contractor.

d. The position of member of the board of directors of a local exposition district not serving for a specified term.

e. An appointive office or position of a local government which is filled by the governing body of the local government or the executive or administrative head of the local government and in which the incumbent serves at the pleasure of the appointing authority, except a clerical position, a position limited to the exercise of ministerial action, or a position filled by an independent contractor.

Section 19.42 (7w), stats., and s. 19.32 (1dm), stats., as created in this bill, specifically refer to certain appointive offices or positions of a local governmental unit. The obvious purpose is to provide that an individual who holds an upper level governmental office or position and who has broad discretionary authority may not seek judicial review in order to prevent the release of records that name that individual. The description of an appointive office or position of a local governmental unit contained in s. 19.32 (1dm), stats., is broader than the description contained in s. 19.42 (7w), stats. For example, unlike the definition contained in s. 19.42 (7w), stats., the definition in the proposed statute includes the offices of police chief and fire chief, positions whose incumbents do not serve for a statutorily specified term, may be removed only for cause, and are not appointed by the governing body of a local government. Section 111.70 (1) (i), stats., defines the term “municipal employee” to mean an individual employed by a municipal employer other than an independent contractor, supervisor, or confidential, managerial, or executive employee.

3. Creates a definition of the term “record subject” to mean an individual about whom personally identifiable information is contained in a record.

4. Creates a definition of the term “state public office” to mean the numerous agency positions listed in ss. 19.42 (13) and 20.923, stats. However, the provision specifically excludes from the definition a position in the Legislative Audit Bureau, the Legislative Council staff, the Legislative Fiscal Bureau, and the Legislative Reference Bureau. Thus, a person in one of these positions may have a right of judicial review before a record in which the person is named may be released.

1 **SECTION 2.** 19.34 (1) of the statutes is amended to read:

2 19.34 (1) Each authority shall adopt, prominently display and make available
3 for inspection and copying at its offices, for the guidance of the public, a notice
4 containing a description of its organization and the established times and places at
5 which, the legal custodian under s. 19.33 from whom, and the methods whereby, the
6 public may obtain information and access to records in its custody, make requests for
7 records, or obtain copies of records, and the costs thereof. The notice shall also
8 separately identify each position ~~employed by~~ ^{of} the authority that constitutes a local
9 public office or a state public office. This subsection does not apply to members of the
10 legislature or to members of any local governmental body.

NOTE: Generally, under current law, an authority having custody of a public record must adopt, prominently display, and make available for inspection and display at its offices a notice containing a description of its organization and the established times and places at which the public may obtain information and access to records in the custody of the authority. The notice must also identify the legal custodian of the records and the costs of obtaining copies of the records. Such notice, obviously, is for the guidance of members of the public who may wish to request copies of open records.

of This SECTION additionally requires the notice to separately identify each position
employed by the authority that in its opinion constitutes a local public office or a state
public office as defined in s. 19.32 (1dm) and (4), stats. [See SECTION 1 of the bill.]

11 **SECTION 3.** 19.345 of the statutes is created to read:

12 **19.345 Time computation.** In ss. 19.33 to 19.39[✓], when a time period is
13 provided for performing an act, whether the period is expressed in hours or days, the
14 whole of Saturday, Sunday[✓], and any legal holiday, from midnight to midnight, shall
15 be excluded in computing the period.

NOTE: This SECTION provides that Saturday, Sunday, and any legal holiday will be excluded in measuring time periods under the open records law.

1 SECTION 4. 19.356 of the statutes is created to read:

2 **19.356 Notice to record subject; right of action.** (1) Except as authorized
3 in this section or as otherwise provided by statute, no authority is required to notify
4 a record subject prior to providing to a requester access to a record containing
5 information pertaining to that record subject, and no person is entitled to judicial
6 review of the decision of an authority to provide a requester with access to a record.

7 (2) (a) Except as provided in pars. (b) and (c) and as otherwise authorized or
8 required by statute, if an authority decides under s. 19.35 to permit access to a record^{specified in this paragraph}
9 the authority shall, before permitting access and within 3 days after making the
10 decision to permit access, serve written notice of that decision on any record subject
11 to whom the record pertains, either by certified mail or by personally serving the
12 notice on the record subject. The notice shall briefly describe the requested record
13 and include a description of the rights of the record subject under subs. (3) and (4).
14 This ^{paragraph} subsection applies only to ~~any~~ the following records

15 1. A record containing information relating to an employee that is created or
16 kept by the authority^{and} that is the result of an investigation into a disciplinary matter
17 involving the employee or possible employment-related violation by the employee of
18 a statute, ordinance, rule, regulation, or policy of the employee's employer.

19 2. A record obtained by the authority through a subpoena or search warrant.

20 3. A record prepared by an employer other than an authority, if that record
21 contains information relating to an employee of that employer, unless the employee
22 authorizes the authority to provide access to that information.

23 (b) Paragraph (a) does not apply to an authority who provides access to a record
24 pertaining to an employee to the employee who is the subject of the record or to his
25 or her representative to the extent required under s. 103.13 or to a recognized or

1 certified collective bargaining representative to the extent required to fulfill a duty
2 to bargain or pursuant to a collective bargaining agreement under ch. 111.

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

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

9 (4) Within 10 days after receipt of a notice under sub. (2) (a), a record subject
10 may commence an action seeking a court order to restrain the authority from
11 providing access to the requested record. If a record subject commences such an
12 action, the record subject shall name the authority as a defendant. Notwithstanding
13 s. 803.09, the requester may intervene in the action as a matter of right. If the
14 requester does not intervene in the action, the authority shall notify the requester
15 of the results of the proceedings under this subsection and sub. (5).

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

1 (6) The court, in an action commenced under sub. (4), may restrain the
2 authority from providing access to the requested record. The court shall apply
3 substantive common law principles construing the right to inspect, copy, or receive
4 copies of records in making its decision.

5 (7) The court, in an action commenced under sub. (4), shall issue a decision
6 within 10 days after the filing of the summons and complaint and proof of service of
7 the summons and complaint upon the defendant, unless a party demonstrates cause
8 for extension of this period. In any event, the court shall issue a decision within 30
9 days after those filings are complete.

10 (8) If a party appeals a decision of the court under sub. (7), the court of appeals
11 shall grant precedence to the appeal over all other matters not accorded similar
12 precedence by law. An appeal shall be taken within the time period specified in s.
13 808.04 (1m).

14 (9) (a) Except as otherwise authorized or required by statute, if an authority
15 decides under s. 19.35 to permit access to a record containing information relating
16 to ~~its employment of~~ a record subject who ^{is an officer or employee of the authority} holds a local public office or a state public ^{holding}
17 office, the authority shall, before permitting access and within 3 days after making
18 the decision to permit access, serve written notice of that decision on the record
19 subject, either by certified mail or by personally serving the notice on the record
20 subject. The notice shall briefly describe the requested record and include a
21 description of the rights of the record subject under par. (b).

22 (b) Within 5 days after receipt of a notice under par. (a), a record subject may
23 augment the record to be released with written comments and documentation
24 selected by the record subject. Except as otherwise authorized or required by statute,

1 the authority under par. (a) shall release the record as augmented by the record
2 subject.

NOTE: This SECTION:

oe
1. Creates s. 19.356 (1), stats., to limit *Woznicki* by stating that, except as otherwise provided, no person is entitled to notice or judicial review of a decision of an authority to provide a requester with access to a record.

oe
2. Creates s. 19.356 (2), stats., to provide that if an authority decides to permit access to certain ~~employee-related~~ records, the authority must, before permitting access and within 3 days after making the decision to permit access, serve written notice (personally or by certified mail) of that decision on any record subject to whom the records pertain. The reference to s. 19.35, stats., indicates that the authority must continue to apply the open records law balancing test before deciding to release the record. The ~~employee-related~~ records to which this notice applies includes only: (a) any record containing information relating to an employee that is created or kept by the authority as the 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; (b) any record obtained by the authority through a subpoena or search warrant; or (c) any record prepared by an employer other than an authority, if that record contains information relating to an employee of that employer, unless the employee authorizes the authority to provide access to that information. The notice requirement is not applicable in the following circumstances:

oe
a. An authority provides access to a record, pertaining to an employee, to the employee who is the subject of the record, to his or her representative, or to his or her bargaining representative.

oe
b. An authority releases a record produced for equal rights, discrimination, or fair employment law compliance purposes.

oe
3. Creates s. 19.356 (3) to (8), stats., to provide that within 5 days after receipt of a notice of the impending release of a record, the record subject may provide written notification to the authority of the record subject's intent to seek a court order restraining release of the record. The legal action must be commenced within 10 days after the record subject receives notice of release of the record. During this time, the authority is prohibited from providing access to the record and must not provide access until any legal action is final. The court must issue its decision within 10 days after the legal action has been commenced, unless a party demonstrates cause for extension of this period. However, the court must issue a decision within 30 days after commencement of the proceedings. Also, a court of appeals must grant precedence to an appeal of a circuit court decision over all other matters not accorded similar precedence by law. An appeal must be taken within 20 days after entry of the judgment or order appealed from. [See SECTION 14.]

oe
4. Creates s. 19.356 (4), stats., to provide that a requester may intervene in the action as a matter of right.

oe
5. Creates s. 19.356 (6), stats., to provide that a court may prevent release of a record by applying substantive common law principles construing the right to inspect, copy, or receive copies of records. In general, this standard often requires a balancing of public harm and public benefit in the release of a record, rather than balancing private harm against public benefit.

oe
6. Creates s. 19.365 (9), stats., to provide that an authority must notify a record subject who holds a local public office or a state public office of the impending release of

a record containing information relating to the employment of the record subject. The record subject, within 5 days of the receipt of the notice, may augment the record to be released with written comments and documentation selected by the record subject. The authority shall release the augmented record, except as otherwise authorized or required by statute.

JNS
9-1

1 SECTION 5. 19.36 (7) (a) of the statutes is amended to read:

2 19.36 (7) ~~IDENTITIES OF APPLICANTS FOR PUBLIC POSITIONS~~ (a) In this section,
3 "final candidate" means each applicant for a position who is seriously considered for
4 appointment or whose name is certified for appointment and whose name is
5 submitted for final consideration to an authority for appointment to any state
6 position, except a position in the classified service, or to any local public office, as
7 defined in s. 19.42 (7w). "Final candidate" includes, whenever there are at least 5
8 candidates for an office or position, each of the 5 candidates who are considered most
9 qualified for the office or position by an authority, and whenever there are less than
10 5 candidates for an office or position, each such candidate. Whenever an
11 appointment is to be made from a group of more than 5 candidates, "final candidate"
12 also includes each candidate in the group.

NOTE: Section 19.36 (7), stats., generally provides that, if an applicant for a position indicates in writing a desire for confidentiality, an authority may not provide access to any record relating to the application that may reveal the ~~applicant's~~ identity. This general provision does not apply to a final candidate for any local public office "as defined in s. 19.42 (7w)". Because the bill expands the definition of the term "local public office" in s. 19.32 (1dm), stats., as created in this bill, this SECTION applies the expanded definition to the issue of confidential applications for purposes of consistency. [For a discussion of the term "local public office" see the note to SECTION 1 of the bill.]

applicant's

13 SECTION 6. 19.36 (10) to (12) of the statutes are created to read:

14 19.36 (10) EMPLOYEE PERSONNEL RECORDS. Unless access is specifically
15 authorized or required by statute, an authority shall not provide access under s.
16 19.35 (1) to records containing the following information, except to an employee or
17 the employee's representative to the extent required under s. 103.13 or to a
18 recognized or certified collective bargaining representative to the extent required to

1 fulfill a duty to bargain under ch. 111 or pursuant to a collective bargaining
2 agreement under ch. 111:

3 (a) Information maintained, prepared, or provided by an employer concerning
4 the home address, home ^{electronic mail} email address, home telephone number, or ~~Social Security~~
5 number of an employee, unless the employee authorizes the authority to provide
6 access to such information.

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

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

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

18 (11) RECORDS OF AN INDIVIDUAL HOLDING A LOCAL PUBLIC OFFICE OR A STATE PUBLIC
19 OFFICE. Unless access is specifically authorized or required by statute, an authority
20 shall [✓] not [✓] provide access under s. 19.35 (1) to records, except to an individual to the
21 extent required under s. 103.13, containing information maintained, prepared, or
22 provided by an employer concerning the home address, home ^{electronic mail} email address, home
23 telephone number, or ~~Social Security~~ number of an individual who holds a local
24 public office or a state public office, unless the individual authorizes the authority
25 to provide access to such information. This subsection does not apply to the home

1 address of an individual who ^{holds an elective public office} has been elected or to the home address of an individual
 2 who, as a condition of employment, is required to reside in a specified location.

LPS:
 → Ignore red marks
 in lines 3 to 12.

(12) INFORMATION RELATING TO CERTAIN EMPLOYEES. Unless access is specifically authorized or required by statute, an authority shall not provide access to a record prepared or provided by an employer performing work on a project to which s. 66.0903, 103.49, or 103.50 applies, or on which the employer is otherwise required to pay prevailing wages, if that record contains the name or other personally identifiable information relating to an employee of that employer, unless the employee authorizes the authority to provide access to that information. In this subsection, "personally identifiable information" does not include an employee's work classification, hours of work, or wage or benefit payments received for work on such projects.

NOTE: This SECTION creates s. 19.36 (10) to (12), stats., to provide that an authority may not provide access to any of the following:

1. Information prepared or provided by an employer concerning the home address, home email address, home telephone number, or Social Security number of an employee, unless the employee authorizes the authority to provide access to the information.
2. 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.
3. Information pertaining to an employee's employment examination, except an examination score if access to that score is not otherwise prohibited.
4. 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.
5. Information maintained, prepared, or provided by an employer concerning the home address, home email address, home telephone number, or ~~Social Security~~ number of an individual ^{who holds an elective public office or a state} public office, unless the individual authorizes the authority to provide access to such information. This provision does not apply to the home address of an individual who has been elected or to the home address of an individual who, as a condition of employment, is required to reside in a specified location.
6. A record prepared or provided by an employer, performing under a contract requiring the payment of prevailing wages, that contains personally identifiable information relating to an employee of that employer, unless the employee authorizes the

who holds an elective

authority to provide access to that information. The term “personally identifiable information” does not include information relating to an employee’s work classification, hours of work, or wage or benefit payments received for work on such projects.

~~7~~ SECTION 7. 59.20 (3) (a) of the statutes is amended to read:

59.20 (3) (a) Every sheriff, clerk of the circuit court, register of deeds, treasurer, register of probate, clerk and county surveyor shall keep his or her office at the county seat in the offices provided by the county or by special provision of law; or if there is none, then at such place as the board directs. The board may also require any elective or appointive county official to keep his or her office at the county seat in an office to be provided by the county. All such officers shall keep their offices open during the usual business hours of any day except Sunday, as the board directs. With proper care, the officers shall open to the examination of any person all books and papers required to be kept in his or her office and permit any person so examining to take notes and copies of such books, records, papers or minutes therefrom except as authorized in par. (c) and s. ss. 19.36 (10) to (12) and 19.59 (3) (d) or under ch. 69.

NOTE: Section 59.20 (3) (a), stats., provides that certain county officers must open to the examination of any person all books and papers required to be kept in his or her office and permit any person examining the records to take notes and copies of the books, records, papers, or minutes except as otherwise provided. The officers to which this requirement applies are every sheriff, clerk of the circuit court, register of deeds, treasurer, register of probate, clerk, and county surveyor. This provision has been interpreted by Wisconsin’s courts to mean that a requester has the absolute right to inspect records required to be kept by law by these officers unless: (a) there is a statutory exception to this right; (b) there is a constitutional provision preventing release of the record; or (c) a court, exercising its inherent authority over judicial records, prevents access to a record when the administration of justice so requires. [See *State ex rel. Journal Co. v. County Court for Racine County*, 43 Wis. 2d 297, 168 N.W.2d 836 (1969); *State ex rel. Bilder v. Township of Delavan*, 112 Wis. 2d 539, 334 N.W.2d 252 (1983); and *State ex rel. Schultz v. Bruendl*, 168 Wis. 2d 101, 483 N.W.2d 238 (Ct. App. 1992).]

Be
In order to take into account the treatment of employee-related records in this bill, this SECTION amends s. 59.20 (3) (a), stats., to provide that county officers must, to the extent provided by current statutes, keep their records open to inspection, except as provided under proposed s. 19.36 (10) to (12), stats.

~~8~~ SECTION 8. 61.25 (5) of the statutes is amended to read:

1 61.25 (5) To be the custodian of the corporate seal, and to file as required by law
 2 and to safely keep all records, books, papers or property belonging to, filed or
 3 deposited in the clerk's office, and deliver the same to the clerk's successor when
 4 qualified; to permit, subject to subch. II of ch. 19, any person with proper care to
 5 examine and copy any of the same, and to make and certify a copy of any thereof when
 6 required, on payment of the same fees allowed town clerks therefor.

NOTE: This SECTION amends s. 61.25 (5), stats., to clarify that a village clerk must comply with all aspects of the open records law, including the provisions of the bill relating to employee-related records.

7 ~~SECTION 9~~ ^{#10} 62.09 (11) (f) of the statutes is amended to read:

8 62.09 (11) (f) The clerk shall keep all papers and records in the clerk's office
 9 open to inspection at all reasonable hours subject to subch. II of ch. 19.

NOTE: This SECTION amends s. 62.09 (11) (f), stats., to clarify that a city clerk must comply with all aspects of the open records law, including the provisions of the bill relating to employee-related records.

10 ~~SECTION 10~~ ^{#11} 230.13 (1) (intro.) of the statutes is amended to read:

11 230.13 (1) (intro.) Except as provided in sub. (3) and ~~s. ss. 19.36 (10) to (12)~~ ^{and}
 12 103.13, the secretary and the administrator may keep records of the following
 13 personnel matters closed to the public:

NOTE: See the note to SECTION 13.

14 ~~SECTION 11~~ ^{#12} 230.13 (3) of the statutes is renumbered 230.13 (3) (a) ^{and amended to read:}

NOTE: See the note to SECTION 13.

15 ~~SECTION 12~~ ^{#13} 230.13 (3) (b) of the statutes is created to read:

16 230.13 (3) (b) The secretary and the administrator may provide any agency
 17 with personnel information relating to the hiring and recruitment process, including
 18 specifically the examination scores and ranks and other evaluations of applicants.

NOTE: Section 230.13, stats., in general provides that the secretary of the Department of Employment Relations and the administrator of the Division of Merit Recruitment and Selection may keep records of the following personnel matters closed to the public:

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ANS 13-14
SECTION 13

- 1. Examination scores and ranks and other evaluations of applicants.
- 2. Dismissals, demotions, and other disciplinary actions.
- 3. Pay survey data obtained from identifiable, nonpublic employers.
- 4. Names of nonpublic employers contributing any pay survey data.

This SECTION and SECS. 11, 12 and amend the statutes to specify that regardless of the discretionary authority to keep certain personnel matters closed to the public, the secretary and the administrator must keep from public access that information listed in s. 19.36 (10) to (12), stats., as created in this bill. However, this SECTION also specifies that 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.

1 SECTION 13. 233.13 (intro.) of the statutes is amended to read:

2 233.13 Closed records. (intro.) Except as provided in ~~s.~~ ss. 19.36 (10) to (12)
 3 and 103.13, the authority may keep records of the following personnel matters closed
 4 to the public:

NOTE: Section 233.13, stats., provides that the University of Wisconsin Hospitals and Clinics authority may keep records of certain personnel matters closed to the public. These personnel matters include all of those matters specified in the comment to ~~Sec 103.13~~ and include the addresses and home telephone numbers of authority employees.

This SECTION amends the statutes to provide that the authority must keep closed to public access the information listed in s. 19.36 (10) to (12), stats., as created in this bill.

5 SECTION 14. 808.04 (1m) of the statutes is created to read:

6 808.04 (1m) An appeal by a record subject under s. 19.356 shall be initiated
 7 within 20 days after the date of entry of the judgment or order appealed from.

NOTE: Generally, s. 808.04, stats., provides that an appeal to the court of appeals must be initiated within 45 days after entry of a judgment or an order. This SECTION creates s. 808.04 (1m), stats., to provide that an appeal by a record subject under s. 19.356, stats., as created in this bill, must be initiated within 20 days after the date of entry of the judgment or order appealed from.

8

(END)

2003 BILL

ANS and
ANALYSES ✓

1 AN ACT to create 22.01 (2n) and 22.03 (2) (o) of the statutes; relating to:
2 directing the Department of Electronic Government to develop a database and
3 Web site on broadband transmission service availability, public access to
4 certain records created for this purpose, and granting rule-making authority.

Analysis by the Legislative Reference Bureau

This bill is explained in the NOTES provided by the Joint Legislative Council in the bill.

For further information see the ~~state~~ fiscal estimate, which will be printed as an appendix to this bill.

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

JOINT LEGISLATIVE COUNCIL PREFATORY NOTE: This bill is introduced at the recommendation of the Joint Legislative Council's Special Committee on Public and Private Broadband.

The bill directs the Department of Electronic Government (DEG) to develop a database and Web site on broadband transmission service availability, and to report to the legislature as to the advisability of upgrading and maintaining the database and Web site as an ongoing effort. The bill creates an exception from the open records law for the information submitted for this purpose and directs the DEG to withhold such information unless the DEG determines, using criteria it has established by rule, that the information

2003-2004 DRAFTING INSERT
FROM THE
LEGISLATIVE REFERENCE BUREAU

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INS 9-1 ✓

#5

SECTION 1. 19.36 (3) of the statutes is amended to read:

19.36 (3) CONTRACTORS' RECORDS. ~~Each~~ Subject to sub. (12), each authority shall make available for inspection and copying under s. 19.35 (1) any record produced or collected under a contract entered into by the authority with a person other than an authority to the same extent as if the record were maintained by the authority. This subsection does not apply to the inspection or copying of a record under s. 19.35 (1) (am).

~~History: 1981 c. 333; 1983 a. 236; 1991 a. 39, 269, 377; 1993 a. 93; 1995 a. 475; 2001 a. 16.~~

NOTE: See the Note to SECTION 7.

no change



Ins 13-14 ✓

~~Section #. 230.13 (3) of the statutes is amended to read:~~

(a)
230.13 (3) The secretary and the administrator shall provide to the department of workforce development or a county child support agency under s. 59.53 (5) information requested under s. 49.22 (2m) that would otherwise be closed to the public under this section. Information provided under this subsection Paragraph may only include an individual's name and address, an individual's employer and financial information related to an individual.

~~History: 1971 c. 270; 1977 c. 196 s. 37; Stats. 1977 s. 230.13; 1979 c. 339; 1989 a. 31; 1991 a. 269, 317; 1997 a. 191.~~

Ron Sklansky and Bob Conlin:

#1. I'm sorry I did not note this earlier, but in proposed s. 19.32(4)

5. Proposed s. 19.36 (10), relating to public employee personnel records, will apply by its terms unless a collective bargaining agreement covering local government employees provides otherwise. Under s. 111.93 (3), stats., a state employee collective bargaining agreement supersedes any statutes governing conditions of employment of state employees, whether or not the matters treated in the statutes are treated in the agreement. In other words, access by third parties to state employee personnel records is governed by this draft, but access by represented state employees and their representatives is governed by the draft to the extent provided in any applicable collective bargaining agreement. This does not seem to me to pose a significant problem since the thrust of the draft is to protect against unwarranted third-party access.

you may wish to insert a reference to

s. 20.923 (6) (bp),

stats., for the purpose of according the same appeal rights to employees of the legislative technology services bureau that are accorded to employees of other legislative service agencies.

6. The instructions provided for the requester to receive notice of any legal action by a record subject to restrain release of a record. Under the instructions, the requester is permitted to intervene and if the requester intervenes, the requester must provide notice to the other parties. Section 803.03, stats., creates a joinder procedure under which a third party may be joined in an action, but the joined party may waive his or her right to participate. Proposed s. 19.356 (4), therefore, incorporates this joinder procedure.

7. The instructions did not indicate what showing the record subject must make in order for a court to restrain release of a record. Under the common law, the record subject must show that the public interest in withholding access outweighs the strong public interest in providing access. *State ex rel. Youmans v. Owens*, 78 Wis.2d 672, 682-83 (1965). The standard recently imposed by the Wisconsin Supreme Court, however, requires the record subject to show that his or her privacy or reputational interests would be impacted by providing access to the record and that that impact outweighs the public interest in providing that access. *Milwaukee Teachers Education Assn. v. Milwaukee Bd. of School Directors*, 227 Wis.2d 779, 798 (1999). This draft therefore provides in proposed s. 19.356 (6) that the record subject must show that the harm to his or her privacy or reputational interests by providing access to a record outweighs the public interest in providing that access.

8. In accordance with the instructions, proposed s. 19.356 (7) directs the court to deny any request by a requester to delay the proceedings. This provision could have due-process or equal-protection implications if a requester, for good cause shown, is unable to effectively participate in the action within the time frame that would have applied had the requester not been joined.

Concerning access to certain information

contained in a public record

*2. Proposed s. 19.356 (7) requires

The instructions provided for the circuit court to issue a decision within a specified period after commencement of legal action. Because under s. 801.02, stats., an action is commenced when a summons and complaint are filed with the clerk of court but a plaintiff has 90 days after filing of the summons and complaint to serve the defendant, this draft, in proposed s. 19.356 (7), requires the court to issue a decision within a specified period after filing and service is complete. I should also mention that a statute which requires a court to issue a decision within a specified period is unusual and perhaps unprecedented in this context, and, given the prerogatives of a coequal branch of government, may not be entirely effective. It may, however, at least suggest

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that some prioritization may be in order, which could advance the disposition of these types of cases.

~~10. The instructions provided that certain personnel records of public employees should be exempt from access by third parties, but did not indicate whether the custodian of the affected records shall or may deny access. This draft provides, in proposed s. 19.36 (10), that the custodian shall deny access (unless, in the case of a home address or telephone number, the affected employee otherwise permits).~~

~~11. Proposed s. 19.36 (10) (c) requires a custodian to deny access to records relating to a possible criminal offense or possible misconduct connected with employment by a public employee prior to disposition of the investigation. Under proposed s. 19.356 (2), some of these same records could become the subject of a lawsuit against the custodian to restrain release. Such a lawsuit would not be possible if the custodian were not to decide in the first instance to proceed with release. Therefore, proposed s. 19.36 (10) (c) limits the potential that proposed s. 19.356 (2) will come into play by preventing the circumstance that would trigger the application of proposed s. 19.356 (2). Of course, each of these proposed statutes applies in situations that the other does not, but the interplay is significant and, if it is not fully intended, the draft should be modified.~~

3. ~~2~~ ¹² Some statutes, for example, ss. 40.07 and 51.30, stats., address the issue of access to public records by public employees and even by employees of the same agency that creates the records. Since under current statutory law it is not generally possible for a record subject to challenge the decision of a public officer or agency to provide access to a record, this issue does not generally arise. However, under proposed s. 19.356 (2), there may be a question as to whether notice of release needs to be provided when access to a public record is sought by other public officers or agencies, or even by officers or employees within the same agency that creates the record. You may wish to address that issue.

and
(9)

a proposed

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DRAFTER'S NOTE
FROM THE
LEGISLATIVE REFERENCE BUREAU

LRB-1820/1dn
JTK:kmg:jf

March 13, 2003

Ron Sklansky and Bob Conlin:

1. I'm sorry I did not note this earlier, but in proposed s. 19.32 (4) you may wish to insert a reference to s. 20.923 (6) (bp), stats., for the purpose of according the same appeal rights to employees of the legislative technology services bureau that are accorded to employees of other legislative service agencies.
2. Proposed s. 19.356 (7) requires the circuit court to issue a decision concerning access to certain information contained in a public record within a specified period after filing and service is complete. A statute which requires a court to issue a decision within a specified period is unusual and perhaps unprecedented, and, given the prerogatives of a coequal branch of government, may not be entirely effective. It may, however, at least suggest that some prioritization may be in order, which could advance the disposition of these types of cases.
3. Some statutes, for example, ss. 40.07 and 51.30, stats., address the issue of access to public records by public employees and even by employees of the same agency that creates the records. Since under current statutory law it is not generally possible for a record subject to challenge the decision of a public officer or agency to provide access to a record, this issue does not generally arise. However, under proposed s. 19.356 (2) and (9), there may be a question as to whether notice of a proposed release needs to be provided when access to a public record is sought by other public officers or agencies, or even by officers or employees within the same agency that creates the record. You may wish to address that issue.

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State of Wisconsin
2003 - 2004 LEGISLATURE

LRB-1820/1
JTK&RAC:kmg:jf

WANTED MON 3/17

2003 BILL

1 **AN ACT to renumber and amend 230.13 (3); to amend 19.34 (1), 19.36 (3), 19.36**
2 **(7) (a), 59.20 (3) (a), 61.25 (5), 62.09 (11) (f), 230.13 (1) (intro.) and 233.13 (intro.);**
3 **and to create 19.32 (1bg), (1de), (1dm), (2g) and (4), 19.345, 19.356, 19.36 (10)**
4 **to (12), 230.13 (3) (b) and 808.04 (1m) of the statutes; relating to: access to**
5 **public records.**

Analysis by the Legislative Reference Bureau

This bill is explained in the NOTES provided by the Joint Legislative Council in the bill.

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

JOINT LEGISLATIVE COUNCIL PREFATORY NOTE: This bill is recommended by the Joint Legislative Council's Special Committee on Review of the Open Records Law. The special committee was directed to review the Wisconsin Supreme Court decisions in *Woznicki v. Erickson* and *Milwaukee Teachers' Educational Association v. Milwaukee Board of School Directors* and recommend legislation implementing the procedures anticipated in the opinions, amending the holdings of the opinions, or overturning the opinions. In addition, the special committee was directed to recommend changes in the open records law to accommodate electronic communications and to consider the sufficiency of an open records request and the scope of exemptions to the open records law.

BILL

In *Woznicki v. Erickson*, 202 Wis. 2d 178, 549 N.W.2d 699 (1996), the Wisconsin Supreme Court held that there is no blanket statutory or common law exception under the open records law that will prevent public access to public employee disciplinary or personnel records. The court stated that these records are subject to the balancing test under which the custodian of the records determines whether permitting inspection would result in harm to the public interest outweighing the legislative policy recognizing the public interest in record inspection. Because the privacy and reputational interests of the school district employee in this case were implicated by the potential release of records, the court held that the employee had the right to judicial review of the decision to release the records. This conclusion necessitated the holding that the record custodian could not release the records without notifying the employee of the pending release and allowing a reasonable amount of time for the employee to appeal the decision to release the records. In *Milwaukee Teachers' Education Association v. Milwaukee Board of School Directors*, 227 Wis. 2d 779, 596 N.W.2d 403 (1999), the court formally extended to any public employee the right to notice about, and judicial review of, a custodian's decision to release information implicating the privacy or reputational interests of the individual public employee. However, in these cases, the court did not establish any criteria for determining when privacy or reputational interests are affected or for providing notice to affected parties. Further, the logical extension of these opinions is that the right to notice and the right to judicial review may extend to any record subject, regardless of whether the record subject is a public employee.

This bill partially codifies *Woznicki* and *Milwaukee Teachers'*. In general, the bill applies the rights afforded by *Woznicki* and *Milwaukee Teachers'* only to a defined set of records pertaining to employees residing in Wisconsin. As an overall construct, records relating to employees under the bill can be placed in the following 3 categories:

1. Employee-related records that may be released under the general balancing test without providing a right of notice or judicial review to the employee record subject.

2. Employee-related records that may be released under the balancing test *only* after a notice of impending release and the right of judicial review have been provided to the employee record subject.

3. Employee-related records that are absolutely closed to public access under the open records law.

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

3 **19.32 (1bg)** "Employee" means any individual who is employed by an authority,
4 other than an individual holding local public office or a state public office, or any
5 individual who is employed by an employer other than an authority.

6 **(1de)** "Local governmental unit" has the meaning given in s. 19.42 (7u).

7 **(1dm)** "Local public office" has the meaning given in s. 19.42 (7w), and also
8 includes any appointive office or position of a local governmental unit in which an
9 individual serves as the head of a department, agency, or division of the local

BILL

1 governmental unit, but does not include any office or position filled by a municipal
2 employee, as defined in s. 111.70 (1) (i).

3 (2g) "Record subject" means an individual about whom personally identifiable
4 information is contained in a record.

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

NOTE: This SECTION:

1. Creates a definition of the term "employee" to mean any public sector or private sector employee, other than an individual holding a local public office or a state public office.

2. Creates a definition of the term "local public office" that incorporates the definition of the term "local public office" contained in s. 19.42 (7w), stats. The latter statutory provision states that a "local public office" means any of the following offices:

a. An elective office of a local governmental unit.

b. A county administrator or administrative coordinator or a city or village manager.

c. An appointive office or position of a local governmental unit in which an individual serves for a specified term, except a position limited to the exercise of ministerial action or a position filled by an independent contractor.

d. The position of member of the board of directors of a local exposition district not serving for a specified term.

e. An appointive office or position of a local government which is filled by the governing body of the local government or the executive or administrative head of the local government and in which the incumbent serves at the pleasure of the appointing authority, except a clerical position, a position limited to the exercise of ministerial action, or a position filled by an independent contractor.

Section 19.42 (7w), stats., and s. 19.32 (1dm), stats., as created in this bill, specifically refer to certain appointive offices or positions of a local governmental unit. The obvious purpose is to provide that an individual who holds an upper level governmental office or position and who has broad discretionary authority may not seek judicial review in order to prevent the release of records that name that individual. The description of an appointive office or position of a local governmental unit contained in s. 19.32 (1dm), stats., is broader than the description contained in s. 19.42 (7w), stats. For example, unlike the definition contained in s. 19.42 (7w), stats., the definition in the proposed statute includes the offices of police chief and fire chief, positions whose incumbents do not serve for a statutorily specified term, may be removed only for cause, and are not appointed by the governing body of a local government. Section 111.70 (1) (i), stats., defines the term "municipal employee" to mean an individual employed by a municipal employer other than an independent contractor, supervisor, or confidential, managerial, or executive employee.

3. Creates a definition of the term "record subject" to mean an individual about whom personally identifiable information is contained in a record.

4. Creates a definition of the term "state public office" to mean the numerous agency positions listed in ss. 19.42 (13) and 20.923, stats. However, the provision specifically excludes from the definition a position in ~~the Legislative Audit Bureau, the Legislative Council staff, the Legislative Fiscal Bureau, and the Legislative Reference~~

BILL**SECTION 1**

Bureau. Thus, a person in one of these positions may have a right of judicial review before a record in which the person is named may be released.

1 **SECTION 2.** 19.34 (1) of the statutes is amended to read:

2 19.34 (1) Each authority shall adopt, prominently display and make available
3 for inspection and copying at its offices, for the guidance of the public, a notice
4 containing a description of its organization and the established times and places at
5 which, the legal custodian under s. 19.33 from whom, and the methods whereby, the
6 public may obtain information and access to records in its custody, make requests for
7 records, or obtain copies of records, and the costs thereof. The notice shall also
8 separately identify each position of the authority that constitutes a local public office
9 or a state public office. This subsection does not apply to members of the legislature
10 or to members of any local governmental body.

NOTE: Generally, under current law, an authority having custody of a public record must adopt, prominently display, and make available for inspection and display at its offices a notice containing a description of its organization and the established times and places at which the public may obtain information and access to records in the custody of the authority. The notice must also identify the legal custodian of the records and the costs of obtaining copies of the records. Such notice, obviously, is for the guidance of members of the public who may wish to request copies of open records.

This SECTION additionally requires the notice to separately identify each position of the authority that in its opinion constitutes a local public office or a state public office as defined in s. 19.32 (1dm) and (4), stats. [See SECTION 1 of the bill.]

11 **SECTION 3.** 19.345 of the statutes is created to read:

12 **19.345 Time computation.** In ss. 19.33 to 19.39, when a time period is
13 provided for performing an act, whether the period is expressed in hours or days, the
14 whole of Saturday, Sunday, and any legal holiday, from midnight to midnight, shall
15 be excluded in computing the period.

NOTE: This SECTION provides that Saturday, Sunday, and any legal holiday will be excluded in measuring time periods under the open records law.

16 **SECTION 4.** 19.356 of the statutes is created to read:

BILL

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

6 (2) (a) Except as provided in pars. (b) and (c) and as otherwise authorized or
7 required by statute, if an authority decides under s. 19.35 to permit access to a record
8 specified in this paragraph, the authority shall, before permitting access and within
9 3 days after making the decision to permit access, serve written notice of that
10 decision on any record subject to whom the record pertains, either by certified mail
11 or by personally serving the notice on the record subject. The notice shall briefly
12 describe the requested record and include a description of the rights of the record
13 subject under subs. (3) and (4). This paragraph applies only to the following records:

14 1. A record containing information relating to an employee that is created or
15 kept by the authority and that is the result of an investigation into a disciplinary
16 matter involving the employee or possible employment-related violation by the
17 employee of a statute, ordinance, rule, regulation, or policy of the employee's
18 employer.

19 2. A record obtained by the authority through a subpoena or search warrant.

20 3. A record prepared by an employer other than an authority, if that record
21 contains information relating to an employee of that employer, unless the employee
22 authorizes the authority to provide access to that information.

23 (b) Paragraph (a) does not apply to an authority who provides access to a record
24 pertaining to an employee to the employee who is the subject of the record or to his
25 or her representative to the extent required under s. 103.13 or to a recognized or

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1 certified collective bargaining representative to the extent required to fulfill a duty
2 to bargain or pursuant to a collective bargaining agreement under ch. 111.

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

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

9 (4) Within 10 days after receipt of a notice under sub. (2) (a), a record subject
10 may commence an action seeking a court order to restrain the authority from
11 providing access to the requested record. If a record subject commences such an
12 action, the record subject shall name the authority as a defendant. Notwithstanding
13 s. 803.09, the requester may intervene in the action as a matter of right. If the
14 requester does not intervene in the action, the authority shall notify the requester
15 of the results of the proceedings under this subsection and sub. (5).

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

BILL

1 (6) The court, in an action commenced under sub. (4), may restrain the
2 authority from providing access to the requested record. The court shall apply
3 substantive common law principles construing the right to inspect, copy, or receive
4 copies of records in making its decision.

5 (7) The court, in an action commenced under sub. (4), shall issue a decision
6 within 10 days after the filing of the summons and complaint and proof of service of
7 the summons and complaint upon the defendant, unless a party demonstrates cause
8 for extension of this period. In any event, the court shall issue a decision within 30
9 days after those filings are complete.

10 (8) If a party appeals a decision of the court under sub. (7), the court of appeals
11 shall grant precedence to the appeal over all other matters not accorded similar
12 precedence by law. An appeal shall be taken within the time period specified in s.
13 808.04 (1m).

14 (9) (a) Except as otherwise authorized or required by statute, if an authority
15 decides under s. 19.35 to permit access to a record containing information relating
16 to a record subject who is an officer or employee of the authority holding a local public
17 office or a state public office, the authority shall, before permitting access and within
18 3 days after making the decision to permit access, serve written notice of that
19 decision on the record subject, either by certified mail or by personally serving the
20 notice on the record subject. The notice shall briefly describe the requested record
21 and include a description of the rights of the record subject under par. (b).

22 (b) Within 5 days after receipt of a notice under par. (a), a record subject may
23 augment the record to be released with written comments and documentation
24 selected by the record subject. Except as otherwise authorized or required by statute,

BILL

SECTION 4

1 the authority under par. (a) shall release the record as augmented by the record
2 subject.

NOTE: This SECTION:

1. Creates s. 19.356 (1), stats., to limit *Woznicki* by stating that, except as otherwise provided, no person is entitled to notice or judicial review of a decision of an authority to provide a requester with access to a record.

2. Creates s. 19.356 (2), stats., to provide that if an authority decides to permit access to certain records, the authority must, before permitting access and within 3 days after making the decision to permit access, serve written notice (personally or by certified mail) of that decision on any record subject to whom the records pertain. The reference to s. 19.35, stats., indicates that the authority must continue to apply the open records law balancing test before deciding to release the record. The records to which this notice applies includes only: (a) any record containing information relating to an employee that is created or kept by the authority as the 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; (b) any record obtained by the authority through a subpoena or search warrant; or (c) any record prepared by an employer other than an authority, if that record contains information relating to an employee of that employer, unless the employee authorizes the authority to provide access to that information. The notice requirement is not applicable in the following circumstances:

a. An authority provides access to a record, pertaining to an employee, to the employee who is the subject of the record, to his or her representative, or to his or her bargaining representative.

b. An authority releases a record produced for equal rights, discrimination, or fair employment law compliance purposes.

3. Creates s. 19.356 (3) to (8), stats., to provide that within 5 days after receipt of a notice of the impending release of a record, the record subject may provide written notification to the authority of the record subject's intent to seek a court order restraining release of the record. The legal action must be commenced within 10 days after the record subject receives notice of release of the record. During this time, the authority is prohibited from providing access to the record and must not provide access until any legal action is final. The court must issue its decision within 10 days after the legal action has been commenced, unless a party demonstrates cause for extension of this period. However, the court must issue a decision within 30 days after commencement of the proceedings. Also, a court of appeals must grant precedence to an appeal of a circuit court decision over all other matters not accorded similar precedence by law. An appeal must be taken within 20 days after entry of the judgment or order appealed from. [See SECTION 14.]

4. Creates s. 19.356 (4), stats., to provide that a requester may intervene in the action as a matter of right.

5. Creates s. 19.356 (6), stats., to provide that a court may prevent release of a record by applying substantive common law principles construing the right to inspect, copy, or receive copies of records. In general, this standard often requires a balancing of public harm and public benefit in the release of a record, rather than balancing private harm against public benefit.

6. Creates s. 19.365 (9), stats., to provide that an authority must notify a record subject who holds a local public office or a state public office of the impending release of a record containing information relating to the employment of the record subject. The record subject, within 5 days of the receipt of the notice, may augment the record to be released with written comments and documentation selected by the record subject. The

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authority shall release the augmented record, except as otherwise authorized or required by statute.

1 **SECTION 5.** 19.36 (3) of the statutes is amended to read:

2 19.36 (3) **CONTRACTORS' RECORDS.** Each Subject to sub. (12), each authority shall
3 make available for inspection and copying under s. 19.35 (1) any record produced or
4 collected under a contract entered into by the authority with a person other than an
5 authority to the same extent as if the record were maintained by the authority. This
6 subsection does not apply to the inspection or copying of a record under s. 19.35 (1)
7 (am).

NOTE: See the note to SECTION 7.

8 **SECTION 6.** 19.36 (7) (a) of the statutes is amended to read:

9 19.36 (7) (a) In this section, "final candidate" means each applicant for a
10 position who is seriously considered for appointment or whose name is certified for
11 appointment and whose name is submitted for final consideration to an authority for
12 appointment to any state position, except a position in the classified service, or to any
13 local public office, ~~as defined in s. 19.42 (7w).~~ "Final candidate" includes, whenever
14 there are at least 5 candidates for an office or position, each of the 5 candidates who
15 are considered most qualified for the office or position by an authority, and whenever
16 there are less than 5 candidates for an office or position, each such candidate.
17 Whenever an appointment is to be made from a group of more than 5 candidates,
18 "final candidate" also includes each candidate in the group.

NOTE: Section 19.36 (7), stats., generally provides that, if an applicant for a position indicates in writing a desire for confidentiality, an authority may not provide access to any record relating to the application that may reveal the applicant's identity. This general provision does not apply to a final candidate for any local public office "as defined in s. 19.42 (7w)". Because the bill expands the definition of the term "local public office" in s. 19.32 (1dm), stats., as created in this bill, this SECTION applies the expanded definition to the issue of confidential applications for purposes of consistency. [For a discussion of the term "local public office" see the note to SECTION 1 of the bill.]

19 **SECTION 7.** 19.36 (10) to (12) of the statutes are created to read:

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1 **19.36 (10) EMPLOYEE PERSONNEL RECORDS.** Unless access is specifically
2 authorized or required by statute, an authority shall not provide access under s.
3 19.35 (1) to records containing the following information, except to an employee or
4 the employee's representative to the extent required under s. 103.13 or to a
5 recognized or certified collective bargaining representative to the extent required to
6 fulfill a duty to bargain under ch. 111 or pursuant to a collective bargaining
7 agreement under ch. 111:

8 (a) Information maintained, prepared, or provided by an employer concerning
9 the home address, home electronic mail address, home telephone number, or social
10 security number of an employee, unless the employee authorizes the authority to
11 provide access to such information.

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

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

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

23 **(11) RECORDS OF AN INDIVIDUAL HOLDING A LOCAL PUBLIC OFFICE OR A STATE PUBLIC**
24 **OFFICE.** Unless access is specifically authorized or required by statute, an authority
25 shall not provide access under s. 19.35 (1) to records, except to an individual to the

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1 extent required under s. 103.13, containing information maintained, prepared, or
2 provided by an employer concerning the home address, home electronic mail address,
3 home telephone number, or social security number of an individual who holds a local
4 public office or a state public office, unless the individual authorizes the authority
5 to provide access to such information. This subsection does not apply to the home
6 address of an individual who holds an elective public office or to the home address
7 of an individual who, as a condition of employment, is required to reside in a specified
8 location.

9 (12) INFORMATION RELATING TO CERTAIN EMPLOYEES. Unless access is specifically
10 authorized or required by statute, an authority shall not provide access to a record
11 prepared or provided by an employer performing work on a project to which s.
12 66.0903, 103.49, or 103.50 applies, or on which the employer is otherwise required
13 to pay prevailing wages, if that record contains the name or other personally
14 identifiable information relating to an employee of that employer, unless the
15 employee authorizes the authority to provide access to that information. In this
16 subsection, “personally identifiable information” does not include an employee’s
17 work classification, hours of work, or wage or benefit payments received for work on
18 such a project.

NOTE: This SECTION creates s. 19.36 (10) to (12), stats., to provide that an authority may not provide access to any of the following:

1. Information prepared or provided by an employer concerning the home address, home email address, home telephone number, or ~~Social Security~~ number of an employee, unless the employee authorizes the authority to provide access to the information.

2. 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.

3. Information pertaining to an employee’s employment examination, except an examination score if access to that score is not otherwise prohibited.

4. 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

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adjustments or other wage treatments, management bonus plans, promotions, job assignments, letters of reference, or other comments or ratings relating to employees.

5. Information maintained, prepared, or provided by an employer concerning the home address, home email address, home telephone number, or social security number of an individual who holds an elective public office or a state public office, unless the individual authorizes the authority to provide access to such information. This provision does not apply to the home address of an individual who has been elected or to the home address of an individual who, as a condition of employment, is required to reside in a specified location.

6. A record prepared or provided by an employer, performing under a contract requiring the payment of prevailing wages, that contains personally identifiable information relating to an employee of that employer, unless the employee authorizes the authority to provide access to that information. The term “personally identifiable information” does not include information relating to an employee’s work classification, hours of work, or wage or benefit payments received for work on such projects.

1 **SECTION 8. 59.20 (3) (a) of the statutes is amended to read:**

2 **59.20 (3) (a) Every sheriff, clerk of the circuit court, register of deeds, treasurer,**
3 **register of probate, clerk and county surveyor shall keep his or her office at the county**
4 **seat in the offices provided by the county or by special provision of law; or if there is**
5 **none, then at such place as the board directs. The board may also require any elective**
6 **or appointive county official to keep his or her office at the county seat in an office**
7 **to be provided by the county. All such officers shall keep their offices open during the**
8 **usual business hours of any day except Sunday, as the board directs. With proper**
9 **care, the officers shall open to the examination of any person all books and papers**
10 **required to be kept in his or her office and permit any person so examining to take**
11 **notes and copies of such books, records, papers or minutes therefrom except as**
12 **authorized in par. (c) and s. ss. 19.36 (10) to (12) and 19.59 (3) (d) or under ch. 69.**

NOTE: Section 59.20 (3) (a), stats., provides that certain county officers must open to the examination of any person all books and papers required to be kept in his or her office and permit any person examining the records to take notes and copies of the books, records, papers, or minutes except as otherwise provided. The officers to which this requirement applies are every sheriff, clerk of the circuit court, register of deeds, treasurer, register of probate, clerk, and county surveyor. This provision has been interpreted by Wisconsin’s courts to mean that a requester has the absolute right to inspect records required to be kept by law by these officers unless: (a) there is a statutory exception to this right; (b) there is a constitutional provision preventing release of the record; or (c) a court, exercising its inherent authority over judicial records, prevents access to a record when the administration of justice so requires. [See *State ex rel. Journal Co. v. County Court for Racine County*, 43 Wis. 2d 297, 168 N.W.2d 836 (1969); *State ex*

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rel. Bilder v. Township of Delavan, 112 Wis. 2d 539, 334 N.W.2d 252 (1983); and *State ex rel. Schultz v. Bruendl*, 168 Wis. 2d 101, 483 N.W.2d 238 (Ct. App. 1992).]

In order to take into account the treatment of employee-related records in this bill, this SECTION amends s. 59.20 (3) (a), stats., to provide that county officers must, to the extent provided by current statutes, keep their records open to inspection, except as provided under proposed s. 19.36 (10) to (12), stats.

1 **SECTION 9.** 61.25 (5) of the statutes is amended to read:

2 61.25 (5) To be the custodian of the corporate seal, and to file as required by law
3 and to safely keep all records, books, papers or property belonging to, filed or
4 deposited in the clerk's office, and deliver the same to the clerk's successor when
5 qualified; to permit, subject to subch. II of ch. 19, any person with proper care to
6 examine and copy any of the same, and to make and certify a copy of any thereof when
7 required, on payment of the same fees allowed town clerks therefor.

NOTE: This SECTION amends s. 61.25 (5), stats., to clarify that a village clerk must comply with all aspects of the open records law, including the provisions of the bill relating to employee-related records.

8 **SECTION 10.** 62.09 (11) (f) of the statutes is amended to read:

9 62.09 (11) (f) The clerk shall keep all papers and records in the clerk's office
10 open to inspection at all reasonable hours subject to subch. II of ch. 19.

NOTE: This SECTION amends s. 62.09 (11) (f), stats., to clarify that a city clerk must comply with all aspects of the open records law, including the provisions of the bill relating to employee-related records.

11 **SECTION 11.** 230.13 (1) (intro.) of the statutes is amended to read:

12 230.13 (1) (intro.) Except as provided in sub. (3) and s. ss. 19.36 (10) to (12) and
13 103.13, the secretary and the administrator may keep records of the following
14 personnel matters closed to the public:

NOTE: See the note to SECTION 13.

15 **SECTION 12.** 230.13 (3) of the statutes is renumbered 230.13 (3) (a) and
16 amended to read.

17 230.13 (3) (a) The secretary and the administrator shall provide to the
18 department of workforce development or a county child support agency under s.

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1 59.53 (5) information requested under s. 49.22 (2m) that would otherwise be closed
2 to the public under this section. Information provided under this subsection
3 paragraph may only include an individual's name and address, an individual's
4 employer and financial information related to an individual.

NOTE: See the note to SECTION 13.

5 **SECTION 13.** 230.13 (3) (b) of the statutes is created to read:

6 230.13 (3) (b) The secretary and the administrator may provide any agency
7 with personnel information relating to the hiring and recruitment process, including
8 specifically the examination scores and ranks and other evaluations of applicants.

NOTE: Section 230.13, stats., in general provides that the secretary of the Department of Employment Relations and the administrator of the Division of Merit Recruitment and Selection may keep records of the following personnel matters closed to the public:

1. Examination scores and ranks and other evaluations of applicants.
2. Dismissals, demotions, and other disciplinary actions.
3. Pay survey data obtained from identifiable, nonpublic employers.
4. Names of nonpublic employers contributing any pay survey data.

This SECTION and SECTIONS 11 and 12 amend the statutes to specify that regardless of the discretionary authority to keep certain personnel matters closed to the public, the secretary and the administrator must keep from public access that information listed in s. 19.36 (10) to (12), stats., as created in this bill. However, this SECTION also specifies that 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.

9 **SECTION 14.** 233.13 (intro.) of the statutes is amended to read:

10 **233.13 Closed records.** (intro.) Except as provided in ~~s.~~ ss. 19.36 (10) to (12)
11 and 103.13, the authority may keep records of the following personnel matters closed
12 to the public:

NOTE: Section 233.13, stats., provides that the University of Wisconsin Hospitals and Clinics authority may keep records of certain personnel matters closed to the public. These personnel matters include all of those matters specified in the comment to SECTION 13 and include the addresses and home telephone numbers of authority employees.

This SECTION amends the statutes to provide that the authority must keep closed to public access the information listed in s. 19.36 (10) to (12), stats., as created in this bill.

13 **SECTION 15.** 808.04 (1m) of the statutes is created to read:

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1 808.04 (1m) An appeal by a record subject under s. 19.356 shall be initiated
2 within 20 days after the date of entry of the judgment or order appealed from.

 NOTE: Generally, s. 808.04, stats., provides that an appeal to the court of appeals
must be initiated within 45 days after entry of a judgment or an order. This SECTION
creates s. 808.04 (1m), stats., to provide that an appeal by a record subject under s. 19.356,
stats., as created in this bill, must be initiated within 20 days after the date of entry of
the judgment or order appealed from.

3

(END)



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Ron ~~Obama~~
Sklansky

March 17, 2003

MEMORANDUM

To: Legislative Council - JLC

From: Jeffery T. Kuesel, Managing Attorney

Re: LRB-1820/2 Access to public records

The attached draft was prepared at your request. Please review it carefully to ensure that it is accurate and satisfies your intent. If it does and you would like it jacketed for introduction, please indicate below for which house you would like the draft jacketed and return this memorandum to our office. If you have any questions about jacketing, please call our program assistants at 266-3561. Please allow one day for jacketing.

JACKET FOR ASSEMBLY JACKET FOR SENATE

If you have any questions concerning the attached draft, or would like to have it redrafted, please contact me at (608) 266-6778 or at the address indicated at the top of this memorandum.

If the last paragraph of the analysis states that a fiscal estimate will be prepared, the LRB will request that it be prepared after the draft is introduced. You may obtain a fiscal estimate on the attached draft before it is introduced by calling our program assistants at 266-3561. Please note that if you have previously requested that a fiscal estimate be prepared on an earlier version of this draft, you will need to call our program assistants in order to obtain a fiscal estimate on this version before it is introduced.

Please call our program assistants at 266-3561 if you have any questions regarding this memorandum.