

# Personnel Records: procedure, privacy, and pitfalls

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# Who can get what, when

There are many types of records generated incidental to a person's public employment

- Payroll/tax
- Time keeping/Vacation/sick days
- Retirement contribution, deferred comp, charitable contributions
- Medical/FMLA
- Performance evaluations
- Disciplinary documents
- Emails

# Who · what · when · why · how

- Requests for employee records under Wis. Stat. §§ 103.13, 19.35(1)(a), and 19.35(1)(am)
- Statutory limitations and the public policy balancing test
- Wis. Stat. § 19.356(4) actions

## Presentation objective answer these questions

- Freddie and Flossie are both employees of the State Department of Food and Drink (DFD). Flossie reported to DFD human resources that Freddie was accepting money and free beer from alcohol vendors in exchange for permission to sell alcohol at state sponsored gymnastics meets. If true, this behavior would be criminal. DFD investigated Freddie, interviewed several employees, found no evidence of wrongdoing, and closed the investigation.
  - During the investigation of Freddie, a DFD employee reported she believed Flossie was out to get Freddie because Freddie and Flossie recently broke off a relationship and Flossie learned from one of Freddie's Facebook friends that he was seeing someone else. If true, telling this lie would not be criminal. DFD initiated an investigation into whether Flossie was telling malicious lies about a co-worker, in violation of employee work rules. This investigation has not yet concluded.
1. An attorney submits a generic request to see any and all records pertaining to the allegation against Freddie, along with an authorization for release of employment records signed by Freddie. You are the records custodian. How should you go about analyzing this request?
  2. Flossie asks to see the contents of Freddie's personnel file pertaining to the investigation against Freddie. How should you go about analyzing this request?
  3. Flossie asks to see all records related to the investigation against her, which has not concluded as of the date of her request. How should you go about analyzing this request?
  4. The state newspaper requests to see all documents related to any investigation or discipline of Freddie or Flossie. How should you go about analyzing this request?

## **Wis. Stat. § 103.13**

### **Records open to employee**

- Pertains only to records requested by an employee or a former employee
- An employee may authorize a representative to obtain records on his/her behalf –see (3), but also, in practice, attorneys may make requests under § 103.13 on behalf of employees.
- Applies to public and private employers

## Wis. Stat. § 103.13

## Records open to employee

- Entitled to "*personnel* documents which are used or which have been used in determining that the employee's qualifications for employment, promotion, transfer, additional compensation, termination or other disciplinary action, and medical records, except as provided in subs. (5) and (6)."
- NOTE: Employees are entitled to a narrow category of records -- § 103.13 does not entitle an employee special access to any public record – special access under § 103.13 only applies to the types of records listed, subject to the exceptions
- Unlike access to records under the PRL, there is no presumption of openness

## Wis. Stat. § 103.13 EXCEPTIONS

## Records open to employee

- **Exceptions: The *right* to inspect records does not apply to:**
  - Records relating to the investigation of possible criminal offenses committed by that employee.
    - NOTE: the statute does not include "possible misconduct"
  - Letters of reference
  - Test documents (except scores)
  - Materials used by the employer for staff management planning, including judgments or recommendations concerning future salary increases and other wage treatments, management bonus plans, promotions and job assignments or other comments or ratings used for the employer's planning purposes.
    - NOTE: Performance evaluations are NOT exempt under this section

**Wis. Stat. § 103.13**  
**EXCEPTIONS**

**Records open to employee**

- Information of a personal nature about a person **other than the employee** if disclosure of the information would constitute a clearly unwarranted invasion of the other person's privacy
  - When read with § 19.36(10), the employer has no discretion whether to allow access to information regarding another employee—access must be denied IF denial is mandated the PRL

## **Wis. Stat. § 103.13 Records open to employee EXCEPTIONS**

- An employer who does not maintain any personnel records is exempted from this section. Sec. 103.13 does not impose an affirmative duty upon an employer to maintain personnel records
  - An employer may not assert it does not maintain "personnel files" and therefore be exempted from § 103.13

**Wis. Stat. § 103.13**  
**EXCEPTIONS**

**Records open to employee**

- Records relevant to any other pending claim between the employer and the employee which may be discovered in a judicial proceeding
  - There is no counterpart in the PRL. Records otherwise available under § 19.35(1)(a) or (am) may not be withheld because of pending litigation.
  - But see § 19.35(1)(am)1 (applies to narrow category of records)

## Wis. Stat. § 103.13 EXCEPTIONS

## Records open to employee

- There is no private right to action to enforce - § 103.13(8)
  - DWD may investigate violations and hand over to DA or AG to enforce, see § 103.005(5); \$10-\$100 per-day forfeiture
  - Employee who is refused records that are not available under PRL cannot sue public employer for violation of § 103.13.
  - § 103.13(8) does not protect a public entity from suit by an employee denied records available under Ch. 19.
  - Don't try to be tricky!

## §19.35(1)(a) Right to inspection

- Anyone may request
- Subject to statutory limitations, including §19.36(10)
- If there are no statutory or common law exceptions the records custodian conducts a public policy balancing test to determine whether to release the employment records.

§19.35(1)(am) Right to inspection by individual  
(records subject)

- When a person makes a public records request for records containing personally identifiable information under (am) the person is entitled to inspect the records unless the surrounding factual circumstances "reasonably fall" within one or more of the statutory exceptions. *Hempel v. City of Baraboo*, 2005 WI 120, ¶ 3, 284 Wis. 2d 162, 699 N.W.2d 551.
- Requests under (am) are not subject to any balancing test; the legislature has done the balancing test
  - Because records must "reasonably fall" within one or more of the statutory exceptions, the records custodian is not without some discretion

§19.35(1)(am)  
EXCEPTIONS

Right to inspection by individual  
– does not apply to:

- record containing personally identifiable information
- collected or maintained
- connection with a complaint, investigation or other circumstances *that may lead* to an enforcement action, administrative proceeding, arbitration proceeding or court proceeding
- collected or maintained in connection with such an action or proceeding.

§19.35(1)(am)  
EXCEPTIONS

Right to inspection by individual

- Any record containing personally identifiable information that, if disclosed, would do any of the following:
  - Endanger someone's life or safety
  - Identify a confidential informant
  - Endanger security of a correctional institution or certain other correctional and mental health facilities
  - Compromise the rehabilitation of someone in a facility listed above.

§19.35(1)(am)  
EXCEPTIONS

Right to inspection by individual

- Any record or series of records that cannot be disclosed without giving the name, address, etc of another person.

## §19.35(1)(am) EXCEPTIONS

## Right to inspection by individual

- In the employment context, (am)1 relating to investigatory records will most often apply, unless the employer is the DOC or DHS and the employee works in a correctional setting, then (am)2 could apply.
- The Wisconsin Supreme Court held that the exceptions to paragraph (am) should **not** be narrowly construed. *Hempel*, ¶ 56.
- A requester who does not qualify for access to records under paragraph (am) will always have the right to seek records under (1)(a), as well as civil and criminal discovery statutes (if involved in such litigation). *Hempel*, ¶ 56.

§19.35(1)(am)

## Right to inspection by individual

When an authority receives a records request for personally identifiable information, the statutory procedure in Wis. Stat. § 19.35(4)(c) is to:

- ✓ first determine whether the person is entitled to the records under (1)(a), and if not,
- ✓ then determine whether the person is entitled to the records under (1)(am). Wis. Stat. § 19.35(4)(c)

However, in *Hempel*, the court first analyzed whether the records should be disclosed under (1)(am); does not apply to *de novo* review by the circuit court

## Wis. Stat. § 19.36(10) Limitations upon access

- Applies to public records requests made under § 19.35(1)(a) *and* (am).
- Records custodian *shall not* provide access under § 19.35(1) to records except to an employee to the extent required under § 103.13
  - Exceptions to § 103.13 are not required to be disclosed, even though the custodian of those personnel records *may* provide excepted records to the employee.

## Employee personnel records may not be disclosed under the following circumstances:

- **(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.

# Wis. Stat. § 19.36(10)(d)

- Ambiguous
- “Staff management planning”
  - *Lakeland Times*, No 14-AP-95
    - *Job performance*
    - *Reputation of employee*
    - *Does not protect “evaluative judgments” over “factual information”*
    - *Records exempt from disclosure by statute are not subject to balancing test even if there are public policy reasons for release.*

# § 103.13 *vs.* § 19.35(1)

- Employee/former employee
  - Applies to public and private employers
  - Narrow category of records
  - Records can be withheld if there is pending litigation in which the records may be disclosed (blanket exception)
  - No presumption of openness
  - No private right of action
  - Employer may require written request
  - Allow inspection within 7 days
  - No written response or denial letter
- Anyone can request
  - Applies to public entities and quasi-governmental entities
  - Any records, with exceptions
  - Generally cannot withhold records because requestor may request them in pending litigation
  - Presumption of openness
  - Private right of action
  - Cannot require written request
  - Respond as soon as practicable and without delay
  - Written explanation of denial

## § 103.13(6) *vs.* § 19.36(10)

- Exceptions generally limit the right of access but do not prohibit disclosure, except subject to s. 19.36(10)
  - Exempts records of investigations of possible criminal offenses but not employee misconduct (does not say “current”)
  - Performance evaluations not exempt
  - Not entitled to records about another employee
- Prohibits disclosure unless disclosure is required by s. 103.13
  - Exempts records of current investigation of possible criminal offense or employee misconduct
  - Employee performance evaluations exempt
  - Prohibits disclosure of “staff management” type records relating to other employees
  - Shall not provide personal information

# Employee records – balancing test

There is no blanket exception to employee records under the PRL.

But categories and types of employee information exempt

- Wis. Stat. §19.36 (7)
- Wis. Stat. §19.36 (10)

# Balancing test -- What to consider

- *State ex rel. Ardell v. Milwaukee Bd. of Sch. Dirs*, 2014 WI App 66, 354 Wis. 2d 471, 849 N.W.2d 894
  - *Public safety*
  - *Is requester aligned with general public*
  - *PRL not a vehicle for harassment and intimidation*
- *Jensen v. Sch. Dist. of Rhineland*, 2002 WI App 78, 251 Wis. 2d 676, 642 N.W.2d 638
  - *Alleged procedural inaccuracies in creating a record not a proper consideration*
- *Seifert v. Sch. Dist. of Sheboygan Falls*, 2007 WI App 207, 305 Wis. 2d 582, 740 N.W.2d 177
  - *Custodian not required to examine request in a vacuum*

## Balancing test – disciplinary records

- Open / closed investigation/ability to investigate
- Investigation referred to law enforcement
- Confidential interviews
- Impact on effective management
- Implication of public resources
- Implication of public trust/misuse of office
- Safety concerns
- Privacy and reputation of public employees

# Balancing test – disciplinary records

- **Privacy and reputation of public employees**
  - Scarlet letter on the Internet / Cyber-harassment
  - Harassment of co-workers
  - Safety issues
  - Untruthful information (but see *Lakeland Times v. Lakeland and Union High Sch.*, No. 14-AP-95, 2014 WL 4548127 (Ct. App., Sept. 16, 2014) (accuracy of record is irrelevant under §19.36(10)(d))
  - Safety

## *Woznicki notice* / § 19.356

- Nobody entitled to notification or judicial review except as provided in subsection 2
- Pertains to “records subjects”
  - § 19.32(2g) "Record subject" means an individual about whom personally identifiable information is contained in a record.
    - §19.62(5): "Personally identifiable information" means information that can be associated with a particular individual through one or more identifiers or other information or circumstances.

## *Woznicki notice* / § 19.356

- Relating to an employee; created or kept; result of investigation in to disciplinary matter or other employment related violation
- Subpoena/search warrant
- Record prepared by an employer other than the authority

## *Woznicki notice* / § 19.356

- Strict timelines in pre-filing and post-filing
- No shortened time to answer
  - Creates confusion and problems due to strict court deadlines
- Most documents reviewed *in camera*, but that is not a requirement
- *De novo* review
- § 19.356 is alive and well

# Law school exam question:

- Freddie and Flossie are both employees of the State Department of Food and Drink (DFD). Flossie reported to DFD human resources that Freddie was accepting money and free beer from alcohol vendors in exchange for permission to sell alcohol at state sponsored gymnastics meets. If true, this behavior would be criminal. DFD investigated Freddie, interviewed several employees, found no evidence of wrongdoing, and closed the investigation.
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# Questions?

