LRB-1477

2001 DRAFTING REQUEST

Bill

Received: **12/13/2000**

Received By: **kuesejt**

Wanted: **Soon**

Identical to LRB:

For: **Michael Powers (608) 266-1192**

By/Representing: **Vince Williams**

This file may be shown to any legislator: **NO**

Drafter: **kuesejt**

May Contact:

Alt. Drafters:

Subject: **Public Record**

Extra Copies: **RAC - 1**
RPN - 1
MES - 1

Pre Topic:

No specific pre topic given

Topic:

Notice of release of public records to record subjects; public employee personnel records

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Instructions:

See Attached.

Drafting History:

Vers.	Drafted	Reviewed	Typed	Proofed	Submitted	Jacketed	Required
/?	kuesejt 02/19/2001	gilfokm 02/20/2001		_____ _____			
/1			jfrantze 02/21/2001	_____ _____	lrb_docadmin 02/21/2001	lrb_docadmin 02/26/2001	

FE Sent For:

<END>

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(DNOR)

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/?	kuesejt	1 - 2/20-01 Kmg	2/21	2/21 KR			

FE Sent For:

<END>

Support Team provided an invaluable assist to the work of the other Teams and, thus, made the work product of the Task Force more credible and useful to the Governor, Legislature, State Agencies, Private Sector, and citizens of the State.

Note: A summary of the minutes for each of the fact-finding Hearings, including the names of those who appeared and the organizations they represented, if applicable, appear in Appendix E.

The Recommendations:

The Task Force, based upon the facts presented at the several Hearing and its deliberations conducted during the course of four (4) working sessions following the conclusion of the fact-finding Hearings, makes the following recommendations to the Governor as the Convening Authority for his consideration in the first year of the 21st Century as he addresses the critical issue of privacy in the age of technology:

Note: Commentary by the Task Force on the underlying reasons for the Recommendations appear in Appendix F.

1. The public sector collection of data in the conduct of government business should be governed by certain general principles. These principles are:

a) Collection of information should be limited to information necessary for government to carry out its statutory duties;

b) The purpose for the collection of information should be stated by government agencies prior to the time of collection;

c) Government agencies should not profit from the use or reuse of the information collected;

d) Personally identifiable information should not be collected by government agencies except to the extent necessary to complete a transaction with the individual from whom the information is collected or when that information is required to comply with federal or state law or regulations. Moreover, the government agency collecting such personal information should identify the reason for such collection and declare that reason.

e) We endorse the concept of a privacy impact statement for legislative bills that impact on personal privacy modeled after the legislative fiscal impact statement process.

f) The law (Chapter 19, Subchapter II, Public Records and Property, Section 19.35, et. seq., Stats.) should be revised as a result of recent Court decisions. In particular, a revision is needed in the so-called Woznicki Rule. Woznicki v. Erickson, 202 Wis2d 178, 549 NW 2d 699 (1996). The Court interpreted this Rule to hold that a record custodian who determines through the use of a balancing test to release information implicating an individual's privacy or reputational interest must notify the individual in order to

provide the individual with the opportunity for judicial review prior to releasing such information.

The law should be revised to provide that notification of a record subject of a request for release of personally identifiable information applies only to public employee personnel records. Moreover, that certain portions of a public employee's personnel record are exempt from the law; and to provide an expedited judicial review process in those cases where other portions of such employee's personnel record are subject to release. *The specific revisions proposed in the current law are:*

(i) **§19.32(1n)** "Record subject" means an individual about whom personally identifiable information is contained in a record.

(ii) **§19.32(1o)** "Personnel record" means a record, or any part of a record, pertaining to a public employee's performance evaluation, medical, social or personal history, dismissal, demotion or discipline, including the investigation of charges against the public employee.

(iii) **§19.32(1t)** "Public employee" means anyone other than an elected or appointed official who is an employee of a governmental unit.

(iv) **§19.35(1)(am)4.** Any public employee personnel records which are:

a. Personal medical records.

b. Records relating to the investigation of possible criminal offenses committed by that employee, except upon disposition of the investigation.

c. Letters of reference for that public employee.

d. Any portion of a test document, except the test scores.

e. Materials used by the authority for staff management planning, including judgments or recommendations concerning future salary increases and other wage treatments, management bonus plans, promotions and job assignments or other comments or ratings used for the planning purposes.

f. Information of a personal nature about a person other than the public employee if disclosure of the information would constitute an invasion of the other person's privacy.

g. Records relevant to any other pending claim between the authority and the public employee which may be discovered in a judicial proceeding, except upon disposition of such claim.

(v) **§19.35(7)** NOTICE TO RECORD SUBJECT AND RIGHT OF ACTION. (a) Except as provided in (1)(am) and (b) below, no authority is required to notify a record subject prior to providing a requestor a record containing information pertaining to that record subject, and no person is entitled to judicial review of an authority's decision to release a record to a requestor.

(b) If an authority decides to release a personnel record, the authority shall, within 24 hours of making the decision, serve written notice of that decision on the

public employee to whom the personnel record pertains, either by registered mail, return receipt requested, or by personally serving the notice on the public employee. The authority shall not release the record for five business days after giving notice. (THE AUTHORITY MAY RELEASE THE RECORD FIVE BUSINESS DAYS AFTER GIVING NOTICE IF THE PUBLIC EMPLOYEE HAS NOT FILED AN OBJECTION)

1. The public employee may, within five (5) business days of receipt of the notice, commence an action in the Circuit Court for the County in which the public employee works, seeking an order restraining the authority from releasing the personnel record. If the public employee commences such an action the public employee shall name the authority as the defendant in the action. The requestor may intervene in the action as a matter of right. If the requestor chooses to intervene, the requestor shall at that time inform all parties of the requestor's identity, including an address where process may be served on the requestor. Intervention shall not delay the proceeding.
2. If no action is commenced under sub.(b)1., the authority shall release the subject record. If an action is commenced under sub.(b)1., the authority shall not release the subject record until the action is decided by the Court or the parties have reached a settlement approved by the Court or either party withdraws the request or objection.
3. In any action filed under sub.(b)1., the authority's decision to release the personnel record shall be entitled to a presumption of correctness.

4. The Court shall decide the action within ten (10) days after commencement unless one of the parties requests an extension for good cause. In any event, the Court shall render a decision within thirty (30) days and if the Court does not decide the action within thirty (30) days the portions of the records requested shall be released.

2. Government agencies should adopt a policy that prohibits State Agency Websites from collecting personally identifiable information without the consent of the visitor to that website.

3. The policies and procedures of the Department of Health and Human Services provide an adequate focus on privacy and confidentiality. The effective collaborative effort of the Department with multiple segments of the private sector should continue as the health care delivery system continues its dramatic change. We find no reason to change the policies and procedures of the Department at this time.

4. Recommendations for changes in the Department of Health and Human Services are deferred at this time. A careful assessment must be made by the Department following the implementation of the HIPAA rules before any potential deficiencies may be identified with respect to the issue of privacy. The Department has given assurances that this assessment process will be followed in due course.

WISCONSIN STATE REPRESENTATIVE
MIKE POWERS
80TH ASSEMBLY DISTRICT

JTK
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Jeff,

Included with this cover sheet are suggested modifications to our original instructions for LRB 1477. Any questions, please call me @ 266-1192.

Vince

State Capitol • Post Office Box 8953 • Madison, WI 53708-8953 • (608) 266-1192 • Toll-Free Hotline: 800-362-9472

PROPOSED PUBLIC RECORDS LEGISLATION

Create sec.19.32(2b) as follows:

"Record subject" means an individual about whom personally identifiable information is contained in a record.

Create sec.19.32(1s) as follows:

"Public employee" means anyone other than an elected or appointed official who is an employee of a governmental unit.

Create sec. 19.35(7) as follows:

NOTICE TO RECORD SUBJECT AND RIGHT OF ACTION

(a) Except as provided in sub. (b), no authority is required to notify a record subject prior to providing a requested record containing information pertaining to that record subject, and no person is entitled to judicial review of an authority's decision to release a record to a requester.

(b) If an authority decides to release a record created or maintained by the authority as a result of the authority's investigation into a disciplinary matter or possible violation of a statute, regulation or authority policy, the authority shall, within 72 hours of making the decision, serve written notice of that decision on any record subject to whom the record pertains either by registered mail, return receipt requested, or by personally serving the notice on the record subject. The notice shall include the timelines set forth below in sub. (b)(1).

1. The record subject may, within five days of receipt of notice, provide written notification to the authority of intent to seek a court order preventing the authority from releasing the record. The record subject must file such action within 10 days of receipt of the notice to release.—

2. If the record subject commences such an action, the record subject shall name the authority as the defendant in the action. The requester may intervene in the action as a matter of rights. If the requester chooses to intervene, the requester shall at that time inform all parties of the requester's identity, including where process may be served on the requester. Intervention shall not delay the proceeding.

1. The court shall decide the action within 10 days after commencement unless one of the parties requests an extension for good cause. In any event, the court shall render a decision within 30 days.

2. Any party may appeal from the determination of the circuit court and the appeal shall be given preference.

Create 19.36(10) as follows:

Certain public employee personnel records.

(a) The following personnel records of public employees are exempt from disclosure under § 19.35(1):

1. Personal medical records.
2. Home addresses and telephone numbers of public employees, if exemption from disclosure is requested by the employee.
3 Records relating to the investigation of a possible criminal offense or possible employment misconduct committed by that employee, except upon disposition of the investigation.
4. Letters of reference for that public employee.
5. Any portion of test documents, except for the test scores if not otherwise protected.
6. Material used by the authority for staff management planning, including performance evaluations, judgments or recommendations concerning future salary increases and other wage treatments, management bonus plans, promotions and job assignments or other comments or ratings used for the planning purposes.

(b) Nothing in this paragraph abrogates or restricts the right to documents available under s. 103.13, or the right of a collective bargaining representative to information under Chapter 111.

2001

BILL

Date (time) needed: Wed 2/21 (DNOTE)

LRB – 1477/1

JTK:kmg

Use the appropriate components and routines developed for bills.

AN ACT . . . [generate catalog] ***to repeal*** . . . ; ***to renumber*** . . . ; ***to consolidate and renumber*** . . . ; ***to renumber and amend*** . . . ; ***to consolidate, renumber and amend*** . . . ; ***to amend*** . . . ; ***to repeal and recreate*** . . . ; and ***to create*** . . . of the statutes; **relating to:** access to public employee personnel records and certain other public records containing personally identifiable information.

[NOTE: See section 4.02 (2) (br), Drafting Manual, for specific order of standard phrases.]

Analysis by the Legislative Reference Bureau

If titles are needed in the analysis, in the component bar:
For the main heading, execute: . . . . . **create → anal: → title: → head**
For the subheading, execute: . . . . . **create → anal: → title: → sub**
For the sub–subheading, execute: . . . . . **create → anal: → title: → sub–sub**
For the analysis text, in the component bar:
For the text paragraph, execute: . . . . . **create → anal: → text**

attached

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

SECTION #.

1999 – 2000 LEGISLATURE

LRB–4511/1
JTK:kmg:kjf

1999 BILL

AN ACT *to create* 19.32 (2g) and 19.356 of the statutes; **relating to:** access to public records containing personally identifiable information.

Analysis by the Legislative Reference Bureau

Under current law, any requester has a right to inspect or copy any public record unless otherwise provided under statutory or common law or unless, under a "balancing test" derived from common law, the custodian demonstrates that the public interest in withholding access to the record outweighs the strong public interest in providing that access. See s. 19.35 (1), stats., and *State ex rel. Youmans v. Owens*, 28 Wis.2d 672, 682–83 (1965) and *Hathaway v. Green Bay School District*, 116 Wis. 2d 388, 395–96 (1984). If a custodian fails to provide prompt access to a requested record or to make this demonstration, a requester may obtain a court order requiring a custodian to provide access to a record. See s. 19.37 (1), stats.

In *Woznicki v. Erickson*, 202 Wis.2d 178, 192–193 (1996), the Wisconsin supreme court held that a district attorney must notify any individual who is the subject of a record which the district attorney proposes to release to a requester prior to release, and that the individual may appeal a decision to release a record to circuit court, which must determine whether permitting access would result in harm to the public interest that outweighs the public interest in allowing access. In *Milwaukee Teachers Education Assn. v. Milwaukee Bd. of School Directors*, 227 Wis. 2d 779, 799 (1999), the Supreme Court expanded this decision to apply to all public records. There is no statutory basis for these decisions. The decisions also depart from the supreme court's previous decisions, which held that, unless otherwise provided, custodians have no obligation to withhold public records from access and no person

privacy or reputational interests of the subject individual

Stat

may require them to do so. See *Newspapers, Inc. v. Brier*, 89 Wis.2d 417, 431–32 (1979) and *State ex rel. Bilder v. Twp. of Delavan*, 112 Wis.2d 539, 558 (1983).

This bill affirms current statutory law by providing that, unless otherwise specifically provided by statute, no custodian of a public record is required to notify an individual who is the subject of a record prior to providing to a requester access to a record containing information pertaining to that individual. ~~The bill also provides~~ that, unless otherwise provided by statute, no person is entitled to judicial review of the decision of a custodian to provide a requester with access to a public record.

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

SECTION 1. 19.32 (2g) of the statutes ~~is~~ created to read:

~~19.32~~ **(2g)** "Record subject" means an individual about whom personally identifiable information is contained in a record.

SECTION 2. 19.356 of the statutes is created to read:

19.356 Notice to record subject; right of action. ~~Unless~~ otherwise provided by statute, no authority is required to notify a record subject prior to providing to a requester access to a record containing information pertaining to that record subject, and no person is entitled to judicial review of the decision of an authority to provide a requester with access to a record.

(END)

INSERT 2–1:

19.32

(1w) "Public employee" means an individual who is employed by an authority, other than an individual holding an elective office.

INSERT 2–9:

(2) If an authority decides to permit access to a record created or maintained by the authority under s. 19.35 (1) as a result of the authority's investigation into a disciplinary matter or possible violation of a statute, rule, regulation, or policy of the authority, the authority shall, before permitting access and within 72 hours ~~of~~ after making the decision to permit access, serve written notice of that decision on any record subject to whom that record pertains, either by registered mail with return receipt signed by the addressee or by personally serving the notice on the subject. The notice shall briefly describe the requested record and include a description of the rights of the record subject under subs. (3) and (4).

(3) Within 5 days ~~of~~ after receipt of a notice under sub. (2), any record subject may provide written notification to the authority of his or her intent to seek a court order restraining the authority from providing access to the requested record.

(4) Within 10 days ~~of~~ after receipt of a notice under sub. (2), any record subject may commence an action seeking a court order to restrain the authority from providing access to the requested record. If a record subject commences such an action, the record subject shall name the authority as a defendant. The record subject shall also join the requester as a party to the action under s. 803.03.

(5) An authority shall not provide access to a requested record within 12 days of sending a notice pertaining to that record under sub. (2). In addition, if the record subject commences an action under sub. (4), the authority shall not provide access to the requested record during pendency of the action. If the record subject appeals or petitions for review of a decision of the court or the time for appeal or petition for review of a decision adverse to the record subject has not expired, the authority shall not provide access to the requested record until any appeal is decided, until the period for appealing or petitioning for review expires, until a petition for review is denied, or until the authority receives written notice from the record subject that an appeal or petition for review will not be filed, whichever first occurs.

(6) If the record subject demonstrates that the harm to his or her privacy or reputational interests caused by disclosure of the information contained in the requested record outweighs the public interest in disclosure of that information, the court shall restrain the authority from providing access to that record under s. 19.35 (1).

(7) The court shall not grant any request by a requester to delay the proceedings. The court shall issue a decision within 10 days after filing of the summons and complaint and proof of service of the summons and complaint upon the defendant and the requester, unless a party demonstrates cause for extension of this period. In any event, the court shall issue a decision within 30 days after those filings are complete.

(8) If a party appeals a decision of the court under sub. (7), the court of appeals shall grant precedence to the appeal over all other matters not accorded similar precedence by law.

SECTION 1. 19.36 (10) of the statutes is created to read:

19.36 **(10)** PUBLIC EMPLOYEE PERSONNEL RECORDS. ~~An~~ authority shall not provide access to the following records under s. 19.35 (1), except to a public employee or the employee's representative to the extent required under s. 103.13 or a collective bargaining agreement under subch. IV of ch. 111:

(a) Personal medical records of a public employee.

(b) Records containing the home address or telephone number of a public employee, if the employee requests the authority to do so.

(c) Records relating to the investigation of a possible criminal offense or possible misconduct connected with employment by a public employee prior to disposition of the investigation.

(d) Letters of reference pertaining to a public employee.

(e) Any record pertaining to an employment examination, except an examination score if access to that score is not otherwise prohibited.

(f) Records of any material used by an authority for staff management planning, including performance evaluations, judgments or recommendations concerning future salary adjustments or other wage treatments, management bonus plans, promotions, job assignments, or other comments or ratings relating to public employees.

SECTION 2. 40.07 (1) (intro.), (2) and (3) of the statutes are amended to read:

40.07 **(1)** (intro.) Notwithstanding any other statutory provision, individual personal information in the records of the department is not ~~a public record and shall not be disclosed, unless~~ subject to access under s. 19.35 (1), but access to that information may be provided, unless prohibited under s. 19.36 (10), if:

History: 1981 c. 96.

(2) Notwithstanding sub. (1), information contained in medical records may be disclosed only when permitted under s. 19.36 (10) and only when a disability application denial is appealed or under a court order duly obtained upon a showing to the court that the information is relevant to a pending court action, but medical information gathered for any one of the benefit plans established under this chapter may be used by any other benefit plan established under this chapter.

History: 1981 c. 96.

(3) The department shall not furnish lists of participants, annuitants or beneficiaries to any person or organization except as permitted under s. 19.36 (10) and as required for the proper administration of the department.

History: 1981 c. 96.

SECTION 3. 230.13 (1) (intro.) of the statutes is amended to read:

230.13 **(1)** (intro.) Except as provided in sub. (3) and ~~s.~~ ss. 19.36 (10) and 103.13, the secretary and the administrator may keep records of the following personnel matters closed to the public:

History: 1971 c. 270; 1977 c. 196 s. 37; Stats. 1977 s. 230.13; 1979 c. 339; 1989 a. 31; 1991 a. 269, 317, 1997 a. 191.

SECTION 4. 233.13 (intro.) of the statutes is amended to read:

233.13 Closed records. (intro.) Except as provided in ~~s.~~ ss. 19.36 (10) and 103.13, the authority may keep records of the following personnel matters closed to the public:

History: 1995 a. 27.

PWS 2A

However, the bill also creates a statutory procedure under which individuals who are the subjects of certain public records may seek a court order to restrain state or local government officers or agencies from providing access to those records to third parties if the subject individuals can demonstrate that the harm to their privacy or reputational interests resulting from disclosure of the information contained in those records outweighs the public interest in providing access to those records. Under the bill, if the officer or agency having custody of a public record receives a request to provide access to a record containing personally identifiable information as the result of an investigation by the officer or agency into a disciplinary matter or possible violation of a statute, rule, regulation or policy of the officer or agency, the officer or agency must, before providing access, provide written notice to each subject individual of ~~his or her~~ intent to release the record. If a subject individual notifies the officer or agency within 5 days of his or her intent to seek a court order restraining release of the record and files an action seeking such an order within 10 days, the record may not be released unless the court so permits.

The bill also provides that no state or local governmental officer or agency ~~shall~~ may not release certain personnel records and information in response to a request for inspection, except to a public employee or employee's representative to the extent required under current law or an applicable collective bargaining agreement. Affected records include personal medical records; records containing home addresses and telephone numbers, unless an affected employee otherwise permits; records relating to a possible criminal offense or possible misconduct connected with employment by a public employee prior to disposition of the investigation; letters of reference; records of employment examinations, except examination scores if not otherwise prohibited; and other records relating to staff management planning, performance evaluations, salary and wage proposals, management bonus plans, promotions, job assignments and comments relating to public employees. Currently, access to some of these records may be denied under specific laws governing those records or under the common law "balancing test."

the officer's or agency's

DRAFTER'S NOTE
FROM THE
LEGISLATIVE REFERENCE BUREAU

LRB–1477/1dn
JTK.....

Representative Powers:

This draft contains a number of clarifications that were not explicitly covered by the instructions. In some cases, alternative choices are possible. Please let me know if any of the details of this draft are not in accord with your intent. My concerns are only that the draft is clear and that existing statutes are reconciled with the draft to ensure that your intent is effected.

1. Wisconsin has over 400 laws governing access to specific public records. In addition, the federal government regulates access to some of these records. Subchapter II of ch. 19, stats., generally applies in the absence of something more specific governing a particular record. This draft has the same application. To broaden it would require identifying and amending or repealing every law that might be in tension with this draft, and we could not reach the federal requirements in any event.

2. The proposed definition of "public employee" excluded all elected and appointed officials. Since all public employees are either elected or appointed, this definition appears potentially to exclude everyone unless some employees are "officials" and some are not. For this draft, I have provided that the definition excludes only individuals (whether elected or appointed) who are serving in elective positions. If there is a need to also exclude some other appointive positions, we need to determine how to describe these positions. Some definitions you might look to are found in s. 19.42 (7w) and (13), stats., which describe high–ranking appointive positions that are subject to code of ethics coverage, but there has been some concern that the definition of "local public official" in s. 19.42 (7w), stats., may not be broad enough to cover certain positions that should be covered.

3. Proposed s. 19.356 (2) provides that notice to a record subject of the proposed release of a record shall briefly describe the requested record. The reason for this is that the record subject may not have knowledge of the existence or contents of the requested record, and would therefore not be able to determine whether to respond.

4. Proposed s. 19.356 (3) to (5) addresses some contingencies that were not specifically covered by the instructions, including the exact circumstances under which an authority may release a record in various situations where litigation may be contemplated or in process.

5. Proposed s. 19.36 (10), relating to public employee personnel records, will apply by its terms unless a collective bargaining agreement covering local government employees provides otherwise. Under s. 111.93 (3), stats., a state employee collective bargaining agreement supercedes any statutes governing conditions of employment of state employees, whether or not the matters treated in the statutes are treated in the agreement. In other words, access by third parties to state employee personnel records is governed by this draft, but access by represented state employees and their representatives is governed by the draft to the extent provided in any applicable collective bargaining agreement. This does not seem to me to pose a significant problem since the thrust of the draft is to protect against unwarranted third party access.

6. The instructions provided for the requester to receive notice of any legal action by a record subject to restrain release of a record. Under the instructions, the requester is permitted to intervene and if the requester intervenes, the requester must provide notice to the other parties. Section 803.03, stats., creates a joinder procedure under which a third party may be joined in an action, but the joined party may waive his or her right to participate. Proposed s. 19.356 (4), therefore, incorporates this joinder procedure.

7. The instructions did not indicate what showing the record subject must make in order for a court to restrain release of a record. Under the common law, the record subject must show that the *public interest* in withholding access outweighs the strong public interest in providing access. *State ex rel. Youmans v. Owens*, 78 Wis.2d 672, 682–83 (1965). The standard recently imposed by the Wisconsin Supreme Court, however, requires the record subject to show that his or her privacy or reputational interests would be impacted by providing access to the record and that impact outweighs the public interest in providing that access. *Milwaukee Teachers Education Assn. v. Milwaukee Bd. of School Directors*, 227 Wis.2d 779, 798 (1999). This draft therefore provides in proposed s. 19.356 (6) that the record subject must show that the harm to his or her privacy or reputational interests by providing access to a record outweigh the public interest in providing that access.

8. In accordance with the instructions, proposed s. 19.356 (7) directs the court to deny any request by a requester to delay the proceedings. This provision could have due process or equal protection implications if a requester, for good cause shown, is unable to effectively participate in the action within the time frame that would have applied had the requester not been joined.

9. The instructions provided for the circuit court to issue a decision within a specified period after commencement of legal action. Because under s. 801.02, stats., an action is commenced when a summons and complaint are filed with the clerk of court but a plaintiff has 90 days after filing of the summons and complaint to serve the defendant, this draft, in proposed s. 19.356 (7), requires the court to issue a decision within a specified period after filing and service is complete. I should also mention that a statute which requires a court to issue a decision within a specified period is unusual and perhaps unprecedented in this context, and given the prerogatives of a coequal branch of government, may not be entirely effective. It may, however, at least suggest that

some prioritization may be in order, which could advance the disposition of these types of cases.

10. The instructions provided that certain personnel records of public employees should be exempt from access by third parties, but did not indicate whether the custodian of the affected records *shall* or *may* deny access. This draft provides in proposed s. 19.36 (10) that the custodian *shall* deny access (unless, in the case of a home address or telephone number, the affected employee otherwise permits).

11. Proposed s. 19.36 (10) (c) requires a custodian to deny access to records relating to a possible criminal offense or possible misconduct connected with employment by a public employee prior to disposition of the investigation. Under proposed s. 19.356 (2), some of these same records could become the subject of a lawsuit against the custodian to restrain release. Such a lawsuit would not be possible if the custodian were not to decide in the first instance to proceed with release. Therefore, proposed s. 19.36 (10) (c) limits the potential that proposed s. 19.356 (2) will come into play by preventing the circumstance that would trigger the application of proposed s. 19.356 (2). Of course, each of these proposed statutes applies in situations that the other does not, but the interplay is significant and if it is not fully intended, the draft should be modified.

12. Some statutes, for example, ss. 40.07 and 51.30, stats., address the issue of access to public records by public employees and even by employees of the same agency that creates the records. Since under current statutory law it is not generally possible for a record subject to challenge the decision of a public officer or agency to provide access to a record, this issue does not generally arise. However, under proposed s. 19.356 (2), there may be a question as to whether notice of release needs to be provided when other public officers or agencies, or even officers or employees within the same agency that creates ~~a public~~ the record ~~seek access to a record~~ by. You may wish to address that issue.

access to a public record is sought by

Jeffery T. Kuesel
Managing Attorney
Phone: (608) 266–6778

DRAFTER'S NOTE
FROM THE
LEGISLATIVE REFERENCE BUREAU

LRB–1477/1dn
JTK:kmg:jf

February 21, 2001

Representative Powers:

This draft contains a number of clarifications that were not explicitly covered by the instructions. In some cases, alternative choices are possible. Please let me know if any of the details of this draft are not in accord with your intent. My concerns are only that the draft be clear and that existing statutes be reconciled with the draft to ensure that your intent is effected.

1. Wisconsin has over 400 laws governing access to specific public records. In addition, the federal government regulates access to some of these records. Subchapter II of ch. 19, stats., generally applies in the absence of something more specific governing a particular record. This draft has the same application. To broaden it would require identifying and amending or repealing every law that might be in tension with this draft, and we could not reach the federal requirements in any event.

2. The proposed definition of "public employee" excluded all elected and appointed officials. Since all public employees are either elected or appointed, this definition appears potentially to exclude everyone unless some employees are "officials" and some are not. For this draft, I have provided that the definition excludes only individuals (whether elected or appointed) who are serving in elective positions. If there is a need to also exclude some other appointive positions, we need to determine how to describe these positions. Some definitions that you might look to are found in s. 19.42 (7w) and (13), stats., which describes high–ranking appointive positions that are subject to code–of–ethics coverage, but there has been some concern that the definition of "local public official" in s. 19.42 (7w), stats., may not be broad enough to cover certain positions that should be covered.

3. Proposed s. 19.356 (2) provides that notice to a record subject of the proposed release of a record must briefly describe the requested record. The reason for this is that the record subject may not have knowledge of the existence or contents of the requested record, and would therefore not be able to determine whether to respond.

4. Proposed s. 19.356 (3) to (5) addresses some contingencies that were not specifically covered by the instructions, including the exact circumstances under which an authority may release a record in various situations where litigation may be contemplated or in progress.

5. Proposed s. 19.36 (10), relating to public employee personnel records, will apply by its terms unless a collective bargaining agreement covering local government employees provides otherwise. Under s. 111.93 (3), stats., a state employee collective bargaining agreement supersedes any statutes governing conditions of employment of state employees, whether or not the matters treated in the statutes are treated in the agreement. In other words, access by third parties to state employee personnel records is governed by this draft, but access by represented state employees and their representatives is governed by the draft to the extent provided in any applicable collective bargaining agreement. This does not seem to me to pose a significant problem since the thrust of the draft is to protect against unwarranted third–party access.

6. The instructions provided for the requester to receive notice of any legal action by a record subject to restrain release of a record. Under the instructions, the requester is permitted to intervene and if the requester intervenes, the requester must provide notice to the other parties. Section 803.03, stats., creates a joinder procedure under which a third party may be joined in an action, but the joined party may waive his or her right to participate. Proposed s. 19.356 (4), therefore, incorporates this joinder procedure.

7. The instructions did not indicate what showing the record subject must make in order for a court to restrain release of a record. Under the common law, the record subject must show that the *public interest* in withholding access outweighs the strong public interest in providing access. *State ex rel. Youmans v. Owens*, 78 Wis.2d 672, 682–83 (1965). The standard recently imposed by the Wisconsin Supreme Court, however, requires the record subject to show that his or her privacy or reputational interests would be impacted by providing access to the record and that that impact outweighs the public interest in providing that access. *Milwaukee Teachers Education Assn. v. Milwaukee Bd. of School Directors*, 227 Wis.2d 779, 798 (1999). This draft therefore provides in proposed s. 19.356 (6) that the record subject must show that the harm to his or her privacy or reputational interests by providing access to a record outweighs the public interest in providing that access.

8. In accordance with the instructions, proposed s. 19.356 (7) directs the court to deny any request by a requester to delay the proceedings. This provision could have due–process or equal–protection implications if a requester, for good cause shown, is unable to effectively participate in the action within the time frame that would have applied had the requester not been joined.

9. The instructions provided for the circuit court to issue a decision within a specified period after commencement of legal action. Because under s. 801.02, stats., an action is commenced when a summons and complaint are filed with the clerk of court but a plaintiff has 90 days after filing of the summons and complaint to serve the defendant, this draft, in proposed s. 19.356 (7), requires the court to issue a decision within a specified period after filing and service is complete. I should also mention that a statute which requires a court to issue a decision within a specified period is unusual and perhaps unprecedented in this context, and, given the prerogatives of a coequal branch of government, may not be entirely effective. It may, however, at least suggest

that some prioritization may be in order, which could advance the disposition of these types of cases.

10. The instructions provided that certain personnel records of public employees should be exempt from access by third parties, but did not indicate whether the custodian of the affected records *shall* or *may* deny access. This draft provides, in proposed s. 19.36 (10), that the custodian *shall* deny access (unless, in the case of a home address or telephone number, the affected employee otherwise permits).

11. Proposed s. 19.36 (10) (c) requires a custodian to deny access to records relating to a possible criminal offense or possible misconduct connected with employment by a public employee prior to disposition of the investigation. Under proposed s. 19.356 (2), some of these same records could become the subject of a lawsuit against the custodian to restrain release. Such a lawsuit would not be possible if the custodian were not to decide in the first instance to proceed with release. Therefore, proposed s. 19.36 (10) (c) limits the potential that proposed s. 19.356 (2) will come into play by preventing the circumstance that would trigger the application of proposed s. 19.356 (2). Of course, each of these proposed statutes applies in situations that the other does not, but the interplay is significant and, if it is not fully intended, the draft should be modified.

12. Some statutes, for example, ss. 40.07 and 51.30, stats., address the issue of access to public records by public employees and even by employees of the same agency that creates the records. Since under current statutory law it is not generally possible for a record subject to challenge the decision of a public officer or agency to provide access to a record, this issue does not generally arise. However, under proposed s. 19.356 (2), there may be a question as to whether notice of release needs to be provided when access to a public record is sought by other public officers or agencies, or even by officers or employees within the same agency that creates the record. You may wish to address that issue.

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February 21, 2001

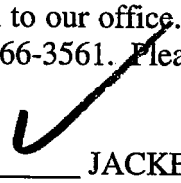
MEMORANDUM

To: Representative Powers

From: Jeffery T. Kuesel, Managing Attorney

Re: LRB-1477 Notice of release of public records to record subjects; public employee personnel records

The attached draft was prepared at your request. Please review it carefully to ensure that it is accurate and satisfies your intent. If it does and you would like it jacketed for introduction, please indicate below for which house you would like the draft jacketed and return this memorandum to our office. If you have any questions about jacketing, please call our program assistants at 266-3561. Please allow one day for jacketing.



_____ JACKET FOR ASSEMBLY _____ JACKET FOR SENATE

If you have any questions concerning the attached draft, or would like to have it redrafted, please contact me at (608) 266-6778 or at the address indicated at the top of this memorandum.

If the last paragraph of the analysis states that a fiscal estimate will be prepared, the LRB will request that it be prepared after the draft is introduced. You may obtain a fiscal estimate on the attached draft before it is introduced by calling our program assistants at 266-3561. Please note that if you have previously requested that a fiscal estimate be prepared on an earlier version of this draft, you will need to call our program assistants in order to obtain a fiscal estimate on this version before it is introduced.

Please call our program assistants at 266-3561 if you have any questions regarding this memorandum.