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☞ Details: Open records information

(FORM UPDATED: 08/11/2010)

WISCONSIN STATE LEGISLATURE ...
PUBLIC HEARING - COMMITTEE RECORDS

1995-96
(session year)

Assembly
(Assembly, Senate or Joint)

Committee on Insurance, Securities and Corporate Policy...

COMMITTEE NOTICES ...

- Committee Reports ... **CR**
- Executive Sessions ... **ES**
- Public Hearings ... **PH**

INFORMATION COLLECTED BY COMMITTEE FOR AND AGAINST PROPOSAL

- Appointments ... **Appt** (w/Record of Comm. Proceedings)
- Clearinghouse Rules ... **CRule** (w/Record of Comm. Proceedings)
- Hearing Records ... bills and resolutions (w/Record of Comm. Proceedings)
  (**ab** = Assembly Bill) (**ar** = Assembly Resolution) (**ajr** = Assembly Joint Resolution)
  (**sb** = Senate Bill) (**sr** = Senate Resolution) (**sjr** = Senate Joint Resolution)
- Miscellaneous ... **Misc**

* Contents organized for archiving by: Stefanie Rose (LRB) (October 2012)

Wisconsin Legislature

Assembly Chamber

P.O. Box 8952
Madison, Wisconsin 53708

DATE: January 3, 1995

TO: ALL REPRESENTATIVES

FROM: Speaker David Prosser

SUBJECT: Open Records Law

Legislators are ***legal custodians*** of various records, documents and other materials in their possession. These records are subject to the Open Records Law [ss. 19.31 to 19.39, Stats.]. The "*legal custodian*" of records is the person to whom requests for copies of records are made and who is responsible for processing requests for access to records. A Legislator ***may designate an employe*** on his or her staff to act as the legal custodian.

Access to public records must be allowed during established office hours. Copies of records must be provided upon request.

Please review the enclosed paper, Legislative Council Information Bulletin 95-3, *Responding to Public Records Requests*, which provides information on matters relating to legislative records.

If you have any questions, please let me know. You may also wish to contact the Legislative Council Staff for assistance with specific questions on the Open Records Law.

DP:wu:kja

Enclosure

Wisconsin Legislature

Assembly Chamber

P.O. Box 8952
Madison, Wisconsin 53708

DATE: January 3, 1995

TO: ASSEMBLY CHAIRPERSONS OF COMMITTEES AND JOINT COMMITTEES

FROM: Speaker David Prosser DP

SUBJECT: Open Records Law for Committee Records

The Open Records Law requires that ***all*** public records must be open for public inspection and copying, except in strictly limited circumstances. Please read the enclosed Legislative Council Information Bulletin 95-3, *Responding to Public Records Requests*. This Bulletin describes matters relating to access to legislative records. The matters described in that memorandum are applicable to ***committee*** records as well as to ***individual Legislator's*** records.

Under the Open Records Law, each committee chairperson or co-chairperson is the ***legal custodian*** of his or her committee records, including such items as committee reports on bills, petitions, written statements presented to the committee, hearing notices and similar materials. The "*legal custodian*" of records is the person to whom requests for copies of records are made and who is responsible for processing requests for access to records. A Chairperson ***may designate an employe*** on his or her staff to act as the legal custodian.

Since a chairperson's office serves as the committee's office, you are ***required***, under the Law, to prominently display in your office ***a notice*** setting forth the policies for access to committee records. The notice must be made available for inspection and copying by the public. Enclosed is a sample "Notice of Access" which contains the basic elements of the notice. Please use the sample to prepare the official notice for your committee, which must show:

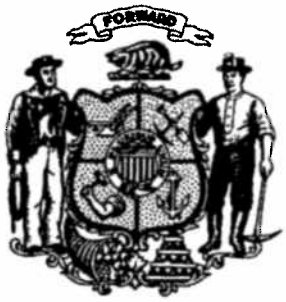
- Your committee's name and your office number.
- The committee records for which you are responsible.
- The normal business hours for your office.
- The name and title of the legal custodian for the committee records.

The required notice is to be posted in your office within one week from the date of this letter.

If you have any questions, please let me know. You may also wish to contact the Legislative Council Staff for assistance with specific questions on the Open Records Law.

DP:wu:kja
Enclosures

Wisconsin Legislative Council Staff
January 1995



RESPONDING TO PUBLIC RECORDS REQUESTS

INFORMATION BULLETIN 95-3*

INTRODUCTION

Much of the material in a Legislator's office or kept by a Legislator qualifies as a public "record" under Wisconsin's open records law [ss. 19.31 to 19.39, Stats.; attached]. Therefore, this material is required by law to be available for inspection and copying by members of the public, including the news media.

The purpose of this Information Bulletin is to set forth the steps by which a Legislator may deal with a request to inspect records in his or her office. Note, however, that a decision to deny access to a record should be made very carefully, since it most likely will be challenged--in court, in the news media or in partisan debate.

Legislators are strongly advised, prior to responding to a request to inspect records, to seek additional advice beyond that set out below. Legislative leaders can provide pragmatic and political advice. Legislative Council Staff can provide legal advice.

1. CLARIFY, IN ADVANCE, WHO IS THE "CUSTODIAN" OF THE OFFICE'S RECORDS

The custodian is the person who responds to a request to inspect records. Each Legislator is automatically the custodian of his or her records, unless an office staff member is designated as custodian. A Legislator and his or her staff should have a clear understanding of who makes the decisions when responding to a request to inspect records.

In most cases, it appears preferable that a Legislator retain the role of custodian of his or her records, since the Legislator is the person directly affected by an inappropriate release of records. Note, however, that in the event that a request is made during a period of time that a

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*This Information Bulletin was prepared by Ronald Sklansky, Senior Staff Attorney.

Legislator is unavailable (e.g., a vacation), action on the request will be delayed. The law makes no provision for appointment of a temporary custodian under such circumstances.

2. RESPOND REASONABLY PROMPTLY TO A REQUEST

A response to a record request must be made "as soon as practicable and without delay" under the law. In practical terms, a custodian may need some amount of time to retrieve and inspect the record before formulating a response. However, a prompt response, such as immediately, within the hour or within 24 hours, is desirable.

The response to a request for a record is either (a) to provide the record or (b) to deny the request, in whole or in part. If the request is denied, the reasons for the denial must be given.

3. RESPOND TO A REQUEST IN KIND

If the request is made orally, and is going to be denied, the denial may be made orally. If a requester who was orally denied a request later demands a written statement of denial, and the demand is made within five business days of the oral denial, the written statement must be provided.

If a request is made in writing, the response must be in writing giving the reasons for the denial. Written responses to written requests must include this statement--"This denial is subject to review by mandamus under s. 19.37 (1), Stats., or by application to the Attorney General or a district attorney."

4. DEMAND THAT A REQUEST BE REASONABLY SPECIFIC

A request must be honored if it "reasonably describes the requested record or the information requested." However, requests to go through an office's files (a "fishing expedition") do not have to be honored.

For example, requests such as the following must be given a response: "All constituent mail on Assembly Bill 000"; "the mailing list for your newsletter distribution"; "all correspondence on the Highway XO project in your district."

Also, there is no blanket exemption for constituent mail--in most cases, it is a "record."

5. SEEKING IDENTITY OF REQUESTER; PURPOSE OF REQUEST

A records request may not be denied because the requester refuses to provide identification or to state the purpose of the request. However, if the record is at a private residence, or valid security reasons exist, a requester may be required to show acceptable identification.

6. DECIDE IF THE REQUESTED MATERIAL IS A "RECORD"

A record is any material which bears information, regardless of form ("written, drawn, printed, spoken, visual or electromagnetic information") and which was created or is being kept by a custodian, **except**:

a. Personal property of the Legislator which has no relation to his or her office of Legislator;

b. Drafts, notes, preliminary computations and similar material prepared for the personal use of the Legislator or prepared in the name of a Legislator by a member of his or her staff;

c. Material to which access is limited by copyright, patent or bequest; and

d. Published materials which are available for sale or are available at a public library.

If the requested material falls into one of the above exceptions, it is not a "record" and the request may be denied for that reason.

7. MAKE A DECISION ON THE REQUEST

The open records law favors inspection of public records, and establishes a presumption of complete access to public records. Access may be denied only in exceptional cases--that is, in cases where it can be demonstrated that the harm done to the public interest by disclosure outweighs the right of access to public records.

In some instances, access to records may be denied. However, any denial must specifically demonstrate that there is a need to restrict public access at the time that the request is made.

The exemptions to the open meetings law are used as a guide for denial. The applicable exemptions in that law are:

a. "Deliberating concerning a case which was the subject of any judicial or quasi-judicial trial or hearing before that governmental body."

b. "Considering dismissal, demotion, licensing or discipline of any public employe or person licensed by a public body or the investigation of charges against such person...and the taking of formal action on any such matter...."

c. "Considering employment, promotion, compensation or performance evaluation data of any public employe over which the governmental body has jurisdiction or exercises responsibility."

d. "Deliberating or negotiating the purchasing of public properties, the investing of public funds or conducting other specific public business, whenever competitive or bargaining reasons require a close session."

e. "Considering financial, medical, social or personal histories or disciplinary data of specific persons, preliminary consideration of specific personnel problems or the investigation of charges against specific persons...which, if discussed in public, would be likely to have a substantial adverse effect on the reputation of any person referred to in such histories or data, or involved in such problems or investigations."

f. "Conferring with legal counsel for the governmental body who is rendering oral or written advice concerning strategy to be adopted by the body with respect to litigation in which it is or is likely to become involved."

g. "Consideration of requests for confidential written advice from the ethics board under s. 19.46 (2), or from any county or municipal ethics board."

h. "Considering any and all matters related to acts by businesses under s. 560.15 [economic adjustment program where a business is shutting down or laying off employes] which, if discussed in public, could adversely affect the business, its employes or former employes."

[In addition to the above, meetings can also be closed to discuss probation or parole applications, crime fighting strategy, burial sites, ice rink operation and certain Unemployment Compensation advisory council and Worker's Compensation advisory council matters. In specific situations, these less-common grounds may be applicable to a records request made to a Legislator.]

In addition, the Wisconsin Supreme Court has stated that access to information collected under a pledge of confidentiality, where the pledge was necessary to obtain the information, may be denied. Last, the open meetings law exempts records from access if: (a) federal or state law requires nondisclosure; (b) the record is a computer program; or (c) the record is a trade secret.

Finally, it should be noted that the privacy advocate may achieve access to a record which would otherwise be shielded from disclosure. Section 19.75, Stats., provides that the privacy advocate may inspect a record that "is not open to inspection" if it is necessary to discharge the duties of the privacy advocate and if the record will remain confidential.

8. PARTIAL DENIAL

If part of a record qualifies for confidential treatment, the remainder must be released. In those instances, either separate the confidential information, or delete it, and release the remainder.

9. PROVIDE COPIES, ON REQUEST

Persons having a right to inspect a record are entitled to a copy, if they ask for it. The custodian should copy the record, to retain control over the original record. A fee for copying, which does not exceed the actual copying cost, may be charged based on per copy charges established by the Chief Clerk in each House.

RS:wu;pkc

Attachment

ATTACHMENT

SECTIONS 19.31 TO 19.39, STATS.

OPEN RECORDS LAW

19.31 Declaration of policy. In recognition of the fact that a representative government is dependent upon an informed electorate, it is declared to be the public policy of this state that all persons are entitled to the greatest possible information regarding the affairs of government and the official acts of those officers and employes who represent them. Further, providing persons with such information is declared to be an essential function of a representative government and an integral part of the routine duties of officers and employes whose responsibility it is to provide such information. To that end, ss. 19.32 to 19.37 shall be construed in every instance with a presumption of complete public access, consistent with the conduct of governmental business. The denial of public access generally is contrary to the public interest, and only in an exceptional case may access be denied.

19.32 Definitions. As used in ss. 19.33 to 19.39:

(1) "Authority" means any of the following having custody of a record: a state or local office, elected official, agency, board, commission, committee, council, department or public body corporate and politic created by constitution, law, ordinance, rule or order; a governmental or quasi–governmental corporation except for the Bradley center sports and entertainment corporation; a local exposition district under subch. II of ch. 229; any public purpose corporation, as defined in s. 181.79 (1); any court of law; the assembly or senate; a nonprofit corporation which receives more than 50% of its funds from a county or a municipality, as defined in s. 59.001 (3), and which provides services related to public health or safety to the county or municipality; a nonprofit corporation operating the Olympic ice training center under s. 42.11 (3); or a formally constituted subunit of any of the foregoing.

(1m) "Person authorized by the individual" means the parent, guardian, as defined in s. 48.02 (8), or legal custodian, as defined in s. 48.02 (11), of a child, as defined in s. 48.02 (2), the guardian, as defined in s. 880.01 (3), of an individual adjudged incompetent, as defined in s. 880.01 (4), the personal representative or spouse of an individual who is deceased or any person authorized, in writing, by the individual to exercise the rights granted under this section.

(1r) "Personally identifiable information" has the meaning specified in s. 19.62 (5).

(2) "Record" means any material on which written, drawn, printed, spoken, visual or electromagnetic information is recorded or preserved, regardless of physical form or characteristics, which has been created or is being kept by an authority. "Record" includes, but is not limited to, handwritten, typed or printed pages, maps, charts, photographs, films, recordings, tapes (including computer tapes), computer printouts and optical disks. "Record" does not include drafts, notes, preliminary computations and like materials prepared for the originator's

personal use or prepared by the originator in the name of a person for whom the originator is working; materials which are purely the personal property of the custodian and have no relation to his or her office; materials to which access is limited by copyright, patent or bequest; and published materials in the possession of an authority other than a public library which are available for sale, or which are available for inspection at a public library.

(3) "Requester" means any person who requests inspection or copies of a record.

19.33 Legal custodians. **(1)** An elected official is the legal custodian of his or her records and the records of his or her office, but the official may designate an employe of his or her staff to act as the legal custodian.

(2) The chairperson of a committee of elected officials, or the designee of the chairperson, is the legal custodian of the records of the committee.

(3) The cochairpersons of a joint committee of elected officials, or the designee of the cochairpersons, are the legal custodians of the records of the joint committee.

(4) Every authority not specified in subs. (1) to (3) shall designate in writing one or more positions occupied by an officer or employe of the authority or the unit of government of which it is a part as a legal custodian to fulfill its duties under this subchapter. In the absence of a designation the authority's highest ranking officer and the chief administrative officer, if any, are the legal custodians for the authority. The legal custodian shall be vested by the authority with full legal power to render decisions and carry out the duties of the authority under this subchapter. Each authority shall provide the name of the legal custodian and a description of the nature of his or her duties under this subchapter to all employes of the authority entrusted with records subject to the legal custodian's supervision.

(5) Notwithstanding sub. (4), if an authority specified in sub. (4) or the members of such an authority are appointed by another authority, the appointing authority may designate a legal custodian for records of the authority or members of the authority appointed by the appointing authority, except that if such an authority is attached for administrative purposes to another authority, the authority performing administrative duties shall designate the legal custodian for the authority for whom administrative duties are performed.

(6) The legal custodian of records maintained in a publicly owned or leased building or the authority appointing the legal custodian shall designate one or more deputies to act as legal custodian of such records in his or her absence or as otherwise required to respond to requests as provided in s. 19.35 (4). This subsection does not apply to members of the legislature or to members of any local governmental body.

(7) The designation of a legal custodian does not affect the powers and duties of an authority under this subchapter.

(8) No elected official of a legislative body has a duty to act as or designate a legal custodian under sub. (4) for the records of any committee of the body unless the official is the

highest ranking officer or chief administrative officer of the committee or is designated the legal custodian of the committee's records by rule or by law.

19.34 Procedural information. **(1)** Each authority shall adopt, prominently display and make available for inspection and copying at its offices, for the guidance of the public, a notice containing a description of its organization and the established times and places at which, the legal custodian under s. 19.33 from whom, and the methods whereby, the public may obtain information and access to records in its custody, make requests for records, or obtain copies of records, and the costs thereof. This subsection does not apply to members of the legislature or to members of any local governmental body.

(2) (a) Each authority which maintains regular office hours at the location where records in the custody of the authority are kept shall permit access to the records of the authority at all times during those office hours, unless otherwise specifically authorized by law.

(b) Each authority which does not maintain regular office hours at the location where records in the custody of the authority are kept shall:

1. Permit access to its records upon at least 48 hours' written or oral notice of intent to inspect or copy a record; or

2. Establish a period of at least 2 consecutive hours per week during which access to the records of the authority is permitted. In such case, the authority may require 24 hours' advance written or oral notice of intent to inspect or copy a record.

(c) An authority imposing a notice requirement under par. (b) shall include a statement of the requirement in its notice under sub. (1), if the authority is required to adopt a notice under that subsection.

(d) If a record of an authority is occasionally taken to a location other than the location where records of the authority are regularly kept, and the record may be inspected at the place at which records of the authority are regularly kept upon one business day's notice, the authority or legal custodian of the record need not provide access to the record at the occasional location.

19.35 Access to records; fees. **(1)** RIGHT TO INSPECTION. (a) Except as otherwise provided by law, any requester has a right to inspect any record. Substantive common law principles construing the right to inspect, copy or receive copies of records shall remain in effect. The exemptions to the requirement of a governmental body to meet in open session under s. 19.85 are indicative of public policy, but may be used as grounds for denying public access to a record only if the authority or legal custodian under s. 19.33 makes a specific demonstration that there is a need to restrict public access at the time that the request to inspect or copy the record is made.

(am) In addition to any right under par. (a), any requester who is an individual or person authorized by the individual, has a right to inspect any record containing personally identifiable information pertaining to the individual that is maintained by an authority and to make or

receive a copy of any such information. The right to inspect or copy a record under this paragraph does not apply to any of the following:

1. Any record containing personally identifiable information that is collected or maintained in connection with a complaint, investigation or other circumstances that may lead to an enforcement action, administrative proceeding, arbitration proceeding or court proceeding, or any such record that is collected or maintained in connection with such an action or proceeding.

2. Any record containing personally identifiable information that, if disclosed, would do any of the following:

a. Endanger an individual's life or safety.

b. Identify a confidential informant.

c. Endanger the security of any state correctional institution, as defined in s. 301.01 (4), jail, as defined in s. 165.85 (2) (bg), secured correctional facility, as defined in s. 48.02 (15m), mental health institute, as defined in s. 51.01 (12), center for the developmentally disabled, as defined in s. 51.01 (3), or the population or staff of any of these institutions, facilities or jails.

d. Compromise the rehabilitation of a person in the custody of the department of corrections or detained in a jail or facility identified in subd. 2. c.

3. Any record that is part of a records series, as defined in s. 19.62 (7), that is not indexed, arranged or automated in a way that the record can be retrieved by the authority maintaining the records series by use of an individual's name, address or other identifier.

(b) Except as otherwise provided by law, any requester has a right to inspect a record and to make or receive a copy of a record which appears in written form. If a requester appears personally to request a copy of a record, the authority having custody of the record may, at its option, permit the requester to photocopy the record or provide the requester with a copy substantially as readable as the original.

(c) Except as otherwise provided by law, any requester has a right to receive from an authority having custody of a record which is in the form of a comprehensible audio tape recording a copy of the tape recording substantially as audible as the original. The authority may instead provide a transcript of the recording to the requester if he or she requests.

(d) Except as otherwise provided by law, any requester has a right to receive from an authority having custody of a record which is in the form of a video tape recording a copy of the tape recording substantially as good as the original.

(e) Except as otherwise provided by law, any requester has a right to receive from an authority having custody of a record which is not in a readily comprehensible form a copy of the information contained in the record assembled and reduced to written form on paper.

(em) If an authority receives a request to inspect or copy a record that is in handwritten form or a record that is in the form of a voice recording which the authority is required to withhold or from which the authority is required to delete information under s. 19.36 (8) (b) because the handwriting or the recorded voice would identify an informant, the authority shall provide to the requester, upon his or her request, a transcript of the record or the information contained in the record if the record or information is otherwise subject to public inspection and copying under this subsection.

(f) Except as otherwise provided by law, any requester has a right to inspect any record not specified in pars. (b) to (e) the form of which does not permit copying. If a requester requests permission to photograph the record, the authority having custody of the record may permit the requester to photograph the record. If a requester requests that a photograph of the record be provided, the authority shall provide a good quality photograph of the record.

(g) Paragraphs (a) to (c), (e) and (f) do not apply to a record which has been or will be promptly published with copies offered for sale or distribution.

(h) A request under pars. (a) to (f) is deemed sufficient if it reasonably describes the requested record or the information requested. However, a request for a record without a reasonable limitation as to subject matter or length of time represented by the record does not constitute a sufficient request. A request may be made orally, but a request must be in writing before an action to enforce the request is commenced under s. 19.37.

(i) Except as authorized under this paragraph, no request under pars. (a) and (b) to (f) may be refused because the person making the request is unwilling to be identified or to state the purpose of the request. Except as authorized under this paragraph, no request under pars. (a) to (f) may be refused because the request is received by mail, unless prepayment of a fee is required under sub. (3) (f). A requester may be required to show acceptable identification whenever the requested record is kept at a private residence or whenever security reasons or federal law or regulations so require.

(j) Notwithstanding pars. (a) to (f), a requester shall comply with any regulations or restrictions upon access to or use of information which are specifically prescribed by law.

(k) Notwithstanding pars. (a), (am), (b) and (f), a legal custodian may impose reasonable restrictions on the manner of access to an original record if the record is irreplaceable or easily damaged.

(L) Except as necessary to comply with pars. (c) to (e) or s. 19.36 (6), this subsection does not require an authority to create a new record by extracting information from existing records and compiling the information in a new format.

(2) FACILITIES. The authority shall provide any person who is authorized to inspect or copy a record under sub. (1) (a), (am), (b) or (f) with facilities comparable to those used by its employes to inspect, copy and abstract the record during established office hours. An authority is not required by this subsection to purchase or lease photocopying, duplicating, photographic

or other equipment or to provide a separate room for the inspection, copying or abstracting of records.

(3) FEES. (a) An authority may impose a fee upon the requester of a copy of a record which may not exceed the actual, necessary and direct cost of reproduction and transcription of the record, unless a fee is otherwise specifically established or authorized to be established by law.

(b) Except as otherwise provided by law or as authorized to be prescribed by law an authority may impose a fee upon the requester of a copy of a record that does not exceed the actual, necessary and direct cost of photographing and photographic processing if the authority provides a photograph of a record, the form of which does not permit copying.

(c) Except as otherwise provided by law or as authorized to be prescribed by law, an authority may impose a fee upon a requester for locating a record, not exceeding the actual, necessary and direct cost of location, if the cost is $50 or more.

(d) An authority may impose a fee upon a requester for the actual, necessary and direct cost of mailing or shipping of any copy or photograph of a record which is mailed or shipped to the requester.

(e) An authority may provide copies of a record without charge or at a reduced charge where the authority determines that waiver or reduction of the fee is in the public interest.

(f) An authority may require prepayment by a requester of any fee or fees imposed under this subsection if the total amount exceeds $5.

(4) TIME FOR COMPLIANCE AND PROCEDURES. (a) Each authority, upon request for any record, shall, as soon as practicable and without delay, either fill the request or notify the requester of the authority's determination to deny the request in whole or in part and the reasons therefor.

(b) If a request is made orally, the authority may deny the request orally unless a demand for a written statement of the reasons denying the request is made by the requester within 5 business days of the oral denial. If an authority denies a written request in whole or in part, the requester shall receive from the authority a written statement of the reasons for denying the written request. Every written denial of a request by an authority shall inform the requester that if the request for the record was made in writing, then the determination is subject to review by mandamus under s. 19.37 (1) or upon application to the attorney general or a district attorney.

(c) If an authority receives a request under sub. (1) (a) or (am) from an individual or person authorized by the individual who identifies himself or herself and states that the purpose of the request is to inspect or copy a record containing personally identifiable information pertaining to the individual that is maintained by the authority, the authority shall deny or grant the request in accordance with the following procedure:

1. The authority shall first determine if the requester has a right to inspect or copy the record under sub. (1) (a).

2. If the authority determines that the requester has a right to inspect or copy the record under sub. (1) (a), the authority shall grant the request.

3. If the authority determines that the requester does not have a right to inspect or copy the record under sub. (1) (a), the authority shall then determine if the requester has a right to inspect or copy the record under sub. (1) (am) and grant or deny the request accordingly.

(5) RECORD DESTRUCTION. No authority may destroy any record at any time after the receipt of a request for inspection or copying of the record under sub. (1) until after the request is granted or until at least 60 days after the date that the request is denied. If an action is commenced under s. 19.37, the requested record may not be destroyed until after the order of the court in relation to such record is issued and the deadline for appealing that order has passed, or, if appealed, until after the order of the court hearing the appeal is issued. If the court orders the production of any record and the order is not appealed, the requested record may not be destroyed until after the request for inspection or copying is granted.

(6) ELECTED OFFICIAL RESPONSIBILITIES. No elected official is responsible for the record of any other elected official unless he or she has possession of the record of that other official.

19.36 Limitations upon access and withholding. (1) APPLICATION OF OTHER LAWS. Any record which is specifically exempted from disclosure by state or federal law or authorized to be exempted from disclosure by state law is exempt from disclosure under s. 19.35 (1), except that any portion of that record which contains public information is open to public inspection as provided in sub. (6).

(2) LAW ENFORCEMENT RECORDS. Except as otherwise provided by law, whenever federal law or regulations require or as a condition to receipt of aids by this state require that any record relating to investigative information obtained for law enforcement purposes be withheld from public access, then that information is exempt from disclosure under s. 19.35 (1).

(3) CONTRACTORS' RECORDS. Each authority shall make available for inspection and copying under s. 19.35 (1) any record produced or collected under a contract entered into by the authority with a person other than an authority to the same extent as if the record were maintained by the authority. This subsection does not apply to the inspection or copying of a record under s. 19.35 (1) (am).

(4) COMPUTER PROGRAMS AND DATA. A computer program, as defined in s. 16.971 (4) (c), is not subject to examination or copying under s. 19.35 (1), but the material used as input for a computer program or the material produced as a product of the computer program is subject to the right of examination and copying, except as otherwise provided in s. 19.35 or this section.

(5) TRADE SECRETS. An authority may withhold access to any record or portion of a record containing information qualifying as a trade secret as defined in s. 134.90 (1) (c).

(6) SEPARATION OF INFORMATION. If a record contains information that is subject to disclosure under s. 19.35 (1) (a) or (am) and information that is not subject to such disclosure, the authority having custody of the record shall provide the information that is subject to disclosure and delete the information that is not subject to disclosure from the record before release.

(7) IDENTITIES OF APPLICANTS FOR PUBLIC POSITIONS. (a) In this section, "final candidate" means each applicant for a position who is seriously considered for appointment or whose name is certified for appointment and whose name is submitted for final consideration to an authority for appointment to any state position, except a position in the classified service, or to any local public office, as defined in s. 19.42 (7w). "Final candidate" includes, whenever there are at least 5 candidates for an office or position, each of the 5 candidates who are considered most qualified for the office or position by an authority, and whenever there are less than 5 candidates for an office or position, each such candidate. Whenever an appointment is to be made from a group of more than 5 candidates, "final candidate" also includes each candidate in the group.

(b) Every applicant for a position with any authority may indicate in writing to the authority that the applicant does not wish the authority to reveal his or her identity. Except with respect to an applicant whose name is certified for appointment to a position in the state classified service or a final candidate, if an applicant makes such an indication in writing, the authority shall not provide access to any record related to the application that may reveal the identity of the applicant.

(8) IDENTITIES OF LAW ENFORCEMENT INFORMANTS. (a) In this subsection:

1. "Informant" means an individual who requests confidentiality from a law enforcement agency in conjunction with providing information to that agency or, pursuant to an express promise of confidentiality by a law enforcement agency or under circumstances in which a promise of confidentiality would reasonably be implied, provides information to a law enforcement agency or, is working with a law enforcement agency to obtain information, related in any case to any of the following:

a. Another person who the individual or the law enforcement agency suspects has violated, is violating or will violate a federal law, a law of any state or an ordinance of any local government.

b. Past, present or future activities that the individual or law enforcement agency believes may violate a federal law, a law of any state or an ordinance of any local government.

2. "Law enforcement agency" has the the meaning given in s. 165.83 (1) (b), and includes the department of corrections.

(b) If an authority that is a law enforcement agency receives a request to inspect or copy a record or portion of a record under s. 19.35 (1) (a) that contains specific information including but not limited to a name, address, telephone number, voice recording or handwriting sample which, if disclosed, would identify an informant, the authority shall delete the portion of the record in which the information is contained or, if no portion of the record can be inspected or

copied without identifying the informant, shall withhold the record unless the legal custodian of the record, designated under s. 19.33, makes a determination, at the time that the request is made, that the public interest in allowing a person to inspect, copy or receive a copy of such identifying information outweighs the harm done to the public interest by providing such access.

19.365 Rights of data subject to challenge; authority corrections. (1) Except as provided under sub. (2), an individual or person authorized by the individual may challenge the accuracy of a record containing personally identifiable information pertaining to the individual that is maintained by an authority if the individual is authorized to inspect the record under s. 19.35 (1) (a) or (am) and the individual notifies the authority, in writing, of the challenge. After receiving the notice, the authority shall do one of the following:

(a) Concur with the challenge and correct the information.

(b) Deny the challenge, notify the individual or person authorized by the individual of the denial and allow the individual or person authorized by the individual to file a concise statement setting forth the reasons for the individual's disagreement with the disputed portion of the record. A state authority that denies a challenge shall also notify the individual or person authorized by the individual of the reasons for the denial.

(2) This section does not apply to any of the following records:

(a) Any record transferred to an archival depository under s. 16.61 (13).

(b) Any record pertaining to an individual if a specific state statute or federal law governs challenges to the accuracy of the record.

19.37 Enforcement and penalties. (1) MANDAMUS. If an authority withholds a record or a part of a record or delays granting access to a record or part of a record after a written request for disclosure is made, the requester may pursue either, or both, of the alternatives under pars. (a) and (b).

(a) The requester may bring an action for mandamus asking a court to order release of the record. The court may permit the parties or their attorneys to have access to the requested record under restrictions or protective orders as the court deems appropriate.

(b) The requester may, in writing, request the district attorney of the county where the record is found, or request the attorney general, to bring an action for mandamus asking a court to order release of the record to the requester. The district attorney or attorney general may bring such an action.

(2) COSTS, FEES AND DAMAGES. (a) The court shall award reasonable attorney fees, damages of not less than $100, and other actual costs to the requester if the requester prevails in whole or in substantial part in any action filed under sub. (1) relating to access to a record or part of a record under s. 19.35 (1) (a). Costs and fees shall be paid by the authority affected or the unit of government of which it is a part, or by the unit of government by which the legal

custodian under s. 19.33 is employed and may not become a personal liability of any public official.

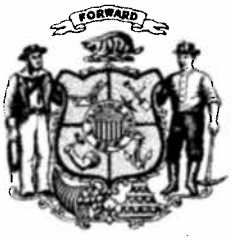
(b) In any action filed under sub. (1) relating to access to a record or part of a record under s. 19.35 (1) (am), if the court finds that the authority acted in a wilful or intentional manner, the court shall award the individual actual damages sustained by the individual as a consequence of the failure.

(3) PUNITIVE DAMAGES. If a court finds that an authority or legal custodian under s. 19.33 has arbitrarily and capriciously denied or delayed response to a request or charged excessive fees, the court may award punitive damages to the requester.

(4) PENALTY. Any authority which or legal custodian under s. 19.33 who arbitrarily and capriciously denies or delays response to a request or charges excessive fees may be required to forfeit not more than $1,000. Forfeitures under this section shall be enforced by action on behalf of the state by the attorney general or by the district attorney of any county where a violation occurs. In actions brought by the attorney general, the court shall award any forfeiture recovered together with reasonable costs to the state; and in actions brought by the district attorney, the court shall award any forfeiture recovered together with reasonable costs to the county.

19.39 Interpretation by attorney general. Any person may request advice from the attorney general as to the applicability of this subchapter under any circumstances. The attorney general may respond to such a request.

WISCONSIN STATE LEGISLATURE



Public Records; Words And Phrases; Treatment of drafts under the public records law discussed. OAG 22-88

May 11, 1988

DIANNE GREENLEY
Wisconsin Coalition for Advocacy

Pursuant to section 19.39, Stats., you ask my advice on the applicability of the public records law to certain documents that have been developed by employes of the Department of Health and Social Services and have been circulated for review and comment within the department. The department has denied your request on the ground that the documents are not "completed documents" and will not be released until "fully developed and approved" and reach "official status."

It is my opinion that the department's position may not fully comport with the state public records law, as discussed in this opinion. This opinion amplifies the earlier opinion on this subject, contained in 72 Op. Att'y Gen. 99 (1983).

> "Record" means any material on which written, drawn, printed, spoken, visual or electromagnetic information is recorded or preserved, regardless of physical form or characteristics, which has been created or is being kept by an authority. "Record" includes, but is not limited to, handwritten, typed or printed pages, maps, charts, photographs, films, recordings, tapes (including computer tapes), and computer printouts. "Record" does not include drafts, notes, preliminary computations and like materials prepared for the originator's personal use or prepared by the originator in the name of a person for whom the originator is working; materials which are purely the personal property of the custodian and have no relation to his or her office; materials to which access is limited by copyright, patent or bequest; and published materials in the possession of an authority other than a public library which are available for sale, or which are available for inspection at a public library.

Sec. 19.32(2), Stats.

It appears that the documents have been created or are being kept by an authority. The issue is whether they nevertheless fall within the exclusion for "drafts, notes, preliminary computations and like materials prepared for the originator's personal use or

prepared by the originator in the name of a person for whom the originator is working . . . ."

It has been stated as a rule of statutory construction "that qualifying or limiting words or clauses in a statute are to be referred to the next preceding antecedent, unless the context or the evident meaning of the enactment requires a different construction." *Jorgenson and another v. City of Superior*, 111 Wis. 561, 566, 87 N.W. 565 (1901). It is also said:

> Under rule *reddendo singula singulis* when one sentence . . . contains several antecedents . . . and several consequents . . . they are to be read distributively, so that each word . . . is applied to the subjects or consequents to which it appears by context most properly to relate and to which it is most applicable.

Mutual Fed. S&L Asso. v. Sav. & L. Adv. Comm., 38 Wis. 2d 381, 387, 157 N.W.2d 609 (1968).

It is my opinion that the terms "drafts, notes, preliminary computations and like materials" are all modified by the phrases "prepared for the originator's personal use or prepared by the originator in the name of a person for whom the originator is working . . . ."

This reading is consistent with the development of the legislation that resulted in the statute quoted above. The legislation was initially introduced as 1981 Senate Bill 250. The product that passed the senate, Engrossed 1981 Senate Bill 250, provided that "'[r]ecord' does not include drafts, notes, preliminary computations and like writings prepared for the author's personal use." *Id.*, page 6, lines 12-14. The phrase about preparations for one's superior was tacked on in Assembly Substitute Amendment 1 to 1981 Senate Bill 250, page 6, lines 11 and 12. It seems clear that the "personal use" qualification was thus intended to apply to all antecedents and the preparation for one's superior applies to any reasonably appropriate antecedent.

In construing the public records law it is important to keep in mind the mandate of section 19.31, which provides:

> Declaration of policy. In recognition of the fact that a representative government is dependent upon an informed electorate, it is declared to be the public policy of this state that all persons

> are entitled to the greatest possible information regarding the affairs of government and the official acts of those officers and employes who represent them. Further, providing persons with such information is declared to be an essential function of a representative government and an integral part of the routine duties of officers and employes whose responsibility it is to provide such information. To that end, ss. 19.32 to 19.37 shall be construed in every instance with a presumption of complete public access, consistent with the conduct of governmental business. The denial of public access generally is contrary to the public interest, and only in an exceptional case may access be denied.

Consonant with this mandate is the proposition that exceptions to the public records law should be narrowly construed. *Hathaway v. Green Bay School Dist.*, 116 Wis. 2d 388, 397, 342 N.W.2d 682 (1984).

It follows that exclusion of material prepared for the originator's personal use is to be construed narrowly. Most typically this exclusion may be invoked properly where a person takes notes for the sole purpose of refreshing his or her recollection at a later time. If the person confers with others for the purpose of verifying the correctness of the notes, but the sole purpose for such verification and retention continues to be to refresh one's recollection at a later time, it is my opinion the notes continue to fall within the exclusion. However, if one's notes are distributed to others for the purpose of communicating information or if notes are retained for the purpose of memorializing agency activity, the notes would go beyond mere personal use and would therefore not be excluded from the definition of a "record."

As to the exclusion of materials "prepared by the originator in the name of a person for whom the originator is working," it is my opinion the exclusion is likewise to be construed narrowly. Its terms contemplate interplay between the author and the author's superior. I assume the reason for the exclusion is to treat as a nullity language which is drafted for but which is not accepted by one's superior.

Your letter gives rise to the question whether a draft in the name of one's superior continues to fall within the draft exclusion if it is distributed to others before it is submitted to or approved by the superior. In my opinion there should be some latitude for collegial exchange with respect to drafts. On the other hand, I would generally consider a draft to be taken beyond the intended scope of the draft exclusion when it is distributed to persons beyond those over whom the designated superior has jurisdiction. Here are some examples:

1. A bureau staff employe drafting an analysis in the name of the bureau director may circulate a draft analysis among bureau colleagues for review and comment without having the draft become a "record." If the draft is circulated outside the bureau it becomes a "record."

2. A bureau staff employe drafting a document in the name of a division administrator could circulate the draft in other bureaus in the division as well as his own bureau without having the draft lose draft status, because the division administrator would have jurisdiction over all personnel involved.

3. A document prepared in the name of a department secretary would retain draft status until it is distributed outside the department or is approved by the secretary.

Once a draft prepared for the signature of one's superior is approved by the superior for circulation, it is no longer a "draft." This is so whether the material is described as a "draft" or not and whether the circulation is considered "formal" or "official" or not. The key thing is that the person having responsibility for the disposition of the "draft" has decided to use it in a way that is beyond the drafting relationship that exists between the drafter and the superior.

As with most public records issues, determinations as to the exact status of a "draft" will have to be made on a case-by-case basis taking into account the specific facts involved. The foregoing guidance is not absolute, but I believe it provides a reasonable and useful framework for analyzing recurring questions concerning "draft" documents under the public records law. It is the framework my office will use in dealing with the subject.

Turning to the situation at hand, you describe the documents you requested as follows:

> The first was a draft policy on "fairness" in the Department's dealings with inmates of Mendota Mental Health Institute and

Winnebago Mental Health Institute. To the best of my knowledge it was distributed to Mendota Staff for their review sometime in the winter of 1985-86. It may also have been distributed to Winnebago staff.

The second is a draft document on informed consent which has been prepared by a committee of doctors who work in the various state institutions. I believe that [th]ere may be a consent, form and supporting documents. There may be additional documents on informed consent which were prepared by Division staff approximately a year and a half ago and which were circulated to the mental health institutes and state centers for the developmentally disabled.

In the first situation, the facts are not specific enough to enable a definite answer. It is clear that the material would not qualify as something prepared for one's "personal use." Under the guidelines set forth above, the status of the materials will depend on who is responsible for signing the policy on fairness and who authorized the circulation of the policy among institute staff.

If, for example, the policy on fairness is to be signed by the administrator of the division having jurisdiction over the institutions involved, the materials may be considered "drafts" to the extent their preparation and circulation occurs within the division at levels below the administrator. Thus a draft policy prepared by the staff of one institution, but for the signature of the division administrator, could be prepared and circulated among staff at the institution and would continue to qualify as a draft prior to the time it is submitted to the division administrator. However, if under these same facts the administrator approves the circulation of the "draft" policy for review and comment, the materials no longer fall within the draft exclusion under the public records law. Again, the draft exclusion is intended to relieve governmental systems of materials which are drafted but are not accepted by the person for whom they are created. Once the person for whom a draft is created accepts the product for the purpose of circulation for review and comment, the material becomes a "record" for that purpose.

The other materials you request relating to a policy on informed consent may be analyzed in the same way, except your reference to a committee raises new issues. Where there is a formally constituted committee having a specified membership and mission, the work

product of the committee may call for a case-by-case analysis to determine its status for the purpose of the public records law. For the purpose of your request I am assuming that the committee referred to is not a formally constituted and distinct entity and thus no further special analysis need be undertaken, and the individual and collective work product of the doctors referred to may be analyzed in the way discussed above, without regard to the existence of a "committee."

DJH:RWL

Title	Docket Number	Date of Decision	Disposition
State v. McAllister	88-1806-CR	02-23-89	Affirmed
State v. Kissinger†	88-1832-CR	02-15-89	Reversed & remanded.
In re Marriage of Pasch v. Brey	88-1845	02-09-89	Reversed
State v. Gehl†	88-1853-CR	02-15-89	Affirmed
State v. Gruenweller†	88-1893-CR	02-21-89	Affirmed
In Matter of C.P.: C.P. v. Milwaukee County	88-1952	02-07-89	Affirmed
State v. Groehler	88-1967-CR-NM	02-07-89	Affirmed
Nyberg v. JJS, Inc.	88-2188	02-21-89	Affirmed

† Petition to review pending.

Peter D. FOX, Plaintiff-Appellant,

v.

William F. BOCK, Racine County Corporation Counsel, Defendant-Respondent.†

Supreme Court

No. 87-1853. Argued March 28, 1989.—Decided April 27, 1989.

(On certification from the court of appeals.)

(Also reported in 438 N.W.2d 589.)

1. **Statutes § 173*—construction—question of law—deference to trial court's decision.**
Whether statute applies to given set of facts presents question of law which is decided independent of and without deference to trial court's decision.

2. **Records § 43*—public access—exceptions to disclosure—narrowly construed.**
Any exception to general rule of disclosure of public records must be narrowly construed.

3. **Records § 43*—public access—exceptions to disclosure—reasons for refusal.**
Upon demand to inspect record, it is incumbant upon custodian of record to refuse demand for inspection and state specifically reasons for such refusal when custodian determines that harmful effect of permitting inspection outweighs benefit to be gained by allowing inspection.

4. **Records § 43*—public access—exceptions to disclosure—burden of proof.**
If there exists factual dispute regarding whether document is

† Motion for reconsideration denied, with $50 costs, on June 20, 1989.

* See Callaghan's Wisconsin Digest, same topic and section number.

draft and not record subject to disclosure, custodian has burden of producing evidence and persuading finder of fact that proffered facts are true by greater weight of credible evidence that document is draft (Stats § 19.32(2)).

5. **Records § 44*—public access—risk management study—disclosure to public.**

Risk management study of county departments prepared for county corporation counsel's office constituted record subject to disclosure under public access statute, since merely labeling each page of document draft did not make document draft as that term was defined in statute, corporation counsel could not keep document classified as draft by not having final corrections made on it, and document was not prepared for personal use of corporation counsel but was report completed, paid for and relied upon by county where report was reviewed by members of sheriff's department command staff and seminar was given on report in which changes in practices and procedures in sheriff's department demonstrated that recommendations of study had been implemented (Stats § 19.32(2)).

APPEAL from a judgment of the Circuit Court for Racine County: Stephen A. Simanek, Judge. *Reversed and remanded.*

For the plaintiff-appellant there were briefs (in court of appeals) by *Constantine, Christensen, Krohn & Kerscher, S.C.*, Racine, and oral argument by *Charles H. Constantine.*

For the defendant-respondent there were briefs (in court of appeals) by *Kenneth F. Hostak, Emily S. Mueller,* and *Thompson & Coates, Ltd.*, Racine, and oral argument by *Mr. Hostak.*

Amicus curiae briefs (in court of appeals) were filed by *Linda M. Clifford* and *LaFollette & Sinykin,* Madison, for Wisconsin Freedom of Information Council and the Racine Journal Times; and by *John K. O'Connell,* Madison, for Wisconsin Counties Association.

* See Callaghan's Wisconsin Digest, same topic and section number.

STEINMETZ, J. This appeal was certified to this court under the provisions of sec. 809.61, Stats. We accepted certification.

The issue in this case is whether a study conducted by the Institute for Liability Management, which was commissioned by and prepared for the Racine County Corporation Counsel's office, is a record as that term is defined in sec. 19.32(2), Stats.[1] The trial court found it was not a record. We hold it was a record.

William F. Bock has been the Racine County Corporation Counsel since 1976. The Deputy Corporation Counsel was Susan Torok. In late 1985 and early 1986, Bock became concerned about the increasing number of civil claims which were being brought against Racine county and ordered a study of the problem. His concerns stemmed in part from the fact that Racine county was self-insured. After making his concerns known to Leonard Ziolkowski, then the Racine County Executive, sufficient funds were set aside in the Racine county budget for the 1986 fiscal year to

[1] Sec. 19.32(2), Stats., provides as follows:

"(2) 'Record' means any material on which written, drawn, printed, spoken, visual or electromagnetic information is recorded or preserved, regardless of physical form or characteristics, which has been created or is being kept by an authority. 'Record' includes, but is not limited to, handwritten, typed or printed pages, maps, charts, photographs, films, recordings, tapes (including computer tapes), and computer printouts. 'Record' does not include drafts, notes, preliminary computations and like materials prepared for the originator's personal use or prepared by the originator in the name of a person for whom the originator is working; materials which are purely the personal property of the custodian and have no relation to his or her office; materials to which access is limited by copyright, patent or bequest; and published materials in the possession of an authority other than a public library which are available for sale, or which are available for inspection at a public library."

allow Bock to hire a consultant to conduct a risk management study of certain Racine county departments.

The corporation counsel contacted various consulting firms requesting bids to conduct the study. Early in 1986 a contract was entered into with the Institute for Liability Management of Vienna, Virginia (the Institute) to conduct a study at a cost to Racine county of $24,000. Prior to the study being prepared by the Institute and prior to the Institute making a proposal, members of the corporation counsel's office had conversations with representatives of the Institute about the Wisconsin Public Records Law and discussed their concerns about possible public access to any report prepared by the Institute.

Members of the Institute came to Racine county to gather information in early 1987. Members of the Racine County Sheriff's Department, Personnel Department, Corporation Counsel's office and District Attorney's office were interviewed. The study was completed in March or April of 1987. In June of 1987 the corporation counsel received two written copies of the study. The word "draft" was stamped on each written page of the study. Although copies of the study were not released by the corporation counsel, at least two members of the sheriff's department were allowed to review the entire document in the corporation counsel's offices. Other members of the sheriff's command staff reviewed portions of the document dealing with their respective areas of responsibility.

In addition to preparing the written report, the Institute also sent a representative to Racine county to conduct briefing and training seminars primarily for members of the sheriff's department. Two separate seminars were given to county personnel. One was a

general educational seminar, and the other was a briefing seminar dealing with specific aspects of the report and was directed specifically to members of the sheriff's department command staff. The study and seminars included recommendations regarding changes in certain policies and procedures of the county and the sheriff's department.

The Institute's representative spent four days in Racine conducting these seminars and meeting with various Racine county employees. On the first day of his visit, the deputy corporation counsel, Torok, told the representative certain changes had to be made in the report. The corrections included typographical errors, an obvious error in the report dealing with the absence of an exercise area in the jail facility and certain other errors, the nature of which have not been disclosed.

At the same time that the Institute's representative was informed that certain changes had to be made, he was also informed that the existence of the study had "leaked out," and that someone had asked Dennis Kornwolf, then County Executive of Racine, for a copy of the report. The representative responded that he would take the two copies of the report back to Washington, and he would wait to hear from the corporation counsel before taking any action. The Institute still has the two copies of the report and, to the best of knowledge of Bock and Torok, has taken no steps to make any changes in the form or content of the report since the copies were returned to the Institute by the corporation counsel.

Bock testified he had no intention of requesting the study from the Institute unless he could be assured that the report, in whatever form it took, would not be subject to inspection by the public.

After the report had been returned to the Institute, the Racine county sheriff's department began implementing certain changes in procedures and policies pursuant to suggestions contained in the report and discussions during the in-service seminars conducted by the Institute's representative. The corporation counsel assisted briefly in implementing certain of these changes. Torok expressed satisfaction with the performance of the Institute and the $24,000 has been paid in full to the Institute for the study and seminars.

On July 8, 1987, Peter D. Fox, editor of the Journal Times, a Racine county newspaper, served a written request on Bock for a copy of the study prepared by the Institute. In a letter dated July 9, 1987, Bock denied Fox's request stating various reasons for the denial. For purposes of this appeal it is sufficient to reiterate two of the reasons for the denial of the request: Bock did not have the report in his possession, and further, in his opinion, the report was not a "record" as that term is defined in sec. 19.32, Stats.

Pursuant to sec. 19.37(1), Stats., Fox then filed and served upon Bock a petition for writ of mandamus. Later Fox served upon Bock a motion and notice of motion to produce the Institute's study. One of the affirmative defenses in the return to the petition for writ of mandamus was that the Institute's study was prepared in draft form and did not constitute a record under sec. 19.32(2).

A hearing on the petition filed by Fox was held before the Honorable Stephen A. Simanek, Racine county circuit court judge. The court, after hearing the testimony of Bock and Torok and hearing arguments of counsel, held that the document requested from the corporation counsel was a "draft" and not a "record" under sec. 19.32(2), Stats., and therefore, not subject to

inspection by Fox. Fox appealed that ruling to the court of appeals.

[1]

Whether a statute applies to a given set of facts presents a question of law. Such questions are decided independent of and without deference to the trial court's decision. *Bucyrus-Erie Co. v. ILHR Department*, 90 Wis. 2d 408, 280 N.W.2d 142 (1979).

Policy underlying the public records law is set forth in sec. 19.31, Stats.:

> In recognition of the fact that a representative government is dependent upon an informed electorate, it is declared to be the public policy of this state that all persons are entitled to the greatest possible information regarding the affairs of government and the official acts of those officers and employes who represent them. Further, providing persons with such information is declared to be an essential function of a representative government and an integral part of the routine duties of officers and employes whose responsibility it is to provide such information. To that end, ss. 19.32 to 19.37 shall be construed in every instance with a presumption of complete public access, consistent with the conduct of governmental business. The denial of public access generally is contrary to the public interest, and only in an exceptional case may access be denied.

To that end, sec. 19.35(1)(a) provides:

> **Access to records; fees. (1)** Right to inspection. (a) Except as otherwise provided by law, any requester has a right to inspect any record. Substantive common law principles construing the right to inspect, copy or receive copies of records shall remain in effect. The exemptions to the requirement

> of a governmental body to meet in open session under s. 19.85 are indicative of public policy, but may be used as grounds for denying public access to a record only if the authority or legal custodian under s. 19.33 makes a specific demonstration that there is a need to restrict public access at the time that the request to inspect or copy the record is made.

The trial court dismissed the petition after concluding that this document was only a draft and therefore not subject to disclosure. The trial court's ruling on this threshold question made it unnecessary for it to apply the remaining portion of sec. 19.35(1), Stats., which may restrict public access. We only discuss the threshold question of whether this document was a "draft" or a "record" and direct the trial court to apply the latter portion of sec. 19.35(1)(a) on remand. *See, e.g., Newspapers, Inc. v. Breier*, 89 Wis. 2d 417, 279 N.W.2d 179 (1979); *Beckon v. Emery*, 36 Wis. 2d 510, 516–19, 153 N.W.2d 501 (1967). *State ex rel. Youmans v. Owens*, 32 Wis. 2d 11, 144 N.W.2d 793 (1966); *State ex rel. Youmans v. Owens*, 28 Wis. 2d 672, 681–82, 139 N.W.2d 241, 137 N.W.2d 470 (1965).

The term "record" is broadly defined in sec. 19.32(2), Stats., as "any material on which written, drawn, printed, spoken, visual or electromagnetic information is recorded or preserved, regardless of physical form or characteristics, which has been created or is being kept by an authority." Section 19.32(2) further states that the term "'record' does not include drafts, notes, preliminary computations and like materials prepared for the originator's personal use or prepared by the originator in the name of a person for whom the originator is working ...."

[2]

Any exceptions to the general rule of disclosure must be narrowly construed. *Hathaway v. Green Bay School Dist.*, 116 Wis. 2d 388, 397, 342 N.W.2d 682 (1984). In *Hathaway* we stated:

> Section 19.21, Stats., in light of prior cases, must be broadly construed to favor disclosure. Exceptions should be recognized for what they are, instances in derogation of the general legislative intent, and should, therefore, be narrowly construed; and unless the exception is explicit and unequivocal, it will not be held to be an exception. It would be contrary to general well established principles of freedom-of-information statutes to hold that, by implication only, any type of record can be held from public inspection.

In *International Union v. Gooding*, 251 Wis. 362, 371–72, 29 N.W.2d 730 (1947), this court analyzed sec. 18.01(1), Stats., predecessor to sec. 19.21. The issue before the court was whether a petition filed with the Wisconsin Employment Relations Board was subject to inspection. In determining whether this document was subject to disclosure, the court stated:

> It is the rule independently of statute that public records include not only papers specifically required to be kept by a public officer but all written memorials made by a public officer within his authority where such writings constitute a convenient, appropriate, or customary method of discharging the duties of the office. ...
>
> In the case at bar the petition was received and given a file number. *It aroused official action of the board resulting in a formal written opinion* which was also filed. This appears to us to indicate that it is a public record or at least that it is a paper in the

> hands of a public official as such officer. While the petition itself is not a memorial by the officer, it is in a sense a part of a docket which includes the memorial of an officer and for the foregoing reasons must be considered to be included in the description of papers affected by sec. 18.01(1), Stats. We think this might be true even if the commission could originally have consigned the paper to the waste-basket or have returned it to its sender, without taking formal action .... (Emphasis added.)

The court went on to hold that the document was within the provisions of sec. 18.01(1). *Id.* at 372.

In *Youmans*, 28 Wis. 2d at 679–80, the court cited *Gooding* with approval. In *Youmans* the Waukesha Freeman demanded access to material submitted to the mayor by the city attorney of Waukesha after the city attorney conducted an investigation of alleged misconduct on the part of members of the Waukesha Police Department. This court deemed it unimportant that the mayor never received a final or formal report from the city attorney. The court stated:

> Defendant mayor as 'head of the ... police departments' is entitled to a report of any investigation of the police department made by the city attorney. We deem it wholly immaterial, on the issue of whether defendant was in legal custody of the papers sought to be inspected, that here the city attorney did not submit a formal report stating the conclusions he had reached as a result of his investigation, but instead merely filed with the mayor the statements of persons interviewed and interdepartmental memoranda. (Footnote omitted.)

Whether the document is in "preliminary" form and therefore not in final form is not determinative of whether it is a record. The trial court erred when it

found that the Institute's study was a draft unless and until the final corrections were made on it.

If the trial court's rulings were correct, legal custodians of public records could circumvent the effect of ch. 19, Stats., by merely claiming that the report is not in final form and further changes must be made in it. In this case, on cross-examination, corporation counsel was asked: "And the truth of the matter is you have no intent to ever request that report with the corrections." He answered: "If there's any possibility that that report would be made public and available to the public, then I don't want the report." Later when asked if the Institute had fulfilled its obligation to the county he stated:

> Well, if—if I keep a written report from being divulged to other people, then I want one of those, and I would probably request it. If that is not possible, then I guess in my opinion they have completed their work because we'll have to operate from what we can remember was in the report.

Public policy set forth in sec. 19.31, Stats., favoring public disclosure does not allow a custodian of a record to delay or cancel delivery of the "final" report in an attempt to have it qualified as a "draft." The study was not a "draft" for purposes of the statute. The Institute's study was delivered, approved by Bock and Torok and paid for by the county. It was reviewed by not only the corporation counsel but members of the sheriff's department command staff, and a seminar was given on the report. Changes in practices and procedures in the sheriff's department demonstrate that recommendations of the study have been implemented.

A determination that a document is a draft prepared for the originator's personal use creates an

exception to the general rule of disclosure. It is a draft if it is prepared for and utilized for the originator's personal use. The Institute's study was not created for the personal use of the corporation counsel nor was it so utilized. Under sec. 19.32(2), Stats., a document prepared for something other than the originator's personal use, whether it is in preliminary form or stamped "draft," whether recommendations of the document are implemented or not, is by definition a record.

The trial court held that the corporation counsel was the originator of the study document. The Institute was not the originator because the study was not prepared for its personal use. If the corporation counsel's office was the originator, it was not the only office utilizing the study. Members of the sheriff's department and their command staff were not only allowed to review the study, but also were required to review the study and attend a seminar regarding it. Based upon recommendations in the study, policy and procedural changes within the sheriff's department are being implemented. It was used for other than personal use of the corporation counsel or the Institute. Regardless of who was the originator of this document, it does not conform with the exclusionary language of sec. 19.32(2), Stats., and therefore it was a record.

[3]

The corporation counsel refused inspection of the document based on the statutory exemption set forth in sec. 19.32(2), Stats. Such denial of inspection is contrary to public policy and the public interest. Upon a demand to inspect a record, "it is incumbent upon [the custodian of the record] to refuse the demand for inspection and state specifically the reasons for this refusal" when the custodian determines that the harmful effect of permitting inspection outweighs the benefit

to be gained by allowing inspection. *Youmans*, 28 Wis. 2d at 682. In *Newspapers*, 89 Wis. 2d at 426-27, the court stated:

> Nevertheless, we have concluded, where common-law limitations on the right to examine records and papers have not been limited by express court decision or by statute, that presumptively public records and documents must be open for inspection. We stated in *Youmans*, relying on sec. 19.21(1) and (2), Stats.:
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> '... that public policy favors the right of inspection of public records and documents, and it is only in the exceptional case that inspection should be denied.' (at 683)
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> In *Beckon v. Emery*, 36 Wis. 2d 510, 516, 153 N.W.2d 501 (1967), we stated that the "public policy, and hence the public interest, favors the right of inspection of documents and public records." *See, also State ex rel. Dalton v. Mundy*, 80 Wis. 2d 190, 196, 257 N.W.2d 877 (1977). These cases restate the legislative presumption that, where a public record is involved, the denial of inspection is contrary to the public policy and the public interest.

In *Beckon*, 36 Wis. 2d at 518, we stated:

> We pointed out in *Youmans* that if an action were brought to compel the production of documents the officer could then, if he wished, stand upon the reasons given, and the documents could be examined by the court *in camera* to determine whether in light of the reasons specified the inspection of the documents would cause harm to the public interest that would outweigh the presumptive benefit to be derived from granting inspection.

We further stated in *Newspapers*, 89 Wis. 2d at 427:

To implement this presumption, our opinions have set out procedures and legal standards for determining whether inspection of records is mandated by the statute. In the first instance, when a demand to inspect public records is made, the custodian of the records must weigh the competing interests involved and determine whether permitting inspection would result in harm to the public interest which outweighs the legislative policy recognizing the public interest in allowing inspection. *Beckon v. Emery, supra* at 516; *Youmans, supra* at 682. If the custodian decides not to allow inspection, he must state specific public-policy reasons for the refusal. These reasons provide a basis for review in the event of court action. *Beckon, supra* at 518; *Youmans, supra* at 682. The custodian of the records must satisfy the court that the public-policy presumption in favor of disclosure is outweighed by even more important public-policy considerations.

Whether harm to the public interest from inspection outweighs the public interest in inspection is a question of law. The duty of the custodian is to specify reasons for nondisclosure and the court's role is to decide whether the reasons asserted are sufficient. It is not the trial court's or this court's role to hypothesize reasons or to consider reasons for not allowing inspection which were not asserted by the custodian. If the custodian gives no reasons or gives insufficient reasons for withholding a public record, a writ of mandamus compelling the production of the records must issue. *Beckon, supra* at 518, states, '[T]here is an absolute right to inspect a public document in the absence of *specifically stated sufficient* reasons to the contrary.' (Emphasis supplied.)

[4]

Upon a demand for inspection, the custodian of the document bears the burden of proof of facts demonstrating that it is a draft. The decision that a document is a draft under sec. 19.32(2), Stats., is a legal conclusion. However, if there exists a factual dispute, the custodian has the burden of producing evidence and persuading the finder of fact that the proffered facts are true. *Hochgurtel v. San Felippo,* 78 Wis. 2d 70, 86-87, 253 N.W.2d 526 (1977). The custodian must satisfy the finder of fact by the greater weight of the credible evidence that the document is a draft.

[5]

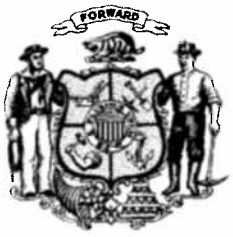
Merely labeling each page of the document "draft" does not make the document a draft as that term is defined in sec. 19.32(2), Stats. Similarly, corporation counsel cannot keep the document classified as a draft by not having the final corrections made on it. It was not prepared for the personal use of the corporation counsel. It was a report completed, paid for and relied upon by the county and therefore it does not comport with the exclusions set forth in the public access statute.

The decision of the trial court is reversed and the case is remanded for the application of *Beckon* and *Newspapers.*

By the Court.—The judgment of the Racine county circuit court is reversed and cause remanded for further proceedings consistent with this opinion.

ABRAHAMSON, J., took no part.

WISCONSIN STATE LEGISLATURE



missioner and the Racine county child support agency merely confirms the family court commissioner's responsibility under section 767.29(1), Stats., to take such proceedings as he or she deems advisable to secure the payment of maintenance payments or support money ordered to be paid.

The family court commissioner, in the context of a remedial contempt proceeding, initiates the contempt action pursuant to section 785.06, Stats.[3] The family court commissioner simply reports the fact of nonpayment to the circuit court for appropriate judicial action and makes recommendations to the court in regard to the matter. After the family court commissioner makes a prima facie showing of a violation of the court's order, the burden of proof is on the person against whom contempt is charged to show that his or her conduct is not contemptuous. *Joint School Dist. No. 1 v. Wisconsin Rapids Education Assoc.*, 70 Wis.2d 292, 320, 234 N.W.2d 289 (1975).

[4] The family court commissioner does not determine whether the alleged contemner is in fact in contempt. Furthermore, the family court commissioner does not possess the ultimate authority to set an original support order because upon the motion of any party, any decision of the family court commissioner shall be reviewed by the judge of the branch of the court to which the case has been assigned, and any such review shall include a new hearing on the subject of the decision, order, or ruling. Section 767.13(6), Stats.

[5] Consequently, we hold that the initiation of the action by the family court commissioner for remedial contempt to enforce child support obligations in the present case was specifically authorized by section 767.29(1), Stats., and did not deny the appellant due process, because a neutral and detached judge presided over the appellant's contempt proceeding. *See In re Marriage of Murray v. Murray*, 128 Wis.2d 458, 462–63, 383 N.W.2d 904 (Ct. App.1986). In addition, we find that the initiation of the remedial contempt action by the family court commissioner did not give the appearance of impropriety because the family court commissioner was merely bringing to the attention of the court the fact that the appellant had not been complying with the court's previously entered support order.

The order of the circuit court is affirmed.

149 Wis.2d 403

Peter D. FOX, Plaintiff–Appellant,

v.

William F. BOCK, Racine County Corporation Counsel, Defendant–Respondent.*

No. 87–1853.

Supreme Court of Wisconsin.

Argued March 28, 1989.

Decided April 27, 1989.

Editor of county newspaper filed petition for writ of mandamus to force county

3. Section 785.06, Stats., provides as follows:

785.06 Court commissioner, municipal courts and administrative agencies. A court commissioner, municipal court or state administrative agency conducting an action or proceeding or a party to the action or proceeding may petition the circuit court in the county in which the action or proceeding is being conducted for a remedial or punitive sanction specified in s. 785.04 for conduct specified in s. 785.01 in the action or proceeding.

The appellant asserts that the family court commissioner in this case brought the contempt action pursuant to section 785.03, Stats., on behalf of a "person aggrieved." Section 785.03, Stats., provides in relevant part as follows:

785.03 Procedure. (1) NONSUMMARY PROCEDURE (a) *Remedial sanction.* A person aggrieved by a contempt of court may seek imposition of a remedial sanction for the contempt by filing a motion for that purpose in the proceeding to which the contempt is related. The court, after notice and hearing, may impose a remedial sanction authorized by this chapter.

. . .

There is nothing in this record to support this contention. Moreover, even if the contention is true, we would nonetheless affirm the actions of the family court commissioner because the commissioner is entitled to initiate such a contempt action under section 785.06.

* Motion for reconsideration denied, with costs, on June 20, 1989.

corporation counsel to turn over copy of liability study commissioned by and prepared for corporation counsel's office. The Circuit Court for Racine County, Stephen A. Simanek, J., denied the petition, and editor appealed. The appeal was certified, and the Supreme Court accepted certification and Steinmetz, J., held that report was a "record" within meaning of statute providing for public access.

Reversed and remanded.

Records ⇐54

Liability study commissioned by and prepared for county corporation counsel's office was a "record" within meaning of statute providing for public access, despite fact that minor corrections needed to be performed; study was not prepared for personal use of corporation counsel, but rather was completed, paid for and relied upon by county in making changes in procedures and policies in county sheriff's department. W.S.A. 19.31, 19.32(2).

See publication Words and Phrases for other judicial constructions and definitions.

Charles H. Constantine, argued and Constantine, Christensen, Krohn & Kerscher, S.C., Racine, on brief, for plaintiff-appellant.

Kenneth F. Hostak, argued, Emily S. Mueller, and Thompson & Coates, Ltd., Racine, on brief, for defendant-respondent.

Linda M. Clifford and LaFollette & Sinykin, Madison, amicus curiae, for Wisconsin Freedom of Information Council and the Racine Journal Times.

John K. O'Connell, Madison, amicus curiae for Wisconsin Counties Ass'n.

STEINMETZ, Justice.

This appeal was certified to this court under the provisions of sec. 809.61, Stats. We accepted certification.

The issue in this case is whether a study conducted by the Institute for Liability Management, which was commissioned by and prepared for the Racine County Corporation Counsel's office, is a record as that term is defined in sec. 19.32(2), Stats.[1] The trial court found it was not a record. We hold it was a record.

William F. Bock has been the Racine County Corporation Counsel since 1976. The Deputy Corporation Counsel was Susan Torok. In late 1985 and early 1986, Bock became concerned about the increasing number of civil claims which were being brought against Racine county and ordered a study of the problem. His concerns stemmed in part from the fact that Racine county was self-insured. After making his concerns known to Leonard Ziolkowski, then the Racine County Executive, sufficient funds were set aside in the Racine county budget for the 1986 fiscal year to allow Bock to hire a consultant to conduct a risk management study of certain Racine county departments.

The corporation counsel contacted various consulting firms requesting bids to conduct the study. Early in 1986 a contract was entered into with the Institute for Liability Management of Vienna, Virginia (the Institute) to conduct a study at a cost to Racine county of $24,000. Prior to the study being prepared by the Institute and prior to the Institute making a proposal, members of the corporation counsel's office had conversations with representa-

1. Sec. 19.32(2), Stats., provides as follows:

(2) 'Record' means any material on which written, drawn, printed, spoken, visual or electromagnetic information is recorded or preserved, regardless of physical form or characteristics, which has been created or is being kept by an authority. 'Record' includes, but is not limited to, handwritten, typed or printed pages, maps, charts, photographs, films, recordings, tapes (including computer tapes), and computer printouts. 'Record' does not include drafts, notes, preliminary computations and like materials prepared for the originator's personal use or prepared by the originator in the name of a person for whom the originator is working; materials which are purely the personal property of the custodian and have no relation to his or her office; materials to which access is limited by copyright, patent or bequest; and published materials in the possession of an authority other than a public library which are available for sale, or which are available for inspection at a public library.

tives of the Institute about the Wisconsin Public Records Law and discussed their concerns about possible public access to any report prepared by the Institute.

Members of the Institute came to Racine county to gather information in early 1987. Members of the Racine County Sheriff's Department, Personnel Department, Corporation Counsel's office and District Attorney's office were interviewed. The study was completed in March or April of 1987. In June of 1987 the corporation counsel received two written copies of the study. The word "draft" was stamped on each written page of the study. Although copies of the study were not released by the corporation counsel, at least two members of the sheriff's department were allowed to review the entire document in the corporation counsel's offices. Other members of the sheriff's command staff reviewed portions of the document dealing with their respective areas of responsibility.

In addition to preparing the written report, the Institute also sent a representative to Racine county to conduct briefing and training seminars primarily for members of the sheriff's department. Two separate seminars were given to county personnel. One was a general educational seminar, and the other was a briefing seminar dealing with specific aspects of the report and was directed specifically to members of the sheriff's department command staff. The study and seminars included recommendations regarding changes in certain policies and procedures of the county and the sheriff's department.

The Institute's representative spent four days in Racine conducting these seminars and meeting with various Racine county employees. On the first day of his visit, the deputy corporation counsel, Torok, told the representative certain changes had to be made in the report. The corrections included typographical errors, an obvious error in the report dealing with the absence of an exercise area in the jail facility and certain other errors, the nature of which have not been disclosed.

At the same time that the Institute's representative was informed that certain changes had to be made, he was also informed that the existence of the study had "leaked out," and that someone had asked Dennis Kornwolf, then County Executive of Racine, for a copy of the report. The representative responded that he would take the two copies of the report back to Washington, and he would wait to hear from the corporation counsel before taking any action. The Institute still has the two copies of the report and, to the best of knowledge of Bock and Torok, has taken no steps to make any changes in the form or content of the report since the copies were returned to the Institute by the corporation counsel.

Bock testified he had no intention of requesting the study from the Institute unless he could be assured that the report, in whatever form it took, would not be subject to inspection by the public.

After the report had been returned to the Institute, the Racine county sheriff's department began implementing certain changes in procedures and policies pursuant to suggestions contained in the report and discussions during the in-service seminars conducted by the Institute's representative. The corporation counsel assisted briefly in implementing certain of these changes. Torok expressed satisfaction with the performance of the Institute and the $24,000 has been paid in full to the Institute for the study and seminars.

On July 8, 1987, Peter D. Fox, editor of the Journal Times, a Racine county newspaper, served a written request on Bock for a copy of the study prepared by the Institute. In a letter dated July 9, 1987, Bock denied Fox's request stating various reasons for the denial. For purposes of this appeal it is sufficient to reiterate two of the reasons for the denial of the request: Bock did not have the report in his possession, and further, in his opinion, the report was not a "record" as that term is defined in sec. 19.32, Stats.

Pursuant to sec. 19.37(1), Stats., Fox then filed and served upon Bock a petition for writ of mandamus. Later Fox served upon Bock a motion and notice of motion to produce the Institute's study. One of the

affirmative defenses in the return to the petition for writ of mandamus was that the Institute's study was prepared in draft form and did not constitute a record under sec. 19.32(2).

A hearing on the petition filed by Fox was held before the Honorable Stephen A. Simanek, Racine county circuit court judge. The court, after hearing the testimony of Bock and Torok and hearing arguments of counsel, held that the document requested from the corporation counsel was a "draft" and not a "record" under sec. 19.32(2), Stats., and therefore, not subject to inspection by Fox. Fox appealed that ruling to the court of appeals.

Whether a statute applies to a given set of facts presents a question of law. Such questions are decided independent of and without deference to the trial court's decision. *Bucyrus-Erie Co. v. ILHR Department*, 90 Wis.2d 408, 280 N.W.2d 142 (1979).

Policy underlying the public records law is set forth in sec. 19.31, Stats.:

> In recognition of the fact that a representative government is dependent upon an informed electorate, it is declared to be the public policy of this state that all persons are entitled to the greatest possible information regarding the affairs of government and the official acts of those officers and employes who represent them. Further, providing persons with such information is declared to be an essential function of a representative government and an integral part of the routine duties of officers and employes whose responsibility it is to provide such information. To that end, ss. 19.32 to 19.37 shall be construed in every instance with a presumption of complete public access, consistent with the conduct of governmental business. The denial of public access generally is contrary to the public interest, and only in an exceptional case may access be denied.

To that end, sec. 19.35(1)(a) provides:

> **Access to records; fees.** (1) RIGHT TO INSPECTION. (a) Except as otherwise provided by law, any requester has a right to inspect any record. Substantive common law principles construing the right to inspect, copy or receive copies of records shall remain in effect. The exemptions to the requirement of a governmental body to meet in open session under s. 19.85 are indicative of public policy, but may be used as grounds for denying public access to a record only if the authority or legal custodian under s. 19.33 makes a specific demonstration that there is a need to restrict public access at the time that the request to inspect or copy the record is made.

The trial court dismissed the petition after concluding that this document was only a draft and therefore not subject to disclosure. The trial court's ruling on this threshold question made it unnecessary for it to apply the remaining portion of sec. 19.35(1), Stats., which may restrict public access. We only discuss the threshold question of whether this document was a "draft" or a "record" and direct the trial court to apply the latter portion of sec. 19.35(1)(a) on remand. *See, e.g., Newspapers, Inc. v. Breier*, 89 Wis.2d 417, 279 N.W.2d 179 (1979); *Beckon v. Emery*, 36 Wis.2d 510, 516–19, 153 N.W.2d 501 (1967). *State ex rel. Youmans v. Owens*, 32 Wis. 2d 11, 144 N.W.2d 793 (1966); *State ex rel. Youmans v. Owens*, 28 Wis.2d 672, 681–82, 139 N.W.2d 241, 137 N.W.2d 470 (1965).

The term "record" is broadly defined in sec. 19.32(2), Stats. as "any material on which written, drawn, printed, spoken, visual or electromagnetic information is recorded or preserved, regardless of physical form or characteristics, which has been created or is being kept by an authority." Section 19.32(2) further states that the term "'record' does not include drafts, notes, preliminary computations and like materials, prepared for the originator's personal use or prepared by the originator in the name of a person for whom the originator is working. . . ."

Any exceptions to the general rule of disclosure must be narrowly construed. *Hathaway v. Green Bay School Dist.*, 116 Wis.2d 388, 397, 342 N.W.2d 682 (1984). In *Hathaway* we stated:

Section 19.21, Stats., in light of prior cases, must be broadly construed to favor disclosure. Exceptions should be recognized for what they are, instances in derogation of the general legislative intent, and should, therefore, be narrowly construed; and unless the exception is explicit and unequivocal, it will not be held to be an exception. It would be contrary to general well established principles of freedom-of-information statutes to hold that, by implication only, any type of record can be held from public inspection.

In *International Union v. Gooding*, 251 Wis. 362, 371–72, 29 N.W.2d 730 (1947), this court analyzed sec. 18.01(1), Stats., predecessor to sec. 19.21. The issue before the court was whether a petition filed with the Wisconsin Employment Relations Board was subject to inspection. In determining whether this document was subject to disclosure, the court stated:

> It is the rule independently of statute that public records include not only papers specifically required to be kept by a public officer but all written memorials made by a public officer within his authority where such writings constitute a convenient, appropriate, or customary method of discharging the duties of the office....
>
> In the case at bar the petition was received and given a file number. *It aroused official action of the board resulting in a formal written opinion* which was also filed. This appears to us to indicate that it is a public record or at least that it is a paper in the hands of a public official as such officer. While the petition itself is not a memorial by the officer, it is in a sense a part of a docket which includes the memorial of an officer and for the foregoing reasons must be considered to be included in the description of papers affected by sec. 18.01(1), Stats. We think this might be true even if the commission could originally have consigned the paper to the wastebasket or have returned it to its sender, without taking formal action.... (Emphasis added.)

The court went on to hold that the document was within the provisions of sec. 18.01(1). *Id.* at 372, 29 N.W.2d 730.

In *Youmans*, 28 Wis.2d at 679–80, 139 N.W.2d 241, 137 N.W.2d 470, the court cited *Gooding* with approval. In *Youmans* the Waukesha Freeman demanded access to material submitted to the mayor by the city attorney of Waukesha after the city attorney conducted an investigation of alleged misconduct on the part of members of the Waukesha Police Department. This court deemed it unimportant that the mayor never received a final or formal report from the city attorney. The court stated:

> Defendant mayor as 'head of the ... police departments' is entitled to a report of any investigation of the police department made by the city attorney. We deem it wholly immaterial, on the issue of whether defendant was in legal custody of the papers sought to be inspected, that here the city attorney did not submit a formal report stating the conclusions he had reached as a result of his investigation, but instead merely filed with the mayor the statements of persons interviewed and interdepartmental memoranda. (Footnote omitted.)

Whether the document is in "preliminary" form and therefore not in final form is not determinative of whether it is a record. The trial court erred when it found that the Institute's study was a draft unless and until the final corrections were made on it.

If the trial court's rulings were correct, legal custodians of public records could circumvent the effect of ch. 19, Stats., by merely claiming that the report is not in final form and further changes must be made in it. In this case, on cross-examination, corporation counsel was asked: "And the truth of the matter is you have no intent to ever request that report with the corrections." He answered: "If there's any possibility that that report would be made public and available to the public, then I don't want the report." Later when asked if the Institute had fulfilled its obligation to the county he stated:

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> Nevertheless, we have concluded, where common-law limitations on the right to examine records and papers have not been limited by express court decision or by statute, that presumptively public records and documents must be open for inspection. We stated in *Youmans*, relying on sec. 19.21(1) and (2), Stats.:
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> Whether harm to the public interest from inspection outweighs the public interest in inspection is a question of law. The duty of the custodian is to specify reasons for nondisclosure and the court's role is to decide whether the reasons asserted are sufficient. It is not the trial court's or this court's role to hypothesize reasons or to consider reasons for not allowing inspection which were not asserted by the custodian. If the custodian gives no reasons or gives insufficient reasons for withholding a public record, a writ of mandamus compelling the production of the records must issue. *Beckon*, [36 Wis.2d] *supra* at 518 [153 N.W.2d 501], states, '[T]here is an absolute right to inspect a public document in the absence of *specifically stated sufficient* reasons to the contrary.' (Emphasis supplied.)

Upon a demand for inspection, the custodian of the document bears the burden of proof of facts demonstrating that it is a draft. The decision that a document is a draft under sec. 19.32(2), Stats., is a legal conclusion. However, if there exists a factual dispute, the custodian has the burden of producing evidence and persuading the finder of fact that the proffered facts are true. *Hochgurtel v. San Felippo*, 78 Wis.2d 70, 86–87, 253 N.W.2d 526 (1977). The custodian must satisfy the finder of fact by the greater weight of the credible evidence that the document is a draft.

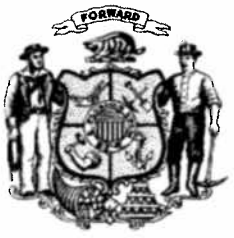
Merely labeling each page of the document "draft" does not make the document a draft as that term is defined in sec. 19.32(2), Stats. Similarly, corporation counsel cannot keep the document classified as a draft by not having the final corrections made on it. It was not prepared for the personal use of the corporation counsel. It was a report completed, paid for and relied upon by the county and therefore it does not comport with the exclusions set forth in the public access statute.

The decision of the trial court is reversed and the case is remanded for the application of *Beckon* and *Newspapers*.

The judgment of the Racine county circuit court is reversed and cause remanded for further proceedings consistent with this opinion.

ABRAHAMSON, J., not participating.

WISCONSIN STATE LEGISLATURE



7/11/95

Kelly —

Attached is the info you requested that discusses open records law treatment of "drafts". Ie. AG opinion & Bodk case.

F. Y.I. LRB advised me that our construction of "record" under § 19.32 (2), stats is correct. Once your draft is exchanged / distributed, it is no longer exempt from disclosure.

Lastly, you should look at 1993 SB 25 (or 26?) that deals w/ this issue. It failed last session.

Please call me if I can be of any further assistance.

Bert
4-6570

19.32 Definition of Record — Open Records

Does not include drafts notes etc.

If this a draft rather than record

19.31 Declaration of Policy

Anyone who gave it to was an open record

Fox v. Bock
149 Wis 2d 403