LRB-2119

2001 DRAFTING REQUEST

Bill

Received: **01/17/2001**

Received By: **kuesejt**

Wanted: **As time permits**

Identical to LRB:

For: **Jon Erpenbach (608) 266-6670**

By/Representing: **Julie Laundrie**

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

Drafter: **kuesejt**

May Contact:

Addl. Drafters: **champra**
shoveme

Subject: **Public Record**

Extra Copies:

Submit via email: **NO**

Pre Topic:

No specific pre topic given

Topic:

Notice of release of public records to data subjects; public employe personnel records

Instructions:

See Attached.

Drafting History:

Vers.	Drafted	Reviewed	Typed	Proofed	Submitted	Jacketed	Required
/?	kuesejt 04/03/2001	gilfokm 04/04/2001					
/1			pgreensl 04/04/2001		lrb_docadmin 04/04/2001		
/2	kuesejt 12/12/2001 kuesejt 12/13/2001	gilfokm 12/12/2001 gilfokm 12/13/2001	jfrantze 12/13/2001				

Vers.	Drafted	Reviewed	Typed	Proofed	Submitted	Jacketed	Required
/3			kfollet 12/13/2001	_____ _____	lrb_docadmin 12/13/2001		
/4	kuesejt 01/11/2002	gilfokm 01/11/2002	pgreensl 01/11/2002	_____ _____	lrb_docadmin 01/11/2002		
/5	kuesejt 01/31/2002	gilfokm 01/31/2002	jfrantze 01/31/2002	_____ _____	lrb_docadmin 01/31/2002		
/6	kuesejt 02/04/2002	gilfokm 02/04/2002	jfrantze 02/05/2002	_____ _____	lrb_docadmin 02/05/2002		
/7	kuesejt 02/12/2002	gilfokm 02/12/2002	jfrantze 02/12/2002	_____ _____	lrb_docadmin 02/12/2002	lrb_docadmin 02/12/2002	

FE Sent For:

<END>

2001 DRAFTING REQUEST

Bill

Received: **01/17/2001**

Received By: **kuesejt**

Wanted: **As time permits**

Identical to LRB:

For: **Jon Erpenbach (608) 266-6670**

By/Representing: **Julie Laundrie**

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

Drafter: **kuesejt**

May Contact:

Addl. Drafters: **champra**
shoveme

Subject: **Public Record**

Extra Copies:

Submit via email: **NO**

Pre Topic:

No specific pre topic given

Topic:

Notice of release of public records to data subjects; public employe personnel records

---

Instructions:

See Attached.

Drafting History:

Vers.	Drafted	Reviewed	Typed	Proofed	Submitted	Jacketed	Required
/?	kuesejt 04/03/2001	gilfokm 04/04/2001		_____ _____			
/1			pgreensl 04/04/2001	_____ _____	lrb_docadmin 04/04/2001		
/2	kuesejt 12/12/2001 kuesejt 12/13/2001	gilfokm 12/12/2001 gilfokm 12/13/2001	jfrantze 12/13/2001	_____ _____ _____ _____			

Vers.	Drafted	Reviewed	Typed	Proofed	Submitted	Jacketed	Required
/3			kfollet 12/13/2001	_____ _____	lrb_docadmin 12/13/2001		
/4	kuesejt 01/11/2002	gilfokm 01/11/2002	pgreensl 01/11/2002	_____ _____	lrb_docadmin 01/11/2002		
/5	kuesejt 01/31/2002	gilfokm 01/31/2002	jfrantze 01/31/2002	_____ _____	lrb_docadmin 01/31/2002		
/6	kuesejt 02/04/2002	gilfokm 02/04/2002	jfrantze 02/05/2002	_____ _____	lrb_docadmin 02/05/2002		
/7	kuesejt 02/12/2002	gilfokm 02/12/2002	jfrantze 02/12/2002	_____ _____	lrb_docadmin 02/12/2002		

FE Sent For:

<END>

2001 DRAFTING REQUEST

Bill

Received: **01/17/2001**

Received By: **kuesejt**

Wanted: **As time permits**

Identical to LRB:

For: **Jon Erpenbach (608) 266-6670**

By/Representing: **Julie Laundrie**

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

Drafter: **kuesejt**

May Contact:

Addl. Drafters: **champra**
shoveme

Subject: **Public Record**

Extra Copies:

Submit via email: **NO**

Pre Topic:

No specific pre topic given

Topic:

Notice of release of public records to data subjects; public employe personnel records

---

Instructions:

See Attached.

Drafting History:

Vers.	Drafted	Reviewed	Typed	Proofed	Submitted	Jacketed	Required
/?	kuesejt 04/03/2001	gilfokm 04/04/2001		_____ _____			
/1			pgreensl 04/04/2001	_____ _____	lrb_docadmin 04/04/2001		
/2	kuesejt 12/12/2001 kuesejt 12/13/2001	gilfokm 12/12/2001 gilfokm 12/13/2001	jfrantze 12/13/2001	_____ _____ _____ _____			

1/17 - 2/12 kmg 2/12 2/12

LRB-2119

Vers.	Drafted	Reviewed	Typed	Proofed	Submitted	Jacketed	Required
/3			kfollet 12/13/2001	_____ _____	lrb_docadmin 12/13/2001		
/4	kuesejt 01/11/2002	gilfokm 01/11/2002	pgreensl 01/11/2002	_____ _____	lrb_docadmin 01/11/2002		
/5	kuesejt 01/31/2002	gilfokm 01/31/2002	jfrantze 01/31/2002	_____ _____	lrb_docadmin 01/31/2002		
/6	kuesejt 02/04/2002	gilfokm 02/04/2002	jfrantze 02/05/2002	_____ _____	lrb_docadmin 02/05/2002		

FE Sent For:

<END>

2001 DRAFTING REQUEST

Bill

Received: **01/17/2001**

Received By: **kuesejt**

Wanted: **As time permits**

Identical to LRB:

For: **Jon Erpenbach (608) 266-6670**

By/Representing: **Julie Laundrie**

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

Drafter: **kuesejt**

May Contact:

Addl. Drafters: **champra**
shoveme

Subject: **Public Record**

Extra Copies:

Submit via email: **NO**

Pre Topic:

No specific pre topic given

Topic:

Notice of release of public records to data subjects; public employe personnel records

---

Instructions:

See Attached.

Drafting History:

Vers.	Drafted	Reviewed	Typed	Proofed	Submitted	Jacketed	Required
/?	kuesejt 04/03/2001	gilfokm 04/04/2001					
/1			pgreensl 04/04/2001		lrb_docadmin 04/04/2001		
/2	kuesejt 12/12/2001 kuesejt 12/13/2001	gilfokm 12/12/2001 gilfokm 12/13/2001	jfrantze 12/13/2001				

/6 - 2/4 KMG 2/5 Sell 2/5

Vers.	Drafted	Reviewed	Typed	Proofed	Submitted	Jacketed	Required
/3			kfollet 12/13/2001	_____ _____	lrb_docadmin 12/13/2001		
/4	kuesejt 01/11/2002	gilfokm 01/11/2002	pgreensl 01/11/2002	_____ _____	lrb_docadmin 01/11/2002		
/5	kuesejt 01/31/2002	gilfokm 01/31/2002	jfrantze 01/31/2002	_____ _____	lrb_docadmin 01/31/2002		

/1e kuesejt

FE Sent For: 2/4/02

<END>

2001 DRAFTING REQUEST

Bill

Received: **01/17/2001**

Received By: **kuesejt**

Wanted: **As time permits**

Identical to LRB:

For: **Jon Erpenbach (608) 266-6670**

By/Representing: **Julie Laundrie**

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

Drafter: **kuesejt**

May Contact:

Addl. Drafters: **champra**
shoveme

Subject: **Public Record**

Extra Copies:

Submit via email: **NO**

Pre Topic:

No specific pre topic given

Topic:

Notice of release of public records to data subjects; public employe personnel records

---

Instructions:

See Attached.

Drafting History:

Vers.	Drafted	Reviewed	Typed	Proofed	Submitted	Jacketed	Required
/?	kuesejt 04/03/2001	gilfokm 04/04/2001		_____ _____			
/1			pgreensl 04/04/2001	_____ _____	lrb_docadmin 04/04/2001		
/2	kuesejt 12/12/2001 kuesejt 12/13/2001	gilfokm 12/12/2001 gilfokm 12/13/2001	jfrantze 12/13/2001	_____ _____ _____ _____			

/5 - 1/31 kmg

1/31 1/31

Vers.	Drafted	Reviewed	Typed	Proofed	Submitted	Jacketed	Required
/3			kfollet 12/13/2001	_____ _____	lrb_docadmin 12/13/2001		
/4	kuesejt 01/11/2002	gilfokm 01/11/2002	pgreensl 01/11/2002	_____ _____	lrb_docadmin 01/11/2002		

FE Sent For:

<END>

LRB-2119

2001 DRAFTING REQUEST

Bill

Received: **01/17/2001**

Received By: **kuesejt**

Wanted: **As time permits**

Identical to LRB:

For: **Jon Erpenbach (608) 266-6670**

By/Representing: **Julie Laundrie**

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

Drafter: **kuesejt**

May Contact:

Addl. Drafters: **champra**
shoveme

Subject: **Public Record**

Extra Copies:

Submit via email: **NO**

Pre Topic:

No specific pre topic given

Topic:

Notice of release of public records to data subjects; public employe personnel records

---

Instructions:

See Attached.

Drafting History:

Vers.	Drafted	Reviewed	Typed	Proofed	Submitted	Jacketed	Required
/?	kuesejt 04/03/2001	gilfokm 04/04/2001		1/11			
/1			pgreensl 04/04/2001	PG/RS	lrb_docadmin 04/04/2001		
/2	kuesejt 12/12/2001 kuesejt 12/13/2001	gilfokm 12/12/2001 gilfokm 12/13/2001	jfrantze 12/13/2001 1/11 PS				

1/4-1/11 KMG

Vers.	Drafted	Reviewed	Typed	Proofed	Submitted	Jacketed	Required
/3			kfollet 12/13/2001	_____ _____	lrb_docadmin 12/13/2001		

FE Sent For:

<END>

LRB-2119

2001 DRAFTING REQUEST

Bill

Received: **01/17/2001**

Received By: **kuesejt**

Wanted: **As time permits**

Identical to LRB:

For: **Jon Erpenbach (608) 266-6670**

By/Representing: **Julie Laundrie**

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

Drafter: **kuesejt**

May Contact:

Addl. Drafters: **champra**
shoveme

Subject: **Public Record**

Extra Copies:

Submit via email: **NO**

Requester's email:

Pre Topic:

No specific pre topic given

Topic:

Notice of release of public records to data subjects; public employe personnel records

---

Instructions:

See Attached.

Drafting History:

Vers.	Drafted	Reviewed	Typed	Proofed	Submitted	Jacketed	Required
/?	kuesejt 04/03/2001	gilfokm 04/04/2001		_____ _____			
/1		12/12 kmg 12/13 kmg	pgreensl 04/04/2001	_____ _____	lrb_docadmin 04/04/2001		

12/12/13 12/13/13 12/13/13 12/13

DNSTE

LRB-2119

2001 DRAFTING REQUEST

Bill

Received: **01/17/2001**

Received By: **kuesejt**

Wanted: **As time permits**

Identical to LRB:

For: **Jon Erpenbach (608) 266-6670**

By/Representing: **Julie Laundrie**

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

Drafter: **kuesejt**

May Contact:

Alt. Drafters: **champra**
shoveme

Subject: **Public Record**

Extra Copies:

Pre Topic:

No specific pre topic given

Topic:

Notice of release of public records to data subjects; public employe personnel records

---

Instructions:

See Attached.

Drafting History:

Vers.	Drafted	Reviewed	Typed	Proofed	Submitted	Jacketed	Required
1?/1	kuesejt 4/3	1-4/kmg 1-4-01	4/4 PS	4/4 PS1 JF			

FE Sent For:

<END>

Kuesel, Jeffery

From: Laundrie, Julie
Sent: Wednesday, January 17, 2001 8:23 AM
To: Kuesel, Jeffery
Subject: FW: Open Records Legislation - Drafting Instructions

Hi Jeff;

Drafting instructions for a bill for Senator Erpenbach regarding changes to open records law as a result of the Wosnicki(sp?) Case - state employee records privacy. Let me know if you need more information or if you are giving to another drafter. Thank you very much and have a great day!

Julie

Open Records Legislation Draft...

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(1e) 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.

3. 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.

4. 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.

DNOTE

2001 – 2002 ~~LEGISLATURE~~

-2119/1

LRB ~~1477/1~~

JTK:kmg:jf

wanted by THU 4/5

~~2001 ASSEMBLY BILL 175~~

March 7, 2001 – Introduced by Representatives POWERS, HAHN, LA FAVE, KREIBICH, TOWNSEND, SYKORA and REYNOLDS, cosponsored by Senator ERPENBACH. Referred to Committee on Personal Privacy.

Gen. Cat.

AN ACT ***to amend*** 40.07 (1) (intro.), (2) and (3), 230.13 (1) (intro.) and 233.13 (intro.); and ***to create*** 19.32 (1w) and (2g), 19.356 and 19.36 (10) of the statutes; **relating to:** access to public employee personnel records and certain other 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 privacy or reputational interests of the subject individual that outweigh 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 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 and 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.

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 the officer's or agency's 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 may 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 these records or under the common law "balancing test."

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

SECTION 1. 19.32 (1w) and (2g) of the statutes are created to read:

19.32 **(1w)** "Public employee" means an individual who is employed by an authority, other than an individual holding an elective office.

(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. (1) Except as authorized in this section or as 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.

(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 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 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 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 occurs first.

(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 the 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 3. 19.36 (10) of the statutes is created to read:

19.36 **(10)** PUBLIC EMPLOYEE PERSONNEL RECORDS. Unless access is specifically authorized or required by statute, 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:

to a collective bargaining representative to the extent required to fulfill a duty to bargain or pursuant to

(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 ~~deny~~ withhold access to such records

(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 4. 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:

(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.

(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.

SECTION 5. 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:

SECTION 6. 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:

(END)

DRAFTER'S NOTE
FROM THE
LEGISLATIVE REFERENCE BUREAU

~~LRB-1477/1dn~~ -2119/1dn
JTK:kmg:jf

February 21, 2001

Senator Erpenbach: Erp b h
~~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.

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

DRAFTER'S NOTE
FROM THE
LEGISLATIVE REFERENCE BUREAU

LRB–2119/1dn
JTK:kmg:pg

April 4, 2001

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.

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

~~JTK:kmg:pg~~
~~LRB-2119/1~~

PROPOSAL

(Changes from LRB 2119/1 are highlighted)

2001 – 2002 LEGISLATURE

2001 BILL

AN ACT ***to amend*** 40.07 (1) (intro.), (2) and (3), 230.13 (1) (intro.) and 233.13 (intro.); and ***to create*** 19.32 (1w) and (2g), 19.356 and 19.36 (10) of the statutes; **relating to:** access to public employee personnel records and certain other 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 privacy or reputational interests of the subject individual that outweigh 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 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~~es 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 and 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. This bill is not intended to modify common law regarding the custodian's obligation to engage in the "balancing test." ~~However, the~~ This 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~~decides to provide access to a record involving the investigation of a public employee or records obtained pursuant to subpoena, search warrant or through grand jury or John doe proceedings ~~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 the officer's or agency's intent to release the record. If a subject individual notifies the officer or agency, within five 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 ten 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 may 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 to a collective bargaining representative to the extent required to fulfill a duty to bargain or pursuant to an applicable collective bargaining agreement. Affected records include personal medical records; ~~records containing~~ home addresses and telephone numbers, unless the ~~if an affected~~ employee authorizes ~~requests~~ the officer or agency to ~~withhold~~ provide access to that information; 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 specific employees, used by an authority for 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 these records or under the common law "balancing test."

We have requested that the marked language in the analysis be deleted. Although there is disagreement as to whether the comment regarding the Supreme Court decisions is accurate, there is agreement that this criticism of the state's highest court is unnecessary to the legislation and is better not included.
The added language is simply to confirm that there is no intent to change common law on the balancing test.
The other changes are intended to track the changes in the content of the bill.

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

SECTION 1. 19.32 (1w) and (2g) of the statutes are created to read:

19.32 **(1w)** "Public employee" means an individual who is employed by an authority, other than an individual holding an elective office, a local public official, or a state public official, and other than the highest ranking employee of any local governmental unit. Private sector employees whose records are being kept by an authority due to the employee's work on a public contract shall have the same rights and remedies under ss. 19.356 and 19.36(10), as public employees.

(1x) "Local public official" means an individual who holdsa local public office as defined in s. 19.42(7w) and who exercises substantial policy-making authority.

(1y) "State public official" means and individual who holds a state public office as defined in s. 19.42(13) and who exercises substantial policy-making authority.

(1z) "Local governmental unit" has the meaning given in s. 19.42(7u).

The purpose of these changes is to exclude the records of those elected and those who hold very high ranking office and exercise substantial policy-making authority, from coverage under these provisions.

The purpose of the reference to private sector employees is to treat the records of those working under public contracts the same as public employees.

(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. **(1)** Except as authorized in this section or as 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.

(2) (a) If an authority decides to permit access to a record regarding a public employee created or ~~maintained~~ kept by the authority ~~under s. 19.35 (1)~~ as a result of the authority's investigation into a disciplinary matter involving the public employee or possible violation by the public employee of a statute, ordinance, rule, regulation, or policy of the authority, the authority shall, before permitting access and within ~~72 hours~~ 3 business days 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~~ certified 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).

(b) If an authority decides to permit access to a record obtained by the authority through a subpoena, search warrant, or through grand jury or John Doe proceedings, the authority shall,

before permitting access and within 3 business days after making the decision to permit access, serve written notice of that decision on any record subject to whom that record pertains, either by certified mail 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).

(c) Subsections (b) and (c) do not apply to case files produced under ss. 106.54, 111.375 or 230.45.

An alternative to 19.356(2) a,b and c

(2) If an authority decides to permit access under s. 19.35 (1) to a record regarding a public employee created or kept by the authority as a result of the authority's investigation into a disciplinary matter involving the public employee or possible violation by the public employee of a statute, ordinance, rule, regulation, or policy of the authority, or any record obtained by the authority through a subpoena, search warrant, or through grand jury or John Doe proceedings, the authority shall, before permitting access and within 3 business days after making the decision to permit access, serve written notice of that decision on any record subject to whom that record pertains, either by certified mail 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). This subsection (2) does not apply to case files produced under ss. 106.54, 111.375 and 230.45.

The purpose of these changes is:

1. To limit the "woznicki" notice and review rights to those situations in which the record involves the investigation of a public employee or where the authority

obtained the records through processes that generally involve a recognition of privacy rights.

2. To provide for notice by the less expensive certified rather than registered mail and that timelines refer to business rather than calendar days.

3. To exclude certain state agencies from the Woznicki requirements.

SECTION 2 BILL

(3) Within 5 business days 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 business days 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~~requester may intervene in the action as a matter of right..

(5) An authority shall not provide access to a requested record within 12 business 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 occurs first.

(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).~~ We believe this section should be deleted from the bill. The balancing test is set forth in the case law and this bill is not intended to change that in any manner. (see addition to drafting notes.)

~~(7)~~ The court shall not grant any request by a requester to delay the proceedings. The court shall issue a decision within 10 business days after the filing of the

SECTION 2 BILL

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)~~ (7)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 3. 19.36 (10) of the statutes is created to read:

19.36 **(10)** PUBLIC EMPLOYEE PERSONNEL RECORDS. Unless access is specifically authorized or required by statute, 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 to a collective bargaining representative to the extent required to fulfill a duty to bargain under ch. 111, or pursuant to a collective bargaining agreement ~~under ch. 111~~:

The intent of this change is to make it clear that this provision does not change current law under statute or common law, which requires an employer to provide information to an employee or to a collective bargaining representative.

(a) Personal medical records of a public employee.

(b) ~~Records containing the~~ The home address or telephone number of a public employee, ~~if~~ unless the employee ~~requests~~ authorizes the authority to ~~withhold~~ provide access to such records.

(c) Records relating to the active 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 relating to specific employees used by an authority for staff management planning, including performance evaluations, judgments or recommendations

SECTION 3 BILL

concerning future salary adjustments or other wage treatments, management bonus plans, promotions, job assignments, or other comments or ratings relating to public employees.

These changes are probably self-explantory.Home addresses and telephone numbers are exempt from disclosure unless there is authorization. Only active investigations are exempt from disclosure. Section f is intended to cover records relating to specific employees, rather than general planning documents.

SECTION 4. 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:

(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.

(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.

SECTION 5. 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:

SECTION 6. 233.13 (intro.) of the statutes is amended to read:

SECTION 6 BILL

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:

(END)