

1       **AN ACT** *to renumber* 230.13 (3); *to amend* 40.07 (1) (intro.) and (3), 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 serve at the pleasure of an appointing authority but who 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.** 19.345 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 3.** 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 containing  
14 information relating to an employee that is created or kept by the authority as a result of an

1 investigation into a disciplinary matter involving the employee or possible  
2 employment-related violation by the employee of a statute, ordinance, rule, regulation, or  
3 policy of the employee's employer, or if an authority decides to permit access to any record  
4 obtained by the authority through a subpoena or search warrant, the authority shall, before  
5 permitting access and within 3 days after making the decision to permit access, serve written  
6 notice of that decision on any record subject to whom that record pertains, either by certified  
7 mail or by personally serving the notice on the record subject. The notice shall briefly describe  
8 the requested record and include a description of the rights of the record subject under subs.  
9 (3) and (4).

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

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

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

21 (4) Within 10 days after receipt of a notice under sub. (2) (a), a record subject may  
22 commence an action seeking a court order to restrain the authority from providing access to  
23 the requested record. If a record subject commences such an action, the record subject shall  
24 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).

**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 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, or any record obtained by the authority through a subpoena or search warrant. 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] [30] days after entry of the judgment or order appealed from. [See SECTION 13.]

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.

1           **SECTION 4.** 19.36 (10) to (12) of the statutes are created to read:

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

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

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

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

16           (d) Information relating to one or more specific employees that is used by an authority  
17 or by the employer of the employees for staff management planning, including performance  
18 evaluations, judgments, or recommendations concerning future salary adjustments or other

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

3 (11) RECORDS OF AN INDIVIDUAL HOLDING A LOCAL PUBLIC OFFICE OR A STATE PUBLIC  
4 OFFICE. Unless access is specifically authorized or required by statute, an authority shall not  
5 provide access under s. 19.35 (1) to records, except to an individual to the extent required  
6 under s. 103.13, containing information maintained, prepared, or provided by an employer  
7 concerning the home address, home email address, home telephone number, or Social  
8 Security number of an individual who holds a local public office or a state public office, unless  
9 the individual authorizes the authority to provide access to such information.

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

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

2           40.07 **(1)** (intro.) Notwithstanding any other statutory provision, individual personal  
3 information in the records of the department is not a public record and shall not be disclosed,  
4 ~~unless subject to access under s. 19.35 (1), but access to that information may be provided,~~  
5 unless prohibited under s. 19.36 (10) and (11), if:

6           **(3)** The department shall not furnish lists of participants, annuitants or beneficiaries to  
7 any person or organization except as permitted under s. 19.36 (10) and (11) and as required  
8 for the proper administration of the department.

**NOTE:** Section 40.07 (1), stats., provides that individual personal information maintained in the records of the Department of Employee Trust Funds is not a public record and may not be disclosed, except under any of the following conditions:

1. The information is requested by the person whose record contains the information or by the duly authorized representative of the person.

2. The information is requested by a public employee for use in the discharge of the employee's official duties.

3. The information is required to be disclosed under a court order duly obtained upon a showing to the court that the information is relevant to a pending court action.

4. The information is required to be disclosed for the proper administration of the department or to assist in locating participants or beneficiaries the department is otherwise unable to contact.

Also, s. 40.07 (3), stats., provides that the department may not furnish lists of participants, annuitants, or beneficiaries to any person or organization except as required for the proper administration of the department.

Section 40.07, stats., is amended to provide that the personnel records that are closed to public access under s. 19.36 (10) and (11), stats., as created in this bill, may be released only for the proper administration of the Department of Employee Trust Funds as permitted under s. 19.36 (10) and (11), stats. The new statute authorizes the release of certain personal information, if an employee authorizes the release of the information or if access to an examination is not otherwise prohibited.

1           **SECTION 6.** 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 7.** 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 8.** 62.09 (11) (f) of the statutes is amended to read:

1           62.09 (11) (f) The clerk shall keep all papers and records in the clerk's office open to  
2 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.

3           **SECTION 9.** 230.13 (1) (intro.) of the statutes is amended to read:

4           230.13 (1) (intro.) Except as provided in sub. (3) and ~~s. ss. 19.36 (10) to (12)~~ and 103.13,  
5 the secretary and the administrator may keep records of the following personnel matters closed  
6 to the public:

**NOTE:** See the note to SEC. 11.

7           **SECTION 10.** 230.13 (3) of the statutes is renumbered 230.13 (3) (a).

**NOTE:** See the note to SEC. 11.

8           **SECTION 11.** 230.13 (3) (b) of the statutes is created to read:

9           230.13 (3) (b) The secretary and the administrator may provide any agency with  
10 personnel information relating to the hiring and recruitment process, including specifically the  
11 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. 9 and 10 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 12.** 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) and

3           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. 11 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.

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

5           808.04 (**1m**) An appeal by a record subject under s. 19.356 shall be initiated within [20]

6           [30] 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] [30] days after the date of entry of the judgment or order appealed from.

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(END)