



**WISCONSIN LEGISLATIVE COUNCIL
REPORT TO THE LEGISLATURE**

**SPECIAL COMMITTEE ON
REVIEW OF THE OPEN
RECORDS LAW**

March 25, 2003

RL 2003-01

**SPECIAL COMMITTEE ON REVIEW OF THE OPEN RECORDS LAW
REPORT TO THE LEGISLATURE**

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March 25, 2003

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PART I

KEY PROVISIONS OF COMMITTEE RECOMMENDATIONS

The Joint Legislative Council introduces in the 2003-04 Session of the Legislature the following companion bills recommended by the Special Committee on Review of the Open Records Law:

2003 ASSEMBLY BILL 196 AND 2003 SENATE BILL 78, RELATING TO ACCESS TO PUBLIC RECORDS

- Requires that a notice of release of a record, and a right to seek a court order to prevent release of the record, will be provided to a record subject when an authority decides to release a record containing information about:
 - ◆ A public sector or private sector employee disciplinary matter, following an investigation.
 - ◆ A private sector employee, unless the private sector employee authorizes the public body to provide access to that information.
 - ◆ Any person, when the information is obtained through a subpoena or search warrant.
- Expedites judicial review when a record subject attempts to prevent the release of a public record.
- Requires an authority to notify a state or local public officer of the impending release of a public record and affords the officer an opportunity to add written comments or documentation to the public record.
- Closes public access to certain records relating to public sector and private sector employees and state and local public officials, including a home address, a home email address, a home telephone number, and a Social Security number. In addition, the proposal closes public access to information about ongoing disciplinary investigations and job evaluations regarding public sector and private sector employees.

PART II

COMMITTEE ACTIVITY

ASSIGNMENT

The Joint Legislative Council established the Special Committee on Review of the Open Records Law and appointed the co-chairs by a May 22, 2002 mail ballot. The Special Committee was directed to review the 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.

Membership of the Special Committee, appointed by a July 15, 2002 mail ballot, consisted of two Senators, two Representatives and 10 public members. A list of committee members is included as *Appendix 3* to this report.

SUMMARY OF MEETINGS

The Special Committee held four meetings at the State Capitol in Madison on the following dates:

August 12, 2002	November 18, 2002
September 23, 2002	December 10, 2002

August 12, 2002. Staff briefly reviewed with committee members the contents of Staff Brief 02-1, *Overview of Selected Laws and Legislation in Wisconsin Relating to the Open Records Law*. Staff pointed out the modifications made to the Open Records Law by two recent supreme court decisions and legislative efforts in the 2001 Session to remedy the effects of those decisions. In addition, federal law relating to open records was briefly reviewed. Members also took a few moments to discuss particular problems they had encountered or concerns they had with the state's Open Records Law. Staff was directed to prepare a legislative draft to address the *Woznicki* decision.

September 23, 2002. The Special Committee was attended by members of a University of Wisconsin-River Falls class who were following the work of the committee. Staff briefly reviewed Memo No. 1 to the committee, which summarizes laws of select states regarding public disclosure of public employee personnel records. In addition, staff described WLC: 0276/1, relating to access to public records. Committee members discussed at length the basic principles at the heart of the state's Open Records Law and how the various options contained in the draft fit within those principles.

November 18, 2002. The committee heard from two invited speakers. The first speaker was Attorney Devon Baumbach from the law firm of Melli, Walker, Pease, and

Ruhly, S.C. The second speaker was Michael Ryan, President/Business Manager, of the Wisconsin Laborers' District Council. Both gentlemen spoke about the issue of public access to records of private contractors doing work on behalf of public entities. In addition, the committee discussed in detail provisions of WLC: 0040/1, relating to access to public records, which was the redraft of WLC: 0276/1, discussed at the previous meeting. The members spent considerable time discussing the issue of the treatment of school administrators under the draft and the accessibility of records of private contractors in the possession of public agencies.

December 10, 2002. The committee discussed WLC: 0040/2, which reflected changes in WLC: 0040/1, requested by the committee. The committee discussed in detail various amendments to the draft and in particular those suggested by Committee Member Hickey relating to access to certain records of public officials, including school administrators. The committee also spent considerable time discussing the issue of access to contractor records. John Metcalf from Wisconsin Manufacturers and Commerce and John Mielke from Associated Builders and Contractors briefly addressed the committee on that issue. As of the end of the meeting, no agreement had been reached on the issue of access to contractor records and members were advised that a compromise would be sought and that either another meeting or a mail ballot would be used to finalize the committee's recommendations.

PART III

RECOMMENDATIONS INTRODUCED BY THE JOINT LEGISLATIVE COUNCIL

This part of the report provides background information on, and a description of, 2003 Assembly Bill 196 and its companion bill 2003 Senate Bill 78, relating to access to public records, as recommended by the Special Committee on Review of the Open Records Law.

2003 ASSEMBLY BILL 196 AND 2003 SENATE BILL 78, RELATING TO ACCESS TO PUBLIC RECORDS

Background

Wisconsin's Open Records Law is contained in ss. 19.31 to 19.39, Stats. Section 19.35, Stats., essentially codifies case law and generally requires that a record held by an authority remain open for inspection and copying. Broadly speaking, an "authority" is a state body, local body, or elected official having custody of a record. Further, an authority usually delegates to a named individual the responsibilities of acting as a legal custodian who will respond to requests for access to records. [See ss. 19.32 (1) and 19.33, Stats.]

The Open Records Law, as interpreted by Wisconsin courts, provides that a record must remain open for inspection and copying unless:

- There is a clear statutory exception to this requirement;
- There exists a limitation on inspection and copying under the common law; or
- On a case-by-case basis, a record custodian decides that the harm done to the public by disclosure of a record outweighs the public's interest in access to the record.

An authority receiving a record request must either fill the request or notify the requester of the authority's determination to deny the request in whole or in part, including specific reasons for the denial. Every written denial of a request by an authority must inform the requester that if the request for the record was made in writing, then the determination to deny the request is subject to review by mandamus or upon application to the Attorney General or a district attorney. [See s. 19.35 (4) (a) and (b), Stats.]

Section 19.37 (1), Stats., provides that if an authority withholds a record, or part of a record, a requester either may:

- Bring an action for mandamus asking a court to order release of the record; or

- In writing, request the district attorney of the county where the record is found, or request the Attorney General, to bring an action for mandamus asking a court to order release of the record.

As noted, the statutes provide a method for a record requester to seek judicial review of an authority's decision to deny access to all or part of a requested record. There is no similar statutory provision providing a person with a right to review an authority's decision to provide access to a record when a request is made under the Open Records Law. A number of recent judicial opinions have recognized such a right in favor of a person who is named in a requested record and whose privacy or reputational interests are implicated by the record, but these opinions have not provided much guidance in the way this right is to be implemented.

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 for public employee disciplinary or personnel records. Instead, the court stated that public employee personnel 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. In *Woznicki*, a school district employee, whose personnel file and personal telephone records had been subpoenaed by a district attorney, moved the circuit court for an order prohibiting the release of these records. In answering the question of whether the release of a record is subject to judicial review, the court noted various statutes promoting a legitimate individual interest in privacy and reputation and concluded that the right of a record subject to a circuit court review of a decision to release a record is implicit in Wisconsin law. Further, because the privacy and reputational interests of the school district employee were implicated by the district attorney's potential release of the records, the employee in this case had the right to judicial review; this conclusion necessitated the holding that the district attorney 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 supreme 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. [See also *Kraemer Bros., Inc. v. Dane County*, 229 Wis. 2d 86, 599 N.W.2d 75 (Ct. App. 1999), in which the court of appeals also recognized the public interest in maintaining the privacy of names of employees of private employers working under contract for a public body.]

Based on the supreme court's decisions, a record custodian must determine whether the release of a record will implicate the privacy or reputational interests of a public employee. If the custodian determines that the record in question would implicate the privacy or reputational interests of a public employee, the custodian must notify the individual to whom the record refers prior to the release and give the individual an opportunity to appeal the decision through a judicial proceeding. However, the supreme 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 the supreme court's 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.

A number of questions remain in this area of the law, including the following:

- Does the right to a *Woznicki* notice and appeal apply to a person named in a record who is not also a public employee?
- What form should the *Woznicki* notice take and how should it be delivered?
- Does a record subject receiving a *Woznicki* notice have the right to inspect and copy the disputed record prior to its release to the original record requester?
- How does a record custodian determine whether privacy or reputational interests are sufficiently implicated to require the issuance of a *Woznicki* notice? The supreme court illustrated, perhaps unintentionally, the difficult position in which a record custodian is placed in making this determination in the following comments:

An individual whose privacy and reputation might potentially be harmed by disclosure is in the best position to present arguments in favor of nondisclosure, given the significance and personal nature of the privacy and reputational interests. Such an individual might well present arguments in favor of nondisclosure that the records custodian did not consider in evaluating the disclosure request, even though *Woznicki* requires custodians to consider "all the relevant factors." [See *Milwaukee Teachers*', 596 N.W.2d at p. 410; citations and footnote omitted.]

- How should judicial review proceed? Should an expedited process be used in order to ensure that the public's right to know is fulfilled in a timely fashion?

Description

The legislation partially codifies *Woznicki* and *Milwaukee Teachers*'. In general, the legislation applies the rights afforded by *Woznicki* and *Milwaukee Teachers*' only to a defined set of records in the possession of governmental entities. Records relating to employees under the draft can be placed in the following three categories:

- 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.

- 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.
- Employee-related records that are absolutely closed to public access under the Open Records Law.

Specifically, the legislation:

- Defines the term “employee” to mean a public sector or private sector employee. The term does not include a person who holds a state or local public office.
- Limits *Woznicki* by stating that, except as otherwise provided, no person is entitled to notice or judicial review of an authority’s decision to provide a requester with access to a record.
- Provides that if an authority decides to permit access to certain records, the authority must, before permitting access and within three 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 records to which this notice applies include only: (a) a record containing information relating to an employee that is created or kept by the authority as a result of an investigation into a disciplinary matter involving the employee or a possible employment-related violation by the employee of a statute, ordinance, rule, regulation, or policy of the employee’s employer, when the investigation is concluded; (b) a record obtained by the authority through a subpoena or search warrant; or (c) 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.
- Creates a system of expedited judicial review when a person attempts to prevent the release of a public record. Within five 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. 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, a 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.
- Requires an authority to notify a record subject who holds a local public office or a state public office of the impending release of the record containing information relating to the employment of the record subject. The record subject, within five days of receipt of the notice, may augment the record to be released with written

comments and documentation selected by the record subject. The authority must release the augmented record, except as otherwise authorized or required by statute.

- Closes public access to all of the following:
 - ◆ 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.
 - ◆ 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.
 - ◆ Information pertaining to an employee's employment examination, except an examination score if access to that score is not otherwise prohibited.
 - ◆ 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.
 - ◆ 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.
 - ◆ 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.

Committee and Joint Legislative Council Votes

This Appendix identifies the votes by the Special Committee on Review of the Open Records Law and the Joint Legislative Council on the proposal that was approved by the Special Committee for recommendation to the Joint Legislative Council for introduction in the 2003-04 Session of the Legislature.

SPECIAL COMMITTEE VOTES

By a mail ballot dated January 15, 2003, the Special Committee voted to recommend WLC: 0040/3 to the Joint Legislative Council for introduction in the 2003-04 Session of the Legislature. The votes on the draft were as follows:

- WLC: 0040/3, relating to access to public records: Ayes, 12 (Sens. Erpenbach and Roessler; Reps. Gundrum and Pocan; and Public Members Cherney, Dreps, Hanson, Horne, Hovind, Laabs, Ladd, and Licht); Noes, 1 (Public Member Stammen); and Not Voting, 1 (Public Member Hickey).

JOINT LEGISLATIVE COUNCIL VOTES

At its February 19, 2003 meeting, the Joint Legislative Council voted to introduce WLC: 0040/3 on a roll call vote as follows: Ayes, 14 (Sens. Lasee, Darling, Erpenbach, Harsdorf, Lazich, and Welch; and Reps. Wieckert, Foti, Freese, Gard, Kaufert, Lehman, Townsend, and Travis); Noes, 3 (Reps. Coggs, Kreuser, and Schneider); and Absent, 5 (Sens. Decker, Ellis, George, Panzer, and Risser).

WLC: 0040/3 was subsequently introduced as 2003 Assembly Bill 196 and its companion bill 2003 Senate Bill 78.

APPENDIX 2

JOINT LEGISLATIVE COUNCIL

s. 13.81, Stats.

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This 22-member committee consists of the majority and minority party leadership of both houses of the Legislature, the cochairs and ranking minority members of the Joint Committee on Finance, and 5 Senators and 5 Representatives appointed as are members of standing committees.

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REVIEW OF THE OPEN RECORDS LAW

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STUDY ASSIGNMENT: The Committee is directed to review the 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 is 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.

Established and Co-Chairs appointed by a May 22, 2002 mail ballot; members appointed by a July 15, 2002 mail ballot.

14 MEMBERS: 2 Senators; 2 Representatives; and 10 Public Members.

LEGISLATIVE COUNCIL STAFF: Ronald Sklansky and Robert J. Conlin, Senior Staff Attorneys; and Kelly Mautz, Support Staff.

Committee Materials List

January 15, 2003 Mail Ballot

[January 15, 2003 Mail Ballot](#)

[WLC: 0040/3](#), relating to access to public records

[Memo No. 2](#), **WLC: 0040/3 and Records Relating to Private Employees** (1-15-03)

December 10, 2002 Meeting

[WLC: 0040/2](#), relating to access to public records

[WLC: 0070/1](#), amendment to WLC: 0040/2

[Correspondence](#) from **Jennifer Sunstrom**, Legislative Associate, Wisconsin Counties Association (11-14-02)

[Correspondence](#) from Public Member **James G. Hickey**

[Correspondence](#) from **Anthony Evers**, Department of Public Instruction

[Correspondence](#) from **Paul Gabriel**, Wisconsin Technical College District Board

[Correspondence](#) from **James Buchen**, Wisconsin Manufacturers and Commerce

November 18, 2002 Meeting

[Memo No. 1](#), **Summary of the Laws of Select States Regarding Public Disclosure of Public Employee Personnel Records** (9-10-02 [Revised 11-6-02])

[WLC: 0040/1](#), relating to access to public records

[Copy](#) of **Minnesota Statute s. 13.43**, relating to personnel data

[Memorandum](#) from **Dennis Boyer**, AFSCME Council 11, regarding open records laws in other states (10-15-02)

[Correspondence](#) from **Curt Witynski**, Assistant Director, League of Wisconsin Municipalities (undated)

[Memorandum](#) from **Dennis Boyer**, Government Relations Counsel, regarding issues relating to public employee privacy and security (9-20-02)

[Correspondence](#) from Public Member **James G. Hickey**

[Testimony](#), **Devon Baumbach**, Melli, Walker, Pease & Ruhly, S.C.

[Testimony](#), **Mike Ryan**, President and Business Manager, Wisconsin Laborers' District Council

[Correspondence](#) from **Joseph Sciascia**, Dodge County Family Court Commissioner

September 23, 2002 Meeting

[Memo No. 1](#), **Summary of the Laws of Select States Regarding Public Disclosure of Public Employee Personnel Records** (9-10-02)

[WLC: 0276/1](#), relating to access to public records

[2001 Senate Bill 484](#), relating to access to certain records in multiple custodianship

[Correspondence](#) from Public Member **Mark Ladd**, relating to recommendations regarding the Open Records Law (8-20-02)

August 12, 2002 Meeting

[Staff Brief 02-1](#), **Overview of Selected Laws and Legislation in Wisconsin Relating to the Open Records Law** (7-31-02)