

**COURT OF APPEALS
DECISION
DATED AND FILED**

July 18, 2000

Cornelia G. Clark
Clerk, Court of Appeals
of Wisconsin

NOTICE

This opinion is subject to further editing. If published, the official version will appear in the bound volume of the Official Reports.

A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals. See WIS. STAT. § 808.10 and RULE 809.62.

No. 99-1221

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT I**

**DALE WIGGINS, D/B/A PROFESSIONAL
SERVICES OF WISCONSIN, INC.,**

PETITIONER-RESPONDENT,

v.

**JOHN C. BUTORAC, CHIEF OF POLICE,
CITY OF WEST ALLIS LEGAL CUSTODIAN OF
RECORDS OF WEST ALLIS POLICE DEPARTMENT,**

RESPONDENT-APPELLANT.

APPEAL from an order of the circuit court for Milwaukee County:
MICHAEL G. MALMSTADT, Judge. *Affirmed.*

Before Wedemeyer, P.J., Fine and Schudson, JJ.

¶1 PER CURIAM. John C. Butorac, the West Allis Police Chief and records custodian, appeals from an order of the circuit court requiring him to

release certain documents pursuant to the Open Records Law. Butorac claims the trial court erred in concluding that there was insufficient public interest in keeping the public records confidential. Because the public interest in inspection outweighs any public interest in keeping the requested records confidential, we affirm.

I. BACKGROUND

¶2 On March 2, 1998, West Allis Police Officer Daniel DiTorrice stopped Anthony Hudler for making an illegal lane change. During the stop, DiTorrice learned that Hudler was operating his vehicle under a suspended license for failure to pay a forfeiture. Hudler was issued a citation, but subsequently drove off. There was some dispute between DiTorrice and Greenfield Police Officer Gregory Hoppe, who had been called to assist DiTorrice, as to exactly what happened relative to Hudler. DiTorrice stated that he believed that Hoppe, who drove off after Hudler, would re-stop Hudler. Hudler was not stopped again by the police. Forty-five minutes after being stopped by DiTorrice, however, Hudler sped through the intersection of South 108th Street and West National Avenue, killing two individuals who were driving through the intersection on the green light.

¶3 On May 5, 1998, Dale K. Wiggins sent an open records request to the West Allis police chief, seeking “[c]opies of any and all records that reflect your department’s review or investigation of the traffic stop of Anthony Hudler on March 2, 1998 by officer Daniel DiTorrice.” Chief Butorac responded to the request by letter dated May 14, 1998, detailing why certain records could not be released. More specifically, Butorac cited seven public policy reasons for denying Wiggins’s request: (1) disclosure would interfere with the department’s ability to

conduct investigations; (2) the records must remain confidential for the day-to-day operations of the police department; (3) release of the records would have a chilling effect on an officer's ability to enforce the law; (4) disclosure would counter the department's interest in keeping personnel records confidential; (5) release of the records would interfere with the officer's privacy and reputational interests protected by WIS. STAT. § 103.13 (1997-98);¹ (6) disclosure is contrary to the general privacy rights of Wisconsin citizens; and (7) disclosure is contrary to protecting the reputation of Wisconsin citizens.

¶4 Wiggins wrote Butorac asking that he reconsider his denial. Butorac did not respond. Subsequently, Wiggins filed a petition seeking a writ of mandamus in the circuit court, which requested the court to order Butorac to release the records. The circuit court conducted an *in camera* inspection of the records at issue, and concluded that the following records could and should be released:

1. The inter-office report dated March 2, 1998, from Lt. Michael Jungbluth to Police Chief John C. Butorac (2 pages).
2. The inter-office report dated March 2, 1998, from Officer Ditorrice to Lt. Michael Jungbluth (1 page).
3. The inter-office report dated March 2, 1998, from Lt. Michael Jungbluth to Police Chief John C. Butorac (1 page). (Subject: Contact-Greenfield Officer Gregory Hoppe.)
4. The recorded interview dated March 5, 1998, of Officer Ditorrice (6 pages).
5. The recorded interview dated April 2, 1998, of Officer Ditorrice (12 pages).

¹ All references to the Wisconsin Statutes are to the 1997-98 version unless otherwise noted.

Butorac appeals from the circuit court's order.²

II. DISCUSSION

¶5 The issue in this case involves Wisconsin Open Records Law, codified at WIS. STAT. §§ 19.31-19.37. Our standard of review is summarized in *Hathaway v. Green Bay School Dist.*, 116 Wis. 2d 388, 342 N.W.2d 682 (1984): “[T]he general presumption of our law is that public records shall be open to the public unless there is a clear statutory exception, unless there exists a limitation under the common law, or unless there is an overriding public interest in keeping the public record confidential.” *Id.* at 397. We review the custodian's decision regarding the open records request independently. See *Kailin v. Rainwater*, 226 Wis. 2d 134, 147, 593 N.W.2d 865 (Ct. App. 1999).

¶6 Our review involves a two-step process:

First, we must decide if the trial court correctly assessed whether the custodian's denial of access was made with the requisite specificity. Second, we determine whether the stated reasons are sufficient to permit withholding, itself a two-step analysis. Here, our inquiry is: (1) did the trial court make a factual determination supported by the record of whether the documents implicate the public interests in secrecy asserted by the custodians and, if so, (2) do the countervailing interests outweigh the public interest in release.

Wisconsin Newspress, Inc. v. Sheboygan Falls Sch. Dist., 199 Wis. 2d 768, 784, 546 N.W.2d 143 (1996) (citation omitted). Butorac argues that the public policy

² Butorac filed a motion in the circuit court seeking a stay pending appeal to prevent the release of the documents. The circuit court denied the motion. Butorac also filed a motion in this court seeking a stay pending appeal, which was also denied. Accordingly, the subject records were released pursuant to the circuit court order. Butorac seeks “reversal of [the circuit court's] order and the return of actual attorney fees, with interest, paid by” Butorac.

interest in protecting privacy and reputational interests should take precedence over release of the records. Butorac also refers to several statutory sections that he asserts support withholding of these records. In response, Wiggins contends that the reasons advanced by Butorac are insufficient to overcome the statutory presumption in favor of disclosure.

¶7 The circuit court examined whether Butorac's stated reasons for denying Wiggins's request were sufficient to permit nondisclosure. The circuit court determined that "[a]lthough Butorac's reasons for nondisclosure are valid public policy concerns, they do not outweigh the public's right to access some of the information requested." The circuit court ruled:

Those documents that contain solely factual information must be disclosed. Factual information gathered in connection with an investigation of police conduct is generally subject to public inspection. However, any records with "supervisory opinions containing recommendations or concerns made for future action or criticisms of past actions may legitimately be withheld."

(Citations omitted.) We have reviewed the documents at issue and conclude that the circuit court's decision was correct.

¶8 Butorac cites several statutory sections, including WIS. STAT. §§ 895.50, 19.85(1)(b)(c) & (f), 103.13(3) & (6) and 230.13, as indicative of legislative intent in favor of protecting the privacy and reputational interests of Wisconsin citizens. Based on that intent, he argues that seven public policy reasons override the presumption in favor of disclosing the records. We reject each in turn.

1. *Disclosure would hamper department's ability to conduct investigations.*

¶9 Butorac first claims that the records should not be disclosed because disclosure would interfere with the police department's ability to conduct thorough, confidential internal personnel investigations, including the gathering of statements from members of the department as a condition of their employment. We are not persuaded that this countervailing factor is sufficient to overcome the presumption of disclosure for several reasons. First, the circuit court clearly indicated that only documents containing factual information would be disclosed. *See State ex rel. Journal/Sentinel, Inc. v. Arreola*, 207 Wis. 2d 496, 514, 558 N.W.2d 670 (Ct. App. 1996). Second, “[f]actual material gathered in connection with an investigation of police conduct is generally subject to public inspection.” *Id.* Third, disclosure of solely factual information will only have a remote impact on investigations. *See id.* Fourth, the open records request in this case did not occur until the investigation was completed. *See id.* Accordingly, the first countervailing interest relied on by Butorac is insufficient to override the public interest in disclosure of the requested information.

2. *Day-to-day operations of the department require confidentiality.*

¶10 Next, Butorac cites the need to keep these records confidential in order to avoid adversely affecting the day-to-day operations of the police department. We are not persuaded. First, Butorac's reason is not fact specific. He fails to explain what day-to-day operations would be affected. Presumably, he is referring to the ability to investigate such incidents, which is merely cumulative to the first public policy interest that we have already rejected. Second, as noted, the records were not requested until after the investigation was complete. The records that were ordered disclosed contained factual information relative to a

public event. Therefore, we see no reason why disclosure of these records would interfere with the day-to-day operations of the police department.

3. *Chilling effect.*

¶11 Next, Butorac claims that release of the records would result in a chilling effect on the ability of law officers to enforce the law effectively, thus harming the general public. We disagree. Again, Butorac does not explain specifically what he means by this general statement. We surmise he is concerned that police officers would choose other employment or make fewer arrests in order to avoid potential embarrassment if they knew that the contents of their personnel files might be made public as a result of an investigation into the circumstances involving an arrest. This concern does not override the public interest in disclosing the requested documents. Our reason here echoes those set forth above. The public is entitled to the factual information generated from this public event. Disclosure of the *factual* information does not impact on a police officer's ability to enforce the law. This case does not involve disclosure of an entire personnel file, and does not involve disclosure of "supervisory opinions" or "criticisms of past actions" of the officer, *see Arreola*, 207 Wis. 2d at 514, which are the type of remarks that may lead to embarrassment. We conclude, therefore, that this countervailing interest is insufficient to outweigh the public's right to access the information disclosed in this case.

4. *Disclosure is adverse to keeping personnel records confidential.*

¶12 Butorac argues that disclosure of these records would run counter to the department's interests in maintaining the confidentiality of its personnel records, citing WIS. STAT. § 230.13. We are not persuaded.

¶13 WISCONSIN STAT. § 230.13 provides that “the administrators of an agency may keep department employees’ personnel records concerning dismissals, demotions and other disciplinary records closed.” *Pangman & Assocs. v. Zellmer*, 163 Wis. 2d 1070, 1084, 473 N.W.2d 538 (Ct. App. 1991). The statute does not apply to this case. The documents ordered disclosed are not personnel records concerning adverse disciplinary action. Rather, the documents contained solely factual information related to the officer’s actions in handling the traffic stop.

5. Section 103.13 prevents disclosure.

¶14 Butorac also cites WIS. STAT. § 103.13 in support of nondisclosure. He argues that this statute evidences a legislative intent to keep certain investigative matters closed to the public. Again, we conclude that this countervailing interest is insufficient to overcome the statutory presumption in favor of disclosure.

¶15 WISCONSIN STAT. § 103.13 provides employees with the right to inspect their own personnel records “covering the areas in which the employer determined the ‘employee’s qualifications for employment, promotion, transfer, additional compensation, termination or other disciplinary action, and medical records.”” *Pangman*, 163 Wis. 2d at 1084 (citation omitted). This statute has no application to the instant case. The documents at issue do not involve the topics covered by this statute.

6. General right to privacy.

¶16 Butorac next suggests that the police officer’s general right to privacy outweighs the public’s right to disclosure. We disagree.

¶17 “When individuals accept positions as police officers, they necessarily relinquish certain privacy rights and must be subject to public scrutiny.” *Arreola*, 207 Wis. 2d at 515. Because of their public employment, police officers have a lower expectation of privacy. *See id.* Thus, a police officer cannot hide behind a “privacy shield” in order to prevent the public’s right to access factual information generated from a public event.

7. *Reputational interest.*

¶18 Finally, Butorac cites the police officer’s right to protect his reputation as justification for denying public access to the records. We are not persuaded.

¶19 Withholding the factual reports here in order to protect the police officer’s reputation runs contrary to the purpose behind the open records law and the case law interpreting it. The public has a right to know the factual background surrounding the event that was the genesis for the open records request. “The public has a particularly strong interest in being informed about public officials who have been ‘derelict in [their] duty.’” *Wisconsin Newspress*, 199 Wis. 2d at 786 (citations omitted). Although disclosure of the factual information related to a public incident may affect a police officer’s reputation, such does not outweigh the benefit to the public in obtaining the information. *See id.*

III. CONCLUSION

¶20 In sum, we conclude that the trial court did not err in ordering the documents disclosed. Public policy favors the right to public inspection of the documents, and disclosure is denied only in the exceptional case. *See State ex rel. Youmans v. Owens*, 28 Wis. 2d 672, 137 N.W.2d 470 (1965). Here, the circuit

court conducted an *in camera* inspection of the requested documents. It balanced the countervailing factors and concluded that certain of the documents contained factual information that should be made available to the public. After reviewing the record in this case and examining each of Butorac's proffered countervailing reasons, we affirm that decision.

By the Court.—Order affirmed.

This opinion will not be published. *See* WIS. STAT. RULE 809.23(1)(b)5.

