DRAFTER'S NOTE
FROM THE
LEGISLATIVE REFERENCE BUREAU

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Senator Erpenbach:

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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