No. _____

In The
Supreme Court of the United States

ALBERT D. MOUSTAKIS,
Petitioner,
v.
STATE OF WISCONSIN
DEPARTMENT OF JUSTICE,

Respondent.

On Petition for Writ of Certiorari
To The Supreme Court of Wisconsin

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

1.) Whether the common law writ of mandamus may be issued when a public official exercises discretion outside the constraints placed upon the discretionary act through case law?

2.) Whether strict scrutiny is the appropriate standard of review for a legislative act restricting access to the courts for a right of pre-release judicial review of public records recognized under the Wisconsin Open Records laws (Wis. Stat. § 19.31, *et. seq.*)?

LIST OF PARTIES

Albert D. Moustakis is the petitioner here and was Plaintiff-Appellant below.

State of Wisconsin, Department of Justice – Defendant-Respondent is the Respondent here, and was Defendant-Respondent below.

Steven M. Lucareli, was allowed to join the circuit court litigation as an Intervenor, but did not appear in the appellate proceedings below, and is unlikely to appear in these proceedings.

LIST OF PROCEEDINGS

Albert D. Moustakis v. State of Wisconsin Department of Justice, et al
Circuit Court, Lincoln County, Wisconsin
Case No.: 2014 CV 41
Decision Date: Order dismissing counts 1, 2, and 3 entered July 21, 2014; order reinstating and staying counts 2 and 3 entered August 6, 2014.

Albert D. Moustakis v. State of Wisconsin Department of Justice, et al
Wisconsin Court of Appeals
Case No.: 2014 AP 1853
Decision Date: July 31, 2015, Court of Appeals decision on Count 1; *published*, 2015 WI App 63, 364 Wis. 2d 740, 869 N.W.2d 788.

Albert D. Moustakis v. State of Wisconsin Department of Justice, et al
Supreme Court of Wisconsin
Case No.: 2014 AP 1853
Decision Date: May 20, 2016, Supreme Court of Wisconsin decision on Count 1; *published*, 2016 WI 42, 368 Wis. 2d 677, 880 N.W.2d 142.

Albert D. Moustakis v. State of Wisconsin Department of Justice, et al
Circuit Court, Lincoln County, Wisconsin
Case No.: 2014 CV 41
Decision Date: Order dismissing Counts 2 and 3 entered January 16, 2018.

Albert D. Moustakis v. State of Wisconsin Department of Justice, et al
Wisconsin Court of Appeals
Case No.: 2018 AP 373
Decision Date: May 7, 2019, Court of Appeals decision on Counts 2 and 3; *unpublished.*

Albert D. Moustakis v. State of Wisconsin Department of Justice, et al
Supreme Court of Wisconsin
Case No.: 2018 AP 373
Decision Date: September 3, 2019, denying Petition for Review.

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PETITION FOR WRIT OF CERTIORARI

Petitioner, Albert D. Moustakis, respectfully petitions for a Writ of Certiorari to review the judgment of the Wisconsin Court of Appeals, following a denial of Certiorari by the Supreme Court of Wisconsin.

OPINIONS BELOW

The circuit court for Lincoln County, Wisconsin ordered dismissal of Petitioner's first cause of action on July 21, 2014, in the case Albert D. Moustakis v. State of Wisconsin, Department of Justice (14 CV 41.) The Wisconsin Court of Appeals affirmed the dismissal on July 31, 2015, (14 AP 1853), reported at 2015 WI App 63, 364 Wis. 2d 740, 869 N.W.2d 788. The Supreme Court of Wisconsin affirmed the dismissal on May 20, 2016, (14 AP 1853), reported at 2016 WI 42, 368 Wis. 2d 677, 880 N.W.2d 142.

On remand, the circuit court for Lincoln County, Wisconsin ordered dismissal of Petitioner's second and third causes of action on January 16, 2018. The Wisconsin Court of Appeals affirmed the dismissals on May 7, 2019. The Supreme Court of Wisconsin denied review of the dismissals on September 3, 2019.

STATEMENT OF JURISDICTION

On May 7, 2019, the Wisconsin Court of Appeals issued a decision and order affirming the trial court decision dismissing the second and third causes of action brought by Petitioner, Albert D. Moustakis. A Petition for Review was filed with the Wisconsin Supreme Court on June 6, 2019; the Wisconsin Supreme Court denied the Petition on September 3, 2019. This Court has jurisdiction to review decisions of the highest court of the State of Wisconsin in which a decision could be had, pursuant to 28 U.S.C. § 1257(a).

STATUTORY AND CONSTITUTIONAL PROVISIONS INVOLVED

- **Wis. Stat. § 19.31** ("Declaration of Policy") reads as follows:

  Declaration of policy. In recognition of the fact that a representative government is dependent upon an informed electorate, it is declared to be the public policy of this state that all persons are entitled to the greatest possible information regarding the affairs of government and the official acts of those officers and employees who represent them. Further, providing persons with such information is declared to be an essential function of a representative government and an integral part of the routine duties of officers and employees whose responsibility it is to provide such information. To that end, ss. 19.32 to 19.37 shall be construed in every instance with a presumption of complete public access, consistent with the conduct of governmental business. The denial of public access generally is contrary to the public interest, and only in an exceptional case may access be denied.

  History: 1981 c. 335, 391.

  An agency cannot promulgate an administrative rule that creates an exception to the open records law. Chavala v. Bubolz, 204 Wis. 2d 82, 552 N.W.2d 892 (Ct. App. 1996), 95-3120.

Although the requester referred to the federal freedom of information act, a letter that clearly described open records and had all the earmarkings of an open records request was in fact an open records request and triggered, at minimum, a duty to respond. ECO, Inc. v. City of Elkhorn, 2002 WI App 302, 259 Wis. 2d 276, 655 N.W.2d 510, 02-0216.

The public records law addresses the duty to disclose records; it does not address the duty to retain records. An agency's alleged failure to keep sought-after records may not be attacked under the public records law. Section 19.21 relates to records retention and is not a part of the public records law. Gehl v. Connors, 2007 WI App 238, 306 Wis. 2d 247, 742 N.W.2d 530, 06-2455.

Absent a clear statutory exception, a limitation under the common law, or an overriding public interest in keeping a public record confidential, the public records law shall be construed in every instance with a presumption of complete public access. As the denial of public access generally is contrary to the public interest, access may be denied only in an exceptional case. An exceptional case exists when the facts are such that the public policy interests favoring nondisclosure outweigh the public policy interests favoring disclosure, notwithstanding the strong presumption favoring disclosure. Hagen v.

Board of Regents of the University of Wisconsin System, 2018 WI App 43, 383 Wis. 2d 567, 916 N.W.2d 198, 17-2058.

The Wisconsin public records law. 67 MLR 65 (1983).

Municipal responsibility under the Wisconsin revised public records law. Maloney. WBB Jan. 1983.

The public records law and the Wisconsin department of revenue. Boykoff. WBB Dec. 1983.

The Wis. open records act: an update on issues. Trubek and Foley. WBB Aug. 1986.

Toward a More Open and Accountable Government: A Call For Optimal Disclosure Under the Wisconsin Open Records Law. Roang. 1994 WLR 719.

Wisconsin's Public-Records Law: Preserving the Presumption of Complete Public Access in the Age of Electronic Records. Holcomb & Isaac. 2008 WLR 515.

Getting the Best of Both Worlds: Open Government and Economic Development. Westerberg. Wis. Law. Feb. 2009.

STATEMENT OF THE CASE

This case is an incident of shameless democracy. It is, at its heart, an attempt by presumed political rivals to make false statements about a public servant, only to manufacture a story whereby those false and slanderous statements are publicized by using a legal mechanism as the open records law.

Petitioner, Albert D. Moustakis (hereinafter referred to as "Moustakis") served as District Attorney for Vilas County, Wisconsin from 1995 through 2016. During that time, Moustakis was the subject of two (2) separate investigations conducted by the State of Wisconsin Department of Justice (hereinafter referred to as "DoJ") based upon complaints raised via an unknown party or parties.

The source of the complaints is unknown to Moustakis. However, the investigators at the DoJ investigated those complaints diligently and, as part of their investigation, completed reports. Those reports are the subject records in this matter. DoJ's ultimate finding was both complaints were unsubstantiated and included false statements. Of course, the presumed source of those complaints reasonably calculated these records existed and, therefore, leaked their

knowledge of these reports to the press, so as to cause an open records request and, ultimately, the publication of the false statements. In other words, the source of the false statements made about Moustakis caused the false narrative, which may be actionable both civilly and criminally as slander and defamation, to be laundered into the open domain of the public through a lawful open records request.

On or about July 18, 2013, the DoJ received an open records request[1] under Wisconsin State Statutes (Wis. Stat. § 19.31 et. seq.) from The Lakeland Times, a regional newspaper in Northern Wisconsin. The Lakeland Times sought records of any complaints or investigations against Moustakis. DoJ took approximately six (6) months to compile and prepare a proposed release of documents pursuant to that open records request. Critically, the DoJ records custodian did not communicate or seek input from Moustakis while compiling the proposed records release, nor did the DoJ communicate with Moustakis during the investigations which led to the creation of the records.

[1] The Wisconsin open records law counterpart in Federal law would be the Freedom of Information Act as codified under 5 U.S.C. § 552. These requests in the Federal domain are commonly called FOIA requests.

In mid February 2014, Moustakis received communications from the DoJ records custodian, Attorney Kevin Potter, indicating Moustakis was named in an open records request and redacted records would be provided to the requester. A copy of the redacted records would be provided to Moustakis, who in turn filed a Complaint under Wisconsin Statute § 19.356 seeking judicial review of the records release. While the matter was before the trial court, Moustakis amended his Complaint to include two (2) additional causes of action, including an action for a common-law Writ of Mandamus[2], and seeking a declaration that the Wisconsin Open Records Laws are unconstitutional. The trial court initially granted motions to dismiss all three (3) causes of action before reconsidering the dismissals of the second and third causes of action, while staying those matters to allow for appeal on the first cause of action.

The Wisconsin Court of Appeals affirmed the dismissal of the first cause of action, indicating Moustakis lacked standing as an individual

[2] The writ sought in the Amended Complaint is referenced as a common-law writ to distinguish between the statutory mandamus action provided in the Wisconsin open records laws. *See,* Wis. Stat. § 19.37(1). The statutory remedy belongs to a records requester when information is withheld or delayed; statutory mandamus has no application in the proceedings at bar.

excluded from the definition of "employee" in the open records statute. Moustakis v. State of Wis. Dept. of Justice, 2015 WI App 63, ¶ 24, 364 Wis. 2d 740, 869 N.W.2d 788. The Wisconsin Supreme Court granted certiorari review, but affirmed the decision of the Court of Appeals in dismissing the first cause of action. Moustakis v. State of Wis. Dept. of Justice, 2016 WI 42, ¶¶ 47-48, 368 Wis. 2d 677, 880 N.W.2d 142. The case was remanded back to the trial court to resolve the second and third causes of action. Id. at ¶ 64.

On remand, the trial court granted motions to dismiss the second and third causes of action. The second cause of action was dismissed due to the Complaint acknowledging – while arguing the open records balancing test was applied improperly and in abuse of the discretion authorized under the case law – that some manner of balancing test was applied by DoJ. The third cause of action was dismissed under rational basis scrutiny, as the trial court "conclude[ed] that the right to court access, [and] the right to privacy, are not fundamental rights." *See,* Appendix at 51a. In an unpublished Decision, dated and filed on May 7, 2019, the Wisconsin Court of Appeals affirmed both dismissals. Moustakis petitioned the Supreme Court of Wisconsin for review of the Wisconsin Court of Appeals' Decision on June 7, 2019, which

the Supreme Court denied via an Order dated September 3, 2019.

Moustakis hereby petitions this Court for certiorari review of the dismissals of Petitioner's second and third causes of action by the Wisconsin Court of Appeals.

REASONS FOR GRANTING THE WRIT

I. Mandamus Should be Available Where an Official Acts Outside the Limits of the Discretionary Authority Allowed at Common Law.

The case at bar would require this Court to determine how to apply its rulings on mandamus where the grant of discretion originates with case law rather than via statute. As the Court recognized in Work v. U.S. ex rel. Rives, 267 U.S. 175, 177 (1925):

> The duty [of an officer against whom mandamus is sought] may be discretionary within limits. He cannot transgress those limits, and if he does so, he may be controlled by injunction or mandamus to keep within them. The power of the court to intervene, if

> at all, thus depends on what statutory discretion he has.

The relevant grant of discretion in the Wisconsin open records laws come not from statute, but via decisions of the Supreme Court of Wisconsin.

The open records laws in Wisconsin start with a statutory presumption of public access, with such access only being denied "in an exceptional case." Wis. Stat. §19.31. The discretionary role allocated to an unchecked, unidentified records custodian was first implemented via case law. State ex rel. Youmans v. Owens, 28 Wis. 2d 672, 681, 137 N.W.2d 470 (1965) ("Thus the right to inspect public documents and records at common law is not absolute. There may be situations where the harm done to the public interest may outweigh the right of a member of the public to have access to particular public records or documents. Thus, the one must be balanced against the other in determining whether to permit inspection.") *See also,* Newspapers, Inc. v. Breier, 89 Wis. 2d 417, 427, 279 N.W.2d 179 (1979). These early cases establishing the "balancing test" involved a records requester whose requests were denied or redacted litigating over the information not provided.

Decades after the balancing test was established, the Wisconsin Supreme Court applied the test in a new context. Instead of cases being

brought by the records requester, the Wisconsin Supreme Court determined that the public employees identified in requested records – the "records subject" – had the right to seek *de novo* review of records prior to those records being released to the requester. Woznicki v. Erickson, 202 Wis. 2d 178, 185, 549 N.W.2d 699 (1996). In so doing, the Wisconsin Supreme Court noted "Our case law has consistently recognized a public policy interest in protecting the personal privacy and reputations of citizens," citing the cases already highlighted above. Id. at 187-190.

Woznicki further clarified the custodian's duty under the balancing test.

> The duty of the District Attorney is to *balance all relevant interests*. Should the District Attorney choose to release records after the balancing has been done, that decision may be appealed to the circuit court, who in turn must decide whether permitting inspection would result in harm to the public interest which outweighs the public interest in allowing inspection.

Id. at 192 (emphasis added).

Three (3) years later, the Wisconsin Supreme Court again addressed the duty of the custodian in open records cases. Milwaukee Teachers Educ.

Assn. v. Milwaukee Bd. of School Directors, 227 Wis. 2d 779, 596 N.W.2d 403 (1999). After restating the essential aspects of the balancing test – including a quotation of the section of Woznicki quoted above[3], the Milwaukee Teachers Decision noted the potential scenario where the "public employee's interest in protecting his or her privacy and reputation might be wholly adverse to the interest of his or her public employer / records custodian." Id. at ¶ 24.

In that same paragraph of Milwaukee Teachers, the Wisconsin Supreme Court lays out the issue at the heart of the mandamus cause of action in the case at bar.

> 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*

[3] *See*, 227 Wis. 2d 779 at ¶ 12.

> *requires custodians to consider "all the relevant factors."*

Id. (emphasis added; internal citations omitted). In the lower courts, Moustakis has cited to this paragraph as demonstrative of the DoJ records custodian's abject failure to act within the constraints placed on his discretion.

While the case law recognizes Moustakis is the person "in the best position" to present factors against nondisclosure, the DoJ records custodian made no attempt to communicate with him prior to performing a balancing test.[4] Voluntarily shutting itself off from the very source highlighted in Milwaukee Teachers as capable of presenting factors favoring nondisclosure which the custodian failed to consider means conducting the remainder of the balancing test with a known unknown, and

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[4] In the trial court and the Wisconsin Court of Appeals, Moustakis additionally sought mandamus based on the remarks of the attorney for DoJ in oral argument to the Wisconsin Supreme Court, wherein falsity of information served as a basis for redaction of some portions of the record, while other false information was not redacted. In other words, the State's attorney acknowledges the records are not only unsubstantiated but include false statements. The Federal courts allow for mandamus where the officer's interpretation of the governing law is clearly wrong – as demonstrated by the failure to communicate with the records subject prior to any balancing test – and his official action is arbitrary and capricious. *See, e.g.,* Americana Healthcare Corp. v. Schweiker, 688 F.2d 1072, 1084 (7th Cir. 1982), *cert denied*, 459 U.S. 1202, 103 S. Ct. 1187, 75 L. Ed. 2d 434.

expressly contrary to the mandate to consider all factors developed by the case law in Woznicki and Milwaukee Teachers Decisions.

And yet, in the face of the obvious truism, the Wisconsin Court of Appeals fails to acknowledge actual communication constraints set on the records custodian while performing the balancing test. *See,* Moustakis II at ¶ 28. Based on the subsequent paragraph, the refusal to acknowledge the constraint on the records custodian's duty appears to be rooted in part within the legislative enactment of 2003 Wis. Act 47, which only partially codified the rulings in Woznicki and Milwaukee Teachers. *See,* Joint Legislative Council's Prefatory Note to 2003 Wis. Act 47. Appendix at 57a-59a. Even if the Act severs Moustakis from the remedy of a pre-release action of judicial review – the Constitutionality of which will be addressed momentarily – it is not clear how the statutory changes could be deemed to alter the balancing test established by the prior decisions of the Wisconsin Supreme Court. A balancing test is performed irrespective of whether a records subject has the ability to seek judicial review between the completion of the balancing test and the release of those records. Nothing within the language of the Act appears to overturn the common law balancing test; indeed, there is no reference to the balancing test anywhere in the

statutory language of Chapter 19, even after the enactment of 2003 Wis. Act 47. The balancing test in this case is demonstrably incomplete when informed by the case law, rendering the results arbitrary and outside the scope of the records custodian's authority.[5]

II. 2003 Wis. Act 47 Unconstitutionally Denies Moustakis his Right to Access the Courts in Order to Pursue a Cause of Action Recognized at Law.

One of the few areas in which Moustakis agrees with the Court of Appeals' Decision after remand is the acknowledgment the Constitutionality question focuses more on the level of scrutiny applied to the legislative act. Moustakis II at ¶ 31. Where fundamental rights or liberty interests are impeded, strict scrutiny is to be

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[5] The Wisconsin Court of Appeals' Decision suggests Moustakis only wishes to see a refusal of the records release. Moustakis II at ¶ 20. In truth, Moustakis' legal counsel noted during oral arguments to the trial court, judicial intervention could have resulted in less redaction of the documents. While generally true that no litigant would continue to raise these issues on appeal if they were satisfied with the result, the argument before the Court is procedural, and not results-oriented. The Courts cannot direct a specific result via the writ of mandamus, but can only require that the official complete the discretionary act while abiding by the constraints placed upon that discretion. *See, e.g.,* Save the Dunes Council v. Alexander, 584 F.2d 158, 162 (7th Cir. 1978).

applied, rather than rational basis scrutiny. *See, e.g.,* Washington v. Glucksberg, 521 U.S. 702, 720-721 (1997).

Over the course of the litigation, Moustakis has raised the fundamental right to equal protection under the law, the right of access to the courts (Penterman v. Wisconsin Electric Power Co., 211 Wis. 2d 458, ¶ 25, 565 N.W.2d 521 (1997)), as well as the right to be free of unwanted governmental intrusions, which the case law subdivides between the fourteenth amendment rights to privacy and to due process. *C.f.,* Eisenstadt v. Baird, 405 U.S. 438, 453 n.10, 92 S. Ct. 1029 (1972), *quoting* Stanley v. Georgia, 394 U.S. 557, 564, 89 S. Ct. 1243 (1969); Wisconsin v. Constantineau, 400 U.S. 433, 437 (1971). At the trial court level, the judge refused to acknowledge these rights as fundamental.

On the appellate level, the Wisconsin Court of Appeals sought to undermine the equal protection challenge on the basis that Moustakis, following the passage of 2003 Wis. Act 47, no longer has standing to pursue pre-release judicial review. Bowman v. Niagara Machine & Tool Works, Inc., 832 F. 2d 1052, 1054-1055 (7th Cir. 1987). *See also,* Moustakis I, 2016 WI 42 at ¶ 5. Unacknowledged by the Court of Appeals is the critical distinction between the cases. In Bowman, no person under the fact pattern (injury using

equipment suffered decades after the statute of repose had run) retains a valid cause of action under the Indiana Statute. In the case at bar, the right to pre-release judicial review still exists as a valid cause of action recognized by the legislature and by the case law; while the right exists, the changes caused by 2003 Wis. Act 47 cordon off to a limited number of individuals who are allowed to utilize the right in court.

Again, the prefatory note to 2003 Wis. Act 47 demonstrates the legislative purpose to cut off court access, not only to Moustakis, but to the vast majority of Wisconsin citizens. "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." By only partially codifying Woznicki and Milwaukee Teachers, the legislature acknowledges the right, presumes it would in time apply to all public and private employees in the State, then constricts the same right by preventing all but a select few from accessing the courts in the exercise of that right. Having substantially interfered in the exercise of fundamental rights, the Wisconsin Act Unconstitutionally violates the spirit and letter of equal protection, and ought to be reviewed under strict scrutiny.

CONCLUSION

Wisconsin law has long recognized a civil cause of action for slander. Likewise, there are criminal statutes for defamation and giving false information for publication.[6] In the case at hand, an unknown third party(ies) made false statements about Moustakis in a complaint to investigators at the DoJ. Through its investigation DoJ concluded the complaints and statements were unsubstantiated and false. These were untrue statements about Moustakis solely to hurt his reputation and political career. Years later, the presumed source, or allies thereof, who are adverse to or rivals of Moustakis, leaked the existence of these records, which could only be known to them, to the press. The purpose of leaking the existence of these records is clear: so the press can make a lawful open records request to obtain unlawful statements which defame Moustakis.

Because of the prior court's ruling, Moustakis cannot identify the origins of the source or view all of the false statements made about him because the records custodian at DoJ made a determination that Moustakis does not have a right to unredacted copies of the records to determine the source of the false statements and the precise words used. Said another way, Moustakis has no meaningful civil remedy against his defamers whose identities are being

[6] *See*, § § 942.01 and 942.03 of the Wisconsin Statutes.

protected by the DoJ. The DoJ's position is because Moustakis was on the ballot, he is not entitled to any protections of the open records law. Ironically, this decision is being made by a records custodian who is not on the ballot.

It is the DoJ's position, and the prior court's ruling, that because of Moustakis' position as an elected official, he is forfeiting his rights to protect himself against slander and defamation and, furthermore, cannot remedy his grievance through the courts. The source of the false statements and unlawful complaints has been buried. If this Petition is denied, the records will be released for the public to without leaving Moustakis any venue for redress.

The open records law in Wisconsin was designed to promote transparency in government. It was not designed for political rivals to use a lawful process to disclose unlawful statements. The open records law is being used to launder an unlawful attack, denying Moustakis access to the courts to mitigate the damage caused to him by the government. If this Court does not grant Moustakis' Petition, one asks, what court does Moustakis go to in order to restore his good reputation?

For the reasons stated above, the Petition for a Writ of Certiorari should be granted.

Respectfully submitted,

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November 27, 2019

APPENDIX

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APPENDIX

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September 3, 2019

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You are hereby notified that the Court has entered the following order:

No.2018AP373 Moustakis v. State of Wisconsin Department of Justice
L.C.#2014CV41

A petition for review pursuant to Wis. Stat. § 808.10 having been filed on behalf of plaintiff-appellant-petitioner, Albert D. Moustakis, and considered by this court;

IT IS ORDERED that the petition for review is denied, without costs.

Sheila T. Reiff
Clerk of Supreme Court

COURT OF APPEALS DECISION
DATED AND FILED
May 7, 2019

Sheila T. Reiff
Clerk of Court of Appeals

Appeal No. 2018AP373 Cir. Ct. No. 2014CV41

STATE OF WISCONSIN IN COURT OF APPEALS
DISTRICT III

ALBERT D. MOUSTAKIS,
PLAINTIFF-APPELLANT,
V.

STATE OF WISCONSIN DEPARTMENT OF JUSTICE,
DEFENDANT-RESPONDENT,

STEVEN M. LUCARELI,
INTERVENOR.

APPEAL from a judgment of the circuit court for Lincoln County: JAY R. TLUSTY, Judge. *Affirmed*.

Before Stark, P.J., Hruz and Seidl, JJ.

¶1 HRUZ, J. Albert Moustakis appeals a judgment dismissing his claims seeking a common law writ of mandamus and a declaration that part of the Wisconsin public records law, WIS. STAT.

§ 19.356 (2017-18),[1] is unconstitutional as applied to him. The Wisconsin Department of Justice (DOJ) planned to release the records of a closed investigation concerning Moustakis's conduct while he was serving as an elected district attorney. Moustakis asserts that in deciding to release the records, the DOJ's records custodian performed an arbitrary public interest balancing test. He also claims that § 19.356 denies him equal protection of the law by excluding him from the class of government workers entitled to maintain an action for prerelease judicial review of the record custodian's decision to release records.

¶2 We conclude the circuit court properly dismissed both of Moustakis's claims. Moustakis is not entitled to a writ of mandamus because the legal authorities he marshals in support of his claim fail to establish that he has a clear legal right to the relief he seeks or that the DOJ has a positive and plain legal duty to withhold the records. Consequently, Moustakis is not permitted to have the public interest balancing applied in the manner he desires or to reach a result in favor of nondisclosure. Moustakis is also not entitled to a judgment declaring WIS. STAT. § 19.356 unconstitutional as applied to him on equal protection grounds. The statute does not violate

[1] All references to the Wisconsin Statutes are to the 2017-18 version unless otherwise noted.

any fundamental right of his so as to warrant the application of strict scrutiny, and the classification scheme established by the statute easily satisfies rational basis review. Accordingly, we affirm.

BACKGROUND

¶3 The basic facts regarding this matter have been addressed by this court and the Wisconsin Supreme Court previously, and we will briefly summarize them here. In 2013, The Lakeland Times sent the DOJ a request for public records concerning Moustakis, who was at the time the Vilas County District Attorney. ***Moustakis v. DOJ***, 2016 WI 42, ¶9, 368 Wis. 2d 677, 880 N.W.2d 142 (hereinafter, Moustakis I). After internal department deliberations, the DOJ's records custodian ultimately approved a proposed response that contained records relating to complaints about Moustakis that the DOJ had found to be unsubstantiated. ***Id.***, ¶10. The DOJ compiled the records for release and redacted some information in the records it determined was not suitable for release. ***Id.***, ¶12. Notably, Moustakis has conceded throughout the proceedings related to this litigation that in reaching its decision to release the records, the DOJ performed a weighing of interests to determine whether disclosure was in the public interest. ***Id.***, ¶23 n.12.

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¶4 Moustakis received a copy of the proposed records response prior to its release. *Id.*, ¶12. He then commenced an action under WIS. STAT. § 19.356(2)(a) and (4) seeking to enjoin the DOJ from releasing the records. *Id.*, ¶13. Together, those provisions operate as an exception to the general rules under § 19.356(1) that an authority need not notify a record subject to the impending release of records and that no person is entitled to judicial review of a decision to provide a requester with access to a record. The circuit court dismissed Moustakis's claim for judicial review of the DOJ's release decision, concluding that Moustakis was not an "employee" as that term is defined in WIS. STAT. § 19.32(1bg) and used in § 19.356(2)(a), and, therefore, he could not maintain an action under § 19.356(4) to prevent the release of the redacted records. *Id.*, ¶15. We affirmed that determination, as did our supreme court. *Id.*, ¶¶15, 19-20.

¶5 Prior to the dismissal of his claim seeking to enjoin release of the redacted records, Moustakis had filed an amended complaint in the circuit court adding two claims. Count 2 of the amended complaint sought a common law writ of mandamus requiring the DOJ's records custodian to "properly apply the balancing test to deny or significantly further redact any response to the request of the Lakeland Times." Count 3 sought a declaration that WIS. STAT. § 19.356, as applied by the DOJ to Moustakis, infringed upon his fundamental rights to access the court system and

to privacy, and therefore denied him equal protection of the law under the Fourteenth Amendment. After initially dismissing Counts 2 and 3 on competency grounds, the circuit court granted Moustakis's motion for reconsideration, reinstated those claims, and stayed further litigation during the pendency of the appeal related to Count 1.

¶6 Following remittitur from the Wisconsin Supreme Court, the DOJ filed a motion to dismiss Counts 2 and 3 of the amended complaint. The DOJ argued Moustakis's request for a writ of mandamus must be denied "because he does not have a clear legal right to the relief he seeks and because the DOJ does not have a positive and plain duty to conduct the public policy balancing test in the manner Moustakis wishes, nor reach the result he desires." With respect to Moustakis's constitutional claim, the DOJ asserted that rational basis review applied and the legislature could rationally conclude that elected officials should be treated differently than typical government employees, including those in the civil service. The DOJ also filed a motion to stay discovery pending a decision on the DOJ's motion to dismiss.

¶7 Construing the DOJ's motion to stay discovery as a motion for a protective order under WIS. STAT. § 804.01(3), the circuit court concluded that permitting discovery to occur prior to deciding

the motion to dismiss would result in undue burden and expense. The court then entered a new scheduling order setting briefing deadlines on the motion to dismiss. Following the initial briefing, the court held two nonevidentiary hearings and requested supplemental briefing from the parties regarding relevant legal authority for their positions.

¶8 The circuit court granted the DOJ's motion to dismiss Counts 2 and 3 after receiving the supplemental materials. As to Count 2, the court concluded Moustakis desired a writ of mandamus merely to require the DOJ to "redo the balancing test" in a fashion that precluded the records' release. Under these circumstances, the court concluded Moustakis had failed to sufficiently allege that he possessed a clear legal right to have the balancing test applied in the manner he desired, nor had Moustakis sufficiently demonstrated that the DOJ's duty to withhold the records was "positive and plain," given the discretionary nature of the balancing test.

¶9 As to Count 3, the circuit court concluded Moustakis was not entitled to a declaration that WIS. STAT. § 19.356 was unconstitutional as applied to him. It determined the statute did not infringe upon either Moustakis's right to access the courts or his right to privacy. The court therefore applied rational basis review to decide whether the statute violated equal

protection. While acknowledging that the statutory scheme provided different rights to elected officials than it did to some other public employees, the court nonetheless concluded that any such treatment was a rational legislative choice based upon the "public platform or public access" that elected officials may enjoy.

¶10 In its concluding remarks, the circuit court emphasized the legislative presumption that government records are public. The court noted that while the legislature had made remedies available to certain parties when a government authority withholds a record or denies access to a record, no law requires the authority to explain its decision to release a record. The court memorialized its decision with a written order granting the DOJ's motion to dismiss. Moustakis now appeals.

DISCUSSION

¶11 Moustakis challenges the dismissal of his claims seeking a common law writ of mandamus and a declaration that WIS. STAT. § 19.356 is unconstitutional as applied to him. A motion to dismiss tests the legal sufficiency of the complaint. *Data Key Partners v. Permira Advisers LLC*, 2014 WI 86, ¶19, 356 Wis. 2d 665, 849 N.W.2d 693. We accept the facts alleged in the complaint as true for purposes of our review. *Id.*, ¶18. Mere legal conclusions, however, are

insufficient to withstand a motion to dismiss and are not accepted for purposes of our review. ***Id.*** Whether a complaint states a claim upon which relief can be granted is a question of law that we review independently. ***Id.***, ¶17.

¶12 Moustakis also challenges the circuit court's decision to grant the DOJ's motion to stay discovery, which the court treated as a motion for a protective order. Moustakis critiques the DOJ's motion for failing to include citations to statutory or case law establishing its entitlement to such a stay. Moustakis concedes, however, that a protective order may issue for reasons of undue burden or expense. See WIS. STAT. § 804.01(3)(a); see also ***Earl v. Gulf & W. Mfg. Co.***, 123 Wis. 2d 200, 208, 366 N.W.2d 160 (Ct. App. 1985). We review a circuit court's discovery ruling using the erroneous exercise of discretion standard, see ***Konle v. Page***, 205 Wis. 2d 389, 393, 556 N.W.2d 380 (Ct. App. 1996), but "[t]he question whether the burden and expense of producing information in a particular case is excessive in light of the information's value is a question of law which we determine independently," ***Earl***, 123 Wis. 2d at 206-07.

¶13 Here, the circuit court could reasonably conclude that discovery was unnecessary given the DOJ's pending motion to dismiss Counts 2 and 3 for failure to state a claim. As just noted, the focus of a motion to dismiss is the

sufficiency of the complaint's factual allegations; a court cannot add facts in the process of construing a complaint. ***Data Key Partners***, 356 Wis. 2d 665, ¶19. Because of this limitation, the discovery Moustakis sought could have no bearing on the pending motion to dismiss, and it was therefore irrelevant to that motion. As such, any expense on the DOJ's part in providing discovery could be viewed as unwarranted, and it was reasonable for the court to stay discovery until after it had addressed the DOJ's potentially dispositive motion. The court's reasoning holds regardless of any deficiencies present in the DOJ's motion to stay.[2]

¶14 Having addressed the discovery issue, we now turn to the two counts the circuit court dismissed. We conclude that the court properly dismissed Counts 2 and 3 for failure to state a claim upon which relief can be granted. Based upon the facts alleged in the complaint, Moustakis is

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[2] Moustakis notes in his reply brief that a circuit court may convert a motion to dismiss to a motion for summary judgment if matters outside of the pleadings are presented to, and not excluded by, the court. See WIS. STAT. § 802.06(2)(b). From this rule, he reasons the circuit court erred in refusing to permit further discovery. His conclusion, however, does not necessarily follow from his premise. Whether a court must convert a motion to dismiss when presented with materials outside the pleadings is a different question from whether a court must allow the parties to continue with discovery in the first instance, despite a pending motion to dismiss for failure to state a claim.

neither entitled to a common law writ of mandamus directing the DOJ to "redo" its balancing test nor to a declaration that WIS. STAT. § 19.356 is an unconstitutional violation of Moustakis's equal protection rights.

I. Common Law Writ of Mandamus

¶15 A writ of mandamus is a remedy used to compel a public officer to perform a duty of his or her office presently due to be performed. ***Voces De La Frontera, Inc. v. Clarke***, 2017 WI 16, ¶11, 373 Wis. 2d 348, 891 N.W.2d 803. Mandamus is an exceptional remedy, only to be applied in extraordinary circumstances where there is no other adequate remedy. ***State ex rel. Harris v. Milwaukee City Fire & Police Comm'n***, 2012 WI App 23, ¶8, 339 Wis. 2d 434, 810 N.W.2d 488. A petitioner for a writ of mandamus must satisfy four prerequisites: (1) a clear legal right; (2) a positive and plain duty; (3) substantial damages; and (4) no other adequate remedy at law. ***Voces De La Frontera***, 373 Wis. 2d 348, ¶11.

¶16 In this instance, Moustakis seeks a writ of mandamus directing the DOJ's records custodian to perform certain tasks pursuant to the authority conferred by the Wisconsin public records law, WIS. STAT. §§ 19.21-19.39. That legislation declares that, to the greatest extent possible, "all persons are entitled to … information regarding the affairs of government and the official acts of those

officers and employees who represent them." Sec. 19.31. Accordingly, "[t]he denial of public access generally is contrary to the public interest, and only in an exceptional case may access be denied." *Id.*

¶17 The strong presumption of public access may give way to three types of exceptions: (1) statutory exceptions; (2) common law exceptions; and (3) public policy exceptions. *Democratic Party of Wis. v. DOJ*, 2016 WI 100, ¶10, 372 Wis. 2d 460, 888 N.W.2d 584. The task for determining whether a record should be disclosed is initially one for the records custodian, a position that all government authorities must designate to fulfill the authority's disclosure responsibilities under the public records law. See generally WIS. STAT. § 19.33. "When a public records request is made, the record custodian must determine whether the Public Records Law applies. If the law applies, the presumption favors disclosure of the record. The next step is to determine whether any exceptions operate to overcome the general presumption of openness." *Democratic Party of Wis.*, 372 Wis. 2d 460, ¶10 (citations omitted).

¶18 The records custodian must conduct the open records disclosure analysis on a case-by-case basis, and our legislature has entrusted the custodian with "substantial discretion" in determining whether the records are to be released.

Id., ¶¶10-11. The custodian initially determines whether any statutory or common law exception applies. *Id.*, ¶11. "If neither applies, the custodian proceeds to the public policy balancing test, which requires a consideration of all relevant factors to determine whether the public interest in nondisclosure outweighs the public interest in favor of disclosure." *Id.*; *Cf. Woznicki v. Erickson*, 202 Wis. 2d 178,191, 549 N.W.2d 699 (1996), superseded by statute on other grounds as recognized in *Moustakis I*, 368 Wis. 2d 677, ¶27 (noting the records custodian's consideration of relevant factors can include the record subject's private interests). In other words, this balancing test considers whether disclosure would cause public harm to such a degree that the presumption of openness is overcome. *Democratic Party of Wis.*, 372 Wis. 2d 460, ¶11.

¶19 Moustakis does not contend that any statutory or common law exception to disclosure exists. In addition, and importantly, he has conceded (both in our supreme court and in the proceedings following remittitur) that the DOJ's records custodian has complied with his duty to perform a balancing of interests to determine whether the records should be released. *See Moustakis I*, 368 Wis. 2d 677, ¶23 n.12. As a result, it is undisputed that this balancing of interests ultimately led the records custodian to conclude that release was warranted subject to various

redactions in the released records. Moustakis, however, challenges the manner and result of the DOJ custodian's weighing of interests.[3] Specifically, he asserts that the custodian failed to consider factors that Moustakis—the subject of the records request—considers relevant. Based on this assertion, Moustakis further argues the custodian "acted outside of his authority in not considering all factors under the balancing test" and reached an arbitrary result. Essentially, Moustakis argues the DOJ records custodian's balancing of interests was simply wrong as a matter of law because any such balancing clearly favored withholding the records, or at a minimum the balancing was incomplete.

¶20 We reject Moustakis's arguments. As an initial matter, he cannot show he has a clear legal right to the relief he seeks, which is necessary for mandamus to issue. Again, he essentially

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[3] We note that this is not a case in which a records requester has been denied access to a public record and seeks review of the records custodian's reasons for doing so. In those circumstances, application of the balancing test presents a question of law to be decided by the courts. ***Democratic Party of Wis. v. DOJ***, 2016 WI 100, ¶9, 372 Wis. 2d 460, 888 N.W.2d 584. Here, we are solely concerned with Moustakis's efforts to prevent the release of the records by having the records custodian conduct the balancing test in a particular way, which, as we explain, is not a proper subject for a writ of mandamus.

accuses the DOJ records custodian of abdicating his statutory duty to properly apply the public interest balancing test when determining whether to release the records. As we explain, however, Moustakis has provided no authority demonstrating that a records custodian must perform the balancing in a particular manner—including his or her reaching out to the records subject for input on the release decision—or to reach a particular result. Indeed, Moustakis's arguments run counter to the very purpose of the public records law.

¶21 As Moustakis readily notes in his brief-in-chief, "[u]nder ordinary circumstances, [application of] the balancing test is a discretionary act, and is not subject to review under a writ of mandamus." This concession is well taken, as our supreme court has long held that a circuit court erroneously exercises its discretion by granting mandamus relief when the duty is not clear and unequivocal but instead requires the exercise of discretion. *Law Enf't Standards Bd. v. Village of Lyndon Station*, 101 Wis. 2d 472, 494, 305 N.W.2d 89 (1981). Here, the mandated public interest balancing test is inherently such a discretionary exercise.

¶22 Moustakis attempts to argue around the general unavailability of mandamus relief in this context by asserting that the DOJ's records

custodian reached an arbitrary decision. In his view, the custodian conducted an "arbitrary" balancing test because the custodian redacted some, but not all, "untrue" statements about Moustakis in the records planned for release.[4] Moustakis provides no authority or cogent rationale for the proposition that only matters within public records that are verifiably true or corroborated are suitable for release.[5]

¶23 To the contrary, the public records law does not contain any blanket exception to disclosure for employee disciplinary or personnel records. ***Woznicki***, 202 Wis. 2d at 183. Disclosure is the norm regardless of whether the accusations

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[4] Moustakis does not explain what untrue statements remained in the redacted records, and the redacted records are not present in the appellate file. However, even assuming some "untrue" statements went unredacted, this fact is immaterial to our analysis.

[5] Indeed, in the context of public actors within the criminal justice system, our courts have expressly recognized "[t]he public interest in being informed both of the potential misconduct by law enforcement officers *and of the extent to which such misconduct was properly investigated is particularly compelling*." ***Kroeplin v. DNR***, 2006 WI App 227, ¶46, 297 Wis. 2d 254, 725 N.W.2d 286 (emphasis added). Plainly, the public's interest in having investigations of alleged public misconduct done correctly exists even if such allegations are ultimately not substantiated. Moustakis's argument largely gainsays this important interest.

of misconduct have been substantiated. WISCONSIN STAT. § 19.36(10)(b) is the only exception to disclosure relating to the investigation of possible employee misconduct, and once the investigation has "achieved its disposition," those records are not exempt from disclosure unless the records custodian or a court finds that the potential for public harm exceeds the public interest in favor of nondisclosure under the traditional balancing test. ***Kroeplin v. DNR***, 2006 WI App 227, ¶32, 297 Wis. 2d 254, 725 N.W.2d 286.

¶24 As to that particular balancing, we have noted that law enforcement officers should expect close public scrutiny—including the possibility that disciplinary records may be released to the public—and that "[t]he public interest in being informed both of the potential misconduct by law enforcement officers and of the extent to which such misconduct was properly investigated is particularly compelling." ***Id.***, ¶¶44, 46. Notably, Moustakis has already presented the argument that public policy does not favor the release of uncorroborated or untrue accusations against a public official, including a district attorney. *See* ***Moustakis I***, 368 Wis. 2d 677, ¶23 n.12. Our supreme court considered and rejected that argument in favor of the general rule of disclosure. ***Id.***

¶25 Given this analysis of the statutory framework, we find Moustakis's legal argument

concerning the "arbitrariness" of the DOJ's balancing test to lack merit as it pertains to his request for a writ of mandamus. "Where the legislature has conferred discretionary power on a legislative body or administrative officer, a court will not set aside an exercise of that power unless it is clear that the power has been abused or exercised beyond the limits conferred by the legislature." *State ex rel. Knudsen v. Board of Ed., Elmbrook Sch., Joint Common Sch. Dist. No. 21*, 43 Wis. 2d 58, 67, 168 N.W.2d 295 (1969). All of the following are true in this case: (1) the legislature has prescribed a presumption in favor of disclosure; (2) the fact that an allegation has been found to be unsubstantiated is not a recognized categorical exception to disclosure; and (3) it is undisputed the DOJ's records custodian has, in fact, applied the public interest balancing test to determine whether to release the records and whether to do so with certain redactions, all consistent with his statutory authority. Under these circumstances, there is no basis to conclude a writ of mandamus should issue to require further action by the DOJ.

¶26 Moustakis's next argument for avoiding the general prohibition on mandamus relief in the context of the public records law again relies on his claims as to the falsity of some of the information contained in the partially redacted

records. Moustakis contends that the case law concerning the public records law requires a records custodian to "seek perspectives outside his or her own" and, specifically, "to communicate with [the records subject] prior to deciding to release the records." Moustakis divines that such communications between a records subject and the records custodian are required for a proper balancing to occur in instances where the records purportedly contain unsubstantiated allegations of wrongdoing. In this regard, Moustakis views the question of whether he is entitled to prerelease judicial review of a release decision as being separate from the question of whether the records custodian has properly carried out his or her duties under the balancing test. Moustakis then argues that "[a]bsent some form of proof the records custodian considered those factors Moustakis would have presented," the circuit court was required to conclude the DOJ and its records custodian failed to perform their obligations under the balancing test.

¶27 Moustakis's arguments are plainly insufficient to warrant mandamus relief. Notably, Moustakis never explains what "factors" he would have presented that were pertinent to his potential request for further redactions, nor what relevant considerations he believes the records custodian ignored when determining disclosure was warranted. Moreover, there are two major defects

concerning the legal authority Moustakis cites in support of his argument that a records custodian must actively seek input from the records subject, at least when the records include information that the record-holding authority deems unsubstantiated.

¶28 First, the case Moustakis relies upon merely held that public employees were entitled to prerelease de novo judicial review when a records custodian decided to release information implicating the employees' privacy or reputational interests. *See* ***Milwaukee Teachers' Educ. Ass'n v. Milwaukee Bd. of Sch. Dirs.***, 227 Wis. 2d 779, 782, 596 N.W.2d 403 (1999), superseded by statute as recognized in ***Moustakis I***, 368 Wis. 2d 677, ¶27. Our supreme court recognized that providing a judicial forum for review of a release decision would allow public employees to "present arguments in favor of nondisclosure that the records custodian did not consider in evaluating the disclosure request." See ***Id.*** at 794. However, the court certainly did not mandate that records custodians consult with subjects prior to deciding to release a record.

¶29 Second, and most importantly for Moustakis, ***Milwaukee Teachers' Education Association*** is no longer good law. The prerelease judicial review adopted by our supreme court in that decision was curtailed by the legislature's

subsequent adoption of WIS. STAT. § 19.356, which limits the rights afforded by that line of cases only to a defined set of records pertaining to employees residing in Wisconsin. ***Moustakis I***, 368 Wis. 2d 677, ¶27. ***Moustakis I*** concluded that Moustakis did not fall within the class of persons entitled to prerelease judicial review. ***Id.***, ¶¶36, 48, 63. Thus, to put it bluntly, Moustakis has no right to seek to enjoin the release of the records under the circumstances here. The authority's obligation is to release the records if its consideration of the balancing test leads it to that conclusion, and Moustakis has not demonstrated he is entitled to any form of judicial review or relief prior to that occurring, including review by mandamus.

II. Declaratory Judgment / Equal Protection Violation

¶30 Moustakis also asserts his complaint adequately states a claim for a declaratory judgment regarding the constitutionality of 2003 Wis. Act 47, which significantly revised the public records law and created WIS. STAT. § 19.356. Moustakis contends that in enacting § 19.356, the legislature impermissibly distinguished between publicly employed records subjects by permitting some to maintain an action for prerelease judicial review of the release decision, see subsecs. (2) and (4), while others are merely allowed to augment the

record with written comments and documentation selected by the records subject, see subsec. (9).[6] Moustakis contends this classification violates his constitutional right to equal protection of the laws.

¶31 The real fight in this case, however, is over the standard of review applicable to Moustakis's equal protection claim. Generally, Wisconsin courts use two levels of scrutiny when addressing equal protection challenges. *See* ***Mayo v. Wisconsin Injured Patients & Families Comp. Fund***, 2018 WI 78, ¶28, 383 Wis. 2d 1, 914 N.W.2d 678. We apply strict scrutiny to statutes that interfere with the exercise of a fundamental right or that operate to the disadvantage of protected

[6] Moustakis proposes that he falls into a third class of records subjects that have "neither the rights set forth under WIS. STAT. § 19.356(2) nor the remedy contained within subsection …(9)." No court has determined that any such "third" class exists, nor that Moustakis was not entitled to supplement the records under subsec. (9) had he sought such relief. Indeed, as our supreme court recognized, Moustakis has never claimed he is entitled to supplement the records; rather, he has consistently sought to prohibit the records' release. See Moustakis v. DOJ, 2016 WI 42, ¶¶54, 61, 368 Wis. 2d 677, 880 N.W.2d 142. For purposes of our constitutional analysis here, it makes no difference whether Moustakis is entitled to supplement the records under subsec. (9); his equal protection challenge rests on the fact that some public employees may seek prerelease judicial review, while state and local elected officials may not do so.

classes. *Id.* "When strict scrutiny is applied, the statute must serve a compelling state interest; the statute must be necessary to serving that interest; and the statute must be narrowly tailored toward furthering that compelling state interest." *Id.*

¶32 "The more common level of statutory scrutiny is rational basis scrutiny, where statutes are upheld if there is any rational basis for the legislation." *Id.*, ¶29. This standard, which generally applies in all instances other than strict scrutiny, tests "not whether some inequality results from the classification, but whether there exists any reasonable basis to justify the classification." *Id.* (citation omitted). The State argues rational basis scrutiny applies to Moustakis's constitutional challenge, whereas Moustakis asserts strict scrutiny is applicable. Moustakis apparently believes that if WIS. STAT. § 19.356 were deemed to be unconstitutional, he would once again enjoy the right to prerelease judicial review established in *Milwaukee Teachers' Education Association*.

¶33 Moustakis concludes that strict scrutiny review is applicable to his equal protection challenge to WIS. STAT. § 19.356 because, in his view, that statute impedes two of his fundamental rights. First, he argues § 19.356 curbs his fundamental right to access the courts. Second, he argues the statute restricts his fundamental right to privacy. We reject both of these arguments and,

consequently, conclude rational basis scrutiny is appropriate.

¶34 The fundamental rights with which we are concerned for equal protection purposes are those "which are, objectively, 'deeply rooted in this Nation's history and tradition.'" ***Black v. City of Milwaukee***, 2016 WI 47, ¶47, 369 Wis. 2d 272, 882 N.W.2d 333 (quoting ***Washington v. Glucksberg***, 521 U.S. 702, 721 (1997)).[7] The fundamental rights so far recognized by the United States Supreme Court include the specific freedoms contained in the Bill of Rights, as well as "liberty" rights, including the right to marry, to have and parent children, and to marital privacy. ***Glucksberg***, 521 U.S. at 720.

¶35 Moustakis correctly observes that the right to access the courts to obtain adequate, effective, and meaningful review is guaranteed by the First and the Fourteenth Amendments. See ***Penterman v. Wisconsin Elec. Power Co.,*** 211 Wis. 2d 458, 474, 565 N.W.2d 521 (1997). However, this right exists only "where the claim has a 'reasonable basis in fact or law.'" ***Id.*** (quoting ***Bell v.***

[7] Generally speaking, the due process and equal protection clauses of the Wisconsin Constitution and the United States Constitution are given "essentially the same" interpretation insofar as the scope of their protections is concerned. County of Kenosha v. C & S Mgmt., Inc., 223 Wis. 2d 373, 393, 588 N.W.2d 236 (1999).

City of Milwaukee, 746 F.2d 1205, 1261 (7th Cir. 1984), overruled on other grounds by *Russ v. Watts*, 414 F.3d 783 (7th Cir. 2005)). Our supreme court has already concluded that Moustakis does not have a viable statutory claim for prerelease judicial review of the records the DOJ has compiled for release. *Moustakis I*, 368 Wis. 2d 677, ¶63. Because the "right" Moustakis seeks to vindicate is not recognized at law, WIS. STAT. § 19.356 does not impede his right to access the courts.

¶36 For the most part, Moustakis does not appear to quarrel with the foregoing analysis. Instead, Moustakis proposes that he should be permitted to access the courts because his pre-existing right to prerelease judicial review under *Milwaukee Teachers' Education Association* was "stripped from him" by WIS. STAT. § 19.356. However, none of the cases Moustakis cites provide support for the general rule he advances: that when the legislature extinguishes a once recognized right, a person formerly entitled to maintain an action seeking to vindicate that right has been denied a fundamental right to access the courts.

¶37 Indeed, one of the primary cases Moustakis relies upon demonstrates that his argument lacks merit. In *Bowman v. Niagara Machine & Tool Works,Inc.*, 832 F.2d 1052 (7th Cir. 1987), the court considered an argument that an Indiana statute violated equal protection because it created two classes of potential product liability

plaintiffs. *Id.* at 1053-54. In rejecting an argument for applying strict scrutiny similar to the one Moustakis presents here, the court stated:

> Bowman cannot claim that he has been denied access to court simply because the Indiana legislature has restricted a particular cause of action in a way that makes it unavailable to him. Such an approach confuses "access" with "success," and Bowman is not constitutionally entitled to the latter. The concept of constitutionally protected access to courts revolves around whether an individual is able to make use of the courts' processes to vindicate such rights as he may have, as opposed to the extent to which rights actually are extended to protect or compensate him. Claims of violation of the right of access to courts have thus focused on the availability of suitable court processes to vindicate existing rights or, more commonly, the ability of an individual to make use of those processes. In contrast, Bowman's claim concerns specific substantive rights that the legislature has declined to extend to a group of persons that includes him. Bowman has not alleged that he has been denied access to either state or federal

> courts to enforce any right that has accrued to him.

Id. at 1054-55 (citations omitted). We adopt the same reasoning as the *Bowman* court in rejecting the application of strict scrutiny to WIS. STAT. § 19.356 based on an alleged impediment to Moustakis's right of court access.

¶38 According to Moustakis, WIS. STAT. § 19.356 also impacts his fundamental right to privacy. Moustakis contends the statute affects two aspects of his privacy interests: his "individual interest in avoiding disclosure of personal matters," *Whalen v. Roe*, 429 U.S. 589, 598-99 (1977), and his "right to be free, except in very limited circumstances, from unwanted governmental intrusions into one's privacy," *Stanley v. Georgia*, 394 U.S. 557, 564 (1969). In Moustakis's view, although the DOJ's investigation into his conduct did not violate these constitutional structures, "the subsequent decision to release the unsubstantiated] allegations made against [him] … [is] an act of defamatory harm to Moustakis, contrary to his right to be let alone."

¶39 The generalized notions of privacy that Moustakis invokes do nothing to aid him in procuring strict scrutiny of the classification that the legislature created in WIS. STAT. § 19.356. Circumscribing prerelease judicial review of the DOJ's decision to release public records regarding

its investigation of an elected official does not inherently place unnecessary or unwarranted public attention on recognized liberty interests like the rights to marry, to parent, or to prevent governmental intrusion into one's intimate relationships.[8] *Cf.* ***In re Kading***, 70 Wis. 2d 508, 526, 235 N.W.2d 409 (1975) (holding that the scope of the right to privacy is limited to intimate personal and familial matters, and does not include the right to freedom from disclosure of an elected official's economic interests).

¶40 In invoking the phrase "an act of defamatory harm," Moustakis again appears to be appealing to the notion that the records should not be released because of their purported falsity, suggesting that their release could damage his standing in the community. However, any harm or injury to a person's reputational interest, even when inflicted by an officer of the State, "does not result in a deprivation of any 'liberty' or 'property' recognized by state or federal law." ***Paul v. Davis***, 424 U.S. 693, 711-12 (1976). Moustakis's resort is to tort law if he believes he has been damaged as a

[8] Despite the continuing litigation in this matter, the records about which Moustakis complains have not been made available to this court. Moustakis does not claim the allegations against him relate to anything other than his conduct while acting in his official capacity as a (continued) district attorney. His focus has been on the professed falsity of the allegations, and he has not argued that the allegations pertain to personal matters unrelated to his elected position.

result of one or more false allegations, assuming he could prove the elements of any such cause of action. See *Id.* at 712.[9]

¶41 Because WIS. STAT. § 19.356 does not implicate the fundamental liberty interests suggested by Moustakis, our task is merely to determine whether there exists any reasonable basis to justify the government's classification. *Mayo*, 383 Wis. 2d 1, ¶29. "When neither a fundamental right has been interfered with nor a suspect class been disadvantaged as a result of the classification, 'the legislative enactment "must be sustained unless it is 'patently arbitrary' and bears no rational relationship to a legitimate government interest."'" *State v. Smith*, 2010 WI 16, ¶12, 323 Wis. 2d 377, 780 N.W.2d 90 (quoting *State v. McManus*, 152 Wis. 2d 113, 131, 447 N.W.2d 654 (1989) (quoting *Frontiero v. Richardson*, 411 U.S. 677, 683 (1973))). Moustakis does not attempt to argue that the statute would fail rational basis scrutiny.

[9] In his reply brief, Moustakis for the first time suggests that because his reputational interests are at stake, due process requires that he receive notice and an opportunity to be heard. Presumably, he believes WIS. STAT. § 19.356 does not extend him such procedural protections. Moustakis, however, has not advanced a procedural due process claim, and we will not manufacture one on his behalf based upon the underdeveloped theory proposed for the first time in his reply brief.

¶42 In any event, we agree with the DOJ that "the analysis would not be a close call." As we have explained, WIS. STAT. § 19.356(1) establishes a general rule that no person is entitled to judicial review of an authority's decision to release a record to a requester. The statute then provides three narrow exceptions from this general rule. See § 19.356(2)(a)1.-3. Moustakis previously litigated the applicability of subd. 1., but now that it has been determined not to apply to him, he contends that excluding elected state officials such as him violated equal protection.

¶43 To the contrary, there are ample rational reasons why the legislature may have desired to exclude elected public officials from the scope of the exceptions to prerelease judicial review identified in WIS. STAT. § 19.356(2)(a)1.-3. As the DOJ notes, excluding such officials is consistent with the general purpose of the public records law, which is to provide the public with "the greatest possible information regarding the affairs of government and the official acts of those officers and employees who represent them." See WIS. STAT. § 19.31. Our case law recognizes that "[o]ne who willingly puts himself [or herself] forward into the public arena, and accepts publicly conferred benefits after election to public office, is legitimately much more subject to reasonable scrutiny and exposure than a purely private individual." ***In re Kading***, 70 Wis. 2d at 526. Additionally, given their platform, elected public

officials are better able to defend their conduct to the public than a typical government employee.

CONCLUSION

¶44 We conclude the circuit court properly dismissed Counts 2 and 3 of Moustakis's amended complaint. Moustakis is not entitled a writ of mandamus because he has failed to demonstrate he has a clear legal right to have the records withheld, or of a positive and plain legal duty on the DOJ's part do anything more than weigh the various public interests when deciding whether a record should be released. Consequently, Moustakis is not permitted to have the public interest balancing applied in the manner he desires or to reach a result in favor of nondisclosure. Moustakis is also not entitled to a declaratory judgment that WIS. STAT. § 19.356 is unconstitutional as applied to him on equal protection grounds. He has failed to sufficiently show that the statute violates a fundamental right so as to warrant strict scrutiny, and the statute's distinguishing between elected public officials and other governmental employees easily satisfies rational basis review.

By the Court.—Judgment affirmed.

Not recommended for publication in the official reports.

STATE OF WISCONSIN CIRCUIT COURT
LINCOLN COUNTY
BRANCH I

ALBERT D. MOUSTAKIS,

Plaintiff

vs. Case No. 14-CV-41
Oral Ruling

STATE OF WISCONSIN DEPARTMENT
OF JUSTICE,

Defendant

And

STEVEN M. LUCARELI,

Intervenor

TRANSCRIPT OF PROCEEDINGS
HELD BEFORE HON. JAY TLUSTY
DECEMBER 20, 2017, 8:00 A.M.
MERRILL, WISCONSIN

A P P E A R A N C E S

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IN OPEN COURT:

THE COURT: The Court will call the -- First of all, good morning everyone. The Court will call the matter of Albert D. Moustakis, plaintiff, versus State of Wisconsin Department of Transportation and Steven M. Lucarelli, Lincoln County case 14-CV-41.
I'll ask the parties to please state their appearance, now that we're on the record, starting with the plaintiff, please.

MR. SWID: Good morning, Your Honor. May it please the Court, the plaintiff, Albert D. Moustakis, appears by Attorney Scott Swid from Swid Law Offices.

MS. BENSKY: Good morning, Your Honor. This is Assistant Attorney General Ann Bensky appearing on behalf of the Department of Justice.

MR. SCHULTZ: And this is Attorney Hank Schultz appearing on behalf of the intervenor, Steve Lucarelli.

THE COURT: I assume, none of the attorneys have any of their clients in their offices; is that correct?

MS. BENSKY: Correct.

MR. SWID: Correct, Your Honor.

MR. SCHULTZ: That's correct.

THE COURT: Thank you. Before I continue I just wanted to note, Mr. Swid, I got your December 15, 2017 letter. The second line from the bottom said the redacted records should be provided to Al Moustakis for his review. My understanding is he has the redacted records.

MR. SWID: Yes, that's correct, Your Honor; it was meant to say the unredacted records.

THE COURT: That was my assumption, it was a typographical error. I just wanted to make certain that I didn't have a misunderstanding.

MR. SWID: Correct. That is correct.

THE COURT: Thank you.

MR. SWID: You're welcome.

THE COURT: This matter is before the Court as a result of the Department of Justice's motion to dismiss the amended complaint based upon the grounds that the amended complaint fails to state a claim upon which relief can be granted pursuant to 802.06(2)(a6) of the Wisconsin Statutes. The amended complaint was filed on June 25, 2014; two causes of action remain based upon the amended complaint.

The plaintiff's first cause of action was dismissed by the circuit court on July 1, 2014. This decision was affirmed by the court of appeals and subsequently affirmed by the Wisconsin Supreme Court at 368 Wis. 2d, 677.

The standard for review of a motion to dismiss for failure to state a claim is set forth in the Wisconsin Supreme Court case of Data Key Partners versus Permira Advisers, 356 Wis. 2d 665 at Paragraph 19 on Page 676. In quoting in part from that paragraph, "A motion to dismiss for failure to state a claim tests

the legal sufficiency of the complaint." "Upon a motion to dismiss, we accept as true all facts well-pleaded in the complaint and the reasonable inferences therefrom." "However, a court cannot add facts in the process of construing a complaint." "Furthermore, legal conclusions stated in the complaint are not accepted as true, and they are insufficient to enable a complaint to withstand a motion to dismiss." "Therefore, it is important for a court considering a motion to dismiss to accurately distinguish pleaded facts from pleaded legal conclusions."

The Court's analysis is limited to the facts pled in the amended complaint filed on June 25, 2014. Scheduling conference was held on June 29, 2016 after the Wisconsin Supreme Court issued its decision on the first cause of action. Scheduling order was signed and filed by the court on July 7, 2016. The scheduling order provided, amendments to the pleadings were to be completed by October 31, 2016. No amended pleadings were filed by any party to this action. The Court, therefore, is limited to the facts pled in the amended complaint and only arguments by the parties limited to those pleaded facts. The Court has considered the written and oral arguments of counsel as well as statutory law and case law.

Turning to the second cause of action, and by second cause of action I mean the second cause of action in the amended complaint. The

plaintiff's second cause of action requests the Court issue a writ of mandamus under Wisconsin common law. The Court has considered various case law regarding this cause of action and in particular the following cases: The Wisconsin Supreme Court case of State Ex Rel Robins versus Madden, 317 Wis. 2d, 364 at Paragraph 10 on Pages 372 and 374 the supreme court wrote in part, "Mandamus is an extraordinary writ that may be employed to compel public officers to perform a duty that they are legally obligated to perform." "For a writ of mandamus to issue, the petitioner for the writ must establish that: (1) he possesses a clear legal right to the relief sought; (2) the duty he seeks to enforce is positive and plain; (3) he will be substantially damaged by nonperformance of such duty; and (4) there is no adequate remedy of law."

The Wisconsin Supreme Court in Madison Metro School District versus Circuit Court for Dane County at 336 Wis. 2d 95 in Paragraph 75 on Page 125 wrote in part, "A writ of mandamus has long been recognized as a 'summary, drastic, and extraordinary writ issued in the sound discretion of the court' to direct a public officer to perform his plain statutory duties." "Because of the extraordinary nature of this discretionary power, the officer's duty must be clear and unequivocal."

And also the court of appeals in Milwaukee Police Association, Local 21 versus

City of Milwaukee, 313 Wis. 2d 253 at Paragraph 3 on Page 258 wrote, "Mandamus is an extraordinary legal remedy, available only to parties that can show that the writ is based on a 'clear, specific legal right which is free from substantial doubt.' A party seeking mandamus must also show that the duty sought to be enforced is positive and plain; that substantial damage will result if the duty is not performed; and that no other adequate remedy at law exists."

Lake Bluff Housing Partners versus City of South Milwaukee, 197 Wis. 2d, 157, 170, 540 N.W.2d 189, 194 (1995) quoted source and citations omitted. Whether to issue a writ of mandamus is within the circuit court's discretion.

By the second cause of action, the plaintiff is asking the Court to order the defendant, that being the Department of Justice, to do something; that is, to perform a duty that they are legally obligated to perform.

The Wisconsin Supreme Court has already determined that the plaintiff's first cause of action in this matter was properly dismissed as the plaintiff was not entitled to prerelease judicial review of the records under Section 19.356 of the Wisconsin Statutes.

The plaintiff in a second cause of action now wants the Court through a writ of

mandamus to command the Department of Justice through its agents to properly apply the balancing test under the open records law. See Paragraph 2 of the wherefore section, Page 4 of the plaintiff's amended complaint.

The plaintiff is making this demand as a records subject; similar to a mandamus request a requester can make under Section 19.37(1) of the Wisconsin Statutes. Section 19.37(1) involves a situation where an authority withholds a record or part of a record or delays granting access to a record or part of a record. This is what occurred in the Wisconsin Supreme Court case of Watton versus Hegerty at 311 Wis. 2d, 52. In that case, Watton was the requester of the public records who was seeking a writ of mandamus.

The Department of Justice was prepared and is still prepared to release a redacted portion of the records to the requester, the Lakeland Times. The Lakeland Times has not brought a mandamus action under Section 19.37(1).

In Paragraph 19 of the amended complaint, the plaintiff acknowledges that the balancing test was applied by the Department of Justice. In its second cause of action, the plaintiff is asking the Court to command through a writ of mandamus for the Department of Justice to properly apply the balancing test. The plaintiff is asking the Court to command through

a writ of mandamus that the Department of Justice again do the balancing test such that the proper applying of the balancing test results in either denying the Lakeland Times request for records or significantly further redacting the response to the Lakeland Times request.

It is important for the Court to go back to the Wisconsin Supreme Court decision in the case of State Ex Rel Robbins versus Madden, 317 Wis. 2d 364 to look at the four requirements that must be met before a court can issue a writ of mandamus. These four requirements are set forth on Page 373 of State Ex Rel Robbins versus madden, and all four conditions are required.

The first requirement is that the plaintiff possess a clear legal right to the relief sought. The plaintiff is asking the Court to require the defendant to redo the balancing test which the plaintiff acknowledges was done by the defendant such that the result of redoing the balancing test will be what the plaintiff is seeking; either denying or significantly redacting.

Section 19.356(4) of the statutes indicates in part, "A records subject may commence an action seeking a court order to restrain the authority from providing access to the requested record." This appears to the Court to be what the plaintiff is asking the

Court to do in the plaintiff's second cause of action.

The Wisconsin Supreme Court has determined in its analysis of the first cause of action in this case that this is something the plaintiff is not entitled to. The Court concludes the plaintiff does not possess a clear and legal right to the relief the plaintiff seeks.

The second requirement is that the duty of the Department of Justice that the plaintiff seeks to enforce is positive and plain. In Naseer versus Miller, 329 Wis. 2d 724 in Paragraph 5 the Court wrote, in part, "An act which requires the exercise of discretion does not present a clear legal duty and cannot be compelled through mandamus." Law Enforcement Standards versus Village of Lyndon Station, 101 Wis. 2d 472, 494, 305, N.W.2d 89, (1981).

A public records request requires a custodian to apply a balancing test. A balancing test must be applied on a case by case basis using substantive common law principles. Balancing involves weighing the public interest in disclosure versus the public interest in nondisclosure. Section 19.31 indicates, in part, as follows: "To that end Section 19.32-19.37 shall be construed in every instance with the presumption of complete public access consistent with the conduct of governmental business. The denial of public

access generally is contrary to the public interest and only in an exceptional case may access be denied."

Section 19.35(1)(a) indicates, in part, "Except as otherwise provided by law, any requester has a right to inspect any record. Substantive common law principles construing the right to inspect, copy or receive copies of records shall remain in effect."

The balancing test requires discretion by the custodian of the records and such discretion occurred when redactions were made to the records that were requested by the Lakeland Times. The application of the balancing test to the open records request is not a ministerial duty. Once the authority has made a decision regarding a records request or delays granting access through a records request, enforcement rights are given to the requester under Section 19.37 for denials and delays by the authority by asking the court to order release of the records.

The Court concludes the Department of Justice's duty which the plaintiff seeks to enforce is not plain and positive. Even if it were a ministerial duty, the Department of Justice has performed that duty. The plaintiff in its pleadings has acknowledged that the balancing test was applied.

The Court has concluded the plaintiff has not established the first two parts of the four-part test set forth in State Ex Rel Robbins versus Madden. The writ of mandamus cannot be issued if any one of the four parts of the test are not established. Based upon the Court's analysis and conclusions of law, the defendant's motion to dismiss the plaintiff's second cause of action is granted.

Turning to the plaintiff's third cause of action in the amended complaint. The plaintiff's third cause of action in his amended complaint is a request for declaratory judgment under Section 806.04 of the Wisconsin Statutes. The third cause of action involves a constitutional argument regarding Section 19.356 of the Wisconsin Statutes.

The plaintiff is asking the Court to declare Section 19.356 unconstitutional as applied by the defendant, the Department of Justice, as it denies the plaintiff the right to court access and the right to privacy and, therefore, violates the plaintiff's equal protection rights under the 14th Amendment of the United States Constitution.

The Court has considered case law regarding this third cause of action and in particular the following provisions from the following cases. The court of appeals in State versus McKenzie, 151 Wis. 2d 775 on Page 779 indicated, in part, "One challenging the

constitutionality of a statute bears a heavy burden. All statutes are presumed to be constitutional, and the challenger must prove unconstitutionality beyond a reasonable doubt."

"Under an equal protection analysis, we will uphold a challenged statute if a rational basis exists to support the classification, unless the statute impinges on a fundamental right or creates a classification based on a suspect criterion." "Under the rational basis, equal protection of the law is denied only where the legislature has made irrational or arbitrary classification...The basic test is not whether some inequality results from the classification, but whether there exists any reasonable basis to justify the classification."

The next case of the Wisconsin Supreme Court case Tomczak versus Bailey, 218 Wis. 2d 245 quoting from Paragraphs 33 and 35 on Pages 261 and 262. "To attack a statute on grounds that it denies equal protection of the law, a party must show that the statute unconstitutionally treats members of similarly situated classes differently." "Upon review of such challenges, there is a strong presumption of constitutionality for legislative enactments, and every presumption favoring validity of the law must be indulged." "Moreover, a party challenging a statute has the burden of proving the law unconstitutional beyond a reasonable doubt."

"Equal protection requires strict scrutiny of the legislative classification only when the classification impermissibly interferes with the exercise of a fundamental right or operates or operates to the peculiar disadvantage of a suspect class." Otherwise, the appropriate analysis is to determine whether the legislative classification rationally furthers a purpose identified by the legislature."

The supreme court of Wisconsin in Riccitelli versus Broekhuizen, 227 Wis. 2d 100 quoting Paragraphs 34 and 36 on Page 119 wrote, "All legislative acts are presumed constitutional." Yotvat4, 95 Wis. 2d at 363. "A party challenging a statute has a heavy burden proving it is unconstitutional beyond a reasonable doubt."

"In an equal protection claim, unless government action involves classifications based on a suspect class, such as race or alienage, or invidious classifications that arbitrarily deprive a class of persons of a fundamental right, the rational basis test applies."

The supreme court in Aicher versus Wisconsin Patients Fund, 237 Wis. 2d 199 at Pages 110 and 111 quoting from Paragraphs 18, 19 and 20 wrote, in part, "Statutes are presumptively constitutional. The court indulges every presumption to sustain the law if at all possible, and if any doubt exist about a

statute's constitutionality, we must resolve that doubt in favor of constitutionality."

"To overcome this strong presumption, the party challenging a statute's constitutionality must demonstrate that the statute is unconstitutional beyond a reasonable doubt."

"The presumption of statutory constitutionality is the product of our recognition that the judiciary is not positioned to make the economic, social, and political decisions that fall within the province of the legislature." "The duty of the court is only to determine if the legislation clearly and beyond doubt offends a provision of the state constitution that specifically circumscribes legislative action."

Also, in Aicher versus Wisconsin Patients Fund at Paragraph 56 on Page 128 the supreme court wrote, "Parties seeking to challenge the constitutionality of a statute on equal protection grounds must demonstrate that the statute treats members of a similarly situated classes differently." "Usually, this court with uphold a statute under equal protection principles if we find that a rational basis supports the legislative classification." "We engage in strict scrutiny analysis only when a statute impinges on a 'fundamental right' or creates a classification that 'operates to the peculiar disadvantage of a suspect class.'"

Then, finally in Professional Police Association versus Lightbourn, 243 Wis. 2d at 512 at Pages 619 and 618 in Paragraphs 221 and 222 the supreme court wrote, "When a party seeks to challenge the constitutionality of a statute on equal protection grounds, it must demonstrate that the statute treats members of similarly situated classes differently." "Usually, this court will uphold a statute under an equal protection challenge if we find a rational basis supports the legislative classification."

"Under a rational basis test, the statute is unconstitutional if the legislature applied an irrational or arbitrary classification when it enacted the statute." "But the court must sustain a statute using this analysis unless we find that it is patently arbitrary and bears no relationship to the legitimate government interest." Tomczak, 218 Wis. 2d at 264. "As we have said in Aicher" 'Recognizing the classifications often are imperfect and can produce inequities, our goal is to determine whether a classification scheme rationally advances a legislative objective....In so doing, we are obligated to locate or...construct a rationale that might have influenced the legislative determination.'" Aicher, 237 Wis. 2d at Paragraph 57.

With those cases as background letting the court to proceed, the Wisconsin Supreme Court has indicated in its decision regarding

the first cause of action that the Department of Justice's application of Section 19.357 to the plaintiff, then, a district attorney in Vilas County, Wisconsin was correctly applied. The plaintiff was not an employee within the meaning of Section 19.32(1bg) and Section 19.356(2)(a1) of the Wisconsin Statutes. See Paragraph 5 of Moustakis versus State DOJ, 368 Wis. 2d 677.

When challenging the constitutionality of Section 19.356, the Court believes it is important to look at open records law as a whole. The presumption is that all records created are maintained by a public entity are subject to a right of inspection. If there is a denial or delay in producing such records, the requester has enforcement rights under Section 19.37. In addition, Section 19.35(4)(b) indicates that if an authority denies a written request, in whole or in part, the requester shall receive from the authority a written statement of the reasons for denying the written request.

A small group of individuals that are record subjects have rights under Section 19.356 when a select set of records are involved to seek judicial review so as to restrain such access to the select records by the requester prior to the time the records are released to the requester.

For this limited judicial review, the Department of Justice has complied -- strike

that. The Department of Justice has applied the law as the Department of Justice interpreted the law and the Wisconsin Supreme Court has agreed that a district attorney does not have a right to judicial review for the specific records set forth in Section 19.356(2)(a1).
The first question the Court must decide regarding the third cause of action is whether or not the right to court access and the right to privacy as alleged in the third cause of action are fundamental rights in the context of an alleged equal protection violation.

From a court access standpoint, parties do have access to the court but only if they have a claim that does exist; not everyone may have a claim that can exist in our court system. From a privacy standpoint, people can be employed privately through self employment; be employed privately through an employer other than themselves; be employed by a public entity such as a person working at a county courthouse or a state agency; or employed through an election process either as a local, state or federal elected official.

A person in an elected official, clearly, has less expectation of privacy than others particularly compared to those who choose to be privately employed and those who choose to be publicly employed but not through the election process.

The Wisconsin Supreme Court in the case of In Re: Honorable Charles E. Kading, 70 Wis. 2d 508 at Page 526 wrote, "While public officials, of course, do not waive their constitutional rights, they are nevertheless set apart from other members of society in terms of certain rights, as the law on libel makes clear. One who willingly puts himself forward into the public arena, and accepts publicly conferred benefits after election to public office, is legitimately much more subject to reasonable scrutiny and exposure than a purely private individual."

The Court concludes that the right to court access, the right to privacy, are not fundamental rights and, therefore, the Court must apply the rational basis test to analyze the equal protection challenge by the plaintiff. The rational basis test requires the Court to answer the question, did the legislature apply an irrational or arbitrary classification when it enacted Section 19.356?

The supreme court in Tomczak and Lightbourn indicated that the court must sustain a statute unless it is patently arbitrary and bears no relationship to a legitimate government interest. In the Lightbourn case different groups of public employees, not elected officials, were treated differently; however, the Wisconsin Supreme Court applied the rational basis test and concluded there was not an equal protection violation.

The Wisconsin Supreme Court in reviewing the first cause of action in this case determined the plaintiff as an employee of an authority -- strike that. The Wisconsin Supreme Court in reviewing the first cause of action in this case determined the plaintiff was an employee of an authority but was excluded from the definition of an employee due to the plaintiff holding a public office. Elected officials are a small and unique group of employees; the DA is a subset of this type of employee. The electorate elect, or in other words employ, a public office holder, by choosing to seek such employment status an elected official can expect to be treated differently than other public employees who are not elected or employees in the private sector. Elected officials have a public platform or public access that others do not have.

When enacting this statute, the legislature did not simply limit district attorneys from the applicability of the statute but that all public officers, both state and local, were included. This includes everyone from the elected corner in a county to the elected governor of the state including themselves who were state representatives and state senators at the time and subsequently.

Based upon case law, the Court's analysis and in particular the presumption that all statutes are constitutional and that the plaintiff must prove unconstitutionality beyond

a reasonable doubt, the Court concludes the legislature did not apply an irrational or arbitrary classification when it enacted the statute. A reasonable basis exists to justify the classification. The statute is not arbitrary and does bear relationship to a legitimate government interest.

Based upon the Court's analysis and conclusions of law, the defendant's motion to dismiss the plaintiff's third cause of action is granted.

In conclusion, the Court notes that the public records law in Wisconsin was created with the presumption that all government records are public. The declaration of this policy is set forth in Section 19.31 of the Wisconsin Statutes. Remedies are available when an authority withholds part or all of a record or delays in granting access to all or a part of the record; in addition, when denials are made, the authority must explain the reasons for the denial. To the contrary, the law does not require the authority to explain its decision to release records.

The Court does understand that the result here may seem harsh but the public records law, as we know them, in Wisconsin was passed by the legislature and signed by the governor. It is the Court's responsibility to apply the law to the facts before it in a particular case. If statutory changes are

appropriate, these changes should occur through the legislative process.

In this matter, the plaintiff is the records subject. It is the Court's understanding, the plaintiff has made an open records request for the unredacted records that are subject to this action. If such a request has been made, the plaintiff is now or in that situation, would be the requester of records and the law applicable to a requester may then come in to play if enforcement by the plaintiff is attempted.

In addition, Section 19.70 may be available to the plaintiff for the Department of Justice to correct inaccuracies in the record. I'm not making a decision one way or the other, I'm just saying it may be available to the plaintiff.

Those are the Court's concluding remarks. I'll ask the assistant attorney general to prepare an order indicating that the motion is granted to dismiss and simply can indicated for the reasons set forth on the record.

MS. BENSKY: Will do.

THE COURT: Thank you very much everyone. We'll stand adjourned and have a good day.

MS. BENSKY: Thank you, Judge, you too.

MR. SCHULTZ: Thank you, Judge.

THE COURT: You're welcome. Good-bye.

(Hearing ended at 8:40 a.m.)

STATE OF WISCONSIN)
)
COUNTY OF LINCOLN)

I, Sharon D. Beever, a stenographic machine shorthand reporter, Registered Professional Reporter, employed in Merrill, Wisconsin, do certify that I took in shorthand the foregoing proceedings in a hearing in Circuit Court for Lincoln County at the Courthouse in the City of Merrill, Wisconsin, on the 20th day of December, 2017, with the Honorable Jay R. Tlusty, Circuit Court Judge, presiding, and the foregoing is a true and correct transcript of my shorthand notes and of the whole thereof.

Dated in Merrill, Wisconsin, this 22nd day of March, 2018.

ELECTRONICALLY FILED BY:

_____

SHARON D. BEEVER
Registered Professional Reporter
Lincoln County, Wisconsin

2003 WISCONSIN ACT 47

AN ACT *to renumber and amend* 230.13 (3); *to amend* 19.34 (1), 19.36 (3), 19.36 (7) (a), 59.20 (3) (a), 61.25 (5), 62.09 (11) (f), 230.13 (1) (intro.) and 233.13 (intro.); and *to create* 19.32 (1bg), (1de), (1dm), (2g) and (4), 19.345, 19.356, 19.36 (10) to (12), 196.135, 230.13 (3) (b) and 808.04 (1m) of the statutes; **relating to**: access to public records and granting rule-making authority.

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 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.

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

19.32 **(1bg)** "Employee" means any 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 governmental unit" has the meaning given in s. 19.42 (7u).

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

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

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

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

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

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.]

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

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

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

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

19.356 Notice to record subject; right of action. (1) Except as authorized in this section or as otherwise provided by statute, no authority is required to notify a record subject prior to providing to a requester access to a record

containing information pertaining to that record subject, and no person is entitled to judicial review of the decision of an authority to provide a requester with access to a record.

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

1. 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.

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

3. 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.

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

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

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

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

the results of the proceedings under this subsection and sub. (5).

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

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

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

shall issue a decision within 30 days after those filings are complete.

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

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

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

SECTION 5. 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).

NOTE: See the note to SECTION 7.

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

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

than 5 candidates, "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.]

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

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

pursuant to a collective bargaining agreement under ch. 111:

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

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

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

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

(11) RECORDS OF AN INDIVIDUAL HOLDING A LOCAL PUBLIC OFFICE OR A STATE PUBLIC OFFICE. Unless access is specifically authorized or required

by statute, an authority shall not provide access under s. 19.35 (1) to records, except to an individual to the extent required under s. 103.13, containing information maintained, prepared, or provided by an employer concerning the home address, home electronic mail address, home telephone number, or social security number of an individual who holds a local public office or a state public office, unless the individual authorizes the authority to provide access to such information. This subsection does not apply to the home address of an individual who holds an elective public office or to the home address of an individual who, as a condition of employment, is required to reside in a specified location.

(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 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 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.

SECTION 8 . 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).]

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.

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

61.25 **(5)** To be the custodian of the corporate seal, and to file as required by law and to safely keep all records, books, papers or property belonging to, filed or deposited in the clerk's office, and deliver the same to the clerk's successor when qualified; to permit, subject to subch. II of ch. 19,

any person with proper care to examine and copy any of the same, and to make and certify a copy of any thereof when 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.

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

62.09 **(11)** (f) The clerk shall keep all papers and records in the clerk's office 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.

SECTION 10M. 196.135 of the statutes is created to read:

196.135 Confidential handling of records. (1) DEFINITION. In this section, "record" has the meaning given in s. 19.32 (2).

(2) RULES. The commission shall promulgate rules establishing requirements and procedures for

the confidential handling of records filed with the commission.

(3) NOTICE. If the commission decides to allow public access under s. 19.35 to a record filed with the commission, the commission shall, before allowing access and within 3 working days after making the decision to allow access, serve written notice of that decision by certified mail or personal service on the person who filed the record, if any of the following applies:

(a) The commission granted the record confidential handling status under the rules promulgated under sub. (2).

(b) The person who filed the record requested confidential handling status under the rules promulgated under sub. (2) and the commission has not yet acted on the request.

(c) The commission denied a request for confidential handling under the rules promulgated under sub. (2); the person whose request was denied filed a petition for review of the commission's decision to deny the request; and the petition is pending before a court.

(4) LIMIT ON ACCESS; RIGHT OF ACTION. (a) The commission shall not provide access to a record that is the subject of a notice under sub. (3) within 12 days of the date of service of the notice.

(b) A person who is entitled to a notice under sub. (3) may bring an action for judicial review of a decision by the commission to allow public access under s. 19.35 to a record. Section 19.356 (3) to (8) applies to such an action, except that "record subject" means the person who is entitled to notice under sub. (3), "authority" means the commission, "notice under s. 19.356 (2) (a)" means the notice under sub. (3), and "action commenced under s. 19.356 (4)" means the action under this paragraph.

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

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

NOTE: See the note to SECTION 13.

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

230.13 **(3)** (a) 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.

NOTE: See the note to SECTION 13.

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

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

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.

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

233.13 Closed records. (intro.) Except as provided in ~~s.~~ ss. 19.36 (10) to (12) and 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 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.

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

808.04 **(1m)** An appeal by a record subject under s. 19.356 shall be initiated 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.