Assembly Substitute Amendment (ASA-SB46)

Received: 05/06/1999 Wanted: Soon For: Steven Foti (608) 266-2401 This file may be shown to any legislator: NO May Contact: Subject: Fin. Inst miscellaneous Criminal Law - miscellaneous					Received By: rmarchan			
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					By/Representing: Michael			
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/3	rmarchan 08/03/1999	gilfokm 08/04/1999	mclark 08/04/199	99	lrb_docadmin 08/04/1999	lrb_docadn 08/04/1999		

08/04/1999 02:29:02 PM Page 2

FE Sent For:

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Assembly Substitute Amendment (ASA-SB46)

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Assembly Substitute Amendment (ASA-SB46)

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Assembly Substitute Amendment (ASA-SB46)

Received: 05/6/99

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Identical to LRB:

For: Steven Foti (608) 266-2401

By/Representing: Michael

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Drafter: rmarchan

May Contact:

Alt. Drafters:

Subject:

Fin. Inst. - miscellaneous

Criminal Law - miscellaneous

Extra Copies:

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Pre Topic:

No specific pre topic given

Topic:

Disposal and use of documents containing personal information

Instructions:

See Attached

Drafting History:

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STATE OF WISCONSIN – **LEGISLATIVE REFERENCE BUREAU** – LEGAL SECTION (608–266–3561)

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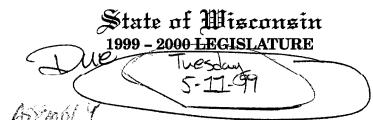
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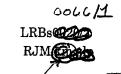
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SENATE SUBSTITUTE AMENDMENT 1,

TO 1999 SENATE BILL 46

March 18 1999 — Offered by COMMITTEE ON PRIVACY, ELECTRONIC COMMERCE AND FINANCIAL INSTITUTIONS

AN ACT to create 895.505 of the statutes; relating to: disposal of documents containing personal information.

Just of personal information in disposed records and providing a penalty

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

SECTION 1. 895.505 of the statutes is created to read:

895.505 Proposa of Coccess containing personal information. (1)

DEFINITIONS. In this section:

- (a) "Credit card" has the meaning given in s. 421.301 (15).
- (b) "Financial institution" means any bank, savings bank, savings and loan association or credit union that is authorized to do business under state or federal laws relating to financial institutions, any issuer of a credit card or any investment company.
 - (c) "Investment company" has the meaning given in s. 180.0103 (11e).

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(d) "Medical business" means any organization or enterprise operated for profit 1 or not for profit, including a sole proprietorship, partnership, firm, business trust, 2 joint venture, syndicate, corporation, limited liability company or association, that 3 possesses information, other than personnel records, relating to a person's physical 4 or mental health, medical history or medical treatment. 5 (e) "Personal information" means any of the following: 6 1. Personally identifiable data about an individual's medical condition, if the 7 data is not generally considered to be public knowledge. 8 Personally identifiable data that contains an individual's account or 9 customer number, account balance, balance owing, credit balance or credit limit, if 10 the data relates to an individual's account or transaction with a financial institution. 11 Personally identifiable data provided by an individual to a financial 12 institution upon opening an account or applying for a loan or credit. 13 4. Personally identifiable data about an individual's insurance, if the insurance 14 is related to a transaction with a financial institution. 15 5. Personally identifiable data about an individual's federal, state or local tax 16 17 (f) "Personally identifiable" means capable of being associated with a particular 18 individual through one or more identifiers or other information or circumstances. 19 (g) "Record" means any material on which written, drawn, printed, spoken, 20 visual or electromagnetic information is recorded or preserved, regardless of 21 22 physical form or characteristics. (h) "Tax preparation business" means any organization or enterprise operated 23

for profit, including a sole proprietorship, partnership, firm, business trust, joint

venture, syndicate, corporation, limited liability company or association, that

an individuals retwins prepares compared federal, state or local tax dense or counsels the paragraph federal, state or local tax files. **(2)** DISPOSAL OF RECORDS CONTAINING PERSONAL INFORMATION. A financial institution, medical business or tax preparation business may not dispose of a record 4 5 containing personal information unless the financial institution, medical business, tax preparation business or other person under contract with the financial 6 institution, medical business or tax preparation business does any of the following: 7 (a) Shreds the record before the disposal of the record. 8 (b) Erases the personal information contained in the record before the disposal 9 of the record. 10 (c) Modifies the record to make the personal information unreadable before the 11 12 disposal of the record. (d) Takes actions that it reasonably believes will ensure that no unauthorized 13 person will have access to the personal information contained in the record for the 14 period between the record's disposal and the record's destruction. 15 IVIL LIABILITY DISPOSAL AND U.SE. (A) A financial institution, medical business or tax 16 preparation business is liable to a person whose personal information is 17 disposed of in violation of sub. (2) for the amount of damages resulting from the 18

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SECTION 2. Effective date.

violation and coresponding therewise

(1) This act takes effect on the first day of the 4th month beginning after publication.

1	i,	ENGE BUREAU-LEGAL SECTION INSERT 1—6	No.
Dispos	se does not	molude a sale of a re	cord or the
transfer of a recon	d tor value.		

imprisoned for not more than 2 years or both. This paragraph does not apply to a

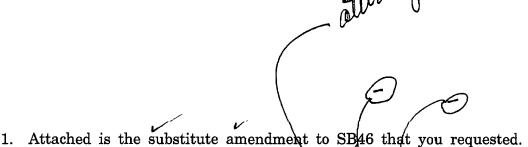
person who possesses a record with the authorization or consent of the individual

whose personal information is contained in the record.

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DRAFTER'S NOTE FROM THE LEGISLATIVE REFERENCE BUREAU

LRBs0066/1dn RJM:y.:... IMG



- 1. Attached is the substitute amendment to SB46 that you requested. This amendment is based on senate substitute amendment 1 to SB46, as amended by senate amendment 1, which deleted the state is fees provision. This amendment incorporates LRBa0272/2, as well as the following changes:
- (a) Title of proposed s. 895.505 and 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 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 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.

Robert J. Marchant Legislative Attorney Phone: (608) 261–4454

E-mail: Robert.Marchant@legis.state.wi.us

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.

Robert J. Marchant Legislative Attorney Phone: (608) 261-4454

E-mail: Robert.Marchant@legis.state.wi.us

Marchant, Robert

From:

Marchant, Robert

Sent:

Friday, May 14, 1999 3:58 PM

To:

Heifetz, Michael

Subject:

Disposal of records: penalty language

Mike--

I have come up with two options for changing the penalty language in sub. (4) (b). It is my understanding that you do not want to have a single disposal of 1,000 records count as 1,000 separate violations. Strangely enough, this is a very difficult concept to convey in statutory language without causing unintended consequences. Here are the options I have come up with:

Option 1

A financial institution, medical business or tax preparation business that violates sub. (2) may be required to forfeit not more than \$1,000. Acts arising out of the same incident or occurrence shall be a single violation.

Option 2

A financial institution, medical business or tax preparation business that violates sub. (2) may be required to forfeit not more than \$1,000. Each day that a financial institution, medical business or tax preparation business disposes of records in violation of sub. (2) shall be a separate violation.

Option 1 uses a phrase that currently is located in several places in the statutes. Thus, the phrase has the benefit of being interpreted in the past and being somewhat understood. However, upon closer analysis it may not be clear just what "the same incident or occurrence" means in this context. If a business takes a week to dispose of all records from 1985 and fails to shred the records before disposal, it is possible that the business has only committed one violation under option 1, even if records are improperly placed in a dumpster for 5 straight days. The business could argue that the disposal of each record from 1985 arose out of the same incident or occurrence.

Option 2 is less ambiguous, in my opinion. This option would create a separate violation for each day that a business improperly disposes of a record. However, it is important to note that a business could dispose of any number and type of records on the same day and, under option 2, the business would have committed one violation.

After you have reviewed these options please let me know how you want to proceed. Also, please call if you have any questions. Thanks.

Robert J. Marchant Legislative Attorney State of Wisconsin Legislative Reference Bureau robert.marchant@legis.state.wi.us

STATE OF WISCONSIN – **LEGISLATIVE REFERENCE BUREAU** – LEGAL SECTION (608–266–3561)

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State of Misconsin 1999 - 2000 LEGISLATURE

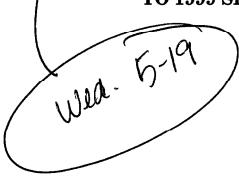


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ASSEMBLY SUBSTITUTE AMENDMENT,

TO 1999 SENATE BILL 46



AN ACT to create 895.505 of the statutes; relating to: disposal of documents containing personal information, use of personal information in disposed records and providing a penalty.

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

- **Section 1.** 895.505 of the statutes is created to read:
- 5 895.505 Records containing personal information. (1) DEFINITIONS. In this section:
 - (a) "Credit card" has the meaning given in s. 421.301 (15).
 - (am) "Dispose" does not include a sale of a record or the transfer of a record for value.
- 10 (b) "Financial institution" means any bank, savings bank, savings and loan
 11 association or credit union that is authorized to do business under state or federal

- laws relating to financial institutions, any issuer of a credit card or any investment
 company.
 - (c) "Investment company" has the meaning given in s. 180.0103 (11e).
 - (d) "Medical business" means any organization or enterprise operated for profit or not for profit, including a sole proprietorship, partnership, firm, business trust, joint venture, syndicate, corporation, limited liability company or association, that possesses information, other than personnel records, relating to a person's physical or mental health, medical history or medical treatment.
 - (e) "Personal information" means any of the following:
 - 1. Personally identifiable data about an individual's medical condition, if the data is not generally considered to be public knowledge.
 - 2. Personally identifiable data that contains an individual's account or customer number, account balance, balance owing, credit balance or credit limit, if the data relates to an individual's account or transaction with a financial institution.
 - 3. Personally identifiable data provided by an individual to a financial institution upon opening an account or applying for a loan or credit.



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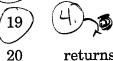
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dependentifiable data about amindividual's insurance, if the insurance issessment to a transaction with a finance limitation.



Personally identifiable data about an individual's federal, state or local tax returns.

- (f) "Personally identifiable" means capable of being associated with a particular individual through one or more identifiers or other information or circumstances.
- (g) "Record" means any material on which written, drawn, printed, spoken, visual or electromagnetic information is recorded or preserved, regardless of physical form or characteristics.

- (h) "Tax preparation business" means any organization or enterprise operated for profit, including a sole proprietorship, partnership, firm, business trust, joint venture, syndicate, corporation, limited liability company or association, that for a fee prepares an individual's federal, state or local tax returns or counsels an individual regarding the individual's federal, state or local tax returns.
- (2) DISPOSAL OF RECORDS CONTAINING PERSONAL INFORMATION. A financial institution, medical business or tax preparation business may not dispose of a record containing personal information unless the financial institution, medical business, tax preparation business or other person under contract with the financial institution, medical business or tax preparation business does any of the following:
 - (a) Shreds the record before the disposal of the record.
- (b) Erases the personal information contained in the record before the disposal of the record.
- (c) Modifies the record to make the personal information unreadable before the disposal of the record.
- (d) Takes actions that it reasonably believes will ensure that no unauthorized person will have access to the personal information contained in the record for the period between the record's disposal and the record's destruction.
- (3) CIVIL LIABILITY; DISPOSAL AND USE. (a) A financial institution, medical business or tax preparation business is liable to a person whose personal information is disposed of in violation of sub. (2) for the amount of damages resulting from the violation.
- (b) Any person who, for any purpose, uses personal information contained in a record that was disposed of by a financial institution, medical business or tax preparation business is liable to an individual who is the subject of the information

and to the financial institution, medical business or tax preparation business that			
disposed of the record for the amount of damages resulting from the person's use of			
the information. This paragraph does not apply to a person who uses personal			
information with the authorization or consent of the individual who is the subject of			
the information.			

- (4) PENALTIES; DISPOSAL AND USE. (a) A financial institution, medical business or tax preparation business that violates sub. (2) may be required to forfeit not more than \$1,000 to convolutions.

 Acts arising out of the same included or occurrence shall be a single violation.
- (b) Any person who possesses a record that was disposed of by a financial institution, medical business or tax preparation business and who intends to use, for any purpose, personal information contained in the record may be fined not more than \$10,000 or imprisoned for not more than 2 years or both. This paragraph does not apply to a person who possesses a record with the authorization or consent of the individual whose personal information is contained in the record.

SECTION 2. Effective date.

(1) This act takes effect on the first day of the 4th month beginning after publication.

(END)

STATE OF WISCONSIN – **LEGISLATIVE REFERENCE BUREAU** – LEGAL SECTION (608–266–3561)

DUOTE RIM: King:
Attacked is the redraft of the substitute amendment that you requested. Please refer to the drafters note included of the Associated of this substitute amendment for further information.
[Bm]

DRAFTER'S NOTE FROM THE LEGISLATIVE REFERENCE BUREAU

LRBs0066/2dn RJM:kmg:km

May 18, 1999

Attached is the redraft of the substitute amendment that you requested. Please refer to the drafter's note included with the first draft of this substitute amendment for further information.

Robert J. Marchant Legislative Attorney Phone: (608) 261-4454

E-mail: Robert.Marchant@legis.state.wi.us

STATE OF WISCONSIN – **LEGISLATIVE REFERENCE BUREAU** – LEGAL SECTION (608–266–3561)

8/3 Tel Mike in Rep. Foto's office
Redraft LRBs 0866 to provide perelly of \$1000/90 days rather than class Efelling.
Complets exec. on 17th



State of Misconsin 1999 - 2000 LEGISLATURE

RJM:kmg:km RMR

ASSEMBLY SUBSTITUTE AMENDMENT, **TO 1999 SENATE BILL 46**

1	AN ACT to create 895.505 of the statutes; relating to: disposal of documents
2	containing personal information, use of personal information in disposed
3	records and providing a penalty.
	The people of the state of Wisconsin, represented in senate and assembly, do enact as follows:
4	SECTION 1. 895.505 of the statutes is created to read:
5	895.505 Records containing personal information. (1) DEFINITIONS. In
6	this section:
7	(a) "Credit card" has the meaning given in s. 421.301 (15).
8	(am) "Dispose" does not include a sale of a record or the transfer of a record for
9	value.
10	(b) "Financial institution" means any bank, savings bank, savings and loan
11	association or credit union that is authorized to do business under state or federal

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- laws relating to financial institutions, any issuer of a credit card or any investment
 company.
 - (c) "Investment company" has the meaning given in s. 180.0103 (11e).
 - (d) "Medical business" means any organization or enterprise operated for profit or not for profit, including a sole proprietorship, partnership, firm, business trust, joint venture, syndicate, corporation, limited liability company or association, that possesses information, other than personnel records, relating to a person's physical or mental health, medical history or medical treatment.
 - (e) "Personal information" means any of the following:
 - 1. Personally identifiable data about an individual's medical condition, if the data is not generally considered to be public knowledge.
 - 2. Personally identifiable data that contains an individual's account or customer number, account balance, balance owing, credit balance or credit limit, if the data relates to an individual's account or transaction with a financial institution.
 - 3. Personally identifiable data provided by an individual to a financial institution upon opening an account or applying for a loan or credit.
 - 4. Personally identifiable data about an individual's federal, state or local tax returns.
 - (f) "Personally identifiable" means capable of being associated with a particular individual through one or more identifiers or other information or circumstances.
 - (g) "Record" means any material on which written, drawn, printed, spoken, visual or electromagnetic information is recorded or preserved, regardless of physical form or characteristics.
 - (h) "Tax preparation business" means any organization or enterprise operated for profit, including a sole proprietorship, partnership, firm, business trust, joint

- venture, syndicate, corporation, limited liability company or association, that for a fee prepares an individual's federal, state or local tax returns or counsels an individual regarding the individual's federal, state or local tax returns.
 - (2) DISPOSAL OF RECORDS CONTAINING PERSONAL INFORMATION. A financial institution, medical business or tax preparation business may not dispose of a record containing personal information unless the financial institution, medical business, tax preparation business or other person under contract with the financial institution, medical business or tax preparation business does any of the following:
 - (a) Shreds the record before the disposal of the record.
 - (b) Erases the personal information contained in the record before the disposal of the record.
 - (c) Modifies the record to make the personal information unreadable before the disposal of the record.
 - (d) Takes actions that it reasonably believes will ensure that no unauthorized person will have access to the personal information contained in the record for the period between the record's disposal and the record's destruction.
 - (3) CIVIL LIABILITY; DISPOSAL AND USE. (a) A financial institution, medical business or tax preparation business is liable to a person whose personal information is disposed of in violation of sub. (2) for the amount of damages resulting from the violation.
 - (b) Any person who, for any purpose, uses personal information contained in a record that was disposed of by a financial institution, medical business or tax preparation business is liable to an individual who is the subject of the information and to the financial institution, medical business or tax preparation business that disposed of the record for the amount of damages resulting from the person's use of

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- the information. This paragraph does not apply to a person who uses personal information with the authorization or consent of the individual who is the subject of the information.

 (4) Penalties; Disposal and use. (a) A financial institution, medical business
 - or tax preparation business that violates sub. (2) may be required to forfeit not more than \$1,000. Acts arising out of the same incident or occurrence shall be a single violation.
 - (b) Any person who possesses a record that was disposed of by a financial institution, medical business or tax preparation business and who intends to use, for any purpose, personal information contained in the record may be fined not more than the property or imprisoned for not more than the person who possesses a record with the authorization or consent of the individual whose personal information is contained in the record.

SECTION 2. Effective date.

(1) This act takes effect on the first day of the 4th month beginning after publication.

(END)