The Wisconsin Public Records Law

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COMMENTS

THE WISCONSIN PUBLIC RECORDS LAW

I. INTRODUCTION

With the extensive amendment of its longstanding public records law,1 Wisconsin has joined a growing number of states which have recently enacted or revised state public records laws.2 The interest of many state legislatures in opening records to the public appears to stem from two sources. One is the 1967 passage of the federal Freedom of Information Act3 (FOIA) which was followed by extensive amendments in 1974.4 The second is a "post-Watergate" concern for the accountability of government officials.5

A major premise underlying public records laws is the rationale that in a self-governing society the electorate must be able to examine the conduct of the affairs of government as contained in documents and records kept by government officials.6 The anticipated benefits to be derived from open records include encouraging informed citizen participation in government, giving citizens a better basis upon which to evaluate the acts of officials, preventing government wrongdoing through increased public scrutiny and increasing public confidence in the political system.7 While there is a

7. Project, supra note 2, at 1164.
consensus as to the importance of these goals, the difficulty which arises is that the right of access to public records cannot be absolute because access often interferes with two other important concerns: a governmental need to maintain confidentiality in certain matters in order to operate efficiently, and the need to preserve an individual right of privacy. The balancing of these conflicting interests is the dilemma posed in the development of any public record legislation. The variance in both the substantive law and the procedural aspects of state and federal public records laws represent different attempts to resolve this conflict.

This comment will examine the Wisconsin public records law enacted as chapter 335 of the Laws of 1981, which became effective January 1, 1983, by comparing it with earlier Wisconsin law, the public record laws of other states and FOIA. Part II of this article will describe the common-law background of public records laws and define the basic components found in various public records laws. Part III will describe the history and case law background of the public records law in Wisconsin. Finally, part IV will analyze the provisions of the amended legislation.

II. THE BACKGROUND OF PUBLIC RECORDS LAWS

A. Common-Law History

In England and the United States there exists a common-law right to inspect and copy public records. The com-
mon-law rules governing inspection developed in response to the use of records as evidence in litigation and, despite the right of inspection, contained many restrictions on access. The records were defined narrowly to include only those documents required to be kept by law. The enforcement of the right of inspection was generally limited to include only persons whose interest in a record gave them standing to maintain or defend a lawsuit. At common law a writ of mandamus was the only means available for enforcing the right of inspection.

Gradually, state statutes were enacted to define access to public records. Those statutes often enlarged the common-law right of inspection. The expansion of the right to inspect public records reflected a concern that citizens should have access to public records in order to monitor the acts of public officials. While early state statutes were brief one or two sentence statements, some modern state statutes are extremely detailed and contain extensive definitional sections as well as lists of specific records which are either open or closed to public inspection. In recent years the trend in drafting statutes has been toward liberalization of access and the addition of enforcement mechanisms. Some of the more recent statutes were drafted in conjunction with open


14. See, e.g., Brewer v. Watson, 71 Ala. 299 (1882); State ex rel. Ferry v. Williams, 41 N.J.L. 332 (1879); In re Caswell, 18 R.I. 835, 29 A. 259 (1893).

15. See, e.g., State ex rel. Colescott v. King, 154 Ind. 621, 57 N.E. 535 (1900); Egan v. Board of Water Supply, 205 N.Y. 147, 98 N.E. 467 (1912); Clement v. Graham, 78 Vt. 290, 63 A. 146 (1906); Annot., 60 A.L.R. 1356 (1929).

16. See H. Cross, supra note 11, at 49.


20. See Comment, supra note 18, at 1136-37.
meetings laws\textsuperscript{21} or information privacy acts.\textsuperscript{22} Forty-nine states and the District of Columbia now have statutes dealing with state public records\textsuperscript{23} and FOIA\textsuperscript{24} defines access to the records of federal agencies.

\textbf{B. Basic Components of Public Records Laws}

Although the public records laws of a few states which modeled their statutes after the FOIA contain some similarities,\textsuperscript{25} public records laws vary greatly from state to state in

\begin{enumerate}
\item \textit{Id.} at 1106.
\item See Comment, The Use and Abuse of Computerized Information: Striking a Balance Between Personal Privacy Interests and Organizational Information Needs, 44 ALB. L. REV. 589, 602-03 (1980).
\item Vache & Makibe, \textit{supra} note 9, at 515. \textit{See}, e.g., N.Y. PUB. OFF. LAW § 87 (McKinney Supp. 1982-1983).
both their scope and their effect. Public records statutes can be compared through an examination of four components present in all statutes. These components include the definition of who may inspect a public record, the description of what material constitutes a public record, the number and nature of the exemptions to public records, and the method of enforcement the statute provides. The scope of these elements determines the degree to which records will be open to the public.

1. Who May Inspect?

The majority of state statutes provide that "any person" may examine a public record. Most judicial interpretations of the phrase "any person" indicate that the motive of the requester is irrelevant to the question of whether to grant access. Only a few specific limitations remain in state statutes which restrict access to a public record on the basis of the status of the party making the request. A few states restrict inspection to state citizens or disallow inspection arising from a purely commercial purpose. Most states allow a person to inspect a public record on behalf of someone else and indicate that corporations, labor unions, and members of the media all share the same rights of inspection which the general public possesses.

Some states have found it necessary to impose limitations associated with practical necessities on the right to inspect public records. Some statutes limit the hours during which a request may be made and require the cost of the search.

27. H. Cross, supra note 11, at 19; Comment, supra note 18, at 1111.
28. H. Cross, supra note 11, at 19; Comment, supra note 18, at 1111.
30. Braverman & Heppler, supra note 26, at 728.
31. See, e.g., DEL. CODE ANN. tit. 29, § 10003 (1979); IDAHO CODE § 9-301 (1979); IND. CODE ANN. § 5-14-1-3 (West 1982).
32. Comment, supra note 18, at 1130-31.
33. Id. at 1134.
34. Comment, supra note 5, at 1201.
or the copying to be borne by the requester.\textsuperscript{36} Other statutes have provisions which address the safety of the records.\textsuperscript{37} The right to inspect records has uniformly been held to include the right to make copies even in the absence of specific language.\textsuperscript{38}

2. What is a Public Record?

The question of what records are covered by public records laws is determined by three factors.\textsuperscript{39} The first factor concerns the identification of those governmental entities which are subject to the public records law.\textsuperscript{40} Some public records laws deal only with agencies and officers of the executive branch,\textsuperscript{41} while other statutes include all three branches\textsuperscript{42} and may also extend to partially publicly funded nonprofit organizations.\textsuperscript{43} The second factor involves the form which a record may take.\textsuperscript{44} Early statutes envisioned records only in the form of books or papers.\textsuperscript{45} Many states have now expanded their definition of the physical form which a record may take to also include photographs, tape recordings and computer printouts;\textsuperscript{46} a few state statutes indicate that a record may take any physical form whatsoever.\textsuperscript{47} The third factor which affects the status of records is their nature and origin.\textsuperscript{48} Some states still retain the narrow

\begin{footnotesize}
\begin{enumerate}
\item[36.] \textit{See}, \textit{e.g.}, KY. REV. STAT. ANN. \S 61.874 (Baldwin 1983); TEX. REV. CIV. STAT. ANN. art. 6252-17a(9) (Vernon Supp. 1982).
\item[37.] Comment, \textit{supra} note 5, at 1201-02.
\item[38.] \textit{See}, \textit{e.g.}, Whorton v. Gaspard, 239 Ark. 715, 393 S.W.2d 773 (1965); Fuller v. State \textit{ex rel.} O'Donnell, 154 Fla. 368, 17 So. 2d 607 (1944); Marsh v. Sanders, 110 La. 726, 34 So. 752 (1903).
\item[39.] Comment, \textit{supra} note 18, at 1112-13.
\item[40.] \textit{Id.} at 1113.
\item[41.] \textit{See}, \textit{e.g.}, ILL. ANN. STAT. ch. 116, \S 3 (Smith-Hurd 1977). The Texas public records statute applies to the legislative and executive branches, but not to the judicial branch. TEX. REV. CIV. STAT. ANN. art. 6252-17a(2) (Vernon Supp. 1982).
\item[42.] \textit{See}, \textit{e.g.}, ARK. STAT. ANN. \S 12-2803 (1979 & Supp. 1981); KY. REV. STAT. ANN. \S 61.870(1) (Baldwin 1983).
\item[43.] \textit{See}, \textit{e.g.}, KY. REV. STAT. ANN. \S 61.870(1) (Baldwin 1983). The Kentucky public records statute applies to any group which derives at least 25\% of its funding from a state or local authority.
\item[44.] Braverman & Heppler, \textit{supra} note 26, at 732.
\item[45.] \textit{Id.}
\item[46.] \textit{See}, \textit{e.g.}, MD. ANN. CODE art. 76A, \S 1(b) (1980).
\item[47.] \textit{See}, \textit{e.g.}, COLO. REV. STAT. \S 24-72-202(7) (1982).
\item[48.] Braverman & Heppler, \textit{supra} note 26, at 733.
\end{enumerate}
\end{footnotesize}
The common-law definition that public records are limited to those which are "required by law to be made." The broadest statutory definitions include all documentary material which a public body may possess. Between these extremes can be found a myriad of definitions which determine the scope of a public record. Such definitions significantly affect the accessibility of certain categories of materials, such as correspondence to and from an agency or official, notes, rough drafts, or other preliminary materials, and intraoffice or interoffice memoranda.


Materials falling within the definition of a public record are accessible to the public unless they are exempted from public inspection. If some type of exemption applies, the disclosure provisions of the public records statute become inoperative. Some exemptions typically found in public records statutes include the following: information required to be kept confidential by state and federal laws; law enforcement and investigation information; juvenile, adoption, and medical records; personnel and school files; trade secrets; preliminary memoranda; invasion of privacy provisions; and information which would jeopardize competitive bidding or a suit pending against a government-
tal unit.\textsuperscript{61}

In addition to or in lieu of specifically stated exemptions, some state statutes or judicial decisions provide for the use of a balancing test to determine whether a specific record will be disclosed.\textsuperscript{62} These balancing tests usually weigh the public interest to be served by disclosure against the private or public interest jeopardized by the disclosure of the record being sought.\textsuperscript{63} If the interest threatened by disclosure outweighs the public right to know, access will be denied.

4. Enforcement.

The enforcement mechanism contained in open records statutes is a major determinant of their effectiveness.\textsuperscript{64} A delay in resolution may often, as a practical matter, amount to a denial of relief. Some states provide only the common-law remedy of mandamus.\textsuperscript{65} Other statutes establish an appeals board or utilize an opinion by a state officer to economically expedite the appeal of a decision denying access.\textsuperscript{66} The penalties imposed for violations of public records laws vary from state to state. Although a few statutes prescribe no penalty for violation,\textsuperscript{67} others call for removal from office\textsuperscript{68} or carry criminal sanctions,\textsuperscript{69} civil forfeitures\textsuperscript{70} or punitive damages.\textsuperscript{71}

\textsuperscript{62} Comment, supra note 18, at 1125.
\textsuperscript{63} Id.
\textsuperscript{64} See Project, supra note 2, at 1186-87.
\textsuperscript{65} Comment, supra note 18, at 1135.
\textsuperscript{66} See id.
III. THE HISTORY OF PUBLIC RECORDS LAWS IN WISCONSIN

A. Early History

Concern about the safekeeping of records and public access to certain records is evident in Wisconsin history. In 1856 the Wisconsin Supreme Court declared that wood for heating and candles for lighting must be provided so that citizens could comfortably transact business and examine all books and papers required to be kept in the clerk of court's office.72 Early Wisconsin statutes contained various sections requiring outgoing officers to hand their records over to successors and provided for public inspection of the records.73

The Wisconsin Supreme Court, in an early decision,74 refused to adopt common-law restrictions regarding who should be allowed to examine public records. The case involved an individual who wanted to copy public records in order to set up a rival abstract business.75 The local register of deeds objected, contending that the right to inspect and copy was confined to one having an interest beyond mere curiosity or pecuniary gain.76 The court departed from prior common law and ruled that any person may examine and copy public records for any lawful purpose.77 The court noted that the right of inspection was subject to the payment of fees and reasonable supervision.78

In 1917, the first unified public records law was enacted in Wisconsin.79 The statute provided that every officer of a

72. County of Jefferson v. Besley, 5 Wis. 134 (1856). The court in Besley noted, however, that the clerk was not required to keep a tavern for the public's convenience. Id. at 136.
73. See, e.g., Wis. Stat. ch. 37, § 700 (1878). See also International Union v. Gooding, 251 Wis. 362, 366-68, 29 N.W.2d 730, 733 (1947) (listing the numerous records statutes existing prior to the 1917 passage of a uniform records law).
74. Hanson v. Eichstaedt, 69 Wis. 538, 35 N.W. 30 (1887).
75. Id. at 539, 35 N.W. at 30. See also Rock County v. Weirick, 143 Wis. 500, 128 N.W. 94 (1910), which deals with a similar situation and reached the same conclusion.
76. Hanson v. Eichstaedt, 69 Wis. 538, 541, 35 N.W. 30, 31 (1887).
77. Id. at 547, 35 N.W. at 34.
78. Id. See also Musback v. Schaefer, 115 Wis. 357, 91 N.W. 966 (1902) (court held that minutes of a school board meeting were public records and the clerk could charge no more than the statutory fee for certified copies of the records).
79. See Wis. Stat. § 18.01 (1917). This statute was later renumbered as Wis. Stat. § 19.21 (1979).
state, county, municipal entity or school district was the legal custodian of the records of the body and responsible for their care and control. It defined public records as including three categories of materials: materials required to be kept in the officer's office, materials in the lawful possession or control of the officer or his deputies, and materials the officer is lawfully entitled to possess or control. The statute defined the physical form a record may take with the words "property or things." The law afforded "any person" access to public records and established a $25 to $2,000 forfeiture for the violation of the statute.

B. Wisconsin Judicial Decisions

Until the passage of chapter 335 in 1981, Wisconsin's public records law of 1917 remained virtually unchanged. During this interim period, the Wisconsin Supreme Court issued ten decisions interpreting the state's public records law. Because the public records statute was very brief,

80. Wis. Stat. § 18.01 (1917).
81. Id.
82. Id. § 18.01(2).
83. Id. The only limitations expressed in the statute were that the inspection must take place during office hours and be subject to any regulations the custodian might prescribe.
84. Id. § 18.01(4).
86. Wis. Stat. § 19.21 (1979-80) reads in part:

(1) Each and every officer of the state, or of any county, town, city, village, school district, or other municipality or district, is the legal custodian of and shall safely keep and preserve all property and things received from his predecessor or other persons and required by law to be filed, deposited, or kept in his office, or which are in the lawful possession or control of himself or his deputies, or to the possession or control of which he or they may be lawfully entitled, as such officers.

(2) Except as expressly provided otherwise, any person may with proper care, during office hours and subject to such orders or regulations as the custodian thereof prescribes, examine or copy any of the property or things mentioned in sub. (1). Any person may, at his or her own expense and under such reasonable regulations as the custodian prescribes, copy or duplicate any materials, including but not limited to blueprints, slides, photographs and drawings. Duplication of university expansion materials may be performed away from the office of the custodian if necessary. Computer programs, as defined in § 16.97(4)(c), are not subject to examination under this subsection,
those decisions have served as a primary body of law in determining the rights of access to records. With the adoption of chapter 335, those cases will continue to be an important element in the interpretation of the new public records statute.\textsuperscript{87} An examination of those decisions follows and focuses on the four basic components of public records laws described in part II above.

1. Who May Inspect?

In regard to the question of who may examine a public record, the Wisconsin Supreme Court has declined to apply any of the limitations imposed at common law by stating that the statutory right of inspection is "independent and in derogation of the common law."\textsuperscript{88} Partnerships, associations, political and corporate bodies have been found to be within the statutory words affording "any person" the right to inspection.\textsuperscript{89} The court also has ruled that no requirement of citizenship may be imposed upon a person seeking inspection of records.\textsuperscript{90}

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but the data stored in the memory of a computer is subject to the right of examination and copying.

(3) Upon the expiration of his term of office, or whenever his office becomes vacant, each such officer, or on his death his legal representative, shall on demand deliver to his successor all such property and things then in his custody, and his successor shall receipt therefor to said officer, who shall file said receipt, as the case may be, in the office of the secretary of state, county clerk, town clerk, city clerk, village clerk, school district clerk, or clerk or other secretarial officer of the municipality or district, respectively; but if a vacancy occurs before such successor is qualified, such property and things shall be delivered to and be receipted for by such secretary or clerk, respectively, on behalf of the successor, to be delivered to such successor upon the latter's receipt.

(4) Any person who violates this section shall, in addition to any other liability or penalty, civil or criminal, forfeit not less than $25 nor more than $2,000; such forfeiture to be enforced by a civil action on behalf of, and the proceeds to be paid into the treasury of the state, municipality, or district, as the case may be.

87. The relationship between case law and chapter 335 is confirmed in a provision of the new statute which provides "[s]ubstantive common law principles construing the right to inspect, copy or receive copies of records shall remain in effect." Wis. Stat. § 19.35(1) (1981-82).
88. \textit{State ex rel. Journal Co. v. County Court, 43 Wis. 2d 297, 306, 168 N.W.2d 836, 840 (1969).}
89. \textit{Id.} at 309, 168 N.W.2d at 841.
90. \textit{Id.}
Several Wisconsin cases have indicated that a newspaper has the same right as any individual to examine public records and even if the motivation of the newspaper is to publish the information, inspection will be allowed. In *State ex rel. Youmans v. Owens*, the supreme court ruled that the publisher of the *Waukesha Freeman* newspaper could bring an action against the mayor of the city of Waukesha to gain access to a report in his custody on police misconduct. The court pointed out the fact that the newspaper publisher's "motivation in seeking inspection is to benefit his newspaper and permit it to publish the material gained therefrom is immaterial." Similarly, in *State ex rel. Journal Co. v. County Court*, the supreme court held that a judge could not deny a newspaper access to a decision in a much publicized custody case despite the fears of the trial judge that publicity of the case would be harmful to the child and to the enforcement of the decision of the court.

The determination by the Wisconsin Supreme Court that the motivation of a requester may not be a factor in the decision to grant access has been followed in attorney general opinions regarding access to records sought solely for commercial purposes. The attorney general has opined that inspection of birth records and lists of licensees cannot be withheld in order to protect individuals from unsolicited mail.

91. Newspapers, Inc. v. Breier, 89 Wis. 2d 417, 279 N.W.2d 179 (1979); *State ex rel. Journal Co. v. County Court*, 43 Wis. 2d 297, 168 N.W.2d 836 (1969); *State ex rel. Youmans v. Owens*, 28 Wis. 2d 672, 137 N.W.2d 470 (1965).
92. 28 Wis. 2d 672, 137 N.W.2d 470 (1965).
93. *Id.* at 677, 137 N.W.2d at 472.
94. *Id.*
95. 43 Wis. 2d 297, 168 N.W.2d 836 (1969).
96. *Id.* at 311-12, 168 N.W.2d at 842-43.
98. 58 Op. Att’y Gen. 67 (1969). The opinion was issued in response to the concern of the Department of Health and Social Services that insurance salesmen and salesmen for baby foods, clothing and magazines sought birth records for commercial purposes.
99. 68 Op. Att’y Gen. 231 (1979). This opinion was requested by the Department of Regulation and Licensing.
2. What is a Public Record?

In its decisions regarding what material constitutes a public record and thus is open to inspection, the Wisconsin Supreme Court has defined "public record" very broadly.\textsuperscript{100} The court's opinions on what is a public record may be approached in the context of two basic questions. First, when is a document not sufficiently related to the office or officer to be considered part of the public record? Second, are preliminary, nonfinal documents or interdepartmental memos public records?

The question of when a document is "sufficiently related" to an officer that it becomes public record was addressed by the supreme court in two cases, \textit{State ex rel. Dinneen v. Larson}\textsuperscript{101} and \textit{International Union v. Gooding}.\textsuperscript{102} Both cases involved an officer of a state agency who received unsolicited materials from citizens. In \textit{Dinneen}, Public Securities Commission Secretary Dinneen received letters of complaint regarding a securities dealer.\textsuperscript{103} Dinneen sent these letters to the dealer complained of in the letters rather than keeping them in the commission's possession.\textsuperscript{104} The supreme court ruled that because the letters were "relevant and material to matters which were within the commission's supervision and powers to investigate,"\textsuperscript{105} they were required to be kept in the Commission's office under the public records law.\textsuperscript{106} The \textit{Dinneen} court did indicate that some letters or materials received by an agency might be deemed "mere fugitive papers."\textsuperscript{107} These papers, the court stated, are "subject to disposition at the pleasure of the [official]."\textsuperscript{108}

In \textit{International Union v. Gooding},\textsuperscript{109} the Wisconsin Supreme Court declared that a petition received by the Wisconsin Employment Relations Board was a public record

\begin{itemize}
\item \textsuperscript{100} H. Cross, \textit{supra} note 11, at 43-44.
\item \textsuperscript{101} 231 Wis. 207, 284 N.W. 21 (1939).
\item \textsuperscript{102} 251 Wis. 362, 29 N.W.2d 730 (1947).
\item \textsuperscript{103} 231 Wis. at 211, 284 N.W. at 24.
\item \textsuperscript{104} \textit{Id}.
\item \textsuperscript{105} \textit{Id}. at 213-14, 284 N.W. at 25.
\item \textsuperscript{106} \textit{Id}. at 214, 284 N.W. at 25.
\item \textsuperscript{107} \textit{Id}. (describing fugitive papers as personal papers which are not relevant to a legitimate concern of the agency).
\item \textsuperscript{108} \textit{Id}. at 214, 284 N.W. at 25.
\item \textsuperscript{109} 251 Wis. 362, 29 N.W.2d 730 (1947).
\end{itemize}
and open to inspection despite the fact that the Board had no authority to act upon it.\textsuperscript{110} The court stated that an officer has the power to dispose of a fugitive paper if he or she finds the document to have "no relation to the function of the office."\textsuperscript{111} However, the court determined that the petition had a relation to the office and was not a fugitive paper because it was placed in the board's official file and a formal opinion was written in response to it.\textsuperscript{112} Thus, Dinneen and Gooding indicate that if a court makes an objective determination that a paper has a relation to the duties of an office or if an officer makes a subjective determination to keep or to act upon a document, that material becomes a public record.

The second question the Wisconsin Supreme Court has addressed in defining a public record is whether nonfinal materials, preliminary documents or interdepartmental memorandum are public records. This question was first considered in \textit{State ex rel. Spencer v. Freedy}.\textsuperscript{113} In Spencer, the court ruled that reports prepared by deputies on behalf of the state fire marshal (on the causes of fires) were not public records despite the fact that the reports had been filed in the marshal's office.\textsuperscript{114} The court indicated that because statistics on fires compiled by the office had an educational value, the statistical information would be available to the public.\textsuperscript{115} However, the court refused to view the reports, correspondence or communications regarding specific fires as a public record and based its decision on the dubious rationale that they "carry no public interest."\textsuperscript{116}

In a later case, \textit{State ex rel. Youmans v. Owens},\textsuperscript{117} the court indicated that the \textit{Spencer} decision had been overruled sub silentio in \textit{Gooding}.\textsuperscript{118} In Youmans, the requested document was a report by a city attorney stemming from his investigation of alleged police misconduct.\textsuperscript{119} The report was

\begin{itemize}
\item \textsuperscript{110} \textit{Id.} at 372, 29 N.W.2d at 735.
\item \textsuperscript{111} \textit{Id.} at 370-71, 29 N.W.2d at 735.
\item \textsuperscript{112} \textit{Id.} at 371, 29 N.W.2d at 735.
\item \textsuperscript{113} 198 Wis. 388, 223 N.W. 861 (1929).
\item \textsuperscript{114} \textit{Id.} at 392, 223 N.W. at 862.
\item \textsuperscript{115} \textit{Id.} at 391, 223 N.W. at 862.
\item \textsuperscript{116} \textit{Id.}
\item \textsuperscript{117} 28 Wis. 2d 672, 137 N.W.2d 470 (1965).
\item \textsuperscript{118} \textit{Id.} at 679, 137 N.W.2d at 473.
\item \textsuperscript{119} \textit{Id.} at 675, 137 N.W.2d at 471.
\end{itemize}
in the custody of the mayor who had received it in his capacity as the head of the police department.\textsuperscript{120} The supreme court ruled that the report was a public record despite the fact that it was not a formal report of conclusions from the investigation, but merely contained interdepartmental memoranda and the statements of persons interviewed.\textsuperscript{121} In reaching this conclusion the court relied upon its earlier statement in \textit{Gooding}: 

\begin{quote}
It is the rule independently of statute that public records include not only papers specifically required to be kept by a public officer but all written memorials made by a public officer within his authority where such writings constitute a convenient, appropriate, or customary method of discharging the duties of the office.\textsuperscript{122}
\end{quote}

\textit{Youmans} thus indicated that preliminary material, and intradepartmental and interdepartmental memoranda, are public record.


Although the supreme court's definition of public record is very inclusive, the court has stated that the right to inspect a public record is not absolute.\textsuperscript{123} Wisconsin appellate courts have indicated two situations in which materials which are public records may be exempt from disclosure. First, it has been recognized that the right to inspect a public record may be limited or denied by an express statutory provision to the contrary.\textsuperscript{124} An example of this exemption arose in \textit{Hathaway v. Joint School District}\textsuperscript{125} which involved the denial of access to a computer listing of the names and addresses of pupils in a school district.\textsuperscript{126} The district contended that the information was a confidential pupil record and as such was exempt from disclosure under section

\begin{itemize}
\item \textsuperscript{120} \textit{Id.}
\item \textsuperscript{121} \textit{Id.} at 679-80, 137 N.W.2d at 473.
\item \textsuperscript{122} \textit{Id.} at 679, 137 N.W.2d at 473 (quoting \textit{Gooding}, 251 Wis. at 370-71, 29 N.W.2d at 735).
\item \textsuperscript{123} Beckon v. Emery, 36 Wis. 2d 510, 516, 153 N.W.2d 501, 503 (1967); State \textit{ex rel.} Youmans v. Owens, 28 Wis. 2d 672, 681, 137 N.W.2d 470, 474 (1965).
\item \textsuperscript{124} Although this has not been stated directly by the Wisconsin Supreme Court, the Wisconsin Attorney General has so stated in 63 Op. Att'y Gen. 400, 406 (1974).
\item \textsuperscript{125} 110 Wis. 2d 254, 329 N.W.2d 217 (Ct. App. 1982).
\item \textsuperscript{126} \textit{Id.} at 254-55, 329 N.W.2d at 217.
\end{itemize}
118.125 (pupil records) of the Wisconsin statutes. In its decision the court of appeals stated that the list was a public record and accessible under the public records statute unless it was found to come within the statutory definition of pupil record. The Hathaway court found that although the information was derived from pupil records, it did not fall within the definition of personal pupil information which the statute sought to protect. The list was deemed to be accessible as a public record.

The second situation in which material considered to be public record may be exempted from disclosure exists when it is determined that the harm likely to result to the public interest from permitting inspection outweighs any benefit to the public which may be gained from inspection. The supreme court has elaborated on the use of this judicially created balancing test in several cases. The balancing must be undertaken with the presumption that material which is a public record is open to inspection. When a request to inspect a record is made, the custodian of the record has the responsibility to weigh the competing interests in order to determine whether the strong policy recognizing the public interest in inspection is outweighed by the harm to the public interest which may result from permitting inspection. A custodian who decides not to allow inspection after applying the balancing test must state the reasons which justify the refusal. The stated reasons must be specific, based upon public policy and cannot be legal conclusions.

Although the Wisconsin Supreme Court has refused to categorize the situations in which the use of the balancing

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127. Id. at 255, 329 N.W.2d at 217.
128. Id.
129. Id.
130. Id.
test would result in a justified refusal to permit inspection, the court’s employment of the balancing test in two cases is instructive in regard to factors which may be considered in the use of the test. In State ex rel. Youmans v. Owens, the court stated that the legislative policy expressed in the state open meeting law can be used as a reference in determining whether inspection of a public record should be granted. In Youmans the court applied the exception to the open meeting law that allows a closed session to be held if material discussed is “[f]inancial, medical, social or personal histories and disciplinary data which may unduly damage reputations.” The court reviewed the refusal of the mayor to permit inspection of a report on alleged police misconduct and remanded the case to the trial court with the directive that it entertain the question of whether undue damage to reputations would outweigh the interest of the public in knowing whether the mayor was derelict in not initiating disciplinary proceedings against the officers. The supreme court also stated that if the statements in the report were first-hand knowledge rather than hearsay, the damage to the officers’ reputations would not outweigh the benefit to the public in granting access.

The denial by the Milwaukee Chief of Police of a request by the Milwaukee Journal newspaper to inspect a daily arrest list, known as the police “blotter,” was reviewed in Newspapers, Inc. v. Breier. The reason enunciated for refusing access to the “blotter” was that disclosure might harm the arrested individuals. The court balanced the harm to the reputation of the individuals involved who might not ever be

136. 28 Wis. 2d 672, 137 N.W.2d 470 (1965).
138. Youmans, 28 Wis. 2d at 685, 137 N.W.2d at 476.
139. Id. at 685-86, 137 N.W.2d at 476-77.
140. Id. at 685-85a, 137 N.W.2d at 476-77.
141. Id. at 685, 137 N.W.2d at 476.
142. The “blotter” lists the names of persons arrested and the alleged offense committed at the time of the arrest. Frequently as a result of a charging conference, a person is charged with a lesser offense or is not charged at all. Thus, disclosure of “blotter” information might distort the gravity of an alleged offense.
143. 189 Wis. 2d 417, 279 N.W.2d 179 (1979).
144. Id. at 428, 279 N.W.2d at 181.
formally charged against the interest of the public in curbing the abuse of the arrest power and determined that the public right to know outweighed the potential harm to individuals.\textsuperscript{145} Thus, the records were ordered open to public inspection.\textsuperscript{146}

These two cases demonstrated the problems inherent in the use of a balancing test. In each case the supreme court balanced factors which were not obvious to most persons. In compelling a custodian, who must decide whether to permit access to a public record, to apply a delicate and yet complicated balancing test, there is an expectation that the custodian possesses a level of legal sophistication. This may be unrealistic. As both the \textit{Youmans} and \textit{Breier} cases indicate, there are very difficult issues involved upon which legally trained minds are likely to differ. Thus, the balancing test is a less than adequate means to resolve the complex problem of determining when the public interest warrants disclosure of a record.

4. Enforcement.

If a requester is denied inspection of a record, the only remedy for a denial in Wisconsin prior to the enactment of chapter 335 was to seek a writ of mandamus to compel production of the record.\textsuperscript{147} The Wisconsin Supreme Court, in \textit{Beckon v. Emery}\textsuperscript{148} and \textit{State ex rel. Youmans v. Owens},\textsuperscript{149} described the procedure to be followed in reviewing the denial of access to a record. Upon application for the writ, the custodian who refused access to the record was obligated to specifically state the reasons for the denial.\textsuperscript{150} If a custodian failed to state a valid reason for refusing inspection, the writ of mandamus was granted without a further hearing.\textsuperscript{151} Upon receiving a statement of the reason for withholding the document, the presiding judge was obligated to repeat the process employed by the custodian by applying the same

\textsuperscript{145} \textit{Id.} at 437, 279 N.W.2d at 189.
\textsuperscript{146} \textit{Id.} at 440, 279 N.W.2d at 190.
\textsuperscript{147} \textit{See} Beckon v. Emery, 36 Wis. 2d 510, 519, 153 N.W.2d 501, 504 (1967).
\textsuperscript{148} 36 Wis. 2d 510, 153 N.W.2d 501 (1967).
\textsuperscript{149} 28 Wis. 2d 672, 137 N.W.2d 470 (1965).
\textsuperscript{150} \textit{Youmans}, 28 Wis. 2d at 682, 137 N.W.2d at 475.
\textsuperscript{151} \textit{Beckon}, 36 Wis. 2d at 517-18, 153 N.W.2d at 504.
balancing test to determine if harm to the public interest resulting from the granting of access outweighed the presumed benefit of access. In conducting this weighing process the presiding judge was obligated to bear in mind the presumption that a public record should be available for inspection and access should only be denied in the exceptional case. The presiding judge was empowered to examine the record in camera in reaching a decision. If the judge found only a portion of a document to be adverse to the public interest, he could order the portion obscured before granting inspection.

C. The Legislative History of Chapter 335

Attempts to modify the longstanding Wisconsin public records law began in 1977 and continued throughout the 1979 session of the legislature. These bills proposed substantial procedural and substantive changes to the existing statute. They were met with strong opposition and none were enacted. In the 1981 legislative session, Senate Bill 250 was introduced. In its original form Senate Bill 250 included provisions for the application of two different balancing tests and listed seventeen specific types of materials to which the balancing tests were to be applied. The bill also provided for an Ethics and Open Records Board with the

152. Youmans, 28 Wis. 2d at 682, 137 N.W.2d at 475.
153. Id. at 683, 137 N.W.2d at 475.
154. Id. at 682, 137 N.W.2d at 475.
155. Id. at 683, 137 N.W.2d at 475.
156. The public records legislation proposed included: Wis. A.B. 780 (1977); Wis. A.B. 1109 (1979); Wis. S.B. 482 (1979).
158. One balancing test directed the custodian not to open the following materials to inspection if the harm to the public "outweighed" the benefit which might be gained from disclosure: trade secrets, test questions and answers, unpublished university research data, key codes and lock combinations, computer security information, information obtained under a pledge of confidentiality, information regarding medical diagnosis which is individually identifiable, and plans for secure structures.

The second balancing test directed the custodian not to open the following materials to the public if the harm to the public "substantially outweighed" the benefit which might be gained from disclosure: information regarding litigation strategy, appraisals and materials involved in competitive bargaining, criminal investigation information, criminal history records, intraagency advisory memoranda, correspondence of elected officials, personnel records, judicial records and minutes of closed governmental meetings. Wis. S.B. 482 (1979).
power to review the denial of access to a record.\footnote{159} Apparently sensing the insurmountable opposition which this bill faced,\footnote{160} its authors amended the bill by dropping the balancing tests and the attempt to specify the types of records to which the balancing tests applied.\footnote{161} The amendment also deleted the concept of an Open Records Board, substituting a provision under which the attorney general could give advisory opinions as to the applicability of the provisions of the statute to specific materials or problems.\footnote{162}

On March 26, 1982, a very heavily amended version of the original bill was enacted.\footnote{163} The new public records statute, section 19.31-19.39, was given a delayed effective date of January 1, 1983, in order to afford public officials and governmental bodies time to comply with the changes in the public records law.\footnote{164}

IV. THE PROVISIONS OF THE NEW PUBLIC RECORDS LAW

A. Declaration of Policy

The amended Wisconsin public records law begins with the following 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

\footnote{159} Wis. S.B. 482 (1979).
\footnote{160} The Wisconsin Associated Press passed a resolution which stated its support of the bill if the following items were eliminated: the listing of exemptions, the reference to balancing tests, references to the privacy of records involving the private life of individuals, the four-day waiting period for a record, and the formation of an open records board to handle appeals. All of these items were omitted in the final legislation.
\footnote{161} Senate Substitute Amendment 1 to Wis. S.B. 250 (1981).
\footnote{162} \textit{Id}.
\footnote{163} Fifty-five amendments were offered to Wis. S.B. 250 (1981) in the Senate and Assembly. Eighteen of those amendments were adopted.
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.\footnote{165}

Although similar language did not appear in the previous public records statute, this declaration of policy does not represent a dramatic departure from prior law because much of the policy can be traced back to Wisconsin case law interpreting the predecessor statute. The first sentence of the declaration of policy echoes a statement by the Wisconsin Supreme Court in *Newspapers, Inc. v. Breier*:\footnote{166} "The public records statute reflects a basic tenet of the democratic system—that the electorate must be informed of the workings of government."\footnote{167} The supreme court had also stated in cases interpreting the previous public records statute the presumption that every public record is available for public inspection\footnote{168} and that only in an exceptional case will inspection be denied.\footnote{169} The inclusion of this policy declaration in the amended statute may be interpreted as a strong legislative approval of prior judicial pronouncements.

Unprecedented in either the prior statute or case law interpretation is the statement contained in the declaration of policy that providing information to the public is "an integral part of the routine duties of officers and employees."\footnote{170} This statement may broaden the responsibilities of various public officials and employees because now, as part of their official function or duties as public agents, they must provide access to public records when a request is made. The statute for the first time qualifies the presumption of complete access with a limitation that a request be "consistent with the conduct of governmental business."\footnote{171} This language may perhaps be employed to guard against a request which is so

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166. 89 Wis. 2d 417, 279 N.W.2d 179 (1979).
167. Id. at 433-34, 279 N.W.2d at 187.
168. Id. at 433, 279 N.W.2d at 187.
169. State ex rel. Youmans v. Owens, 28 Wis. 2d 672, 683, 137 N.W.2d 470, 475 (1965).
171. Id.
}
broad or undefined that compliance would be extremely time consuming and would unduly interfere with the other duties of an office or individual.

**B. Entities with Public Records**

An initial determination which must precede the question of whether a record is accessible, is whether the record is in the possession or control of an individual or entity subject to the public records law. Chapter 335 collectively identifies those under the jurisdiction of the public records law as an "authority," and provides a comprehensive definition of who is an authority. The wording of the statute clearly indicates that it applies to all three branches of government and the subdivisions of each branch. The statute also embraces two areas not covered in the previous public records statute. Certain nonprofit corporations receiving governmental funding are brought within its scope. Also, entities acting under a contract with an "authority" must make records produced or collected under that contract available for public inspection. Both these provisions bring records of nongovernmental entities under the coverage of the public records act and allow members of the public access to records which may have been previously unavailable.

Chapter 335 identifies those individuals to whom a request for a record is to be made and who makes the determinations.

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172. Wis. Stat § 19.32(1) (1981-82). The statute provides:

"Authority" means any of the following having custody of a record: a state or local office, elected official, agency, board, commission, committee, council, department or public body corporate and politic created by constitution, law, ordinance, rule or order; a governmental or quasi-governmental corporation; any court of law; the assembly or senate; a nonprofit corporation which receives more than 50% of its funds from a county or a municipality, as defined in § 59.001(3), and which provides services related to public health or safety to the county or municipality; or a formally constituted subunit of any of the foregoing.

Id.

173. Id.

174. Id. § 19.32(1) indicates that 50% governmental funding will bring nonprofit corporations within the coverage of the public records statute. Several other states have considered governmental funding as a criterion for inclusion under the public records statute. See, e.g., Ky. Rev. Stat. Ann. § 61.870(1) (Baldwin 1983) (25% of its funding); W. Va. Code § 29B-1-2(3) (1980) (any body primarily funded by state or local authority).

nation whether inspection will be allowed to be "legal custodians."\textsuperscript{176} Elected officials and chairpersons of committees are custodians under the statute.\textsuperscript{177} Additionally, both elected officials and chairpersons may designate members of their staff or committee to be legal custodians.\textsuperscript{178} If an authority fails to designate a legal custodian, the statute provides that the highest ranking officer and the chief administrative officer, if any, are the legal custodians.\textsuperscript{179} The authority also has the responsibility to display information regarding access to public records including the name of the custodian.\textsuperscript{180}

C. Who May Inspect Public Records

Chapter 335 continues Wisconsin's longstanding pol-

\begin{itemize}
\item \textsuperscript{176} \textit{Id.} § 19.33 reads in part:
\begin{enumerate}
\item An elected official is the legal custodian of his or her records and the records of his or her office, but the official may designate an employe of his or her staff to act as the legal custodian.
\item The chairperson of a committee of elected officials, or the designee of the chairperson, is the legal custodian of the records of the committee.
\item The cochairpersons of a joint committee of elected officials, or the designee of the cochairpersons, are the legal custodians of the records of the joint committee.
\item Every authority not specified in subs. (1) to (3) shall designate in writing one or more positions occupied by an officer or employe of the authority or the unit of government of which it is a part as a legal custodian to fulfill its duties under this subchapter. In the absence of a designation the authority's highest ranking officer and the chief administrative officer, if any, are the legal custodians for the authority. The legal custodian shall be vested by the authority with full legal power to render decisions and carry out the duties of the authority under this subchapter. Each authority shall provide the name of the legal custodian and a description of the nature of his or her duties under this subchapter to all employes of the authority entrusted with records subject to the legal custodian's supervision.
\end{enumerate}
\item \textsuperscript{177} \textit{Id.} § 19.33(1)-(2).
\item \textsuperscript{178} \textit{Id.} § 19.33(1), (3).
\item \textsuperscript{179} \textit{Id.} § 19.33(4).
\item \textsuperscript{180} \textit{Id.} § 19.34(1) provides:
\begin{quote}
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 § 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. This subsection does not apply to members of the legislature or to members of any local governmental body.
\end{quote}
\end{itemize}
icy that any person may inspect a public record. The identity, motive or purpose of the individual seeking to inspect a public record is not a factor which can be considered by the custodian. As a result, only a determination relative to the content of a record may foreclose its disclosure. In contrast, although FOIA states that "any person" may make a request to inspect a public record, one federal court has upheld the denial of access to a requester who sought to use information obtained for commercial purposes on the ground that mail solicitation constituted an unwarranted invasion of personal privacy. The Wisconsin policy of not denying a request on the basis of the requester's intended use is more compatible with the policy of the public records law in that there is a presumption of complete access which may only be denied in an "exceptional case."

The one qualification that chapter 335 adds to the right of inspection is found in the words "[e]xcept as otherwise provided by law." This language indicates that in instances in which a particular statute specifically limits the right of access to certain individuals or an agency, such a statute takes precedence over the public records access provisions. Examples of this situation include juvenile records which are only open to members of the press and welfare records which are only open to legislators. Also

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181. See supra text accompanying notes 74-77 and 83.
182. Wis. Stat. § 19.35(1)(a) (1981-82) states: "Except as otherwise provided by law, any requester has a right to inspect any record . . . ." An amendment to Wis. S.B. 250 (1981), which would have required a requester to identify himself, was defeated by one vote.
183. Wis. Stat. § 19.35(1)(i) (1981-82). See also supra note 98. However, there is one exception to this: "A requester may be required to show acceptable identification whenever the requested record is kept at a private residence or wherever security reasons or federal law or regulations so require." Wis. Stat. § 19.35(1)(i)(1981-82).
185. HMG Marketing Ass'n v. Freeman, 523 F. Supp. 11 (S.D.N.Y. 1980) (an individual was disallowed inspection of a mailing list of persons who had purchased historical silver dollars).
187. Id. § 19.35(a).
188. Letter from Wisconsin Attorney General Bronson C. LaFollette to George A. Schmus, City Attorney of West Allis, Wisconsin (Dec. 27, 1982).
190. See id. § 46.206(1)(bm).
included are statutes which close records entirely.191

D. The Chapter 335 Definition of Public Record

A crucial section in any public records law is the provision that defines what materials are public records. Chapter 335 has greatly revised the earlier statutory definition of public record both in terms of the form a record may take and the nature or manner of acquisition of information which will be included or excluded as a public record.192 The definition of the form which a record may take has been expanded from the pre-amendment phrase "property and things"193 to a comprehensive definition which indicates that a record can appear in virtually any form.194 This revision is consistent with the technological changes which have taken place since the original statute first appeared in 1917.

From the standpoint of the manner of acquisition, chapter 335 indicates that, with four exceptions, material which "has been created or is being kept by an authority"195 will be a public record. Two of these exceptions appear for the first time in the public records statute and are self-explanatory. These exemptions include materials with limited access due to patent, bequest or copyright, and published materials

191. For examples of these statutes see infra note 233.
192. Wis. Stat. § 19.32(2) (1981) defines a record as:
[Any material on which written, drawn, printed, spoken, visual or electromagnetic information is recorded or preserved, regardless of physical form or characteristics, which has been created or is being kept by an authority. “Record” includes, but is not limited to, handwritten, typed or printed pages, maps, charts, photographs, films, recordings, tapes (including computer tapes), and computer printouts. “Record” does not include drafts, notes, preliminary computations and like materials prepared for the originator’s personal use or prepared by the originator in the name of a person for whom the originator is working; materials which are purely the personal property of the custodian and have no relation to his or her office; materials to which access is limited by copyright, patent or bequest; and published materials in the possession of an authority other than a public library which are available for sale, or which are available for inspection at a public library.
193. Wis. Stat. § 19.21 (1979) defined a record as “all property and things received . . . filed, deposited, or kept [by a public official].”
195. Id. The Wisconsin Attorney General has stated that copies of documents received from other agencies purely for informational purposes and concerning matters not affecting the department’s function are not subject to disclosure under this definition. 72 Op. Att’y Gen. 28-83 (Aug. 4, 1983).
available for sale or for inspection at a public library.\textsuperscript{196}

The third exclusion from the definition of public record is "materials which are purely the personal property of the custodian and have no relation to his or her office."\textsuperscript{197} This exclusion may be seen as a refinement of earlier case law which recognized some materials to be "fugitive papers" and indicated that if such items had no relation to the function of the office, there was no requirement that they be kept as a public record.\textsuperscript{198} The attorney general, in a recent opinion interpreting the chapter 335 definition of public record, advised that if records are prepared for an authority to serve an "aim, function or need," they are public records.\textsuperscript{199} If this interpretation is followed by the courts, the addition of the elements "aim" and "need" may have the effect of narrowing the personal paper exception, effectively broadening the definition of what is a public record.

The fourth area excluded did not appear previously in the statute and presents many interpretational problems. The amended statute excludes from the definition of public record "drafts, notes, preliminary computations and like materials prepared for the originator's personal use or prepared by the originator in the name of a person for whom the originator is working."\textsuperscript{200} The scope and meaning of this exclusion is problematic because a broad interpretation could exclude a large number of documents from the realm of accessible public records.\textsuperscript{201} The exclusion of preliminary documents follows the common-law view that only writings which represent ultimate official actions should be public

\textsuperscript{196} Wis. Stat. § 19.32(2) (1981-82).

\textsuperscript{197} Id.

\textsuperscript{198} International Union v. Gooding, 251 Wis. 362, 370, 29 N.W.2d 730, 735 (1947); State ex rel. Dinneen v. Larson, 231 Wis. 207, 214, 284 N.W. 21, 25 (1939).

\textsuperscript{199} 72 Op. Att'y Gen. 19-83 (June 2, 1983).

\textsuperscript{200} Wis. Stat. § 19.32(2) (1981-82). Further defining this language the Wisconsin Attorney General has opined that "all preliminary versions of a document prepared by an employee for his or her own or another's signature do not constitute 'records' under section 19.32(2)." 72 Op. Att'y Gen. 28-83 (Aug. 4, 1983).

\textsuperscript{201} As an example of how dramatically this exclusion could have an impact on access to records, consider the report to the mayor on police conduct in State ex rel. Youmans v. Owens, 28 Wis. 2d 672, 137 N.W.2d 470 (1965), and the investigator's report to the state fire marshal in State ex rel. Spencer v. Freedy, 198 Wis. 388, 223 N.W. 861 (1929). Under the new statute both might fall into the preliminary document exception and thus not be public record.
There exists the strong public policy argument that insulating predecisional documents protects an agency's deliberative and consultative decision-making process by encouraging the candid exchange of ideas and prevents premature disclosure which could disrupt agency procedures.203 However, if interpreted too broadly, the exception of preliminary documents could consume the basic premise of open government that underlies the public records statute.

The public records statute of Connecticut204 provides an exemption similar to the Wisconsin statute and excludes "preliminary drafts or notes."205 A recent Connecticut case, Wilson v. Freedom of Information Commission,206 dealt with the preliminary draft or note exclusion and involved the advisory report of a commission to the vice president of a public university.207 In its decision that the report was a preliminary document, the Connecticut Supreme Court indicated that the exclusion contemplates two types of documents, one that is "final" and another that is "preliminary."208 The court defined preliminary as "that aspect of the agency's function that precedes formal and informal decision making."209 It described preliminary notes or drafts as recommendations, advisory opinions and deliberations which are part of the government's decision-making process.210 However, in the Connecticut public records statute, unlike Wisconsin's, preliminary drafts and notes are listed as an exemption to the public records law and thus are subject to a balancing test.211 In Wilson, the court, after deciding the report was a predecisional document, determined

205. Id. at § 1-19(b)(1) provides: "[P]reliminary drafts or notes [are exempted from access] provided the public agency has determined that the public interest in withholding such documents clearly outweighs the public interest in disclosure."
207. Id. at ___, 435 A.2d at 356.
208. Id. at ___, 435 A.2d at 358.
209. Id. at ___, 435 A.2d at 359.
210. Id.
211. Id. at ___, 435 A.2d at 361.
that the public interest in withholding the document outweighed the public interest in its disclosure because of a promise of confidentiality which had been given, the potential embarrassment to individuals criticized in the report, and the "panic" that could be caused by the structural revisions proposed.\textsuperscript{212} The Wisconsin exclusion of preliminary materials, however, is an exclusion within the definition of public record rather than an exemption and as such is not subject to a balancing test such as the one employed in Connecticut. Thus, once the decision is made that a document is preliminary, the deliberation seemingly ends — it is not accessible to the public. The finality of the Wisconsin preliminary document exclusion should give government officials and custodians more certainty that their work will be kept private, but it has the undesirable effect of concealing from public scrutiny the decision-making process itself.

Other decisions which may be instructive in defining preliminary materials are those dealing with the fifth exemption to FOIA which pertains to intraagency and interagency communication.\textsuperscript{213} The Wilson court used judicial interpretations of the intraagency and interagency FOIA exemption as instructive in defining preliminary documents,\textsuperscript{214} and Wisconsin may choose to do the same since there is a great deal of case law on the intraagency and interagency communication exemption.\textsuperscript{215} Federal courts have distinguished between decisional and predecisional memoranda stating that "predecisional" memoranda are composed exclusively for the purpose of assisting in policy formation while "decisional" memoranda are documents which reflect policy already made and announced by the agency.\textsuperscript{216} One unanswered question with this definition is whether predecisional material becomes public record once a decision is reached and announced. In order to fulfill the policy behind public records laws, it would appear that the preliminary

\begin{footnotesize}
\begin{itemize}
\item \textsuperscript{212} \textit{Id.} at \_\_\_, 435 A.2d at 362.
\item \textsuperscript{213} 5 U.S.C. § 552(b)(5) (1976).
\item \textsuperscript{214} 181 Conn. at \_\_\_, 435 A.2d at 359.
\item \textsuperscript{215} \textit{See, e.g.,} \textit{Litigation Under FOIA, supra} note 24, at 67-76 (detailing the large number of cases on this FOIA exemption).
\end{itemize}
\end{footnotesize}
data should be disclosed so that the public can evaluate the basis and the information upon which public officials have relied in reaching a decision.

In addition to the four exceptions stated in the statute to the definition of public record, two recent informal opinion letters of the attorney general indicate an additional area which is not to be considered a public record. The interpretations or mental impressions of state employees concerning the content of public records and information known by a custodian but not reduced to record are not, in the attorney general's opinion, accessible through the public records law. Although a contrary determination, requiring a custodian to divulge everything known regarding a public record, would be impractical and undesirable, it should be recognized that these exceptions may encourage authorities to avoid reducing information to a recordable format in order to bypass the complications of dealing with the public records statute.

One additional concern with the definition of public record in the Wisconsin public records statute is that there exists in the statutes another definition of public record which is different from the chapter 335 definition. However, if each definition is used in the exact context of the statute in which it appears, confusion should be minimized. Although there is a certain amount of overlap, one definition of public record pertains primarily to the permanent preservation of important state records while the chapter 335 definition appears to have been intended for broader utilization.

217. Letter from Wisconsin Attorney General Bronson C. LaFollette to Meredith E. Ostrom, Director, Geological and Natural History Survey (June 2, 1983) (responding to questions of the Geological and Natural History Society regarding how to answer inquiries made by the Federal Department of Energy regarding the long-term disposal of high-level radioactive waste in Wisconsin).

218. Letter from Wisconsin Attorney General Bronson C. LaFollette to Kevin C. Potter, District Attorney of Wood County (June 17, 1983) (responding to questions regarding disclosure of information of alleged shoplifting by a police chief).

219. Wis. Stat. § 16.61(2)(b) (1981-82) provides:

"Public records" means all books, papers, maps, photographs, films, recordings, or other documentary materials or any copy thereof, regardless of physical form or characteristics, made, or received by any agency of state or its officers or employees in connection with the transaction of public business, except the records and correspondence of any member of the state legislature.

220. Id. § 16.61(1).
E. Limitations on the Right of Inspection

Although chapter 335 presumes that a public record will be available for inspection, the legislation also recognizes a number of areas in which public records may be exempt from disclosure. These exemptions represent areas in which the legislature has determined that reasons for withholding information outweigh the advantages of disclosing it. Some of the exemptions preclude the use of a balancing of interest test, the only issue being whether the information sought is covered by the exemption. Other exemptions, however, are still subject to the application of the Wisconsin common-law balancing test by the custodian and by the court upon review.

A difficulty which may arise in a determination as to whether particular material falls within an exemption is that there is no statutory or case law guidance as to whether exemptions should be broadly or narrowly construed. On the basis of the overriding Wisconsin presumption that a record is open to the public and the fact that most states and the federal act have indicated their exemptions are to be narrowly construed, Wisconsin is likely to also construe these exemptions narrowly. Each area of exempted material will be described in the subsections to follow.

1. Records Exempted by State or Federal Law.

Records which are specifically exempted from disclosure by state or federal law are not open to inspection. This is an absolute exemption, but the language of the exemption does indicate that if only a portion of the record consists of exempted information, the nonexempt portions are open to the public. This provision rests upon a sound policy basis but may prove difficult to implement as custodians under-

221. Braverman & Heppler, supra note 26, at 739.
222. Wis. Stat. § 19.36(1) (1981-82) provides:
Any record which is specifically exempted from disclosure by state or federal law or authorized to be exempted from disclosure by state law is exempt from disclosure under s. 19.35(1), except that any portion of that record which contains public information is open to public inspection as provided in sub. (6).
223. Id.
take the task of sorting out and deleting exempt portions of records.

Two Wisconsin cases have dealt with situations in which a custodian masked confidential portions of a record so that nonconfidential portions could be made available. In *State ex rel. Dalton v. Mundy*224 an individual doing statistical research sought Milwaukee County Hospital’s records concerning abortion cases.225 Stating that a breach of confidence between the facility, its doctors and patients would result from disclosure of the records, the hospital denied the request.226 However, the court ruled that public policy favored the inspection of these public records and granted the suggestion of the requester that she be given copies with the patients’ names obscured.227

A similar approach, however, backfired against a municipality in *Maynard v. City of Madison*.228 Maynard had been a paid police informer, who, with the assurance that her identity would be kept confidential, reported on local radical groups protesting during the Vietnam War.229 In response to a request, the department made public edited versions of intelligence reports.230 Although her name was deleted, the activities and people Maynard had described in her reports made her identity obvious.231 She was exposed as an informer in a local newspaper, suffered harassment232 and brought a successful suit against the municipality. The *Maynard* case vividly reveals the serious problem a custodian may face when determining which portions of a body of material are confidential and which portions are not.

Another problem which custodians may face is that there are a large number of both state233 and federal234 statutes

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224. 80 Wis. 2d 190, 257 N.W.2d 877 (1977).
225. *Id.* at 192, 257 N.W.2d at 879.
226. *Id.*
227. *Id.* at 195-96, 257 N.W.2d at 879-80.
228. 101 Wis. 2d 273, 304 N.W.2d 163 (Ct. App. 1981).
229. *Id.* at 275, 304 N.W.2d at 165.
230. *Id.*
231. *Id.* at 277, 304 N.W.2d at 166.
232. *Id.*
233. A partial listing of Wisconsin statutes which indicate that the records or certain information on the records may be either absolutely closed to inspection or closed under certain conditions include records involving: juveniles, Wis. Stat.
which dictate that certain records are to be closed to public inspection in some or all situations. There is presently no compilation of all the exemptions. Those custodians who are knowledgeable about laws pertaining to specific categories of records under their supervision may not have a problem determining what material is exempted by other statutes. However, custodians who do not regularly receive public requests for records may be faced with very difficult questions.

2. Use of the Balancing Test.

Chapter 335 provides that "[s]ubstantive common law principles construing the right to inspect, copy or receive copies of records shall remain in effect." This provision indicates that the judicial balancing test continues to be operative in determining whether to grant inspection of a public record. The statute also provides that the custodian must specifically state the reasons for denial if, after weighing the competing public policy interests, the custodian de-

§ 48.396 (1981-82); child care agencies, id. § 48.78; adoption, id. § 48.93; abused or neglected children, id. § 48.981(10); welfare recipients, id. § 49.001; medical assistance recipients, id. § 49.45(4); vocational rehabilitation records, id. § 47.40(13); AFDC recipients, id. § 49.53(1)(b); health care facilities, id. § 50.03(2)(e); mental health reports, id. § 51.30(4)(b); protective placement, id. § 55.06(17); illegitimate births, id. § 69.30(1); congenital disabilities, id. § 69.32; income tax returns, id. § 71.11(44); real estate transfer fees, id. § 77.23(2); employment records, id. § 103.13; pupil records, id. § 118.125(2); communicable disease reports, id. § 143.07(7); patient health care records, id. § 146.82; pollution monitoring reports, id. § 147.08(2); employment relations records, id. § 230.13; juvenile license suspensions, id. § 343.30(5); accident reports, id. § 349.19; coroner's blood tests, id. § 346.71(2); incompetency findings, id. § 880.33(6); privileged communications, id. § 905.03-.05; identity of an informer, id. § 905.10; investigatory law enforcement files, id. § 905.09.


235. The interplay of other statutory provisions was demonstrated in a recent case, State ex rel. Bilder v. Township of Delavan, 112 Wis. 2d 539, 334 N.W.2d 252 (1983), in which the supreme court determined that exhibits attached to pleadings were not governed by the public records law but by Wis. Stat. § 59.14(1) (1981-82). The court further stated that the exceptions to the right of public access under § 59.14(1) were different from those in the public records law.


237. This has been confirmed by the attorney general. Letter from Bronson C. LaFollette, Attorney General of Wisconsin to James W. Conway, City Attorney of Kenosha (March 1, 1983).
cides the reasons for nondisclosure outweigh the presumption in favor of disclosure.238

While the use of a balancing test is a recognized method of resolving the conflict between the need to inform the public and the need for personal and governmental confidentiality, there are some problems inherent in the use of the test in Wisconsin. The side of the equation which recognizes the presumption of the public right to know cannot always take into account the gravity of the need to know because the requester is not required to be identified or to state a motive or purpose for requesting a record. On the other side of the balance, that which weighs the countervailing public interest in nondisclosure, the statute provides little guidance as to the interests to be considered. The original version of chapter 335 contained the balancing test and listed the specific types of records to which the balancing test was to be applied.239 However, the wording of the balancing test and the specific listing of exemptions were omitted in the final bill enacted into law. Because there is no specific mention of the balancing test in the statute and its use is described only in case law, it is questionable whether it will be fully or properly utilized by many records custodians. Also, a records custodian will have difficulty applying a legal test, the results of which attorneys and judges may differ on.

3. Exemptions Inferable from the Open Meeting Law.

Chapter 335 restates the previous judicial acknowledgment that there is an interplay between the exemptions to the requirement of open sessions for governmental bodies and the right to inspect a public record.240 The Wisconsin open meeting law241 provides that meetings of governmental bodies are to be open to the public unless the agenda falls within one of eight stated exemptions.242 The amended pub-

239. See supra note 158.
241. Id. §§ 19.81-.98.
242. Id. § 19.85. The eight exemptions are: deliberation concerning a trial or hearing; considering dismissal, demotion, licensing, discipline, tenure or charges against a public employee or licensee; considering employment, promotion compensation or evaluation of a public employee; considering applications for probation or
lic records statute provides that these open meeting exemptions:

are indicative of public policy, but may be used as grounds for denying public access to a record only if the authority or legal custodian . . . makes a specific demonstration that there is a need to restrict public access at the time that the request to inspect or copy the record is made.243

This language indicates that the use of the open meeting exemptions are not absolute in the context of public records and consequently must be used in conjunction with the balancing test. In the requirement that the custodian specifically demonstrate the need to restrict access at the time of the request, the legislature appears to indicate that although, at an earlier point, material may have been too sensitive or damaging to disclose, this may not be used as a justification to continue its nondisclosure merely because it fits under one of the exceptions to the open meeting law.244 This may represent a significant curtailment of the previous judicial recognition of the applicability of the open meeting law to information in records since it requires a “specific demonstration” that there be a concurrent need “at the time that the request . . . is made.”245 This is a much higher standard than previously set forth by the Wisconsin Supreme Court.246

The Wisconsin Supreme Court, thus far, has focused its attention solely on one of the exemptions found in the public meeting law: those situations in which financial, medical, social or personal histories and disciplinary data which could unduly damage reputations was under considera-

parole or strategies for crime detection or prevention; deliberating or negotiating competitive bargaining of public funds; considering financial, medical, social or personal histories of employees; conferring with legal counsel; or considering advice from an ethics board. Id.

243. Id. § 19.35(1)(a).
244. See supra note 242.
246. See Newspapers, Inc. v. Breier, 89 Wis. 2d 417, 430, 279 N.W.2d 179, 185 (1979), in which the court stated merely that “the legislative policy expressed in [the opening meeting statute] ‘carries over to the field of inspection of public records and documents.’” (quoting State ex rel. Youmans v. Owens, 28 Wis. 2d 672, 685, 137 N.W.2d 470, 476 (1965)).
This exemption appears to have the greatest possibility for application to the public records law.

The largest number of exceptions under the open meeting law pertain to employment situations. However, the employee records statute may operate to open up employment records deemed nondisclosable under an application of the policies embodied in the exceptions to the open meeting law in instances in which an "employee" or his "representative" makes a request for personnel records. In much the same way that the Wisconsin Supreme Court applied the policy considerations of the open meeting law in recognizing exceptions to the prior public records statute, the employee records statute contains a set of exceptions and underlying policies to the right of access which may be added to the categories of reasons for legitimate denial of access to public records.

4. Other Specific Exemptions in Chapter 335.

Although a detailed listing of exemptions was eliminated from the original draft of the law, seven specific exemptions to the public records law remain. Their inclusion appears to be due either to their noncontroversial nature or to the personal interest legislators had in them. The wording of these exemptions indicates they are absolute rather than subject to the balancing of interests.

Computer programs are specifically exempted from inspection under the public records statute, but the data inputted and material produced is subject to inspection. Information which qualifies as a common-law trade secret is

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248. Id. § 19.85(1)(c) (concerning promotion, employment, compensation or performance evaluation).
249. Id. § 103.13(2).
250. Id. § 103.13(1)(b).
251. Id. § 103.13(3).
also immune from disclosure. The legislation also closes two categories of materials which obviously elicited a personal concern on the part of the legislators: research and drafting requests made to the legislative council staff and current audits performed by the legislative audit bureau are exempted from disclosure.

Investigative law enforcement records are exempted from inspection whenever federal law requires they be kept confidential or their confidentiality is a condition to the receipt of federal aid. This provision is the only one in the public records statute which addresses law enforcement records. Newspapers, Inc. v. Breier, a case which involved the Milwaukee police chief's refusal to provide the Milwaukee Journal newspaper with access to records, provides some guidance regarding the treatment of law enforcement records not specifically addressed by state or federal law. The Breier court stated that the records custodian must weigh the competing interests involved in disclosure in determining whether to permit access to police records. After weighing the interests involved, the court determined that daily arrest records, often called the police "blotter," which records the cause of arrest when individuals are taken into custody, were available for inspection. The court in Breier, however, declined to decide whether "rap sheets,"

255. Wis. Stat. § 19.36(5) (1981-82). The Wisconsin Supreme Court has adopted the Restatement of Torts definition of trade secret which provides: "A trade secret may consist of any formula, pattern, device or compilation of information which is used in one's business, and which gives him an opportunity to obtain an advantage over competitors who do not know or use it." Restatement of Torts § 757 comment b (1939). See Gary Van Zeeland Talent, Inc. v. Sandas, 84 Wis. 2d 202, 267 N.W.2d 242 (1978).
257. Id. § 13.91.
258. Id. § 13.94.
259. Id. § 19.36(2). However, if state law specifically requires the disclosure of the record despite the fact that nondisclosure is a condition to receipt of federal aids by the state, the record is not exempt from disclosure. Letter from Bronson C. LaFollette, Wisconsin Attorney General, to George Schmus (Dec. 27, 1982).
260. 89 Wis. 2d 417, 279 N.W.2d 179 (1979).
261. Id. at 427, 279 N.W.2d at 184.
262. Id. at 423, 279 N.W.2d at 182.
the record kept on an individual with an arrest record, must be disclosed.\textsuperscript{263} The attorney general, in a formal opinion, has given additional guidance regarding law enforcement records.\textsuperscript{264} Where an official obtains information under a clear pledge of confidentiality and there is no specific statutory authority regarding its submission, the information is not accessible.\textsuperscript{265} In a private letter ruling the attorney general has also stated that to preserve the integrity of an ongoing investigation, records relating to a specific case may be withheld from disclosure.\textsuperscript{266} However, that reason for non-disclosure will disappear once a case is concluded.\textsuperscript{267}

\textbf{F. Access to Public Records}

Chapter 335 contains extremely specific details defining the duties of authorities and custodians in facilitating a request for inspection of a public record. The degree of detail appears to have been directed at facilitating the accessing of public records while still providing some protection against disruption of governmental offices. However, in practice and despite such intentions, some of the provisions may create new problems. The paragraphs which follow describe the new provisions.

An authority must display a notice describing the times, location and identity of individuals from whom access to records and copies of records may be obtained.\textsuperscript{268} The cost of copies must also be prominently displayed.\textsuperscript{269} Authorities must permit access to records during regular office hours.\textsuperscript{270} An authority must provide facilities comparable to those used by its employees to those wishing to inspect or copy a record.\textsuperscript{271}

\begin{thebibliography}{9}
\bibitem{263} Id. at 424, 279 N.W.2d at 183.
\bibitem{265} Id.
\bibitem{266} Letter from Bronson C. LaFollette, Wisconsin Attorney General, to Joe Vandel, News Director WYUR-FM (May 20, 1983).
\bibitem{267} Id.
\bibitem{268} Wis. Stat. § 19.34(4) (1981-82).
\bibitem{269} Id.
\bibitem{270} Id. § 19.34(2).
\bibitem{271} Id. § 19.35(2).
\end{thebibliography}
In regard to fees charged to the requester of a record, the statute states that the fee for copying a record cannot exceed the "actual, necessary and direct cost."\(^\text{272}\) There may be an additional fee charged for locating records, but only if the cost of location exceeds fifty dollars.\(^\text{273}\) These fee provisions have raised many questions, some of which have been recently addressed in opinions of the attorney general. The attorney general has opined that the "actual, necessary and direct cost of copying" may include the cost of paper and the rental of a copier, but may not include overhead or set-up charges.\(^\text{274}\) The attorney general has also indicated that the labor involved in making copies may be considered a cost,\(^\text{275}\) but the cost of separating confidential from nonconfidential information must be borne by the agency.\(^\text{276}\) If another statute establishes a higher fee for copies of a particular record, this fee may be charged,\(^\text{277}\) but a custodian may not require a requester to pay the cost of unrequested certification.\(^\text{278}\)

Chapter 335 provides that an authority must fill a request or notify the requester of reasons for denial "as soon as practicable and without delay."\(^\text{279}\) There may, however, be delays as the need arises to resort to legal counsel for advice despite the fact that many procedures are stated in the statute. A denial in response to a written request must be in writing.\(^\text{280}\) A mandamus action may be commenced only after a written request has been made and denied.\(^\text{281}\) A request must reasonably describe the records being sought.\(^\text{282}\)

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\(^{272}\) Id. § 19.35(3)(a)-(b).

\(^{273}\) Id. § 19.35(3)(c). The attorney general has indicated that the cost of a computer run may not be considered a location fee. 72 Op. Att'y Gen. 19-83 (June 2, 1983).

\(^{274}\) Letter from Bronson C. LaFollette, Wisconsin Attorney General, to Attorney Robert A. Christensen (Mar. 8, 1983).


\(^{280}\) Id. § 19.35(4)(b). An oral request may be denied orally, unless the requester demands a written statement of reasons for the denial within five business days of the oral denial. Id.

\(^{281}\) Id. § 19.37(1).

\(^{282}\) Id. § 19.35(1)(h).
Requested materials are not reasonably described if the request does not limit the subject matter or length of time represented by the record.283

A requester also has the right to receive a copy of a record including audio and videotapes.284 A photocopy, video copy or audio recording must be substantially as good as the original.285 No copies must be supplied if the record will soon be offered for sale or distribution.286

Authorities do not have to create a new record for a requester.287 Authorities do have to sort out and release non-confidential materials when they are mixed with confidential materials.288 Authorities can impose reasonable restrictions on the manner of access if the record is easily damaged or irreplacable289 and may reproduce the requested copies themselves rather than allowing the requester to copy them.290

G. Enforcement of the Act and Remedies

Chapter 335 adds enforcement alternatives and penalties to the public records statute which may have the effect of encouraging litigation over a denial of access to a record. A requester who has been denied access may seek enforcement of the right of access by bringing an action for a writ of mandamus personally291 or may request that either the district attorney or the attorney general bring the action.292 The alternative of requesting either the attorney general or the dis-

283. Id.
284. Id. § 19.35(1)(d).
285. Id. § 19.35(1)(b), (d). An audio recording must be substantially as audible as the original or the authority may provide a transcript of the original. Id. § 19.35(1)(c).
286. Id. § 19.35(1)(g).
287. Id. § 19.35(1)(i).
288. Id. § 19.36(6).
289. Id. § 19.35(1)(k).
290. Id. § 19.35(1)(b). The copy must be substantially as readable as the original. Id.
292. Id. § 19.37(1)(b). The request must be in writing and may be directed either to the district attorney “where the record is found” or to the attorney general. However, the involvement of the attorney general and district attorney is permissible under Wis. Stat. § 19.37(1)(b) (1981-82). At present, the attorney general follows a deferral policy with respect to alleged violations of the open meeting law:
District attorney to bring an action should serve to encourage those who might not have the personal resources to bring a lawsuit to challenge the denial of a record request. However, it should be noted that the wording of the statute indicates that bringing such an action by the attorney general or district attorney is discretionary rather than mandatory. Another enforcement aid in the amended statute allows a requester who "prevails in whole or in substantial part in any action filed" the award of "reasonable attorney fees, damages of not less than $100 and other actual costs to the requester." These provisions may encourage requesters and their attorneys to pursue a legal action even if the district attorney or attorney general declines to become involved.

Although the litigation expense barrier can be overcome by a requester, the new statute does not suggest which factors a court may take into consideration in determining the award of attorney fees. Wisconsin courts may find assistance in existing federal case law. In addition to the poten-
tial award of attorney fees, damages and costs, the new statute sanctions the awarding of punitive damages to the requester where “an authority or legal custodian . . . has arbitrarily and capriciously denied or delayed response to a request or charged excessive fees.” However, it is not clear whether the payment of punitive damages is the responsibility of the unit of government employing the legal custodian or public official or is to be paid personally by the custodian or public official. The majority of courts which have considered the question of liability for punitive damages have held that a governmental entity is not liable for punitive damages occasioned by the wrongful acts of its employees or officials unless authorized or ratified in some manner. It would not be difficult for Wisconsin to adopt the majority approach since it appears to be based upon sound public policy considerations. The purpose of punitive damages is to punish and deter reckless, willful or wanton conduct. Such conduct is beyond the scope of employment. The imposition of this penalty on a governmental entity rather than on an official or employee negates the deterrence aspect of punitive damages on the wrongdoer. It


297. Wis. Stat. § 19.37(3) (1981-82). This section does not contain language found in Wis. Stat. § 19.37(2) (1981-82) which has the effect of holding legal custodians and public officials harmless.

298. See, e.g., Newport v. Fact Concerts, Inc., 453 U.S. 247 (1981) (municipalities are immune from punitive damages in 1983 actions); Shore v. County of Mohave, 644 F.2d 1320 (9th Cir. 1981) (city held not liable for punitive damages stemming from false imprisonment claim against police officer); Fisher v. City of Miami, 172 So. 2d 455 (Fla. 1965) (assault by police officer was intentional act and to impose punitive damages on municipality would not punish officer); George v. Chicago Transit Authority, 58 Ill. App. 3d 692, 374 N.E.2d 679 (1978) (compensatory but not punitive damages recoverable from transit authority after train collision). But see Bonsignore v. City of New York, 521 F. Supp. 394 (S.D.N.Y. 1981) (city liable for punitive damages where police officer shot his wife before committing suicide); Young v. City of Des Moines, 262 N.W. 2d 612 (Iowa 1973) (city held liable for punitive damages resulting from an act of one of its police officers).

299. See supra note 296.

can also place an unjust burden on taxpayers who lack total control over employee conduct.\textsuperscript{301}

Perhaps in an effort to maximize the options available to the district attorney and the attorney general, the new statute allows the pursuit of a forfeiture action resulting in a possible forfeiture not exceeding $1,000.\textsuperscript{302} It is not clear whether such an action is allowable in addition to an action for punitive damages, or in lieu of such an action. In both instances, the standard is the same: "arbitrarily and capriciously denied or delayed response to a request or charged excessive fees."\textsuperscript{303} It is conceivable that the forfeiture action may serve no real purpose if the attorney general is put in a position of prosecuting a state agency for policies or practices which are viewed as undesirable. Moreover, an inherent conflict of interest may exist if the attorney general or the district attorney pursues such actions since they represent the state of Wisconsin in civil and criminal matters.

\section*{V. A Missing Element: Privacy Protection}

In striking a balance between the right of the public to know and the competing rights of individuals, the Wisconsin public records law overlooks the right of confidentiality, a right the United States Supreme Court has described as "the individual interest in avoiding disclosure of personal matters."\textsuperscript{304} In order to carry on their delegated functions such as education, police protection, dispensing welfare benefits, licensing and taxation, governmental agencies must acquire detailed information on citizens.\textsuperscript{305} Much of this information is supplied with the express or implied understanding that it will be kept confidential.

A majority of the states and FOIA\textsuperscript{306} have some type of privacy exemptions covering confidential information in

\textsuperscript{301} Nevertheless, the Wisconsin Attorney General has concluded that punitive damages and forfeitures can be the liability of both the agency and the employee, but that the employee will be indemnified for punitive damages but not for forfeitures. 72 Op. Att'y Gen. 28-83 (Aug. 4, 1983).
\textsuperscript{303} Id. § 19.37(3)-(4).
\textsuperscript{305} See Project, supra note 2, at 1244-45.
their public records statute or in separate legislation.\textsuperscript{307} Wisconsin, however, has not adequately dealt with privacy problems inherent in information collection and its release, except through separate statutes which deal only with a specific type of record.\textsuperscript{308} The Wisconsin public records statute contains no specific exemption dealing with privacy and the balancing test makes no mention of the privacy concern. The balancing test, as enunciated by the supreme court, weighs the need of the public to be informed against the harm to the public interest rather than harm to any private interest in the release of the record.\textsuperscript{309} Although Newspapers, Inc. v. Breier\textsuperscript{310} did consider the harm to reputation through the disclosure of arrest information,\textsuperscript{311} reputation is only one aspect of the right of privacy and the court has not faced other legitimate privacy interests such as the right to confidentiality inherent in the disclosure of personal information.

Wisconsin's privacy statute, enacted in 1977, does not protect the privacy rights of individuals when confidential information is contained in public records.\textsuperscript{312} The statute provides, "[i]t is not an invasion of privacy to communicate any information available to the public as a matter of public record."\textsuperscript{313} The supreme court, referring to the foregoing legislation, has stated, "individuals have no right of privacy in materials contained in public records that are open to the public generally."\textsuperscript{314} Thus in both the privacy statute and the public records statute neither the Wisconsin Legislature nor the Wisconsin Supreme Court has confronted the privacy right of an individual regarding confidential information given to a governmental agency.

\begin{itemize}
\item \textsuperscript{307} Braverman & Heppler, supra note 26, at 745.
\item \textsuperscript{308} See, e.g., Wis. Stat. § 118.125(2) (1981-82) (pupil records); \textit{id.} § 146.82 (patient health care records).
\item \textsuperscript{309} Newspapers, Inc. v. Breier, 89 Wis. 2d 417, 427, 279 N.W.2d 179, 184 (1979).
\item \textsuperscript{310} \textit{Id.} at 433, 279 N.W.2d at 187.
\item \textsuperscript{311} See Wis. Stat. § 895.50 (1981-82).
\item \textsuperscript{312} \textit{Id.} § 895.50(2)(c).
\item \textsuperscript{313} Breier, 89 Wis. 2d at 431-32, 279 N.W.2d at 186.
\end{itemize}
VI. Conclusion

Although the recent revision of the Wisconsin public records statute was launched several years ago as an attempt to comprehensively codify the substantive law and detail the procedural mechanics associated with access to public records, the final product, although extensive, failed to fully achieve earlier goals. Instead of a legislative condensation of substantive standards found in prior case law in one statute for more convenient reference and application or an elaboration of a judicially devised "balancing test," chapter 335 merely permits the continuation of some lingering problems and uncertainties of the existing substantive law by providing that "[s]ubstantive common law principles construing the right to inspect, copy or receive copies of records shall remain in effect." Thus, the new statute can be viewed as a silent acknowledgement that either the substantive law status quo was deemed adequate or perhaps that the challenge of localizing and reconciling in one statutory section the multitude of other statutory records provisions and interpretive judicial pronouncements is better left for another time.

The new legislation fails to consider the role of privacy with respect to public records in any direct fashion. It does not enhance in a practical manner the ability of legal custodians to apply the broadly stated balancing test. It fails to give any insight to the judiciary on how the privacy rights of individuals must be weighed in the context of applying the balancing test — a general formula which on its face considers only whether the harm to the public outweighs the presumption of benefit to the public. By not listing in one place the recognized statutory exemptions, it complicates the task of custodians who must hunt out and interpret provisions on public records scattered in various unrelated provisions of the Wisconsin statutes. This shortcoming may foster uncertainty on the part of custodians which may necessitate further consultation with legal counsel. This additional step may infuse delay into the process of obtaining access to public records. This is especially true since the legislation is am-

biguously drafted in regard to who is financially responsible for the payment of punitive damages or a forfeiture in the event of a violation. To the extent that the new statute acknowledges the interplay of policy considerations associated with the open meeting law, it does not clearly specify the weight which those policies are to carry, especially when the burden is affirmatively placed on the legal custodian to make a "specific demonstration that there is a need to restrict public access." The kind of showing which a custodian must make and the manner in which it must be accomplished is left uncertain.

On the other hand, chapter 335 unambiguously declares that an essential function of government includes providing information. This statement is further enhanced by the statement of the "presumption of complete public access, consistent with the conduct of governmental business." The new statute also details procedural ground rules which do enhance the mechanical process of accessing public records while at the same time permitting individual tailoring within each "authority" as to: the level of status and number of personnel who will be responsible for serving in the role of records custodian, the fees that will be charged for searching and copying records, the hours of access and the setting within which the examination of public records may occur. To assure compliance, a rather broad range of compliance devices are provided: a writ of mandamus, damages, attorney fees, costs, punitive damages and forfeiture penalties as well as the discretionary assistance of the offices of the district attorney or attorney general.

While there remain numerous areas which await further judicial clarification and despite the disappointing silence of this legislation relative to the substantive law, on balance, chapter 335 can be viewed as a positive step in the evolution of public records law in Wisconsin.

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316. Id.
317. Id. § 19.31.