



STATE OF WISCONSIN
DEPARTMENT OF JUSTICE

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PEGGY A. LAUTENSCHLAGER
ATTORNEY GENERAL

Daniel P. Bach
Deputy Attorney General

114 East, State Capitol
P.O. Box 7857
Madison, WI 53707-7857

Alan Lee
Deputy Administrator
Division of Legal Services
leeam@doj.state.wi.us
608/266-0020
TTY 1-800-947-3529
FAX 608/266-1656

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Ms. Elizabeth Burmaster
State Superintendent
Department of Public Instruction
125 South Webster Street
Madison, WI 53702

Dear Ms. Burmaster:

You have requested an opinion from my office in response to a series of questions concerning the interpretation and application of section 43.30 of the Wisconsin Statutes, "Public Library Records," to library surveillance systems installed in many modern public libraries.

Your questions are primarily directed at whether, or to what extent, the prohibition on disclosure of library records set forth in section 43.30(1m) applies to such videotape surveillance systems.¹ You cite as an example the Sun Prairie Public Library which was built with a videotape surveillance system that employs cameras located both inside and outside the library,

¹This opinion focuses entirely on the interpretation of section 43.30, limiting access to certain library records, and does not address the extent to which enforcement of section 43.30 may be affected in some circumstances by provisions of the USA PATRIOT Act, the acronym for the United and Strengthening America by Providing Appropriate Tools Require to Intercept and Obstruct Terrorism Act of 2001, Pub. L. No. 107-56, 115 Stat. 572 (codified as amended in scattered sections of the U.S. Code, Titles 18, 22, 31, 47 and 50). Provisions of the PATRIOT Act lowering barriers to law enforcement access to library patron or circulation records have, however, been the subject of considerable recent criticism and published commentary. See, e.g., Anne Klinefelter, *The Role of Librarians in Challenges to the USA PATRIOT Act*, 5 N.C.J.L. & Tech. 219 (2004) ("Klinefelter"); Kathryn Martin, *The USA PATRIOT Act's Application to Library Patron Records*, 29 J. Legis. 283 (2003) ("Martin"); Mary Minow & Tomas A. Lipinski, *THE LIBRARY'S LEGAL ANSWER BOOK*, "Library Records and Privacy," 163-221 (Chicago, 2003) ("Minow & Lipinski"). Published commentary on the PATRIOT Act contains considerable information concerning the context and public policies supporting pre-existing legislation enacted in nearly all of the 50 states, including Wisconsin, limiting public and law enforcement access to library records which either identify library patrons or the reading preferences of individual library users. See gen., Klinefelter at 219-26; Martin at 288-95; Minow & Lipinski at 171-89, and Appendix, "State Library Confidentiality Statutes" with related materials collected at 200-14. The historical background of state statutes like section 43.30 is also recounted in pre-PATRIOT Act commentary. See, e.g., Ulrika Ekman Ault, Note, *The FBI's Library Awareness Program: Is Big Brother Reading Over Your Shoulder?*, 65 N.Y.U. L. Rev. 1532, 1533-52 (1990); Julie E. Cohen, *A Right to Read Anonymously: A Closer Look at "Copyright Management" in Cyberspace*, 28 Conn. L. Rev. 981, 1003-19 (1996).

including outside and inside the main entrance, in the computer lab and in the reference, children's and study areas. The surveillance tapes are intended to support a variety of purposes, including security, protection of library assets, enforcement of library policies, defense against possible claims arising on library property and as evidence in the prosecution of individuals accused of committing crimes on library property.

The core provision of section 43.30 is now contained in section 43.30(1m), which provides in relevant part:

Records of any library which is in whole or in part supported by public funds, including the records of a public library system, indicating the identity of any individual who borrows or uses the library's documents or other materials, resources, or services may not be disclosed except by court order or to persons acting within the scope of their duties in the administration of the library or library system, to persons authorized by the individual to inspect such records, to custodial parents . . . of children under the age of 16 . . . or to libraries as authorized under subs. (2) and (3).

Section 43.30(1m), (2) and (3), in turn, specify the conditions libraries must meet in order to receive records from the library maintaining the original records. Section 43.30(4), recently created by 2003 Wisconsin Act 207, allows access to library records relating to children under the age of 16 by custodial parents or guardians.

Your questions have arisen from a variety of instances in which library officials may wish to seek the assistance of law enforcement officers and, alternatively, other circumstances in which law enforcement officers may seek access to library records for law enforcement purposes. In some situations, library officials may want the police to view the surveillance tapes. For example, in one instance the library's donation box was stolen during hours the library was open to the public and library administrators sought to make the surveillance tapes available to officers investigating the theft. In other instances, the police may seek access to the records for their own law enforcement purposes, including the investigation of crimes on property adjacent to the library, or in order to secure evidence relating to, or investigate the alibi of a suspect in, crimes committed elsewhere.

With this background in mind, you ask the following questions, reworded and renumbered for purposes of this discussion:

1. Are public library surveillance tapes "library records" whose disclosure is controlled by section 43.30?

2. In determining whether section 43.30 controls disclosure of particular library surveillance tapes, does the answer depend on whether the tapes show individuals using specific library materials or services or on whether the tapes show only persons entering or exiting the building or walking through corridors?

3. Is a court order required before library administrative staff may disclose surveillance tapes to the police for the purpose of seeking police assistance "within the scope of their duties in the administration of the library or library system" for such purposes as recovering stolen library property or seeking the prosecution of persons who vandalize library property?

4. Is a court order required in order for library staff to provide law enforcement officers or the district attorney with evidence needed for prosecution of cases under section 943.61, "Theft of library material"?

5. Is a court order required in order for the police to obtain surveillance tapes for a purpose unrelated to library administration?

6. Assuming the answer to #1 is "yes" and the answer to #3 is "no," when library surveillance tapes are provided to police in connection with an investigation, is the library custodian required to redact identifying information or otherwise protect the privacy of law-abiding users of library materials or services who may appear incidentally on such tapes?

The answers to your questions require the application and interpretation of the requirements of section 43.30. The task of statutory interpretation focuses primarily on the language of the statute. *State ex rel. Kalal v. Circuit Court*, 2004 WI 58, ¶ 44, 271 Wis. 2d 633, 681 N.W.2d 110. Statutory language is given its common, ordinary and accepted meaning, although technical or specially defined words or phrases are given their technical or special definitional meaning. *Id.* ¶ 45. "[S]tatutory language is interpreted in the context in which it is used; not in isolation but as part of a whole; in relation to the language of surrounding or closely-related statutes; and reasonably, to avoid absurd or unreasonable results." *Id.* ¶ 46. Statutory language is read where possible to avoid surplusage and to give reasonable effect to every word. *Id.*

Where statutory language is unambiguous, there is no need to consult extrinsic sources of interpretation such as legislative history. *Id.* ¶ 46. "A statute's purpose or scope may be readily apparent from its plain language or its relationship to surrounding or closely-related statutes—that is, from its context or the structure of the statute as a coherent whole." *Id.* ¶ 49. As a general rule, legislative history need not be and is not consulted except to resolve an ambiguity in the statutory language, although legislative history is sometimes consulted to confirm or verify the interpretation of the statute's plain meaning. *Id.* ¶ 51.

Section 43.30 was created in 1981 in the same session law which created the modern Wisconsin public records statute, sections 19.31-19.39. *See* ch. 335, secs. 14-15, Laws of 1981. Originally, the prohibition on nondisclosure contained in section 43.30 applied solely to those records that indicated “which of its documents or other materials have been loaned to or used by an identifiable individual,” and the only exceptions applied to disclosure to persons “acting within the scope of their duties in the administration of the library,” to those with authorization from the individual, and by court order. Ch. 335, sec. 15, Laws of 1981.

In 1991, the Legislature amended the language of section 43.30 to prohibit disclosure of records that indicate “the identity of any individual who borrows or uses the library’s documents or other materials, resources or services.” 91 Wisconsin Act 269, sec. 277hm. The title of the statute was also changed from “Public library circulation records” to “Public library records.” *Id.* sec. 277hg. Both of these changes remain in the current statute. The 1991 amendments also created section 43.30(2) and (3), allowing for disclosure to other libraries supported wholly or in part by public funds or where the library, although not supported by public funds, agrees to limit disclosure, or has a written policy prohibiting disclosure of the identity of individuals, consistent with the requirements of section 43.30. *See* 91 Wisconsin Act 269, sec. 277r.

The three original exceptions to non-disclosure, based on a court order, on authorization by the affected individual or to persons acting within the scope of their duties in administering the library or library system, remain in the statute today. *Cf.* ch. 335, sec. 15, Laws of 1981; and sec. 43.30(1m), Wis. Stats. (2003-04). Most recently, the Legislature enacted a fourth statutory exception allowing disclosure to custodial parents or guardians of children under the age of sixteen. *See* 2003 Wisconsin Act 207, creating section 43.30(lb) and (4) (effective April 23, 2004).

Based on the language of current section 43.30, including surrounding or closely related statutes, the answers to your questions are as follows:

First, referring to the title of section 43.30, you ask whether public library surveillance tapes are “library records” for purposes of section 43.30. Ordinarily, the text, rather than the title of a statute governs its meaning. *Cf. State v. Black*, 188 Wis. 2d 639, 645, 526 N.W.2d 132 (1994). While the term “library records” is generally descriptive, the statute applies by its terms to “[r]ecords . . . indicating the identity of any individual who borrows or uses the library’s documents or other materials, resources, or services” *See* sec. 43.30(1m), Wis. Stats. Although the term “records” is not defined in section 43.30 itself, “record” is defined in the public records statute, section 19.32(2), which is closely related both in subject matter and by virtue of the fact that the two statutes were created within the same session law, chapter 335, sections 14-15, Laws of 1981. “[F]ilms, recordings, [and] tapes” are expressly recognized as records under the public records statute. Sec. 19.32(2), Wis. Stats.; *see also*, sec. 19.35(1)(d), Wis. Stats. (specifically governing copies of videotapes). When two closely related statutes use

a common term, it is appropriate to apply the same statutory definition in relation to both statutes. *See Morris v Juneau County*, 219 Wis. 2d 543, 560, 579 N.W.2d 690 (1998).

In response to your first question, therefore, it is my opinion that library surveillance tapes are records whose disclosure is subject to the limitations of section 43.30, so long as the tapes "indicate[] the identity of any individual who borrows or uses the library's documents or other materials, resources, or services." Sec. 43.30(1m), Wis. Stats. To the extent individuals may be identifiable from their appearance on a surveillance videotape, these tapes presumably fall within the scope of section 43.30, by virtue of section 43.30(1m). *Cf.* secs. 19.32(1r) and 19.62(5), Wis. Stats. (defining "Personally identifiable information" as "information that can be associated with a particular individual through one or more identifiers or other information or circumstances"). *Cf. WFTV, Inc. v. School Bd. of Seminole*, 874 So.2d 48, 50, 56 (Fla. App. 5 Dist., 2004), *review denied* (Fla., 12/23/04) (Table No. SC04-918) (concluding that surveillance videotapes showing "identifiable facial features" of students riding school buses are exempt from disclosure and confidential under Florida law).

Second, you ask if application of section 43.30 depends on whether the tape shows a patron using specific library materials, or whether it is enough that a surveillance videotape shows persons entering or leaving the building or passing through the corridors. The answer to your second question follows readily from the answer to the first. Given the statute's broad prohibition on the disclosure of records indicating the identity "of any individual who borrows or uses the library's documents *or other materials, resources, or services*," sec. 43.30(1m), Wis. Stats., its application clearly does not depend on showing a library patron with specific library materials or resources, such as a book or computer screen. Because a surveillance videotape showing a library patron walking in the door or through an empty corridor within the library creates the reasonable inference that the patron is using the resources or services of the library in some fashion, the non-disclosure prohibitions of section 43.30 would presumptively apply to such images as well. While exceptions to the public records statute must be narrowly construed, *see Hathaway v. Green Bay School Dist.*, 116 Wis. 2d 388, 397, 342 N.W.2d 682 (1984), the language of section 43.30 is itself broad and must be given its ordinary meaning.

Some might suggest that the Legislature did not intend to include surveillance tapes of common areas, parking lots, entrances and exits within the statute's proscription. But the clear language of the statute belies that suggestion. Certainly, an individual who parks in the library's parking lot, enters the library through its entrance, and walks through the library's hallways, stacks and sitting or study areas is an individual who is using the library's "resources." A community group using the library's meeting room is using the library's "resources." The Legislature's intent is reflected in the statute's unambiguous language. *State ex rel. Kalal v. Circuit Court*, 271 Wis. 2d at 633, ¶ 46. It is not this office's function to rewrite the statute or to amend it to correct what some may see as an oversight on the part of the Legislature. *See In Interest of G. & L.P.*, 119 Wis. 2d 349, 354, 349 N.W.2d 743 (Ct. App. 1984) (court's

function is not to rewrite the statute or to amend it to correct a legislative oversight. Courts have no right or power to amend a statute by the insertion of additional language. It is not the court's function to rewrite a statute because a statute, as written, may seem unwise.)

Third, you ask whether a court order is required before library administrative staff may provide surveillance videotapes to law enforcement for purposes within the scope of their duties in administering the library system, pointing out that such duties include the protection of library property from theft or damage. The statute expressly authorizes disclosing records to "persons acting within the scope of their duties in the administration of the library or library system," sec. 43.30(1m), Wis. Stat., but does not expressly address whether such persons may share library records with law enforcement personnel charged with investigating crimes relating to library property or facilities or otherwise assisting library administrators acting within the scope of their duties.

The statute authorizes disclosure "to persons acting within the scope of their duties in the administration of the library or library system." Sec. 43.30(1m), Wis. Stats. The disclosure is limited to those individuals who are acting within the scope of their duties in the administration of the library or library system. Law enforcement agencies have no duties in the administration of the library or library system. The fact that the statute's authorization to disclose library records is meant to be limited is evidenced by the fact that later sections of the statute itself specifically allow disclosure to other libraries while simultaneously restricting the recipient libraries from redisclosing the information. The Legislature evidently did not consider that disclosing an individual's identity to another library for the purpose of borrowing materials was included within the phrase "administration of the library or library system" because such an interpretation would render section 43.30(2) and (3), surplusage. If providing an individual's identity to another library for the purpose of borrowing materials for the individual is not considered to be something within the scope of the library's duties in the administration of the library or library system, providing records to law enforcement agencies would not be considered to be something done in the administration of the library or library system.

When the Legislature wishes to permit confidential records to be provided law enforcement agencies, it generally specifically so provides. *See* secs. 51.30(4)(b)19. (mental health records); 460.12(4) (reports and records relating to certain investigations of prostitution may be provided to law enforcement agencies); 601.59(6)(e) (certain confidential records of the intrastate insurance receivership commission may be provided to law enforcement agencies); 940.22(4)(a) (confidential reports of sexual exploitation by therapist investigations may be provided to law enforcement agencies); and 118.125(2), Wis. Stats. (confidential pupil records may be provided to law enforcement agencies under certain circumstances).

I must conclude that the unambiguous language of the statute prohibits library officials from providing law enforcement agencies with surveillance tapes absent a court order even if the alleged wrongdoing involves theft of library material or damage to library resources.

Your fourth question is closely related to the third and the answer is implicit in the foregoing discussion. You ask whether library staff may provide circulation or other library records concerning usage by a particular patron to law enforcement without a court order when library staff do so for the purpose of assisting in the prosecution of charges of violating section 943.61, "Theft of library material." In my opinion, for the reasons just discussed, the answer to question 4 is no as well.

Fifth, you ask whether a court order is required for the police to obtain library surveillance tapes for purposes unrelated to administration of the library, such as the apprehension of a suspect in, or investigation of crimes unrelated to, administration of the library. In view of the straightforward language of the statute, I believe the answer is plainly yes: the non-disclosure provisions of section 43.30(1b) require that law enforcement must obtain a court order before obtaining access to records covered by the statute when investigating possible criminal activities that are not directly related to the duties of library staff in administering the library or library system.²

Although the language of the statute plainly contemplates that law enforcement must seek a court order under these circumstances, both the legislative history and the public policies on which section 43.30 is based support this result as well. *Cf. Kalal*, 271 Wis. 2d 633, ¶ 51 (resort to legislative history may be appropriate to confirm or verify a statute's plain meaning). The bill analysis prepared by the Legislative Reference Bureau ("LRB") that accompanied Engrossed 1981 Senate Bill 250, enacted as chapter 335, Laws of 1981, creating section 43.30, refers to that provision by stating: "The circulation records of public libraries are required to be closed, except upon issuance of a court order authorizing inspection." The broad scope of the requirement that, with limited exceptions, access will ordinarily be controlled by court order is underlined by the further recognition in the LRB bill analysis that, absent such a specific statutory exception, these records would be subject to release under the common law balancing test of whether "the public interest in nondisclosure is weighed against the strong interest in providing public access." *See id.*; *see also, Hathaway*, 116 Wis. 2d at 396; *State ex rel. Journal Co. v. County Court*, 43 Wis. 2d 297, 305, 168 N.W.2d 836 (1969). Thus, the legislative history strongly evidences

²There are no Wisconsin cases addressing this question and very little precedent from other states that is even arguably relevant. The only two cases our research has located are illustrative but not directly useful. *See Brown v. Johnston*, 328 N.W.2d 510, 511-12 (Iowa 1983) (held: Iowa statute governing confidentiality of library records and requiring a court order for release, did not bar enforcement of a prosecutor's subpoena for library circulation records in connection with a criminal investigation; applicable subpoena statute required court approval); *see also, Quad/Graphics v. So. Adirondack Library*, 174 Misc.2d 291, 664 N.Y.S.2d 225, 228 (1997) (applying New York law and statutory policy, the court refused to order pre-litigation disclosure of library user records for use by corporate employer investigating employee internet usage, observing that "the confidentiality of a library's records should not be routinely breached").

the unequivocal nature of the requirement that access to library records under section 43.30 is ordinarily governed by application for a court order. There is no suggestion that law enforcement officers are generally exempt from this procedural limitation on access.

Indeed, the historical context in which statutes like section 43.30, expressly limiting access to library circulation records and other records tending to identify library users and their reading preferences, were enacted demonstrates that the court order limitation on access was primarily directed at law enforcement as well as the general public. See Martin, 29 J. Legis. at 288-89 n.37, citing *inter alia* Herbert N. Foerstel, SURVEILLANCE IN THE STACKS: THE F.B.I.'S LIBRARY AWARENESS PROGRAM at 133-150 (1991); Klinefelter, 5 N.C.J.L. & Tech. at 224.

Furthermore, the statutory policies underlying section 43.30 and similar laws in other states are derived from core First Amendment protections for freedom of speech and expression, and on the concomitant desire to protect against the chilling effect on intellectual freedom that easy official access to library patrons' identities and reading preferences is likely to have. See Martin, 29 J. Legis. at 289. The courts have recognized that the First Amendment "necessarily protects the right to receive" information, see *Martin v. City of Struthers*, 319 U.S. 141, 143 (1943), and that self-censorship is the likely result of close government supervision of the exercise of First Amendment rights. Cf. *Lamont v. Postmaster General of United States*, 381 U.S. 301, 307 (1965).

The rationale for the statutory policy requiring a court order under section 43.30 is that if users know, or are simply just afraid, that the police or members of the public have ready access to their library records, they are likely to limit what they check out or read at the library. See Martin, 29 J. Legis. at 289; cf. *Quad/Graphics*, 664 N.Y.S.2d at 227. Accordingly, the plain language of section 43.30, requiring that law enforcement officers investigating criminal activity unrelated to administration of a library or the library system itself must obtain a court order before obtaining access to library records protected by the statute, is reinforced by its legislative history, by the historical context in which it was enacted and by the public policies the statute is intended to serve.

Because the answer to number 3 is "yes," that is, that a court order is required before library administrative staff may disclose surveillance tapes to the police for the purpose of seeking police assistance for such purposes as recovering stolen library property or seeking the prosecution of persons who vandalize library property, question six becomes moot. The custodian should not redact identifying information from surveillance tapes when providing those tapes pursuant to a court order unless the court order specifically directs or authorizes redaction.

It is important to note what section 43.30 does not prohibit. Librarians may disclose information regarding crimes to law enforcement officers without a court order. The statute only

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prohibits the disclosure of library records that identify patrons. If a librarian observes a patron steal library materials or assault a child, the librarian may report the crime to law enforcement officers and identify the patron to officers. If the librarian happens to observe this conduct on videotape after the fact, the librarian may disclose detailed information regarding the crime's commission without disclosing the patron's identity. Officers may then obtain a court order to secure the release of the appropriate records.

If a librarian discovers criminal activity in the course of reviewing library records, the librarian should inform the appropriate law enforcement agency and discuss the criminal activity. The librarian should also inform the law enforcement agency that the library would disclose the identifying information upon receipt of a valid court order. Similarly, librarians may review surveillance tapes to look for evidence of a crime at the request of law enforcement agencies. If librarians observe criminal activity on the tape, they should advise the officers accordingly but not disclose identifying information until the law enforcement agency obtains a court order.

Of course, if someone's life or safety is at risk, for example, if there was a child abduction at the library, the law would not require the police to obtain a court order before being allowed to view any relevant tapes. The exigent circumstances would allow access to the tapes without a court order. *See State v. Richter*, 2000 WI 58, ¶ 37, 235 Wis. 2d 524, 612 N.W.2d 29 (Fourth Amendment does not require police officer to delay in the course of an investigation if to do so would gravely endanger someone's life or safety).

I have no doubt that section 43.30 could be amended so that it would simultaneously protect the privacy rights of library patrons and still allow library staff to provide video surveillance tapes to law enforcement agencies when criminal activity is suspected or witnessed. I would recommend that the Department of Public Instruction, in consultation with library associations and librarians, propose amendments to the present statute to cure some of the statute's deficiencies.

I hope that this discussion will assist you, and in turn, library administrators and law enforcement generally in complying with the requirements of section 43.30.

Sincerely,



Alan Lee
Assistant Attorney General

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c: Paul F. Evert
City Attorney
City of Sun Prairie