Public Access to Law Enforcement Records in Wisconsin

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PUBLIC ACCESS TO LAW ENFORCEMENT
RECORDS IN WISCONSIN

I. INTRODUCTION

More than two years have passed since the new Wisconsin public records law\(^1\) went into effect, establishing a presumption of complete public access to records regarding the affairs of all units of state and local government. Its declaration of policy states that "all persons are entitled to the greatest possible information regarding the affairs of government"\(^2\) and that only in an "exceptional case"\(^3\) may access to records be denied. Almost every form of information created or kept by a government authority is a "record."\(^4\) The law is intended to provide citizens with a greater opportunity to monitor the activities of their government.\(^5\)

Since its inception, the new public records law has created confusion for the legal custodians of law enforcement records.\(^6\) These custodians are now suddenly faced with requests from the public and the press to disclose records that have not traditionally been disseminated to the public. May a member of the public walk into a police station and demand to see the investigative records of a given incident? Must the custodian disclose daily arrest lists and records of persons committed to jail to anyone who asks? These questions involve complicated competing interests of which most records custodians have not received sufficient knowledge and training to address. To compound the problem, the Wisconsin Supreme Court has provided very few guidelines in this area.

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3. Id.
4. See id. § 19.32(2).
5. Memo from Lynn Adelman, Wisconsin State Senator, to Wisconsin legislature (why public records law should be supported).
6. For purposes of this comment, the term law enforcement records means any record kept by any municipal, county or state law enforcement agency. A law enforcement agency is a governmental unit organized for the purpose of preventing and detecting crime, and enforcing state laws and municipal ordinances. See, e.g., Wis. Stat. § 16.969(2)(1) (1983-84). The term "record" is defined by Wis. Stat. § 19.32(2) (1981-82) to include almost all forms of information kept.
Most of the existing analysis is found in attorney general opinions.\(^7\)

This comment will provide records custodians, as well as the public, with a practical, step-by-step analytical framework to use in dealing with a request for access to law enforcement records pursuant to the Wisconsin public records law. This framework will apply only to requests for law enforcement records kept by municipal, county and state police authorities. While parallels might be drawn, this comment will not deal with requests made to the judicial system for access to court files or prosecutor's files containing law enforcement records.\(^8\)

II. Statutes Closing Law Enforcement Records

Because the public records law provides that "[a]ny record which is specifically exempted from disclosure by state or federal law"\(^9\) does not have to be disclosed, the first inquiry in a request for public access to a law enforcement record is whether there are any statutes which specifically require nondisclosure.

A. Wisconsin Statute Section 19.36(2)

The only statute in the public records law itself limiting access to law enforcement records is Wisconsin Statutes section 19.36(2). It requires that, except where otherwise provided by law, records of "investigative information obtained for law enforcement purposes"\(^10\) are exempt from disclosure if so required by federal law or as a condition of federal aid to the state.\(^11\)

The Justice System Improvement Act of 1979\(^12\) provides records guidelines for municipal, county and state police authorities receiving federal aid from the Law Enforcement Assistance Administration, National Institute of Justice and the Bureau of Justice Statistics. The Act indicates that the

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7. There is primarily one case dealing with law enforcement records. *See* Newspapers, Inc. v. Breier, 89 Wis. 2d 417, 279 N.W.2d 179 (1979).
10. *Id.* § 19.36(2).
11. *Id.*
security and privacy of "criminal history information" must be adequately provided and used only for law enforcement purposes. Accordingly, Wisconsin law enforcement records custodians probably do not have to disclose records from automated or manual information systems which are financed through these federal programs.

The potentially large exception to the public records law which section 19.36(2) of the Wisconsin Statutes appears to provide may not be as broad as it seems. The Wisconsin Attorney General has interpreted the phrase "except as otherwise provided by law" in the statute as meaning that records are not exempt under section 19.36(2) if another state law specifically requires disclosure. This interpretation pertains primarily to records kept in sheriffs' departments and will be discussed in section III.

B. Juvenile Records

Public access to law enforcement records of juveniles is restricted by Wisconsin Statutes section 48.396(1). It provides that police records of persons eighteen years of age and younger "shall not be open to inspection or their contents disclosed except by order of the court."

13. The term "criminal history information" is defined as records and related data, contained in an automated or manual criminal justice information system, compiled by law enforcement agencies for the purpose of identifying criminal offenders and alleged offenders and maintaining as to such persons records of arrests, the nature and disposition of criminal charges, sentencing, confinement, rehabilitation, and release.

Id. § 3791 (9).
14. Id. § 3789g(b).
15. Letter from Bronson LaFollette, Wisconsin Attorney General, to attorney George Schmus (Dec. 27, 1982).
16. Wis. STAT. § 48.396(1) (1983-84). This statute does not apply to: representatives of newspapers or other reporters of news who wish to obtain information for the purpose of reporting news without revealing the identity of the child involved or to the confidential exchange of information between the police and officials of the school attended by the child or other law enforcement or social welfare agencies or to children 16 or older who are transferred to the criminal courts.

Id.
The supreme court has indicated that juvenile records are discoverable only in limited circumstances. While *State ex rel. Herget v. Waukesha County Circuit Court* deals with a request for court ordered discovery of police records in a civil case, the court articulated principles which could be helpful in future mandamus actions for access to juvenile police records. The court in *Herget* indicated that the interests of the juvenile must be given paramount consideration, requiring protection of the confidentiality of records in most cases. The confidentiality of police records is essential to rehabilitation of the juvenile, because it encourages the family to provide information and reduces the stigma attached to the juvenile from the proceedings. While the press, the child's attorney and the guardian ad litem have access to the police records, the considerations set forth in *Herget* indicate a custodian would be justified in denying access to a member of the public under section 48.396(1).

**C. Accident Reports**

Written automobile accident reports to county and municipal authorities are for the confidential use of those authorities. These include reports made by the operator of the vehicle, the occupant and the owner. The custodian may disclose "the identity of a person involved in an accident when such identity is not otherwise known or when such person denies his [or her] presence at such accident." In addition, the attorney general has determined that interdepartmental reports prepared by a sheriff's or police department in the investigation of an accident are not entitled to confidential status under the statute.
D. Search Warrants

A custodian will usually be justified in denying a public request to examine a search warrant in the hands of any law enforcement authority before the warrant's execution. Wisconsin Statute section 968.21 indicates that a search warrant must be issued "with all practicable secrecy, and the complaint, affidavit or testimony upon which it is based shall not be filed with the clerk or made public in any way until the search warrant is executed." If the law provides for secrecy of the documents upon which a search warrant is granted, it follows that a custodian is justified in denying access to the actual warrant. There is no comparable Wisconsin statute for arrest warrants, and thus their availability to the public must be evaluated in terms of the balancing test explained in section IV.

E. Disclosure of Information Gained Through Electronic Surveillance

Wisconsin Statute section 968.29 indicates that the public does not have access to records of the contents of wire and oral communications intercepted by law enforcement officers. A law enforcement officer may disclose such information only to another law enforcement officer, or while giving testimony under oath in court. The statute only covers records of the contents of wire and oral communications, and leaves open the question of whether a member of the public has access to a record indicating he or she is under surveillance in the first instance. Again, the custodian must evaluate a request of this nature by applying the balancing test set forth in section IV.

F. Polygraph Examinations

When an individual is given a polygraph examination, voice stress analysis, psychological stress evaluator, "or any other similar test purporting to test honesty," the custodian

27. Id. § 968.29(1).
28. Id. § 968.29(3).
may not disclose a record indicating a test was given or the results of the test without the prior written and informed consent of the tested subject. This rule is strengthened further by Wisconsin Statute section 905.065, which grants a privilege to any person to refuse to disclose, and to prevent anyone else from disclosing, "any oral or written communications during or any results of an examination using an honesty testing device in which the person was the test subject."

III. STATUTES OPENING LAW ENFORCEMENT RECORDS

Just as the custodian's first inquiry is whether there is a specific statute closing records to public access, the next step in the analysis of a records request is whether there are any statutes which specifically open records to public view. For purposes of law enforcement records, there is one statute which mandates the disclosure of records, and it pertains only to sheriffs.

Wisconsin Statutes section 59.14 purports to open the records of all county officers, including the sheriff, to public inspection. It states: "With proper care, the officers shall open to examination of any person all books and papers required to be kept in his or her office and permit any person so

30. Id.
31. WIS. STAT. § 905.065(2) (1983-84). There are other statutes, while not falling within the scope of this comment, which close certain types of law enforcement records to the public.

Evidence, information and the analysis of evidence obtained from law enforcement officers by the state crime lab is privileged and not available to any persons other than the law enforcement officers. See WIS. STAT. § 165.79 (1983-84).

Records of arson investigations can, within the discretion of the state fire marshall, be withheld from public view. See WIS. STAT. § 165.55(8) (1983-84). Similarly, information furnished by the insurer of a dwelling shall be held in confidence by the state fire marshall. See id.

Presentence investigation reports are confidential and are not available to the public except upon specific authorization of the court. See WIS. STAT. ANN. § 972.15(4) (1983-84). The comment to this section indicates that it is consistent with A.B.A. Sentencing Alternatives and Procedural Standards § 4.3, which states that presentence reports should not be public records.

Any record of a John Doe proceeding shall not be made available to the public. See WIS. STAT. § 968.26 (1983-84); State ex rel. Distenfeld v. Neelen, 255 Wis. 214, 218, 38 N.W.2d 703, 704 (1949). The policy underlying a John Doe proceeding is to promote the effectiveness of investigation by preventing the procedure from becoming public knowledge. See State v. O'Connor, 77 Wis. 2d 261, 281, 252 N.W.2d 671, 679 (1977).

examining to take notes and copies of such books, records, papers or minutes therefrom. . . ." The right to inspect and copy records is not limited to those having some particular interest in the record sought to be inspected or copied. At first glance, it would appear this statute opens almost all the records of the sheriff to public inspection. However, there are several limitations that might justify denial of access in certain situations.

In *State ex rel. Bilder v. Delevan Township*, the supreme court indicated that section 59.14, "reflects a basic tenet of the democratic system that the people have the right to know about operations of their government . . . and that where public records are involved the denial of public examination is contrary to the public policy and the public interest." However, the right to public inspection pursuant to this statute is not absolute and gives way in at least two situations. First, documents can be closed to public examination if there is another statute authorizing the nondisclosure of otherwise public records. "Such a clear public policy pronouncement takes precedence over section 59.14." Thus, the custodian of sheriff's records is justified in denying access to any records covered by one of the statutes set forth in section II. Second, disclosure of a record pursuant to section 59.14(1) must yield if it would infringe upon a constitutional right.

There is a third possible limitation which might serve to restrict access to sheriff's records. The attorney general has interpreted the phrase "required to be kept in his or her office" as meaning records "required by law" to be kept in the sheriff's office, rather than required by office policy or tradi-

33. *Id.*
35. 112 Wis. 2d 539, 334 N.W.2d 252 (1983).
36. *Id.* at 553, 334 N.W.2d at 260.
37. *Id.* at 554, 334 N.W.2d at 260.
38. *Id.*
39. *Id.*
40. *Id.* at 555, 334 N.W.2d. at 260. An individual's constitutional right to privacy in the disclosure of records is an emerging issue and might serve to preclude access to records. For a discussion of the right to privacy as it relates to the disclosure of records, see *infra* notes 135-46 and accompanying text.
Under this interpretation, section 59.14(1) provides a clear right of public inspection only to books, records, papers and minutes specifically required by statute to be kept in the sheriff's office. For example, the sheriff must keep a register of prisoners committed to county jail, a sheriff's docket, daily jail records and cash books. These records must be made available to the public pursuant to section 59.14(1). Records such as a telephone log of incoming calls for assistance and a radio log of dispatches are not required by law to be kept, and at least in the opinion of the attorney general, are not required to be disclosed under the statute. However, such records still might be subject to disclosure pursuant to the balancing test.

Section 59.14(1) requires the sheriff to proceed “with proper care” in disclosing records to the public. Although this language has yet to be interpreted by a Wisconsin appellate court, it might suggest a fourth limitation in access to sheriff's records. Because the sheriff must proceed “with proper care,” an argument can be made that the custodian should take into account the possible damage to an investigation or an individual's reputation that disclosure of a record might cause. Section 59.14(1) would then, in effect, be subject to the balancing test, rather than mandating automatic disclosure.

A request to the sheriff for a record that is generated from a federally funded information system brings up the potentially confusing interplay between section 19.36(2), discussed in section IIA, and section 59.14(1). Assume that a member of the public makes a request for a warrant list generated from a computer in the sheriff's office that was purchased with funds

42. Id. at 13.
44. Id. § 59.23(8).
45. Id.
46. Id.
48. See infra notes 57-145 and accompanying text.
50. See infra notes 57-146 and accompanying text.
from the Law Enforcement Assistance Administration.\textsuperscript{51} Under section 19.36(2), this is "investigative law enforcement information" which must be kept confidential by federal law,\textsuperscript{52} and thus appears to be unavailable to the public. However, under the public records law, the custodian should consider the attorney general's determination that section 19.36(2) does not protect records from disclosure if there is a specific statute authorizing public access.\textsuperscript{53} This brings up section 59.14(1), which opens records to public inspection that federal law would otherwise close.\textsuperscript{54} The custodian then would apply the two \textit{Bilder} limitations\textsuperscript{55} and possibly the balancing test.\textsuperscript{56} to determine if nondisclosure is still warranted.

IV. THE BALANCING TEST

Even if there are no statutes that specifically require the disclosure or nondisclosure of a law enforcement record, the substantive common law principles construing the right to inspect records remain in effect.\textsuperscript{57} This refers primarily to a balancing test the supreme court has set forth whereby "the custodian of the records must weigh the competing interests involved and determine whether permitting inspection would result in harm to the public interest which outweighs the legislative policy recognizing the public interest in allowing inspection."\textsuperscript{58}

The custodian must give specific public policy reasons for the denial of access to records under this test.\textsuperscript{59} Should the

\textsuperscript{51} Such lists are presently in use in various Wisconsin counties. They contain the name, address, description and charges of all persons wanted by the courts. These lists are used for a quick determination of whether an individual who has been observed or contacted by the sheriff should be arrested, or advised of the existence of the warrant. See letter from Robert Mawdsley, Waukesha County Corporation Counsel, to Waukesha County Sheriff Raymond Klink (Nov. 28, 1983).

\textsuperscript{52} See 42 U.S.C. § 3789g(b) (1983).


\textsuperscript{55} See supra notes 37-40 and accompanying text.

\textsuperscript{56} See infra notes 58-146 and accompanying text.


\textsuperscript{58} Newspapers, Inc., 89 Wis. 2d at 427, 279 N.W.2d at 184; Beckon v. Emery, 36 Wis. 2d 510, 518, 153 N.W.2d 501, 503 (1967); State \textit{ex rel.} Youmans v. Owens, 28 Wis. 2d 672, 682, 137 N.W.2d 470, 475 (1965).

\textsuperscript{59} Beckon, 36 Wis. 2d at 517, 153 N.W.2d at 504.
requester bring a mandamus action, these reasons are then subject to review by the court.\textsuperscript{60} The failure to give specific reasons for denying access will automatically result in the court granting access to the requested records.\textsuperscript{61}

Most custodians have not been provided with sufficient information to fairly apply the balancing test to a records request. The remainder of the comment will present the various factors a custodian should take into account in determining whether granting a request for access to law enforcement records will result in a harm to public interest that outweighs the public policy favoring inspection.

\section*{A. The Public Interest in Access to Records}

The strong presumption favoring access to public records created by the public records law\textsuperscript{62} must be the first consideration of any records custodian applying the balancing test. A request for a record is to be denied under only exceptional circumstances.\textsuperscript{63} The public records law declaration of policy strengthens the side of the balance favoring disclosure. The law states:

\begin{quote}
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.\textsuperscript{64}
\end{quote}

The law was intended to be a means by which citizens could more effectively monitor the activities of government.\textsuperscript{65} The presumption of access should never be ignored or taken lightly

\textsuperscript{60} Newspapers, Inc., 89 Wis. 2d at 427, 279 N.W.2d at 184.

\textsuperscript{61} Id.

\textsuperscript{62} Wis. Stat. § 19.31 (1983-84); Hathaway, 116 Wis. 2d at 392, 342 N.W.2d at 684.

\textsuperscript{63} State ex rel. Youmans, 28 Wis. 2d at 683, 137 N.W.2d at 475 (1965); Hathaway, 116 Wis. 2d at 396, 342 N.W.2d at 686.

\textsuperscript{64} Wis. Stat. § 19.31 (1983-84).

\textsuperscript{65} Memo from Lynn Adelman, Wisconsin State Senator, to Wisconsin legislature (why public records law should be supported).
by custodians. However, the area of law enforcement records presents several public policy considerations that might tip the balance in favor of nondisclosure in some situations. These possible exemptions to disclosure are in derogation of the legislative intent that public records be open, and must be narrowly construed.66

**B. Exemption to Disclosure Based on the Open Meetings Law**

The Wisconsin open meetings law lists nine situations in which the meeting of any government body may be closed to the public.67 The public records law specifically states that these exemptions are indicative of public policy and may be used as a grounds for denying access to a record.68 These exemptions are not absolute and may be used only as a factor to be considered in applying the balancing test.69 Two of these exemptions might be a factor in determining the outcome of a request for law enforcement records.

1. Strategies for Crime Detection and Prevention

Wisconsin Statute section 19.85(1)(d) permits closed government meetings for the purpose of considering strategy for crime detection and prevention.70 If a custodian has good cause to believe that public inspection of law enforcement records relating to the detection and prevention of crime might allow persons to evade arrest or prosecution, the public interest might be on the side of denying access.71 The supreme court has recognized that, in the investigation of pending and proposed criminal charges, there is an overriding public interest in preserving secrecy.72 The police function de-

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66. *Hathaway*, 116 Wis. 2d at 397, 342 N.W.2d at 687.
68. *Id.* § 19.35(1)(a).
72. *Newspapers, Inc.*, 89 Wis. 2d at 438, 279 N.W.2d at 189.
pends to a large extent on the element of surprise. 73 This might be impaired by access to records concerning crime detection and prevention which would expose police strategies to the public. 74

2. Financial, Medical, Social and Personal Histories

Section 19.85(1)(f) authorizes closed government meetings when “[c]onsidering financial, medical, social or personal histories or disciplinary data of specific persons, preliminary consideration of specific personal problems or the investigation of charges against specific persons . . . which, if discussed in public would be likely to have a substantial adverse effect upon the reputation”75 of any such person. Accordingly, the supreme court has stated that there is a public policy interest in protecting the reputations of citizens and that the extent of this harm must be considered by the custodian in the balancing test. 76

C. The Statutory Privileges

The Chapter 905 privileges, which protect certain types of information from disclosure, are factors to be considered in the balancing test. These are not statutes which absolutely close records to public view and preclude use of the balancing test, 77 as do the statutes in section II. For example, the Judicial Council Committee’s Note to the law enforcement records privilege78 recognizes it is not absolute by stating that “[t]he burden is upon the person claiming the privilege to establish in a judicial determination that the public interest out-

73. See letter from Robert Mawdsley, Waukesha County Corporation Counsel, to Waukesha County Sheriff Raymond Klink (Nov. 28, 1983).
74. However, police secrecy does not always aid the police arrest function. For example, the Milwaukee County Sheriff began publishing a list of various persons in the Milwaukee Journal who have outstanding arrest warrants. Almost immediately an anonymous tip from a reader lead to the arrest of a fugitive. See The Milwaukee J., Mar. 14, 1984 at 1, col. 2.
75. Wis. Stat. § 19.85(1)(f) (1983-84). Also note that the judge may issue orders to seal depositions or permit confidential discovery in order to protect a party from embarrassment. See Wis. Stat. § 804.01(3)(a) (1983-84).
76. Newspapers, Inc., 89 Wis. 2d at 430, 279 N.W.2d at 185.
weighs the right of the public to have access to claimed privileged material."79 Also, in Stelloh v. Liban,80 the court analyzed the government privilege to withhold the identity of informers and held the privilege must give way to disclosure in some situations.81 There are three privileges that most likely would affect a request for access to law enforcement records.

1. Law Enforcement Records

The government has "a privilege to refuse to disclose investigatory files, reports and returns for law enforcement purposes, except to the extent available by law, to a person other than the federal government, a state or subdivision thereof."82 However, this privilege carries very little weight in the balancing test. It is qualified by the phrase "to the extent available by law" in order to preserve the supremacy of the public records law.83 In light of the legislature's intent in enacting the public records law, a denial of access to records pursuant to the balancing test based solely on the law enforcement records privilege is incorrect.

2. The Identity of Informers

The government has a privilege to refuse to disclose the identity of a person who has furnished information "relating to or assisting in an investigation of a possible violation of law."84 This rule is designed to encourage citizen participation in law enforcement by protecting the identities of those who supply information to the police.85

There are three situations in which the identity of an informer must be disclosed. First, disclosure is required if it appears necessary in order to secure useful testimony or avoid

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80. 21 Wis. 2d 119, 124 N.W.2d 101 (1963).
81. Id. at 126, 124 N.W.2d at 104.
83. See Judicial Council Committee's Note to Wis. Stat. § 905.09 (1981-82).
the risk of false testimony.  

Second, disclosure is required if it is necessary to a proper disposition of a case, would indicate the innocence of the accused or would lessen the risk of false testimony.  

Third, disclosure is required if the public interest in secrecy is outweighed by the individual's right to prepare a defense.  

The custodian should consider that these exceptions somewhat weaken the privilege when a defendant in a criminal proceeding requests a record of the identity of an informant. The exceptions do not apply to the general public, and in those situations the privilege to conceal the identity of an informant takes on greater weight in the balancing test.

3. Required Reports

Wisconsin Statutes section 905.02 provides that "[a] person, corporation, association, or other organization or entity, either public or private, making a return or report required by law to be made has a privilege to refuse to disclose and to prevent any other person from disclosing the return or report, if provided by law." Because the supreme court has strictly interpreted the statutory privileges, section 905.02 only applies to a situation where another statute specifically permits nondisclosure of a "report required by law to be made." Therefore, section 905.02 merely reiterates what statutes requiring the nondisclosure of records provide for already. Because the existence of one of these statutes precludes use of the balancing test, section 905.02 should not be a factor in the balancing of interests by the custodian.

86. *Stelloh*, 21 Wis. 2d at 125, 126 N.W.2d at 104.

87. *Id.*


89. Wis. Stat. § 905.02 (1983-84).


91. *Id.* at 196, 248 N.W.2d at 437. For example, Wis. Stat. § 346.73(2) (1983-84) provides for the confidentiality of certain accident reports required by law to be made. This interpretation of Wis. Stat. § 905.02 (1983-84) avoids a conflict with Wis. Stat. § 59.14 (1983-84), which requires certain reports to be open to inspection if they are required by law to be made by the sheriff. By determining that section 905.02, Stats., applies only to statutes which specifically close required reports from public view, the conflict apparent on the face of the two statutes is avoided.
D. A Pledge of Confidentiality

The fact that a record was obtained pursuant to a confidentiality pledge is a consideration to be taken into account in applying the balancing test. Various opinions of the attorney general indicate that the inspection of records may be denied where a clear pledge has been made in order to obtain the information, where the pledge was necessary to obtain the information, and where the custodian determines that the harm to the public interest from inspection would outweigh the public interest in access to public records.92 This commonly pertains to information received from police informants under a pledge of confidentiality, and can be used in conjunction with Wisconsin Statute section 905.10 as a strong argument for nondisclosure of an informant’s identity.

If the government has specific statutory authority to require the submission of information in the first instance, the custodian must permit inspection regardless of the fact a pledge of confidentiality has been given.93 For example, Wisconsin law enforcement officials have the statutory authority to require all arrested persons to be fingerprinted and photographed.94 A custodian cannot deny access to these records solely on the basis that a police officer made a pledge to the arrestee that this information would be kept confidential.

E. Law Enforcement Interests

“The public’s right to know has never been interpreted to provide such unlimited access to public records that the state is unable to effectively prosecute and punish criminals and protect society from criminal ravaging.”95 The supreme court has indicated that it will consider in the balancing test the interests of the government in preserving the effectiveness of the police function.96 However, the relative weight given to law enforcement interests varies according to the type of rec-

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94. See Wis. Stat. § 165.83(2) (1983-84); Wis. Stat. § 165.84 (1983-84).
96. See Newspapers, Inc., 89 Wis. 2d at 437, 279 N.W.2d at 188.
ord requested. The court in Newspapers, Inc. v. Breier\(^97\) made it clear that records relating to the police investigatory function invoke entirely different considerations than records generated pursuant to an arrest.\(^98\)

1. Police Investigatory Records

It is apparent that the interest in preserving the secrecy of investigatory records is to receive substantial weight in the balancing test. The Breier court acknowledged that there is an overriding public interest in preserving the secrecy of police investigations into pending and proposed criminal charges.\(^99\) This does not expressly sanction the nondisclosure of investigation files, but suggests that "such a position is not patently indefensible and may be entirely appropriate."\(^100\) And while there are no statutes which specifically close police investigative files to the public, a parallel can be drawn to section 19.85(1)(d), which permits the government to close any meetings in which strategy for crime detection and prevention is considered.\(^101\)

The Wisconsin Attorney General has consistently taken the position that investigative records of crime generally can be kept confidential.\(^102\) "The pendency of criminal prosecution or the investigation of incidents which might result in prosecution would in most cases justify denial of inspection."\(^103\) However, once the investigation is completed, there may no longer be sufficient reasons for keeping those records confidential.\(^104\)

There are a number of reasons why the public interest might favor nondisclosure of investigative records. The information requested might identify a complainant or informant, possibly putting them in danger and thereby hindering citizen

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97. 89 Wis. 2d 417, 279 N.W.2d 179 (1979).
98. Newspapers, Inc., 89 Wis. 2d at 438, 279 N.W.2d at 189.
participation in law enforcement. The information requested might expose law enforcement strategies, thus taking away the "element of surprise" often relied upon by the police. Access to investigative records might promote the flight of those under investigation or cause them to obstruct their identities. The information requested also might expose the identity of an undercover agent involved in an investigation.

There is possibly one exception to the general rule that the secrecy of investigative law enforcement records is entitled to substantial weight in the balancing test. Allowing public access to records of outstanding arrest warrants would probably not impair the police function in any significant way. In fact, it may lead to citizen information as to the location of wanted persons. It also might cause persons who otherwise do not know they are wanted to turn themselves in. Also, many arrest warrants are capiases or bench warrants issued in open court. The process of obtaining the warrant is a public one and there is no legitimate reason for thereafter concealing the record of its issuance.

2. Arrest Records

Once an arrest is made by the police, the supreme court has strongly suggested that all records produced pursuant to the arrest, and thereafter, should be available to the public. At this point the public interest in the secrecy of law enforcement records diminishes and the public interest favors disclosure of arrest records.

105. See, e.g., letter from attorney Stephen Hayes to Bronson LaFollette, Wisconsin Attorney General (voicing concerns about impact of public records law on law enforcement records).
106. See, e.g., letter from Robert Mawdsley, Waukesha County Corporation Counsel to Waukesha County Sheriff Raymond Klink (Nov. 23, 1983)(opinion on availability of certain law enforcement records under public records law).
107. Id.
109. Letter from Robert Mawdsley, Waukesha County Corporation Counsel, to Waukesha County Sheriff Raymond Klink (Nov. 23, 1983).
110. See Newspapers, Inc., 89 Wis. 2d at 438, 279 N.W.2d at 189.
111. Id. at 435-36, 279 N.W.2d at 188. See also 73 Op. Att'y Gen. 10-84 (Feb. 17, 1984).
An arrest represents the power of the state to deprive a person of his or her liberty. It is a completed, official act of the executive branch of government, an "awesome weapon" that can be abused.\textsuperscript{112} Curbing the potential for abuse is possible only if the public is allowed to oversee the arrest function and learn how that power is exercised.\textsuperscript{113} The \textit{Breier} court went as far as to say that the right of the public to know why an individual is in custody and what he or she is charged with is vital to any system of ordered liberty.\textsuperscript{114}

Accordingly, the court specifically held that in all cases a "police blotter" must be made available to the public.\textsuperscript{115} A blotter is a police record made at the time of booking which contains a chronological listing of the names of persons arrested and the charges.\textsuperscript{116} The court declined to rule on whether a "rap sheet" must be made available to the public.\textsuperscript{117} This is a record kept by the police showing all the arrests and police contacts of a given individual.\textsuperscript{118} The language in \textit{Breier} strongly suggests that rap sheets should also be open to public inspection.

\section*{F. Individual Reputation Interests and the Right to Privacy}

Undoubtedly, the release of some types of law enforcement records to the public carries with it the potential for damage to the reputation of those who are the subject of the record. For example, opportunities for professional licensing,\textsuperscript{119} education\textsuperscript{120} and employment\textsuperscript{121} may be restricted or nonexistent

\begin{itemize}
\item \textsuperscript{112} \textit{Newspaper, Inc.}, 89 Wis. 2d at 436, 279 N.W.2d at 188.
\item \textsuperscript{113} \textit{Id.} at 437, 279 N.W.2d at 188.
\item \textsuperscript{114} \textit{Id.} at 438, 279 N.W.2d at 189.
\item \textsuperscript{115} \textit{Id.} at 440, 279 N.W.2d at 190.
\item \textsuperscript{116} For an example of a police blotter, see Appellant Brief at Exhibit B, Newspapers, Inc. v. Breier, 89 Wis. 2d 417, 279 N.W.2d 179 (1979).
\item \textsuperscript{117} \textit{Newspapers, Inc.}, 89 Wis. 2d at 424, 279 N.W.2d at 182.
\item \textsuperscript{118} \textit{Id.} at 424, 279 N.W.2d at 182-83.
\item \textsuperscript{119} A record that a person was investigated by the police or was arrested could be fatal when measured against the vague standards of most state licensings boards. Comment, \textit{Expungement and Sealing of Arrest and Conviction Records: The New Jersey Response}, 5 SETON HALL 864, 867-68 (1974).
\item \textsuperscript{120} See \textit{Menard v. Mitchell}, 430 F.2d 486, 493-94 (D.C. Cir. 1970).
\item \textsuperscript{121} The dissemination of arrest records has an "enormous influence" on a person's job opportunities. Morrow v. District of Columbia, 417 F.2d 728, 742 (D.C. Cir. 1969). For example, a survey of New York employment agencies indicated that 75\% refused to refer an applicant with an arrest record. Comment, \textit{Removing the Stigma of Arrest: The
to those with an arrest record. The problem is compounded by the fact that some arrested persons are not subsequently charged, or the charge is reduced, or they are acquitted at trial. Unfortunately, the common public perception is that an arrest is tantamount to guilt.\textsuperscript{122}

On its face, the balancing test does not appear to recognize individual reputational interests. The custodian must determine if permitting inspection would result in harm to the public, not individual, interest which outweighs the legislative policy favoring inspection.\textsuperscript{123} However, the court has been willing to recognize individual reputational interests in applying the balancing test to a records request.\textsuperscript{124} The court has justified this by asserting that section 19.35(1)(f), which permits the government to close a meeting to the public if the discussion could damage an individual's reputation,\textsuperscript{125} "carries over to the field of inspection of public records and documents."\textsuperscript{126} Thus, the court will consider the reputation of the person involved, but only in light of the public policy favoring inspection.\textsuperscript{127}

As with the law enforcement interests involved, the weight individual reputational interests carry in the balancing test varies with the type of record being requested. The Breier court characterized the individual reputational interests in the dissemination of arrest records as "amorphous" and "ill-defined"\textsuperscript{128} when balanced against the public policy favoring inspection. This view is understandable in light of the court's position that the public must at all times be allowed to moni-

\textsuperscript{122} Morrow, 417 F.2d at 748 (Tamm, J., separate opinion).
\textsuperscript{123} See Newspapers, Inc., 89 Wis. 2d at 429, 279 N.W.2d at 185.
\textsuperscript{124} Id. at 429, 279 N.W.2d at 185.
\textsuperscript{125} Wis. Stat. § 19.35(1)(f) (1983-84).
\textsuperscript{126} State ex rel. Youmans, 28 Wis. 2d at 685, 137 N.W.2d at 476.
\textsuperscript{127} Newspaper, Inc., 89 Wis. 2d at 437, 279 N.W.2d at 189.
\textsuperscript{128} Id. at 440, 279 N.W.2d at 190.
tor the "completed official act" of arrest in order to prevent its abuse.\textsuperscript{130}

Prior to an arrest, individual reputational interests take on greater importance in a request for access to investigatory records. The attorney general has indicated that, while an investigation is in process, private reputational interests will outweigh the public interest in access to records.\textsuperscript{131} The investigative stage is a tentative one which may or may not result in charges being brought against the individual. However, records indicating that a person is under investigation might have a substantial impact on his or her reputation.\textsuperscript{132} Therefore, both the Breier court\textsuperscript{133} and the attorney general\textsuperscript{134} have shown a sensitivity to persons under investigation and indicate it might be proper to keep investigative files confidential until an arrest is made.

Despite the uncertain status of an individual's right to privacy as it relates to records, individual reputation is a factor to be considered in the balancing test. The right to privacy first took on a limited constitutional dimension in \textit{Griswold v. Connecticut},\textsuperscript{135} where the United States Supreme Court found that it emanated from the first, fourth, fifth and ninth amendments.\textsuperscript{136} In \textit{Whalen v. Roe},\textsuperscript{137} the Court expanded the definition of the right to privacy to include two different types of interests. "One is the individual interest in avoiding disclosure of personal matters, and another is the interest in independence in making certain kinds of important decisions."\textsuperscript{138} Nonetheless, the Court in \textit{Paul v. Davis}\textsuperscript{139} held there is no constitutional right to privacy in records of official action, includ-
ing records of arrest without conviction. The basic common law approach is that, where a matter of legitimate public interest is concerned, no cause of action for invasion of privacy will lie.

Nor does state law appear to afford the individual a right to privacy in records. The Wisconsin right to privacy law states "[i]t is not an invasion of privacy to communicate any information available to the public as a matter of public record." Thus, as the Breier court indicated, the right to privacy law does not affect the duties of custodians of public records. However, this does not prevent the custodian from taking individual reputational interests into account in the balancing test. The court has characterized the right to privacy as a remedy, and the fact that this remedy does not exist as to records does not necessarily mean a custodian may always release records which might damage an individual's reputation.

V. Conclusion

The new Wisconsin public records law is a giant step forward in allowing citizens to monitor the activities of their government. However, there is a tension between it and some of the special considerations involved in disseminating law enforcement records. It is hoped that the framework provided by this comment will serve three purposes. First, to educate custodians of law enforcement records and provide them with a guideline for making a fair determination of whether a request for records should be granted. Second, if a request is to be denied, to provide specific reasons for denial sufficient to withstand judicial scrutiny. And third, to inform the public of

140. Id. at 713.
141. Newspaper, Inc., 89 Wis. 2d at 431, 279 N.W.2d at 186 (quoting Williams v. K.C.M.O. Broadcasting Division-Meredith Corp., 472 S.W.2d 1, 4 (Mo. Ct. App. 1971)).
143. Id. § 895.50(2)(c).
144. See Newspaper, Inc., 89 Wis. 2d at 431-32, 279 N.W.2d at 186; 68 Op. Att'y Gen. 68, 70 (1979). Justice Coffey, in his Newspaper, Inc. dissent, takes a different interpretation of Wis. Stat. § 895.50(2)(c). He reads the statute as applying only to records required by law to be kept. Newspapers, Inc., 89 Wis. 2d at 442-43, 279 N.W.2d at 191.
145. Newspapers, Inc., 89 Wis. 2d at 430-32, 279 N.W.2d at 185-86.
146. Id. at 432, 279 N.W.2d at 186.
its rights with the hope that increased knowledge will bring with it decreased public records litigation.

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