



# State of Wisconsin

LEGISLATIVE REFERENCE BUREAU

## **RESEARCH APPENDIX -** **PLEASE DO NOT REMOVE FROM DRAFTING FILE**

Date Transfer Requested: 12/29/2010 (Per: CMH)

A ☞ The 2011 drafting file for  
LRB-0358

E ☞ The 2011 drafting file for  
LRB-0371

B ☞ The 2011 drafting file for  
LRB-0368

F ☞ The 2011 drafting file for  
LRB-0372

C ☞ The 2011 drafting file for  
LRB-0369

G ☞ The 2011 drafting file for  
LRB-0671

D ☞ The 2011 drafting file for  
LRB-0370

Part 2 of 2

☞ **Compile Draft – Appendix A**

has been copied/added to the drafting file for

**2011 LRB-0388**

**(Jr1 Special Session Draft)**



State of Wisconsin  
2011 - 2012 LEGISLATURE

January 2011 Special Session

In: 12/22/10 Today  
**BILL**



LRB-0358

TJD&PJH:kjf:md

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P. 8

Regen

1 **AN ACT to repeal** 146.38 (3) (d) and 146.38 (3) (e); **to renumber and amend**  
2 146.38 (1) (b); **to amend** 146.38 (1m), 146.38 (2), 146.38 (3) (intro.), 146.38 (3)  
3 (a), (b) and (c), 940.08 (1), 940.24 (1) and 940.295 (3) (a) 3.; and **to create** 146.38  
4 (1) (b) 1., 146.38 (1) (b) 2., 146.38 (1) (b) 3., 146.38 (1) (b) 4., 146.38 (1) (bm),  
5 146.38 (2m), 146.38 (3m), 146.38 (3t), 146.38 (6), 153.05 (3m), 904.16, 940.08  
6 (3), 940.24 (3) and 940.295 (3) (am) of the statutes; **relating to:** confidentiality  
7 of health care services reviews; use as evidence of information regarding health  
8 care providers; reporting of quality indicators identifying individual hospitals;  
9 homicide or injury by negligent handling of a dangerous weapon, explosives, or  
10 fire; criminal abuse of individuals at risk; and criminal abuse and neglect of  
11 patients and residents.

*Analysis by the Legislative Reference Bureau*

***Confidentiality of health care services reviews***

Current law provides that a person who participates in a review or evaluation of services provided by a health care provider or facility, or of charges for such

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services (a review), generally may not disclose information acquired in connection with the review. Further, the records that a reviewer or evaluator creates of investigations, inquiries, proceedings, and conclusions conducted for the review (review records) generally may not be released. Under current law, review records may not be used in a civil action for personal injuries against the health care provider or health care facility.

Current law contains several exceptions to confidentiality of review records and information acquired in connection with a review, which require disclosure of such records and information under the following circumstances: to a health care provider or facility whose services are reviewed, or to any person with the consent of that provider or facility; to the person who requested the review, for use only for the purpose of improving the quality of health care, avoiding improper utilization of health care services, and determining reasonable charges for services; to a court upon issuance of a subpoena in a criminal action; to an examining or licensing board or agency, when the organization or evaluator conducting the review determines that such action is advisable; and in a report in statistical format.

This bill makes the following changes to confidentiality provisions for health care service reviews:

1. The bill repeals the exception to confidentiality that requires release of review records and information acquired in connection with a review upon issuance of a subpoena in a criminal action.

2. The bill provides that review records may not be used in any civil or criminal action against any health care provider.

3. The bill provides that a person who participates in a review may not disclose any incident or occurrence report that is made to notify a reviewer of an incident, practice, or other situation that becomes the subject of a review. Further the bill prohibits using such an incident or occurrence report in any civil or criminal action against a health care provider.

4. The bill specifies that the confidentiality provisions related to review records apply regardless of whether the review is conducted by representatives from one or more organizations.

5. The bill provides that the confidentiality provisions for review records apply only if the review for which the records were created was conducted for one of the following purposes: to help improve the quality of health care, to avoid improper utilization of the services of health care providers, or to determine reasonable charges for such services.

6. Instead of requiring that review records and information acquired in connection with a review be disclosed in statistical form, the bill allows that such information and review records may be disclosed in statistical form. The bill also allows information acquired in connection with a review to be disclosed to a health care provider's employer or parent, subsidiary, or affiliated organization or to the parent, subsidiary, or affiliated organization of a health care provider's employer.

7. The bill requires that any record or incident or occurrence report that is disclosed to another, properly or improperly, remains confidential and may not be used in a civil or criminal action against the health care provider.

8. The bill includes as health care providers, for purposes of the confidentiality provisions, all of the following: individual health care providers; facilities, organizations, and business entities that are health care providers; persons working under the supervision of or in collaboration with an individual health care provider; and parents, subsidiaries, or affiliate organizations of facilities, organizations, and business entities that are health care providers.

***Use of health care reports or employee statements***

This bill prohibits the use as evidence in a civil or criminal action of any health care provider reports that are required by the Department of Regulation and Licensing (DRL) or by the division within the Department of Health Services (DHS) that conducts health care provider quality assurance reviews. The bill also prohibits the use as evidence in a civil or criminal action of any statements of, or records of interviews with, employees of a health care provider related to the regulation of a health care provider and obtained by DRL or by the division within DHS that conducts health care provider quality assurance reviews. The bill makes an exception from these prohibitions for the use of the records, statements, or interviews in an administrative proceeding conducted by DRL or by the division within DHS that conducts health care provider quality assurance reviews.

***Reporting of hospital quality indicators***

Current law requires the Department of Administration to contract with a certain entity to collect health care information from hospitals and ambulatory surgery centers. This entity analyzes and disseminates that health care information in a language understandable to laypersons. Among other health care information, the entity must report hospital quality indicators, but the report cannot identify the individual hospital with the quality indicators. This bill allows the entity to report quality indicators identifying individual hospitals.

***Crimes***

Under current law, a person who causes the death of, or bodily harm to, an individual by negligent operation or handling of a dangerous weapon, explosives, or fire is guilty of a crime. A dangerous weapon includes any device or instrumentality, which in the manner it is used or intended to be used, is calculated or likely to produce death or great bodily harm. The bill provides that a health care provider is not guilty of the crimes of causing the death of, or bodily harm to, an individual by negligent operation or handling of a dangerous weapon, explosives, or fire, if the health care provider is acting within the scope of his or her practice or employment.

Also under current law, a person who is in charge of or employed by a residential care facility, an inpatient health care facility, a treatment facility, or a home health agency, who intentionally, recklessly, or negligently abuses or neglects a patient or a resident in one of those facilities or agencies is guilty of a crime. The penalties for the crime depend upon the degree of harm suffered by the patient or resident. Under the bill, a person who negligently abuses or neglects a patient or a resident is not guilty of a crime if the person is a health care provider acting in the scope of his or her practice or employment, and he or she commits an act or omission of mere inefficiency, unsatisfactory conduct, or failure in good performance as the result of

inability, incapacity, inadvertency, ordinary negligence, or good faith error in judgment or discretion.

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*The people of the state of Wisconsin, represented in senate and assembly, do enact as follows:*

1           **SECTION 1.** 146.38 (1) (b) of the statutes is renumbered 146.38 (1) (b) (intro.)  
2 and amended to read:

3           146.38 (1) (b) "Health care provider" ~~includes an ambulance service provider,~~  
4 ~~as defined in s. 256.01 (3), an emergency medical technician, as defined in s. 256.01~~  
5 ~~(5), and a first responder, as defined in s. 256.01 (9).~~ means any of the following:

6           **SECTION 2.** 146.38 (1) (b) 1. of the statutes is created to read:

7           146.38 (1) (b) 1. A person specified in s. 146.81 (1) (a) to (hp), (r), or (s).

8           **SECTION 3.** 146.38 (1) (b) 2. of the statutes is created to read:

9           146.38 (1) (b) 2. A facility, association, or business entity, as specified in s.  
10 146.81 (1) (i) to (q).

11           **SECTION 4.** 146.38 (1) (b) 3. of the statutes is created to read:

12           146.38 (1) (b) 3. A person working under the supervision of or in collaboration  
13 with a person specified in subd. 1.

14           **SECTION 5.** 146.38 (1) (b) 4. of the statutes is created to read:

15           146.38 (1) (b) 4. A parent, subsidiary, or affiliate organization of a facility,  
16 association, or business entity, as specified in subd. 2.

17           **SECTION 6.** 146.38 (1) (bm) of the statutes is created to read:

18           146.38 (1) (bm) "Incident or occurrence report" means a written or oral  
19 statement that is made to notify a person, organization, or an evaluator who reviews  
20 or evaluates the services of health care providers or charges for such services of an

1 incident, practice, or other situation that becomes the subject of such a review or  
2 evaluation.

3 **SECTION 7.** 146.38 (1m) of the statutes is amended to read:

4 146.38 (1m) No person who participates in the review or evaluation of the  
5 services of health care providers ~~or facilities~~ or charges for such services may disclose  
6 an incident or occurrence report or any information acquired in connection with such  
7 review or evaluation except as provided in sub. (3) or (3m).

8 **SECTION 8.** 146.38 (2) of the statutes is amended to read:

9 146.38 (2) All persons, organizations, or evaluators reviewing or evaluating,  
10 whether from one or more entities, who review or evaluate the services of health care  
11 providers in order to help improve the quality of health care, to avoid improper  
12 utilization of the services of health care providers, or to determine the reasonable  
13 charges for such services shall keep a record of their investigations, inquiries,  
14 proceedings and conclusions. No such record may be released to any person under  
15 s. 804.10 (4) or otherwise except as provided in sub. (3) or (3m). No such record may  
16 be used in any civil or criminal action ~~for personal injuries~~ against the health care  
17 provider ~~or facility or any other health care provider~~; however, except for incident or  
18 occurrence reports or records from other persons, organizations, or evaluators  
19 reviewing or evaluating health care providers, information, documents or records  
20 presented during the review or evaluation may not be construed as immune from  
21 discovery under s. 804.10 (4) or use in any civil or criminal action merely because they  
22 were so presented. Any person who testifies during or participates in the review or  
23 evaluation may testify in any civil or criminal action as to matters within his or her  
24 knowledge, but may not testify as to information obtained through his or her

1 participation in the review or evaluation, nor as to any conclusion of such review or  
2 evaluation.

3 **SECTION 9.** 146.38 (2m) of the statutes is created to read:

4 146.38 (2m) An incident or occurrence report may not be used in any civil or  
5 criminal action against a health care provider.

6 **SECTION 10.** 146.38 (3) (intro.) of the statutes is amended to read:

7 146.38 (3) (intro.) Information acquired in connection with the review and  
8 evaluation of health care services shall be disclosed and records of such review and  
9 evaluation shall be released, with the identity of any patient whose treatment is  
10 reviewed being withheld ~~unless the patient has granted permission to disclose~~  
11 identity except as permitted under s. 146.82, in the following circumstances:

12 **SECTION 11.** 146.38 (3) (a), (b) and (c) of the statutes are amended to read:

13 146.38 (3) (a) To the health care provider ~~or facility~~ whose services are being  
14 reviewed or evaluated, upon the request of such provider ~~or facility~~;

15 (b) To any person with the consent of the health care provider ~~or facility~~ whose  
16 services are being reviewed or evaluated;

17 (c) To the person requesting the review or evaluation, for use solely for the  
18 purpose of improving the quality of health care, avoiding the improper utilization of  
19 the services of health care providers ~~and facilities~~, and determining the reasonable  
20 charges for such services;

21 **SECTION 12.** 146.38 (3) (d) of the statutes is repealed.

22 **SECTION 13.** 146.38 (3) (e) of the statutes is repealed.

23 **SECTION 14.** 146.38 (3m) of the statutes is created to read:

24 146.38 (3m) (a) Information acquired in connection with the review and  
25 evaluation of health care services may be disclosed, and records of such review and

1 evaluation may be released, in statistical form with the consent of the person  
2 authorizing or with the authority to authorize the review or evaluation. Information  
3 disclosed or records released under this subsection shall not reveal the identity of any  
4 patient except as permitted under s. 146.82.

5 (b) Information acquired in connection with the review or evaluation of health  
6 care services may be disclosed, and the records of such a review or evaluation  
7 released, to any of the following persons, with the consent of the person authorizing  
8 or with the authority to authorize the review or evaluation:

- 9 1. The employer of a health care provider, as defined in sub. (1) (b) 1. and 3.
- 10 2. The parent, subsidiary, or affiliate organization of a health care provider, as  
11 defined in sub. (1) (b) 2.
- 12 3. The parent, subsidiary, or affiliate organization of the employer of a health  
13 care provider, as defined in sub. (1) (b) 1. and 3.

14 **SECTION 15.** 146.38 (3t) of the statutes is created to read:

15 146.38 (3t) A record described under sub. (2) or an incident or occurrence report  
16 disclosed either under sub. (3) or (3m) or in violation of this section remains  
17 confidential and may not be used in any civil or criminal action against the health  
18 care provider.

19 **SECTION 16.** 146.38 (6) of the statutes is created to read:

20 146.38 (6) Health care provider specific information acquired by an  
21 administrative agency in order to help improve the quality of health care, to avoid  
22 the improper utilization of services of health care providers, or to determine the  
23 reasonable charges for health care services is exempt from inspection, copying, or  
24 receipt under s. 19.35 (1).

25 **SECTION 17.** 153.05 (3m) of the statutes is created to read:

1           153.05 (3m) The department or the department of administration may not  
2    prohibit the entity under contract under sub. (2m) (a) from reporting quality  
3    indicators identifying individual hospitals based on data the entity collects under  
4    this subchapter.

5           **SECTION 18.** 904.16 of the statutes is created to read:

6           **904.16 Health care reports.** (1) In this section:

7           (7) (a) "Health care provider" has the meaning given in s. 146.81(1).

8           (b) "Regulatory agency" means the department of regulation and licensing or  
9    the division within the department of health services that conducts quality  
10   assurance activities related to health care providers.

11           (2) Except as provided in sub. (3), the following may not be used as evidence  
12   in a civil or criminal action brought against a health care provider.

13           (a) Reports that a regulatory agency requires a health care provider to give or  
14   disclose to that regulatory agency.

15           (b) Statements of, or records of interviews with, employees of a health care  
16   provider related to the regulation of the health care provider obtained by a regulatory  
17   agency.

18           (3) This section does not prohibit the use of the reports, statements, and records  
19   described in sub. (2) in any administrative proceeding conducted by a regulatory  
20   agency. This section does not apply to reports protected under s. 146.997.

21           **SECTION 19.** 940.08 (1) of the statutes is amended to read:

22           940.08 (1) ~~Whoever~~ Except as provided in sub. (3), whoever causes the death  
23   of another human being by the negligent operation or handling of a dangerous  
24   weapon, explosives or fire is guilty of a Class G felony.

25           **SECTION 20.** 940.08 (3) of the statutes is created to read:

1           940.08 (3) Subsection (1) does not apply to a health care provider acting within  
2 the scope of his or her practice or employment.

3           **SECTION 21.** 940.24 (1) of the statutes is amended to read:

4           940.24 (1) ~~Whoever~~ Except as provided in sub. (3), whoever causes bodily harm  
5 to another by the negligent operation or handling of a dangerous weapon, explosives  
6 or fire is guilty of a Class I felony.

7           **SECTION 22.** 940.24 (3) of the statutes is created to read:

8           940.24 (3) Subsection (1) does not apply to a health care provider acting within  
9 the scope of his or her practice or employment.

10          **SECTION 23.** 940.295 (3) (a) 3. of the statutes is amended to read:

11          940.295 (3) (a) 3. ~~Abuses~~ Except as provided in par. (am), abuses, with  
12 negligence, or neglects a patient or a resident.

13          **SECTION 24.** 940.295 (3) (am) of the statutes is created to read:

14          940.295 (3) (am) Paragraph (a) 3. does not apply to a health care provider  
15 acting in the scope of his or her practice or employment who commits an act or  
16 omission of mere inefficiency, unsatisfactory conduct, or failure in good performance  
17 as the result of inability, incapacity, inadvertency, ordinary negligence, or good faith  
18 error in judgment or discretion.

19          **SECTION 25. Initial applicability.**

20          (1) **CRIMES.** The treatment of sections 940.08 (1) and (3), 940.24 (1) and (3), and  
21 940.295 (3) (a) 3. and (am) of the statutes first applies to acts or omissions committed  
22 on the effective date of this subsection.

23          (2) **DISCLOSURE AND RELEASE OF RECORDS OR INFORMATION.** The treatment of  
24 section 146.38 (1m), (2), (3) (d) and (e), and (3m) of the statutes first applies to  
25 disclosures or releases occurring on the effective date of this subsection.





State of Wisconsin  
2011 - 2012 LEGISLATURE

January 2011 Special Session

In. 12/23/10 TODAY  
**BILL**



LRB-03583 or 4  
TJD&PJH:kjf:md  
RMR  
+ WLj

Regen

1 AN ACT *to repeal* 146.38 (3) (d) and 146.38 (3) (e); *to renumber and amend*  
2 146.38 (1) (b); *to amend* 146.38 (1m), 146.38 (2), 146.38 (3) (intro.), 146.38 (3)  
3 (a), (b) and (c), 940.08 (1), 940.24 (1) and 940.295 (3) (a) 3.; and *to create* 146.38  
4 (1) (b) 1., 146.38 (1) (b) 2., 146.38 (1) (b) 3., 146.38 (1) (b) 4., 146.38 (1) (bm),  
5 146.38 (2m), 146.38 (3m), 146.38 (3t), 146.38 (6), 153.05 (3m), 904.16, 940.08  
6 (3), 940.24 (3) and 940.295 (3) (am) of the statutes; **relating to:** confidentiality  
7 of health care services reviews; use as evidence of information regarding health  
8 care providers; reporting of quality indicators identifying individual hospitals;  
9 homicide or injury by negligent handling of a dangerous weapon, explosives, or  
10 fire; criminal abuse of individuals at risk; and criminal abuse and neglect of  
11 patients and residents.

*Analysis by the Legislative Reference Bureau*

***Confidentiality of health care services reviews***

Current law provides that a person who participates in a review or evaluation of services provided by a health care provider or facility, or of charges for such

services (a review), generally may not disclose information acquired in connection with the review. Further, the records that a reviewer or evaluator creates of investigations, inquiries, proceedings, and conclusions conducted for the review (review records) generally may not be released. Under current law, review records may not be used in a civil action for personal injuries against the health care provider or health care facility.

Current law contains several exceptions to confidentiality of review records and information acquired in connection with a review, which require disclosure of such records and information under the following circumstances: to a health care provider or facility whose services are reviewed, or to any person with the consent of that provider or facility; to the person who requested the review, for use only for the purpose of improving the quality of health care, avoiding improper utilization of health care services, and determining reasonable charges for services; to a court upon issuance of a subpoena in a criminal action; to an examining or licensing board or agency, when the organization or evaluator conducting the review determines that such action is advisable; and in a report in statistical format.

This bill makes the following changes to confidentiality provisions for health care service reviews:

1. The bill repeals the exception to confidentiality that requires release of review records and information acquired in connection with a review upon issuance of a subpoena in a criminal action.

2. The bill provides that review records may not be used in any civil or criminal action against any health care provider.

3. The bill provides that a person who participates in a review may not disclose any incident or occurrence report that is made to notify a reviewer of an incident, practice, or other situation that becomes the subject of a review. Further the bill prohibits using such an incident or occurrence report in any civil or criminal action against a health care provider.

4. The bill specifies that the confidentiality provisions related to review records apply regardless of whether the review is conducted by representatives from one or more organizations.

5. The bill provides that the confidentiality provisions for review records apply only if the review for which the records were created was conducted for one of the following purposes: to help improve the quality of health care, to avoid improper utilization of the services of health care providers, or to determine reasonable charges for such services.

6. Instead of requiring that review records and information acquired in connection with a review be disclosed in statistical form, the bill allows that such information and review records may be disclosed in statistical form. The bill also allows information acquired in connection with a review to be disclosed to a health care provider's employer or parent, subsidiary, or affiliated organization or to the parent, subsidiary, or affiliated organization of a health care provider's employer.

7. The bill requires that any record or incident or occurrence report that is disclosed to another, properly or improperly, remains confidential and may not be used in a civil or criminal action against the health care provider.

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8. The bill includes as health care providers, for purposes of the confidentiality provisions, all of the following: individual health care providers; facilities, organizations, and business entities that are health care providers; persons working under the supervision of or in collaboration with an individual health care provider; and parents, subsidiaries, or affiliate organizations of facilities, organizations, and business entities that are health care providers.

***Use of health care reports or employee statements***

This bill prohibits the use as evidence in a civil or criminal action of any health care provider reports that are required by the Department of Regulation and Licensing (DRL) or by the division within the Department of Health Services (DHS) that conducts health care provider quality assurance reviews. The bill also prohibits the use as evidence in a civil or criminal action of any statements of, or records of interviews with, employees of a health care provider related to the regulation of a health care provider and obtained by DRL or by the division within DHS that conducts health care provider quality assurance reviews. The bill makes an exception from these prohibitions for the use of the records, statements, or interviews in an administrative proceeding conducted by DRL or by the division within DHS that conducts health care provider quality assurance reviews.

***Reporting of hospital quality indicators***

Current law requires the Department of Administration to contract with a certain entity to collect health care information from hospitals and ambulatory surgery centers. This entity analyzes and disseminates that health care information in a language understandable to laypersons. Among other health care information, the entity must report hospital quality indicators, but the report cannot identify the individual hospital with the quality indicators. This bill allows the entity to report quality indicators identifying individual hospitals.

***Crimes***

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Also under current law, a person who is in charge of or employed by a residential care facility, an inpatient health care facility, a treatment facility, or a home health agency, who intentionally, recklessly, or negligently abuses or neglects a patient or a resident in one of those facilities or agencies is guilty of a crime. The penalties for the crime depend upon the degree of harm suffered by the patient or resident. Under the bill, a person who negligently abuses or neglects a patient or a resident is not guilty of a crime if the person is a health care provider acting in the scope of his or her practice or employment, and he or she commits an act or omission of mere inefficiency, unsatisfactory conduct, or failure in good performance as the result of

inability, incapacity, inadvertency, ordinary negligence, or good faith error in judgment or discretion.

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*The people of the state of Wisconsin, represented in senate and assembly, do enact as follows:*

1           **SECTION 1.** 146.38 (1) (b) of the statutes is renumbered 146.38 (1) (b) (intro.)  
2 and amended to read:

3           146.38 (1) (b) "Health care provider" ~~includes an ambulance service provider,~~  
4 ~~as defined in s. 256.01 (3), an emergency medical technician, as defined in s. 256.01~~  
5 ~~(5), and a first responder, as defined in s. 256.01 (9).~~ means any of the following:

6           **SECTION 2.** 146.38 (1) (b) 1. of the statutes is created to read:

7           146.38 (1) (b) 1. A person specified in s. 146.81 (1) (a) to (hp), (r), or (s).

8           **SECTION 3.** 146.38 (1) (b) 2. of the statutes is created to read:

9           146.38 (1) (b) 2. A facility, association, or business entity, as specified in s.  
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11           **SECTION 4.** 146.38 (1) (b) 3. of the statutes is created to read:

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13 with a person specified in subd. 1.

14           **SECTION 5.** 146.38 (1) (b) 4. of the statutes is created to read:

15           146.38 (1) (b) 4. A parent, subsidiary, or affiliate organization of a facility,  
16 association, or business entity, as specified in subd. 2.

17           **SECTION 6.** 146.38 (1) (bm) of the statutes is created to read:

18           146.38 (1) (bm) "Incident or occurrence report" means a written or oral  
19 statement that is made to notify a person, organization, or an evaluator who reviews  
20 or evaluates the services of health care providers or charges for such services of an

1 incident, practice, or other situation that becomes the subject of such a review or  
2 evaluation.

3 **SECTION 7.** 146.38 (1m) of the statutes is amended to read:

4 146.38 (**1m**) No person who participates in the review or evaluation of the  
5 services of health care providers ~~or facilities~~ or charges for such services may disclose  
6 an incident or occurrence report or any information acquired in connection with such  
7 review or evaluation except as provided in sub. (3) or (3m).

8 **SECTION 8.** 146.38 (2) of the statutes is amended to read:

9 146.38 (**2**) All persons, organizations, or evaluators reviewing or evaluating,  
10 whether from one or more entities, who review or evaluate the services of health care  
11 providers in order to help improve the quality of health care, to avoid improper  
12 utilization of the services of health care providers, or to determine the reasonable  
13 charges for such services shall keep a record of their investigations, inquiries,  
14 proceedings and conclusions. No such record may be released to any person under  
15 s. 804.10 (4) or otherwise except as provided in sub. (3) or (3m). No such record may  
16 be used in any civil or criminal action ~~for personal injuries~~ against the health care  
17 provider ~~or facility or any other health care provider~~; however, except for incident or  
18 occurrence reports or records from other persons, organizations, or evaluators  
19 reviewing or evaluating health care providers, information, documents or records  
20 presented during the review or evaluation may not be construed as immune from  
21 discovery under s. 804.10 (4) or use in any civil or criminal action merely because they  
22 were so presented. Any person who testifies during or participates in the review or  
23 evaluation may testify in any civil or criminal action as to matters within his or her  
24 knowledge, but may not testify as to information obtained through his or her

1 participation in the review or evaluation, nor as to any conclusion of such review or  
2 evaluation.

3 **SECTION 9.** 146.38 (2m) of the statutes is created to read:

4 146.38 (2m) An incident or occurrence report may not be used in any civil or  
5 criminal action against a health care provider.

6 **SECTION 10.** 146.38 (3) (intro.) of the statutes is amended to read:

7 146.38 (3) (intro.) Information acquired in connection with the review and  
8 evaluation of health care services shall be disclosed and records of such review and  
9 evaluation shall be released, with the identity of any patient whose treatment is  
10 reviewed being withheld ~~unless the patient has granted permission to disclose~~  
11 ~~identity except as permitted under s. 146.82~~, in the following circumstances:

12 **SECTION 11.** 146.38 (3) (a), (b) and (c) of the statutes are amended to read:

13 146.38 (3) (a) To the health care provider ~~or facility~~ whose services are being  
14 reviewed or evaluated, upon the request of such provider ~~or facility~~;

15 (b) To any person with the consent of the health care provider ~~or facility~~ whose  
16 services are being reviewed or evaluated;

17 (c) To the person requesting the review or evaluation, for use solely for the  
18 purpose of improving the quality of health care, avoiding the improper utilization of  
19 the services of health care providers ~~and facilities~~, and determining the reasonable  
20 charges for such services;

21 **SECTION 12.** 146.38 (3) (d) of the statutes is repealed.

22 **SECTION 13.** 146.38 (3) (e) of the statutes is repealed.

23 **SECTION 14.** 146.38 (3m) of the statutes is created to read:

24 146.38 (3m) (a) Information acquired in connection with the review and  
25 evaluation of health care services may be disclosed, and records of such review and

1 evaluation may be released, in statistical form with the consent of the person  
2 authorizing or with the authority to authorize the review or evaluation. Information  
3 disclosed or records released under this subsection shall not reveal the identity of any  
4 patient except as permitted under s. 146.82.

5 (b) Information acquired in connection with the review or evaluation of health  
6 care services may be disclosed, and the records of such a review or evaluation  
7 released, to any of the following persons, with the consent of the person authorizing  
8 or with the authority to authorize the review or evaluation:

- 9 1. The employer of a health care provider, as defined in sub. (1) (b) 1. and 3.
- 10 2. The parent, subsidiary, or affiliate organization of a health care provider, as  
11 defined in sub. (1) (b) 2.
- 12 3. The parent, subsidiary, or affiliate organization of the employer of a health  
13 care provider, as defined in sub. (1) (b) 1. and 3.

14 **SECTION 15.** 146.38 (3t) of the statutes is created to read:

15 146.38 (3t) A record described under sub. (2) or an incident or occurrence report  
16 disclosed either under sub. (3) or (3m) or in violation of this section remains  
17 confidential and may not be used in any civil or criminal action against the health  
18 care provider *or any other health care provider*

19 **SECTION 16.** 146.38 (6) of the statutes is created to read:

20 146.38 (6) Health care provider specific information acquired by an  
21 administrative agency in order to help improve the quality of health care, to avoid  
22 the improper utilization of services of health care providers, or to determine the  
23 reasonable charges for health care services is exempt from inspection, copying, or  
24 receipt under s. 19.35 (1).

25 **SECTION 17.** 153.05 (3m) of the statutes is created to read:

1           153.05 (3m) The entity under contract under sub. (2m) (a) may report quality  
2 indicators identifying individual hospitals based on data the entity collects under  
3 this subchapter.

4           **SECTION 18.** 904.16 of the statutes is created to read:

5           **904.16 Health care reports. (1)** In this section:

6           (a) "Health care provider" has the meaning given in s. 146.38 (1) (b).

7           (b) "Regulatory agency" means the department of regulation and licensing or  
8 the division within the department of health services that conducts quality  
9 assurance activities related to health care providers.

10          (2) Except as provided in sub. (3), the following may not be used as evidence  
11 in a civil or criminal action brought against a health care provider.

12          (a) Reports that a regulatory agency requires a health care provider to give or  
13 disclose to that regulatory agency.

14          (b) Statements of, or records of interviews with, employees of a health care  
15 provider related to the regulation of the health care provider obtained by a regulatory  
16 agency.

17          (3) This section does not prohibit the use of the reports, statements, and records  
18 described in sub. (2) in any administrative proceeding conducted by a regulatory  
19 agency. This section does not apply to reports protected under s. 146.997.

20          **SECTION 19.** 940.08 (1) of the statutes is amended to read:

21          940.08 (1) ~~Whoever~~ Except as provided in sub. (3), whoever causes the death  
22 of another human being by the negligent operation or handling of a dangerous  
23 weapon, explosives or fire is guilty of a Class G felony.

24          **SECTION 20.** 940.08 (3) of the statutes is created to read:

1           940.08 (3) Subsection (1) does not apply to a health care provider acting within  
2 the scope of his or her practice or employment.

3           **SECTION 21.** 940.24 (1) of the statutes is amended to read:

4           940.24 (1) ~~Whoever~~ Except as provided in sub. (3), whoever causes bodily harm  
5 to another by the negligent operation or handling of a dangerous weapon, explosives  
6 or fire is guilty of a Class I felony.

7           **SECTION 22.** 940.24 (3) of the statutes is created to read:

8           940.24 (3) Subsection (1) does not apply to a health care provider acting within  
9 the scope of his or her practice or employment.

10          **SECTION 23.** 940.295 (3) (a) 3. of the statutes is amended to read:

11          940.295 (3) (a) 3. ~~Abuses~~ Except as provided in par. (am), abuses, with  
12 negligence, or neglects a patient or a resident.

13          **SECTION 24.** 940.295 (3) (am) of the statutes is created to read:

14          940.295 (3) (am) Paragraph (a) 3. does not apply to a health care provider  
15 acting in the scope of his or her practice or employment who commits an act or  
16 omission of mere inefficiency, unsatisfactory conduct, or failure in good performance  
17 as the result of inability, incapacity, inadvertency, ordinary negligence, or good faith  
18 error in judgment or discretion.

19          **SECTION 25. Initial applicability.**

20          (1) **CRIMES.** The treatment of sections 940.08 (1) and (3), 940.24 (1) and (3), and  
21 940.295 (3) (a) 3. and (am) of the statutes first applies to acts or omissions committed  
22 on the effective date of this subsection.

23          (2) **DISCLOSURE AND RELEASE OF RECORDS OR INFORMATION.** The treatment of  
24 section 146.38 (1m), (2), (3) (d) and (e), and (3m) of the statutes first applies to  
25 disclosures or releases occurring on the effective date of this subsection.





State of Wisconsin  
2011 - 2012 LEGISLATURE  
January 2011 Special Session



LRB-0358/4  
TJD&PJH:kjf&wlj:md

## BILL

1     **AN ACT to repeal** 146.38 (3) (d) and 146.38 (3) (e); **to renumber and amend**  
2             146.38 (1) (b); **to amend** 146.38 (1m), 146.38 (2), 146.38 (3) (intro.), 146.38 (3)  
3             (a), (b) and (c), 940.08 (1), 940.24 (1) and 940.295 (3) (a) 3.; and **to create** 146.38  
4             (1) (b) 1., 146.38 (1) (b) 2., 146.38 (1) (b) 3., 146.38 (1) (b) 4., 146.38 (1) (bm),  
5             146.38 (2m), 146.38 (3m), 146.38 (3t), 146.38 (6), 153.05 (3m), 904.16, 940.08  
6             (3), 940.24 (3) and 940.295 (3) (am) of the statutes; **relating to:** confidentiality  
7             of health care services reviews; use as evidence of information regarding health  
8             care providers; reporting of quality indicators identifying individual hospitals;  
9             homicide or injury by negligent handling of a dangerous weapon, explosives, or  
10            fire; criminal abuse of individuals at risk; and criminal abuse and neglect of  
11            patients and residents.

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*Analysis by the Legislative Reference Bureau*

***Confidentiality of health care services reviews***

Current law provides that a person who participates in a review or evaluation of services provided by a health care provider or facility, or of charges for such

services (a review), generally may not disclose information acquired in connection with the review. Further, the records that a reviewer or evaluator creates of investigations, inquiries, proceedings, and conclusions conducted for the review (review records) generally may not be released. Under current law, review records may not be used in a civil action for personal injuries against the health care provider or health care facility.

Current law contains several exceptions to confidentiality of review records and information acquired in connection with a review, which require disclosure of such records and information under the following circumstances: to a health care provider or facility whose services are reviewed, or to any person with the consent of that provider or facility; to the person who requested the review, for use only for the purpose of improving the quality of health care, avoiding improper utilization of health care services, and determining reasonable charges for services; to a court upon issuance of a subpoena in a criminal action; to an examining or licensing board or agency, when the organization or evaluator conducting the review determines that such action is advisable; and in a report in statistical format.

This bill makes the following changes to confidentiality provisions for health care service reviews:

1. The bill repeals the exception to confidentiality that requires release of review records and information acquired in connection with a review upon issuance of a subpoena in a criminal action.

2. The bill provides that review records may not be used in any civil or criminal action against any health care provider.

3. The bill provides that a person who participates in a review may not disclose any incident or occurrence report that is made to notify a reviewer of an incident, practice, or other situation that becomes the subject of a review. Further the bill prohibits using such an incident or occurrence report in any civil or criminal action against a health care provider.

4. The bill specifies that the confidentiality provisions related to review records apply regardless of whether the review is conducted by representatives from one or more organizations.

5. The bill provides that the confidentiality provisions for review records apply only if the review for which the records were created was conducted for one of the following purposes: to help improve the quality of health care, to avoid improper utilization of the services of health care providers, or to determine reasonable charges for such services.

6. Instead of requiring that review records and information acquired in connection with a review be disclosed in statistical form, the bill allows that such information and review records may be disclosed in statistical form. The bill also allows information acquired in connection with a review to be disclosed to a health care provider's employer or parent, subsidiary, or affiliated organization or to the parent, subsidiary, or affiliated organization of a health care provider's employer.

7. The bill requires that any record or incident or occurrence report that is disclosed to another, properly or improperly, remains confidential and may not be used in a civil or criminal action against any health care provider.

8. The bill includes as health care providers, for purposes of the confidentiality provisions, all of the following: individual health care providers; facilities, organizations, and business entities that are health care providers; persons working under the supervision of or in collaboration with an individual health care provider; and parents, subsidiaries, or affiliate organizations of facilities, organizations, and business entities that are health care providers.

***Use of health care reports or employee statements***

This bill prohibits the use as evidence in a civil or criminal action of any health care provider reports that are required by the Department of Regulation and Licensing (DRL) or by the division within the Department of Health Services (DHS) that conducts health care provider quality assurance reviews. The bill also prohibits the use as evidence in a civil or criminal action of any statements of, or records of interviews with, employees of a health care provider related to the regulation of a health care provider and obtained by DRL or by the division within DHS that conducts health care provider quality assurance reviews. The bill makes an exception from these prohibitions for the use of the records, statements, or interviews in an administrative proceeding conducted by DRL or by the division within DHS that conducts health care provider quality assurance reviews.

***Reporting of hospital quality indicators***

Current law requires the Department of Administration to contract with a certain entity to collect health care information from hospitals and ambulatory surgery centers. This entity analyzes and disseminates that health care information in a language understandable to laypersons. Among other health care information, the entity must report hospital quality indicators, but the report cannot identify the individual hospital with the quality indicators. This bill allows the entity to report quality indicators identifying individual hospitals.

***Crimes***

Under current law, a person who causes the death of, or bodily harm to, an individual by negligent operation or handling of a dangerous weapon, explosives, or fire is guilty of a crime. A dangerous weapon includes any device or instrumentality, which in the manner it is used or intended to be used, is calculated or likely to produce death or great bodily harm. The bill provides that a health care provider is not guilty of the crimes of causing the death of, or bodily harm to, an individual by negligent operation or handling of a dangerous weapon, explosives, or fire, if the health care provider is acting within the scope of his or her practice or employment.

Also under current law, a person who is in charge of or employed by a residential care facility, an inpatient health care facility, a treatment facility, or a home health agency, who intentionally, recklessly, or negligently abuses or neglects a patient or a resident in one of those facilities or agencies is guilty of a crime. The penalties for the crime depend upon the degree of harm suffered by the patient or resident. Under the bill, a person who negligently abuses or neglects a patient or a resident is not guilty of a crime if the person is a health care provider acting in the scope of his or her practice or employment, and he or she commits an act or omission of mere inefficiency, unsatisfactory conduct, or failure in good performance as the result of

inability, incapacity, inadvertency, ordinary negligence, or good faith error in judgment or discretion.

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*The people of the state of Wisconsin, represented in senate and assembly, do enact as follows:*

1           **SECTION 1.** 146.38 (1) (b) of the statutes is renumbered 146.38 (1) (b) (intro.)  
2 and amended to read:

3           146.38 (1) (b) “Health care provider” ~~includes an ambulance service provider,~~  
4 ~~as defined in s. 256.01 (3), an emergency medical technician, as defined in s. 256.01~~  
5 ~~(5), and a first responder, as defined in s. 256.01 (9).~~ means any of the following:

6           **SECTION 2.** 146.38 (1) (b) 1. of the statutes is created to read:

7           146.38 (1) (b) 1. A person specified in s. 146.81 (1) (a) to (hp), (r), or (s).

8           **SECTION 3.** 146.38 (1) (b) 2. of the statutes is created to read:

9           146.38 (1) (b) 2. A facility, association, or business entity, as specified in s.  
10 146.81 (1) (i) to (q).

11           **SECTION 4.** 146.38 (1) (b) 3. of the statutes is created to read:

12           146.38 (1) (b) 3. A person working under the supervision of or in collaboration  
13 with a person specified in subd. 1.

14           **SECTION 5.** 146.38 (1) (b) 4. of the statutes is created to read:

15           146.38 (1) (b) 4. A parent, subsidiary, or affiliate organization of a facility,  
16 association, or business entity, as specified in subd. 2.

17           **SECTION 6.** 146.38 (1) (bm) of the statutes is created to read:

18           146.38 (1) (bm) “Incident or occurrence report” means a written or oral  
19 statement that is made to notify a person, organization, or an evaluator who reviews  
20 or evaluates the services of health care providers or charges for such services of an

1 incident, practice, or other situation that becomes the subject of such a review or  
2 evaluation.

3 **SECTION 7.** 146.38 (1m) of the statutes is amended to read:

4 146.38 (1m) No person who participates in the review or evaluation of the  
5 services of health care providers ~~or facilities~~ or charges for such services may disclose  
6 an incident or occurrence report or any information acquired in connection with such  
7 review or evaluation except as provided in sub. (3) or (3m).

8 **SECTION 8.** 146.38 (2) of the statutes is amended to read:

9 146.38 (2) All persons, organizations, or evaluators reviewing or evaluating,  
10 whether from one or more entities, who review or evaluate the services of health care  
11 providers in order to help improve the quality of health care, to avoid improper  
12 utilization of the services of health care providers, or to determine the reasonable  
13 charges for such services shall keep a record of their investigations, inquiries,  
14 proceedings and conclusions. No such record may be released to any person under  
15 s. 804.10 (4) or otherwise except as provided in sub. (3) or (3m). No such record may  
16 be used in any civil or criminal action ~~for personal injuries~~ against the health care  
17 provider ~~or facility~~ or any other health care provider; however, except for incident or  
18 occurrence reports or records from other persons, organizations, or evaluators  
19 reviewing or evaluating health care providers, information, documents or records  
20 presented during the review or evaluation may not be construed as immune from  
21 discovery under s. 804.10 (4) or use in any civil or criminal action merely because they  
22 were so presented. Any person who testifies during or participates in the review or  
23 evaluation may testify in any civil or criminal action as to matters within his or her  
24 knowledge, but may not testify as to information obtained through his or her

1 participation in the review or evaluation, nor as to any conclusion of such review or  
2 evaluation.

3 **SECTION 9.** 146.38 (2m) of the statutes is created to read:

4 146.38 (2m) An incident or occurrence report may not be used in any civil or  
5 criminal action against a health care provider.

6 **SECTION 10.** 146.38 (3) (intro.) of the statutes is amended to read:

7 146.38 (3) (intro.) Information acquired in connection with the review and  
8 evaluation of health care services shall be disclosed and records of such review and  
9 evaluation shall be released, with the identity of any patient whose treatment is  
10 reviewed being withheld ~~unless the patient has granted permission to disclose~~  
11 ~~identity except as permitted under s. 146.82~~, in the following circumstances:

12 **SECTION 11.** 146.38 (3) (a), (b) and (c) of the statutes are amended to read:

13 146.38 (3) (a) To the health care provider ~~or facility~~ whose services are being  
14 reviewed or evaluated, upon the request of such provider ~~or facility~~;

15 (b) To any person with the consent of the health care provider ~~or facility~~ whose  
16 services are being reviewed or evaluated;

17 (c) To the person requesting the review or evaluation, for use solely for the  
18 purpose of improving the quality of health care, avoiding the improper utilization of  
19 the services of health care providers ~~and facilities~~, and determining the reasonable  
20 charges for such services;

21 **SECTION 12.** 146.38 (3) (d) of the statutes is repealed.

22 **SECTION 13.** 146.38 (3) (e) of the statutes is repealed.

23 **SECTION 14.** 146.38 (3m) of the statutes is created to read:

24 146.38 (3m) (a) Information acquired in connection with the review and  
25 evaluation of health care services may be disclosed, and records of such review and

1 evaluation may be released, in statistical form with the consent of the person  
2 authorizing or with the authority to authorize the review or evaluation. Information  
3 disclosed or records released under this subsection shall not reveal the identity of any  
4 patient except as permitted under s. 146.82.

5 (b) Information acquired in connection with the review or evaluation of health  
6 care services may be disclosed, and the records of such a review or evaluation  
7 released, to any of the following persons, with the consent of the person authorizing  
8 or with the authority to authorize the review or evaluation:

- 9 1. The employer of a health care provider, as defined in sub. (1) (b) 1. and 3.
- 10 2. The parent, subsidiary, or affiliate organization of a health care provider, as  
11 defined in sub. (1) (b) 2.
- 12 3. The parent, subsidiary, or affiliate organization of the employer of a health  
13 care provider, as defined in sub. (1) (b) 1. and 3.

14 **SECTION 15.** 146.38 (3t) of the statutes is created to read:

15 146.38 (3t) A record described under sub. (2) or an incident or occurrence report  
16 disclosed either under sub. (3) or (3m) or in violation of this section remains  
17 confidential and may not be used in any civil or criminal action against the health  
18 care provider or any other health care provider.

19 **SECTION 16.** 146.38 (6) of the statutes is created to read:

20 146.38 (6) Health care provider specific information acquired by an  
21 administrative agency in order to help improve the quality of health care, to avoid  
22 the improper utilization of services of health care providers, or to determine the  
23 reasonable charges for health care services is exempt from inspection, copying, or  
24 receipt under s. 19.35 (1).

25 **SECTION 17.** 153.05 (3m) of the statutes is created to read:

1           153.05 (3m) The entity under contract under sub. (2m) (a) may report quality  
2 indicators identifying individual hospitals based on data the entity collects under  
3 this subchapter.

4           **SECTION 18.** 904.16 of the statutes is created to read:

5           **904.16 Health care reports.** (1) In this section:

6           (a) "Health care provider" has the meaning given in s. 146.38 (1) (b).

7           (b) "Regulatory agency" means the department of regulation and licensing or  
8 the division within the department of health services that conducts quality  
9 assurance activities related to health care providers.

10          (2) Except as provided in sub. (3), the following may not be used as evidence  
11 in a civil or criminal action brought against a health care provider.

12          (a) Reports that a regulatory agency requires a health care provider to give or  
13 disclose to that regulatory agency.

14          (b) Statements of, or records of interviews with, employees of a health care  
15 provider related to the regulation of the health care provider obtained by a regulatory  
16 agency.

17          (3) This section does not prohibit the use of the reports, statements, and records  
18 described in sub. (2) in any administrative proceeding conducted by a regulatory  
19 agency. This section does not apply to reports protected under s. 146.997.

20          **SECTION 19.** 940.08 (1) of the statutes is amended to read:

21          940.08 (1) ~~Whoever~~ Except as provided in sub. (3), whoever causes the death  
22 of another human being by the negligent operation or handling of a dangerous  
23 weapon, explosives or fire is guilty of a Class G felony.

24          **SECTION 20.** 940.08 (3) of the statutes is created to read:

1           940.08 (3) Subsection (1) does not apply to a health care provider acting within  
2 the scope of his or her practice or employment.

3           **SECTION 21.** 940.24 (1) of the statutes is amended to read:

4           940.24 (1) ~~Whoever~~ Except as provided in sub. (3), whoever causes bodily harm  
5 to another by the negligent operation or handling of a dangerous weapon, explosives  
6 or fire is guilty of a Class I felony.

7           **SECTION 22.** 940.24 (3) of the statutes is created to read:

8           940.24 (3) Subsection (1) does not apply to a health care provider acting within  
9 the scope of his or her practice or employment.

10          **SECTION 23.** 940.295 (3) (a) 3. of the statutes is amended to read:

11          940.295 (3) (a) 3. ~~Abuses~~ Except as provided in par. (am), abuses, with  
12 negligence, or neglects a patient or a resident.

13          **SECTION 24.** 940.295 (3) (am) of the statutes is created to read:

14          940.295 (3) (am) Paragraph (a) 3. does not apply to a health care provider  
15 acting in the scope of his or her practice or employment who commits an act or  
16 omission of mere inefficiency, unsatisfactory conduct, or failure in good performance  
17 as the result of inability, incapacity, inadvertency, ordinary negligence, or good faith  
18 error in judgment or discretion.

19          **SECTION 25. Initial applicability.**

20          (1) **CRIMES.** The treatment of sections 940.08 (1) and (3), 940.24 (1) and (3), and  
21 940.295 (3) (a) 3. and (am) of the statutes first applies to acts or omissions committed  
22 on the effective date of this subsection.

23          (2) **DISCLOSURE AND RELEASE OF RECORDS OR INFORMATION.** The treatment of  
24 section 146.38 (1m), (2), (3) (d) and (e), and (3m) of the statutes first applies to  
25 disclosures or releases occurring on the effective date of this subsection.

1           (3) USE OF RECORDS OR INFORMATION. The treatment of section 146.38 (2) and  
2           (2m) of the statutes first applies to use of records or information on the effective date  
3           of this subsection.

4           (4) EVIDENCE. The treatment of section 904.16 of the statutes first applies to  
5           health care provider reports received, and statements of, or records of interviews  
6           with, employees of a health care provider obtained, on the effective date of this  
7           subsection.

8

(END)