DRAFTER'S NOTE
FROM THE
LEGISLATIVE REFERENCE BUREAU

LRBs0066/1dn
RJM:kmg:hmh

May 11, 1999

1. Attached is the substitute amendment to SB–46 that you requested. This amendment is based on senate substitute amendment 1 to SB–46, as amended by senate amendment 1, which deleted the attorney fees provision. This amendment incorporates LRBa0272/2, as well as the following changes:

(a) Title of proposed s. 895.505 and proposed s. 895.505 (3) and (4) revised to more accurately reflect the content the proposed statute.

(b) The word "improperly" in proposed s. 895.505 (3) removed as extraneous and confusing. The word implies that there is a proper method of violating proposed s. 895.505 (2).

(c) Liability provision for use of disposed personal information expanded to provide cause of action for damaged financial institution, medical business or tax preparation business and expanded to cover use of personal information regardless of how the personal information was disposed of.

(d) Penalty provision for use of disposed personal information expanded to penalize use of personal information regardless of how the personal information was disposed of.

2. This substitute amendment also clarifies the meaning of "dispose". Because "dispose" currently is not defined in the bill, a court could interpret the term to include the sale of a record. Under the definition in this substitute amendment, the sale of a record is not a disposal and, therefore, does not trigger the requirements of proposed s. 895.505 (2). However, it remains unclear whether the voluntary transfer of records between affiliated businesses is a disposal that triggers the requirements of proposed s. 895.505 (2). Furthermore, this definition does not address the problem of a regulated business transferring a record for nominal value. I did not address these concerns because to do so would require additional changes to the bill and it is my understanding that, for political reasons, changes must be kept to a minimum. In addition, to resolve these issues I would need additional information regarding your intent. If you intend to address these concerns or if the definition is otherwise not consistent with your intent, please let me know.

3. As I have discussed with your office, I have two areas of concern with the criminal penalty provisions in proposed s. 895.505 (4) (b). First, this bill may be unconstitutionally vague if applied in a criminal prosecution. Although the definition

of "personal information" was sufficient when the bill only provided a civil remedy, the definition may not be constitutionally sufficient to delineate a crime. See *State v. Popanz*, 112 Wis. 2d 166 (1983).

Second, by penalizing possession of a record with intent to use, for any purpose, the information contained in the record, proposed s. 895.505 (4) (b) may be broader than you intend. For example, this statute may penalize a journalist who investigates a business's trash to determine how well the business destroys its records. One option would be to apply criminal penalties to possession of a record with intent to use information contained in the record to harm the individual whose information is contained in the record or to obtain something of value. Another more enforceable option would be to penalize the use, rather than the possession, of the information. This approach is used in the current identity theft statute. See s. 943.201, stats.

Please feel free to call if you desire any changes to this amendment.

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