

The Revised Open Records Act

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Practice Area: Labor and Employment & School Law & County and Municipal Governance

INTRODUCTION

Governor James Doyle recently signed into law significant changes to Wisconsin's open records law. Wisconsin Act 47 ("Open Records Act"). The law will only apply to a governmental or quasi-governmental authority ("Authority"), such as, among others, a state or local office, elected official, agency, board, committee, and department. WIS. STAT § 19.32(1) (defining "Authority").

This article will first summarize the background leading to the revisions of Wisconsin's open records law. This section discusses two seminal Wisconsin Supreme Court cases that detailed important principles regarding open records, but because procedures were not clear, necessitated legislative assistance. The second part highlights the key elements of the Open Records Act. This second section sets forth the three classifications of records that the Open Records Act creates: (1) Records that shall not be produced; (2) Records that may be produced, but must provide the subject of the record with notice and an opportunity to challenge the release; and (3) Records that may be produced without notice to the subject of the record. The final section addresses the implications created by the Open Records Act for Authorities and outlines the specific procedures applicable to records that require notice to the subject or subjects of a requested record.

BACKGROUND

The Open Records Act followed a March 25, 2003, report from the Legislative Council Special Committee ("Legislative Council Report") that addressed confusion about the release of records concerning public employees as a result of two Wisconsin Supreme Court cases: *Woznicki v. Erickson*, 202 Wis. 2d 178, 549 N.W.2d 699 (1996) and *Milw. Teachers' Educ. Ass'n v. Milw. B'd of Sch. Directors*, 227 Wis. 2d 779, 596 N.W.2d 403 (1999).

In *Woznicki*, a district attorney subpoenaed a school district employee that he would release them. The employee filed a court action to prevent the release. The Court concluded that the employee's records were subject to a balancing test where the district attorney, the "custodian" of these records, had to determine whether "permitting inspection would result in harm to the public interest which outweighs the legislative policy recognizing the public interest in allowing inspection." In other words, the district attorney had to determine whether release of the records would harm the public policy interest in the employee's privacy and reputation more than it would harm the public policy interest in favor of open records. *Compare Newspaper, Inc. v. Breier*, 89 Wis. 2d at 417, 430, 279 N.W.2d 179, 185 (1979) ("[T]his court has concluded that the public-policy interest may be served in protecting the reputations of individuals.") to *Nichols v. Bennett*, 199Wis. 2d 268, 273, 544 N.W. 2d 428, 430 (1996) ("The open records law serves one of the basic tenets of our democratic system by providing an opportunity for public oversight of the workings of government. This state recognizes a presumption of accessibility to public records, reflected in both the statutes and in case law."). The district attorney, however, could not release the records without notifying the employee of the pending release and permit the employee time to appeal the decision.

In *Milw. Teachers' Educ. Ass'n.*, a school district performed a criminal background check on all of its employees and fired eighteen employees as a result of the search. *The Milwaukee Journal* requested information related to the employees. The custodian of the records for the school district engaged in a *Woznicki* balancing test and agreed to produce the records. However, he first notified the employees of their right to challenge the decision, which they did. *The Milwaukee Journal* argued that the *Woznicki* balancing test only applied to district attorneys. The Wisconsin Supreme Court stated, "The central issue in this case is whether the de novo judicial review recognized in *Woznicki* as implicit in the open records law is available when the public records custodian is not a district attorney." 227 Wis.2d at 787-88, 596 N.W.2d at 407. The Court answered affirmatively and extended such rights to all public employees: *Woznicki* balancing test only applied to district attorneys. The Wisconsin Supreme Court stated, "The central issue in this case is whether the de novo judicial review recognized in *Woznicki* as implicit in the open records law is available when the public records custodian is not a district attorney." 227 Wis.2d at 787-88, 596 N.W.2d at 407. The Court answered affirmatively and extended such rights to all public employees:

For these reasons, we hold that the implicit right of a de novo judicial review of a public records custodian's decision recognized by this court in *Woznicki* is available to an individual public employee whose privacy or reputational interests would be impacted by disclosure of records requested under the open records law. This right of de novo judicial review applies whether or not the custodian of the records is a district attorney.

Id. at 797-98, 596 N.W.2d at 411.

The Legislative Council noted that "the logical extension" of the *Woznicki* and *Milw. Teacher's Educ. Ass'n.* decisions "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." Legislative Council Report at 9. The Legislative Council further noted that substantial confusion resulted from the decisions because the Supreme Court did not establish any criteria for (1) determining when privacy and reputational interests become affected and (2) providing notice to affected parties. *Id.* The Open Records Act, which partially codifies *Woznicki* and *Milw. Teacher's Educ. Ass'n.*, signed into law by Governor Doyle aimed to mitigate such confusion.

KEY ELEMENTS OF THE OPEN RECORDS ACT

Two new key definitions under the Open Records Act are that of "Employee" and "Record subject." The definitions ensure that any record held by an Authority that relates to a public employee, private employee, or citizen will be covered by the act. WIS. STAT. § 19.36(10).

The Open Records Act created three classifications of records in the possession of an Authority:

1. Records that are absolutely closed to public access under the Open Records Law;
2. Records that may be released under the balancing test only after a notice of impending release and the right of judicial review has been provided to the subject of such records; and
3. Records that may be released under the balancing test without providing a right of notice or judicial review to the subject of such records.

Legislative Council Report at 9-10.

RECORDS BARRED FROM RELEASE

Explicitly barred from release under the Open Records Act are employment records concerning employees':

- Home addresses, e-mails, and telephone numbers;
- Social security numbers;
- Current investigations—prior to disposition—of employees' misconduct;
- Examinations, other than scores, unless otherwise prohibited; and
- Information relating to staff management planning, such as, evaluations, judgments, or recommendations concerning wages, bonuses, promotions, assignments, reference letters, or other comments and/or ratings.

WIS STAT § 19.36(10).

RECORDS THAT MAY NOT BE RELEASED WITHOUT AN OPPORTUNITY FOR REVIEW

The Open Records Act mandates that a custodian of records for an Authority provide proper notice and opportunity for judicial review "only to the following records," WIS. STAT. § 19.356 (2)(a):

- "A record containing information relating to an employee that is created or kept by the authority and that is 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";
- "A record obtained by the authority through a subpoena or search warrant"; and
- "A 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."

WIS. STAT. § 19.356 (2)(a)(1) and (3) **RECORDS THAT MAY BE RELEASED WITHOUT NOTICE AND AN OPPORTUNITY FOR REVIEW**

The Open Records Act does not spell out what records are automatically subject to release without the right of review. WIS. STAT. § 19.356(1). Rather, it defines what is subject to review under § 19.356(2) and excludes anything else, other than records that are absolutely closed under § 19.36(10).

IMPLICATION FOR AUTHORITIES RECORDS BARRED FROM RELEASE

The Open Records Act is explicit with regard to what is not subject to release. Thus, a custodian of records for an Authority need not engage in a balancing test when a requestor seeks information identified in WIS. STAT. § 19.36(10), such as, employees' home addresses or telephone number records, records pertaining to ongoing misconduct investigations, and records related to management, *e.g.* evaluations, wage recommendations, and other human resource related documents. For this information, nondisclosure is automatic.

RECORDS THAT MAY NOT BE RELEASED WITHOUT NOTICE AND AN OPPORTUNITY FOR REVIEW

The Open Records Act creates strict procedures with regard to three classifications of records that require notice and an opportunity for review:

1. Records related to concluded employee disciplinary investigations;
2. Records obtained by subpoena or search warrant; and
3. "A record prepared by an employer other than an authority, if that record contains information relating to an employee of that employer."

WIS. STAT. § 19.356 (2)(a)(1) - (3).

The first classification is straightforward, contemplating any records regarding an investigation into an employee for misconduct, whether he or she is a private or public employee. The second classification, records obtained by subpoena or search warrant, is also straightforward, but note that it is not restricted to employee records. Here, it appears, is the only opportunity for citizens to seek judicial review when an Authority determines it will release records related to a citizen that is not an employee under the Open Records Act. The last classification is somewhat confusing. Records "prepared by an employer other than an authority" contemplates documents that an Authority may obtain from a private employer. For example, if an Authority hires persons from the private sector and requested their personnel files from their private employers, such records would require notice to the persons before the Authority released them as open records. Similarly, if an Authority contracted out work to private employers and obtained records related to their employees, the Authority could not release those records without providing notice.

Specific procedures apply when an Authority decides "under § 19.35" to permit access to records requiring notice. WIS. STAT. § 19.356(2)(a). The reference to § 19.35 means an Authority must first engage in the *Woznicki* balancing test, that is, determine whether release of the records would harm the public policy interest in the record subject's privacy and reputation more so than it would harm the public policy interest in favor of open records. WIS. STAT. § 19.356(2), Note 2 (indicating the reference to § 19.35 mandates application of the *Woznicki* balancing test before deciding to release the records"). Once the Authority has decided to release the records, the following procedures apply to it and any one that is a record subject:

1. After deciding to release a record, the Authority shall within three business days serve by certified mail or personal service written notice of that decision to any one that is the subject of the record;
2. The notice must briefly describe the requested record and include a description of their rights under the Open Records Act;
3. The record subjects that receive the notice may, within five business days of receiving the notice, provide written notice to the Authority of their intent to block release; and
4. The record subjects may then commence an action seeking a court order to block release within ten business days of their receipt of the notice.

WIS. STAT. §§ 19.345 and 19.356(2)-(4). In other words, once an Authority decides release of a record outweighs the record subject's privacy and reputational interests, and provides notice, the record subject in question has ten business days to challenge the decision in court from the day he, she, or they receive the notice. The subjects can opt not to file a court action. If they do not challenge the release, the Authority may release the requested record on the thirteenth business day following its sending of the notice. WIS. STAT. §§ 19.345 and 19.356(5).

Although the Open Records Act permits an employer to release a requested record on the thirteenth business day after it sends proper notice, past decisions regarding open records notes courts need not read legislation regarding open records "literally." *Breier*, 89 Wis. 2d at 427, 279 N.W.2d at 183. Rather courts have viewed such legislation as "a statement of the common law." *Id.* Thus, it may be prudent for an Authority to not begin the thirteen-day count until it verifies the date that the record subject received the notice. This minimizes risk for Authorities that serve notice by certified mail to a record subject that may not receive the notice.

The above procedures will apply to most governmental and quasi-governmental Authorities, however, the Open Records Act limits the rights of individuals that hold local or State public office. Such individuals are not "employees" under the Open Records Act, WIS. STAT. § 19.32(1bg), and, thus, the following restricted procedures apply:

1. After deciding to release a record where a local or State official is the subject, the Authority shall within three business days serve by certified mail or personal service written notice of that decision to the official;
2. The notice must briefly describe the requested record and include a description of the rights of the official under the Open Records Act;
3. The official may, within five business days after receipt of the notice supplement the record with written comments and documentation; and
4. The Authority shall release the record as supplemented.

WIS. STAT. § 19.356(9). When an Authority decides to release records that concern employees of officials they, too, may supplement the released records with written comments and documentation. *Id.* Such employees, however, retain their rights to court action under the Open Records Act.

Because, pursuant to WIS. STAT. § 19.356(6), a court will "apply substantive common law principles construing the right to inspect, copy, or receive copies of records in making its decision," if an Authority decides not to release a requested record, it must provide "specifically stated reasons" for its decision. *Breier*, 89 Wis. 2d at 427, 279 N.W.2d at 184. To do otherwise will create "an absolute right to inspect a public document" because "it is not the trial court's . . . role to hypothesize reasons or to consider reasons for not allowing inspection that are not asserted by" an Authority. *Id.* The most commonly used reasons for denying access, especially in the law enforcement area, continue to be those cited with approval in *Village of Butler v. Cohen*, 163 Wis. 2d 819, 472 N.W.2d 579 (Ct. App. 1991)

In *Village of Butler*, attorneys representing clients charged with driving while intoxicated requested the personnel files of the police officers that arrested their clients. The Authority denied access for the following reasons:

1. Run counter to the legislature's recognition, indicated in sec. 19.85, Stats., of the need to keep personnel records confidential "to maintain the reputational and privacy interests of the individual employee";
2. Provide the requester with greater access than the officer himself enjoys;
3. Subvert the villages' policy of ensuring their employees "opportunities for satisfying careers and fair treatment" based on the value of each employee's service;
4. Impinge upon the officers' right to privacy;
5. Inhibit the villages' ability to hire and retain competent personnel and would diminish the fair, efficient and effective rendering
6. of services;
7. Prevent a reviewer from freely making candid assessments of an individual officer's strengths and weaknesses, if that information might later be used publicly against the officer, perhaps in a life threatening situation;
8. Discourage officers from testifying in court, thus frustrating the public interest in prosecution of law violators;
9. Run counter to the villages' interests in maintaining the confidentiality of its personnel records, an interest similar to that of state employee personnel matters which are closed to the public under sec. 230.13, Stats.; and
10. Aid in the circumvention of rules against pretrial discovery in the prosecution of traffic offenses.

Id. at 829 n.3, 472 N.W.2d at 583 n.3.

RECORDS THAT MAY BE RELEASED WITHOUT NOTICE AND AN OPPORTUNITY FOR REVIEW

The Open Record Act permits an Authority to release any records that do not require notice and are not specifically barred from release. This appears to make decisionmaking regarding the release of certain records easy. However, the revisions to the Open Records Act did not void the part of § 19.35 that says, "Substantive common law principles construing the right to inspect, copy or receive copies of records shall remain in effect." It was this language that led past courts to require authorities to engage in a balancing test and provide notice to record subjects before releasing records concerning them.

The Open Records Act does not explicitly relieve an Authority from engaging in the balancing test with regard to any record. Rather, it merely permits an Authority not to provide notice, although it is not unlawful to still do so, and prevents certain record subjects from seeking judicial review when an Authority decides to release records. Authorities should still weigh whether the release of a record would harm the public interest in the record subject's privacy or reputation more so than it would harm the public interest in open records. If the scale tips in favor of privacy, the record should not be released.

Although the Open Records Act prevents record subjects from being able sue when an Authority decides to release records that do not require notice or are not specifically barred, record requesters still may do so. In this respect, the Open Record Act implicitly tells Authorities to apply the balancing test in favor of release, undermining the purpose of the test. Nevertheless, the common law balancing test remains an integral part of the analysis that an Authority should contemplate in good faith before deciding to release records.

RECORDS CONCERNING CITIZENS THAT ARE NOT EMPLOYEES UNDER THE OPEN RECORDS ACT

As read, the Open Records Act only grants citizens, persons that are not “employees” under the act, the right to judicial review when an Authority decides to release a record obtained by subpoena or search warrant. WIS. STAT. § 19.356(2)(a)(2). Thus, when someone requests a copy of a 911 tape, or a citizen complaint regarding someone other than an “employee” under the act, an Authority, such as a police department, a school district, or a regulatory agency, based purely on the Open Records Act, can, after applying the balancing test, produce the record without notice to anyone that is the subject of the record. One justice has already commented on a problem with such scenarios:

Custodians of public records are human. And humans make mistakes. Witness the case of *Monfils v. Charles*, 216 Wis. 2d 323, 575 N.W.2d 728 (Ct. App. 1998). An anonymous call comes to the police department warning of an impending theft. The call is taped. The thief requests the tape. The custodian of the tape releases it to him. *Monfils* is later found brutally murdered. The alleged thief, and some colleagues, are convicted of murder. In retrospect, the release of the tape was a tragic mistake.

Milw. Teachers’ Educ. Ass’n, 227 Wis. 2d at 802, 596 N.W.2d at 413 (J. Bablitch, concurring). The *Monfils* scenario is an extreme example of what can go wrong when an Authority decides to release a record, but it emphasizes the importance of engaging in the balancing test. If there is knowledge of substantial risk to an individual record subject, release should be improper.

CONCLUSION

The Open Records Act has changed the procedural landscape for open records decision-making. Substantively, however, the landscape remains familiar because the balancing test remains integral. Furthermore, although the act aims to close the door to judicial review of a broad classification of records, courts will likely have opportunities to crack that door back open.

The legislative history preceding the revised Open Records Act indicates that the goal was to review the Wisconsin Supreme Court decisions in *Woznicki* and *Milw. Teacher’s Educ. Ass’n* and “recommend legislation implementing the procedures anticipated in the opinions, amending the holding of the opinions, or overturning the opinions.” Preamble, Open Records Act. The concern for the Legislative Council that drafted the law was that any record subject, whether a public employee or not, would have the right to notice and judicial review. *Id.* A note included with the statute declares § 19.356 was created “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.” WIS. STAT. § 19.356, Note 1 (emphasis added). This aspect of the legislative history supports the view that the Open Record Act narrows the right to notice and judicial review to the select classifications identified in the act. Courts down the road, however, may disagree.

The facts underlying both *Woznicki* and *Milw. Teacher’s Educ. Ass’n* concerned public employees’ interests in their privacy and reputation, not specifically private citizens. A court may consider this together with § 19.35’s mandate that substantive common law remains applicable and find that the *Woznicki* rights remain relevant to citizens that are not “employees” under the Open Records Act. Due Process may also lead to *Woznicki*-like rights for citizens, if not also “employees” under the Open Records Act.

Justice Bablitch discussed the Due Process Clause and its relationship to individuals’ interests in their reputation and privacy in *Milw. Teacher’s Educ. Ass’n*:

In his classic statement, Justice Brandeis characterized “the right to be let alone . . .” as the most comprehensive of rights and the right most valued by a civilized society. See *Olmstead v. United States*, 277 U.S. 438, 478, 72 L. Ed. 944, 48 S. Ct. 564 (1928) (Brandeis, J., dissenting). In *Wisconsin v. Constantineau*, 400 U.S. 433, 434, 27 L. Ed. 2d 515, 91 S. Ct. 507 (1971), the U.S. Supreme Court held that a protectable liberty interest is implicated “where a person’s good name, reputation, honor, or integrity is at stake because of what the government is doing to him . . .” *Id.* at 437

Id. at 801, 596 N.W.2d at 413 (J. Bablitch, concurring). Certainly a property interest will not arise in every record release instance, however, it is a safe bet that the issue will be argued. For example, an Authority may investigate a private physician for improper care and prepare and release a detailed complaint obtained from investigations without subpoenas or search warrants prior to a hearing regarding the physician's license to practice. Even if the physician were exonerated, arguably his livelihood could suffer from the negative attention. As a result, the physician may have a Constitutional claim because he did not have an opportunity to block release of the complaint and protect his livelihood. A court down the road may implement notice and hearing procedures that mirror *Woznicki* to protect such interests.

While procedures for notice and review have changed under the Open Records Act, the balancing test remains integral to an Authority's duty before deciding whether to release records. Given the range of documents barred from release and class of documents that require notice, questions will arise whether requested records are barred from release, require notice before release, or, indeed, should be released without any notice. In addition, records not available via the Open Records Act may still be available pursuant to other laws, such as WIS. STAT. § 103.13 dealing with an employees' rights to records related to their employment and Chapter 111, WIS. STAT., which addresses the right for union representatives to obtain records in order to fulfill their duty to bargain or other duties pursuant to a collective bargaining agreement. Finally, other State and federal laws limit the handling of records held by an Authority, in particular public employers, that the Open Records Act, at first blush, suggests may be released. For example, health care records are not mentioned in the Open Records Act, however, such records are confidential under the Wisconsin Patient Health Care Records and the federal American with Disabilities Act ("ADA") and Family and Medical Leave Act ("FMLA"). WIS. STAT. § 146.82(1) ("All patient health care records shall remain confidential.") and 29 C.F.R. § 825.600(g) (noting medical records related to employees or their family members must be confidential and kept separate from general personnel files under the FMLA and ADA). WIS. STAT. § 19.85 notes governmental bodies may go into closed session to deliberate multiple matters, including, dismissal, demotion, or discipline of any public employee. Records generated from such meetings will require analysis beyond the Open Records Act.

Determining when to release a requested record will continue to raise significant substantive concerns. As such questions arise, public employers and other governmental and quasi-governmental authorities should, before deciding whether to release requested records, consult with an attorney familiar with open records law and other laws controlling the dissemination of records in their custody.

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