



State of Wisconsin  
2005 - 2006 LEGISLATURE

LRB-1965/2

RLR:.....

PI

In 10/15/05  
Wanted by 11/10/05

gs

PRELIMINARY DRAFT - NOT READY FOR INTRODUCTION

T-ref  
SA

Gen cat

RMR

D-Note

1 AN ACT ...; relating to: health care quality review records.

**Analysis by the Legislative Reference Bureau**

This is a preliminary draft. An analysis will be provided in a later version.

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

2 SECTION 1. 146.38 of the statutes is repealed and recreated to read:

3 **146.38 Health care quality review; confidentiality of information. (1)**

4 In this section:

5 (a) "Adverse action" means any action or recommendation to reduce, restrict,  
6 suspend, deny, revoke, or fail to renew any of the following:

7 1. A health care entity's clinical privileges or clinical practice authority at a  
8 hospital or other health care entity, or a health care entity's membership in a medical  
9 staff.

\*\*\*NOTE: I dropped "professional certification" under subd. 1 because it is covered  
under subd. 3. ✓

\*\*\*\*NOTE: "Medical staff" is not defined in ch. 146. (It is defined and used elsewhere in the statutes to cover health care providers in the corrections system.) Would you like to include the definition of "medical staff" that is provided in HFS 125, or should "medical staff" cover medical personnel in other settings besides hospitals? 124.02(10) ✓

1 2. A health care entity's participation on a provider panel. ✓

\*\*\*\*NOTE: The term "provider panel" is not used in the statutes or the administrative code. Is a provider panel the group of health care providers whose services are covered by a health insurance plan or does it mean something more? ✓

2 3. The accreditation, licensure, or certification of a health care entity.

3 (b) "Health care entity" means any of the following: ✓

4 1. A health care provider, as defined in s. 146.81 (1), or other person who  
5 provides health care services, including mental health services.

6 2. A person who is licensed to arrange for the provision of health care services  
7 to an individual.

\*\*\*\*NOTE: It is my understanding that subdivision 2. is intended to cover home health agencies. Does it cover anyone else, and if not why not specify home health agencies? ✓

8 3. A person who furnishes the services of a person under subd. 1. to another  
9 person under subd. 1. or 2.

\*\*\*\*NOTE: Do you want to specify that persons providing health care services under a regulated training program (i.e. residents) are health care entities? ✓

\*\*\*\*NOTE: It is my understanding that you intend the definition of "health care entity" to include ambulance service providers, emergency medical technicians, and first responders even though this draft does not explicitly include them as under current law ss. 146.37 (1) (a) and 146.38 (1) (b). ✓

10 (c) "Records" includes images, data, communications in any format, and  
11 aggregations or compilations of pre-existing material.

12 (2) Except as provided in subs. (6), (7), and (8), records created or collected in  
13 preparation for or as part of an evaluation, review, study, or assessment of any of the  
14 following that is conducted by one or more health care entities, an employee or agent  
15 of a health care entity, a fixed or ad hoc committee of one or more health care entities,  
16 or another person to whom the health care entity has granted authority to conduct

1 the evaluation, review, study, or assessment, including records of any analysis,  
2 conclusions, or recommendations of persons conducting or participating in the  
3 evaluation, review, study, or assessment are confidential and privileged and are not  
4 subject to discovery or subpoena and are not admissible as evidence in any civil or  
5 criminal action or administrative proceeding:

6 a. The qualifications of a health care entity.

7 b. The fitness or competence of a health care entity.

8 c. The performance or conduct of a health care entity.

9 d. The quality of care provided by a health care entity.

10 e. Morbidity or mortality among patients cared for by a health care entity.

11 f. The cost-effectiveness of care provided by a health care entity.

12 g. The appropriateness of care provided by a health care ~~provider~~ entity

13 h. An application or reapplication for professional credentials, staff privileges,  
14 or accreditation of a health care entity.

15 i. A health care entity's compliance with regulatory, legal or ethical  
16 requirements or standards.

\*\*\*NOTE: Subsection (2) (intro.) provides that the health care entity may be the  
evaluator -- is that ok? ✓

17 (3) Except as provided in subs. (6), (7), and (8), information contained in records  
18 <sup>described</sup> under sub. (2) is not subject to discovery or subpoena and is not admissible as  
19 evidence in any civil or criminal action or administrative proceeding. ✓

20 (4) Except as provided in subs. (6), (7), and (8), a person who conducts or  
21 participates in an evaluation, review, study, or assessment <sup>described</sup> under sub. (2) may not  
22 disclose whether an evaluation, review, study, or assessment was conducted or

1 disclose action or lack of action taken as a consequence of the evaluation, review,  
2 study, or assessment.

3 (5) The protections <sup>afforded to records and information</sup> provided under subs. (2), (3), and (4) are not waived by  
4 either authorized or unauthorized disclosure of records or information.

5 (6) A person may disclose information in a record <sup>described</sup> created or collected under sub.  
6 (2) as necessary to comply with a federal or state law requirement for reporting.

\*\*\*\*NOTE: Should a person be able to produce a record under this exception, or just  
the information contained in the record? ✓

7 (7) If a person to whom a health care entity has granted authority to conduct  
8 an evaluation, review, study, or assessment <sup>described</sup> under sub. (2) takes an adverse action  
9 against the health care entity or notifies the health care entity of a proposed adverse  
10 action, the person shall, upon request by the health care entity, disclose to the health  
11 care entity any records in the person's possession relating to the evaluation, review,  
12 study, or assessment. The person may at any time disclose to a health care entity  
13 records relating to a proposed adverse action by the person against a health care  
14 entity.

15 (8) If the health care entity that authorized an evaluation, review, study, or  
16 assessment <sup>described</sup> under sub. (2) provides written authorization for disclosure of records  
17 created or collected in preparation for or as part of the evaluation, review, study, or  
18 assessment, the records may be disclosed to the extent allowed in the written  
19 authorization.

20 (9) Subsection <sup>5</sup> (2) <sup>and (3)</sup> does not apply to records <sup>or information</sup> maintained by or for a health care  
21 entity for the particular purpose of diagnosing, treating, or documenting care  
22 provided to an individual patient. ✓



**DRAFTER'S NOTE**  
**FROM THE**  
**LEGISLATIVE REFERENCE BUREAU**

LRB-1965/P1dn

RLR:}.....

gjs

Representative Underheim:

Attached is the draft on confidentiality of health care quality review records for the Wisconsin Hospital Association (WHA). The draft is different from the WHA proposed language because I placed the substance of the draft in requirements and prohibitions rather than definitions. If this draft does not accomplish what WHA desires, I would be happy to work on it further, however I would like to work from this draft, rather than the language supplied by WHA, because I believe it is clearer.

This draft amends s. 146.38 but not 146.37, because many of the changes to s. 146.37 requested by WHA are contingent upon changes in terminology made in 146.38. Once you and WHA are satisfied with the treatment of 146.38, I can incorporate the changes to s. 146.37. into

I could not determine from the WHA proposed language whether and to what extent the confidentiality provisions should apply to records created by government agencies, such as DHFS. This draft does not affect records created by government agencies. ✓

I do not understand the provisions in the WHA draft concerning "public reporting activity," "public reporting entities," and "public reporting documents." Apparently public reporting activity refers to projects conducted by the Joint Commission on Accreditation of Healthcare Organizations (JCAHO), the Centers for Medicare and Medicaid Services (CMS), and others to communicate quality and cost information about hospitals to consumers. However, the definitions in the draft apply equally to mandated reporting under ch. 153. If the WHA's intent is to allow an exception to confidentiality for the purpose of reporting projects such as those conducted by JCAHO and CMS, isn't it sufficient to give a health care entity power to control release of records? ✓ ←

Robin Ryan  
Legislative Attorney  
Phone: (608) 261-6927  
E-mail: robin.ryan@legis.state.wi.us

**DRAFTER'S NOTE**  
**FROM THE**  
**LEGISLATIVE REFERENCE BUREAU**

LRB-1965/P1dn

RLR:cjs:rs

November 8, 2005

Representative Underheim:

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Robin Ryan  
Legislative Attorney  
Phone: (608) 261-6927  
E-mail: robin.ryan@legis.state.wi.us

## Ryan, Robin

---

**From:** Sweet, Richard  
**Sent:** Tuesday, November 22, 2005 3:57 PM  
**To:** Ryan, Robin  
**Subject:** FW: Draft review: LRB 05-1965/P1 Topic: Health care quality review

**Attachments:** Peer Review draft 110905.doc; Peer Review draft 110905 no redlines.doc; August 2004 Kahler draft.pdf; Work Group January 2005 suggested revisions sent to PK.doc



Peer Review draft 110905.doc (...  
Peer Review draft 110905 no re...  
August 2004 Kahler draft.pdf (...  
Work Group January 2005 sugges.

-----Original Message-----

From: Thorson, Randy  
Sent: Tuesday, November 22, 2005 8:51 AM  
To: Sweet, Richard  
Subject: FW: Draft review: LRB 05-1965/P1 Topic: Health care quality review

Dick,

This is the heart of the matter.

RAT

-----Original Message-----

From: Stanford, Matthew [mailto:mstanford@wha.org]  
Sent: Wednesday, November 09, 2005 4:53 PM  
To: Thorson, Randy  
Cc: Borgerding, Eric; Leitch, Laura  
Subject: RE: Draft review: LRB 05-1965/P1 Topic: Health care quality review

Randy,

The document "Peer Review draft 110905" is attached and is the draft our attorney work group would like to see drafted by LRB.

The base language in the "Peer Review draft 110905" document is the language proposed in Pam Kahler's draft of August 2004. The redlined text in the document is amendments to Kahler's draft that the work group proposed and sent back to Pam Kahler in January 2005. Finally, the yellow highlighted redlines in the document are minor changes made subsequent to January 2005 to make the findings and purpose section non-statutory language rather than statutory language and to explicitly clarify that a public reporting entity may disclose quality review records as is contemplated in Par. (1)(d)1. and 2. A copy of the draft ("Peer Review draft 110905 no redlines") without redlines is also attached if that is helpful to you.

I think it might also be helpful to review the process of how we got this point. In the fall of 2003 WHA convened a group of approximately 20 health care attorneys from around Wisconsin for the purpose of modernizing and updating Wisconsin's peer review protections. The group met four times between November 2003 and January 2004 to revise 146.38, Wis. Stat. During and between these meetings, the group examined other peer review statutes and model legislation and drafted and exchanged proposed language to clearly address specific peer review and quality improvement situations group members had encountered. Due to court decisions that have narrowly interpreted peer review protections under 146.38, one goal of the group was to craft language that would clearly encompass all types and facets of peer review and quality improvement activity. In February 2004, the group's initial draft was submitted to Pam Kahler for drafting.



In August 2004, WHA received Kahler's preliminary draft statutory language (attached as "August 2004 Kahler draft"). This draft generally followed the form that the group originally proposed, but Pam suggested a few changes. We brought those changes to a meeting of the group for review, and the group was generally supportive of the changes and suggestions made in the draft but also suggested some alternative language. The main remaining sticking point seemed to be the removal of the findings and purpose section in Kahler's draft. We took the group's proposals back to Pam in January 2005. A copy of the document and cover letter to Pam are attached as "Work Group January 2005 suggested revisions sent to PK."

In April 2005, WHA was informed that Pam Kahler would no longer be working on the draft and that the draft would be transferred to Robin Ryan. WHA had discussions with Robin in April at which time it appeared that she would be taking a fresh look at the draft.

Yesterday, your office received Robin's version of the draft. As discussed since then, the attorney group's work has been completely reorganized and rewritten in this latest draft. In some cases, certain provisions such as the provisions for public reporting have been completely eliminated. The attorney group was very particular in the language that it chose when drafting the initial language and the amendments to the first LRB draft in order to clearly and particularly address certain peer review and quality improvement situations. Ultimately, we are concerned that attempts to marry the group's particularized language with Robin's reorganized and simplified draft will result in a draft that is less clear than the original Pam Kahler draft or that leaves out or muddies situations which the group desired to clearly address.

As such we believe that the best course of action is to request a third LRB draft using the document "Peer Review draft 110905."

I recognize that this is a lot of information, so please feel free to email or call me if you have any questions.

Matthew

<<Peer Review draft 110905.doc>> <<Peer Review draft 110905 no redlines.doc>> <<August 2004 Kahler draft.pdf>> <<Work Group January 2005 suggested revisions sent to PK.doc>>

Matthew Stanford  
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Wisconsin Hospital Association, Inc.  
PO Box 259038,  
5510 Research Park Drive  
Madison, WI 53725-9038  
608-274-1820  
mstanford@wha.org

## Ryan, Robin

---

**From:** Sweet, Richard  
**Sent:** Tuesday, November 22, 2005 3:57 PM  
**To:** Ryan, Robin  
**Subject:** FW: Draft review: LRB 05-1965/P1 Topic: Health care quality review

Robin,

Randy Thorson from Rep. Underheim's office asked me to forward you this (and another e-mail that will be coming momentarily). He asked me to work with you on this.

Do you want to take a look at the e-mails and maybe we can get together to discuss them after Thanksgiving?

Thanks.

Dick

-----Original Message-----

**From:** Thorson, Randy  
**Sent:** Tuesday, November 22, 2005 8:51 AM  
**To:** Sweet, Richard  
**Subject:** FW: Draft review: LRB 05-1965/P1 Topic: Health care quality review

Dick,

This is FYI, so you understand where they are coming from.

RAT

-----Original Message-----

**From:** Stanford, Matthew [mailto:mstanford@wha.org]  
**Sent:** Tuesday, November 08, 2005 4:24 PM  
**To:** Thorson, Randy  
**Subject:** Re: Draft review: LRB 05-1965/P1 Topic: Health care quality review

Randy,

We have had a chance to look through the quality review draft that Robin Ryan sent to you today. Unfortunately, this draft is pretty much unrecognizable from the language that we had proposed. Because the draft is completely different in form and function from what we proposed, a quick analysis of the differences can't really be listed at this time, but one major provision, that regarding public reporting, appears to be completely absent from the draft.

WHA staff will be discussing next steps, including the possibility of using an earlier draft by Pam Kahler that reflected our intent and required only minor amendments, and I will get back to you with more detail hopefully tomorrow. Please call or email me if you have questions.

Matthew

Matthew Stanford  
Associate Counsel  
Wisconsin Hospital Association, Inc.  
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5510 Research Park Drive  
Madison, WI 53725-9038  
608-274-1820  
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12/19

Meeting with Dick Sweet

(1)  
(2)Add all "records" to def.  
leave out proceedings but  
ask about it.

(3)

add reporting to intro (b)

(4)

make (d) & (e) sep. par. under  
(a)

(5)

Exceptions @ have the treatment record  
to Confidentiality (b) need the pub. rpt. doc

(6)

Permitted disclosure just an exception  
under (3) - use my sub. (8)

(7)

Add liberal construction statement

(8)

Note - explaining how public records  
covered - ~~records~~ reporting  
covered by contract  
CMS } covered by fed state  
153 } law as exception

(9)

Add provision (maybe under sub<sup>(a)</sup>)  
that ch. 19 doesn't apply  
to records  
records received by a gov.  
entity not sub. 19 -  
so clear that if JACO  
renews ch. 19 excep  
doesn't apply!

10/19 (cont)

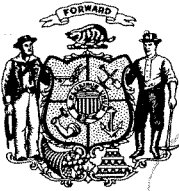
my notes mishap in LLC  
maybe we then lang.

proceed panel

Dick suggests  
HCE's particip in a  
deferred network plan  
a deferred in 6.609

(6) Dick thinks record or information





TODAY

State of Wisconsin  
2005 - 2006 LEGISLATURE

P2  
LRB-1965/P1  
RLR:cjs:rs  
8 days

Wanted Jan B for as  
son as child car credit

PRELIMINARY DRAFT - NOT READY FOR INTRODUCTION

SA ✓  
+ - reb ✓  
inter + - reb ✓

Regen cat

RMNR  
D-N

1 AN ACT to repeal and recreate 146.38 of the statutes; relating to: health care  
2 quality review records.

**Analysis by the Legislative Reference Bureau**

This is a preliminary draft. An analysis will be provided in a later version.

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

3 SECTION 1. 146.38 of the statutes is repealed and recreated to read:  
4 **146.38 Health care quality review; confidentiality of information. (1)**

5 In this section: Definitions. CS

6 (a) "Adverse action" means any action or recommendation to reduce, restrict,  
7 suspend, deny, revoke, or fail to renew any of the following:

8 1. A health care entity's clinical privileges or clinical practice authority at a  
9 hospital or other health care entity, or a health care entity's membership in a medical  
10 staff.

\*\*\*NOTE: I dropped "professional certification" under subd. 1 because it is covered under subd. 3.

\*\*\*NOTE: "Medical staff" is not defined in ch. 146. (It is defined and used elsewhere in the statutes to cover health care providers in the corrections system.) Would you like to include the definition of "medical staff" that is provided in HFS 124.02 (10), or should "medical staff" cover medical personnel in other settings besides hospitals?

1 2. A health care entity's participation on a provider panel.

\*\*\*NOTE: The term "provider panel" is not used in the statutes or the administrative code. Is a provider panel the group of health care providers whose services are covered by a health insurance plan or does it mean something more?

JNS 2-2  
2

3. The accreditation, licensure, or certification of a health care entity.

(3) (c) (b) "Health care entity" means any of the following:

4 1. A health care provider, as defined in s. 146.81 (1), or other person who  
5 provides health care services, including mental health services.

6 2. A person who is licensed to arrange for the provision of health care services  
7 to an individual.

\*\*\*NOTE: It is my understanding that subdivision 2. is intended to cover home health agencies. Does it cover anyone else, and, if not, why not specify home health agencies?

8 3. A person who furnishes the services of a person under subd. 1. to another  
9 person under subd. 1. or 2.

\*\*\*NOTE: Do you want to specify that persons providing health care services under a regulated training program (i.e. residents) are health care entities?

\*\*\*NOTE: It is my understanding that you intend the definition of "health care entity" to include ambulance service providers, emergency medical technicians, and first responders even though this draft does not explicitly include them as under current law ss. 146.37 (1) (a) and 146.38 (1) (b).

JNS 2-9

10 (c) "Records" includes images, data, communications in any format, and  
11 aggregations or compilations of preexisting material.

12 (2) Except as provided in subs. (6), (7), and (8), records created or collected in  
13 preparation for or as part of an evaluation, review, study, or assessment of any of the  
14 following that is conducted by one or more health care entities, an employee or agent  
15 of a health care entity, a fixed or ad hoc committee of one or more health care entities,

1 or another person to whom the health care entity has granted authority to conduct  
2 the evaluation, review, study, or assessment, including records of any analysis,  
3 conclusions, or recommendations of persons conducting or participating in the  
4 evaluation, review, study, or assessment are confidential and privileged and are not  
5 subject to discovery or subpoena and are not admissible as evidence in any civil or  
6 criminal action or administrative proceeding:

- 7 a. The qualifications of a health care entity.
- 8 b. The fitness or competence of a health care entity.
- 9 c. The performance or conduct of a health care entity.
- 10 d. The quality of care provided by a health care entity.
- 11 e. Morbidity or mortality among patients cared for by a health care entity.
- 12 f. The cost-effectiveness of care provided by a health care entity.
- 13 g. The appropriateness of care provided by a health care entity.
- 14 h. An application or reapplication for professional credentials, staff privileges,  
15 or accreditation of a health care entity.
- 16 i. A health care entity's compliance with regulatory, legal, or ethical  
17 requirements or standards.

\*\*\*\*NOTE: Subsection (2) (intro.) provides that the health care entity may be the  
evaluator -- is that ok?

18 **(3)** Except as provided in subs. (6), (7), and (8), information contained in records  
19 described under sub. (2) is not subject to discovery or subpoena and is not admissible  
20 as evidence in any civil or criminal action or administrative proceeding.

21 **(4)** Except as provided in subs. (6), (7), and (8), a person who conducts or  
22 participates in an evaluation, review, study, or assessment described under sub. (2)  
23 may not disclose whether an evaluation, review, study, or assessment was conducted

1 or disclose action or lack of action taken as a consequence of the evaluation, review,  
2 study, or assessment.

3 (5) The protections afforded to records and information under subs. (2), (3), and  
4 (4) are not waived by either authorized or unauthorized disclosure of records or  
5 information.

6 (6) A person may disclose information in a record described under sub. (2) as  
7 necessary to comply with a federal or state law requirement for reporting.

\*\*\*\*NOTE: Should a person be able to produce a record under this exception, or just  
the information contained in the record?

8 (7) If a person to whom a health care entity has granted authority to conduct  
9 an evaluation, review, study, or assessment described under sub. (2) takes an adverse  
10 action against the health care entity or notifies the health care entity of a proposed  
11 adverse action, the person shall, upon request by the health care entity, disclose to  
12 the health care entity any records in the person's possession relating to the  
13 evaluation, review, study, or assessment. The person may at any time disclose to a  
14 health care entity records relating to a proposed adverse action by the person against  
15 a health care entity.

16 (8) If the health care entity that authorized an evaluation, review, study, or  
17 assessment described under sub. (2) provides written authorization for disclosure of  
18 records created or collected in preparation for or as part of the evaluation, review,  
19 study, or assessment, the records may be disclosed to the extent allowed in the  
20 written authorization.

21 (9) Subsections (2) and (3) do not apply to records or information maintained  
22 by or for a health care entity for the particular purpose of diagnosing, treating, or  
23 documenting care provided to an individual patient.



1           **(10)** Subsections (2) and (3) do not apply to records or information collected for  
2           an evaluation, review, study, or assessment that are available from a source other  
3           than the health care entity that conducted or authorized the evaluation, review,  
4           study, or assessment.

5

**(END)**

2005-2006 DRAFTING INSERT  
FROM THE  
LEGISLATIVE REFERENCE BUREAU

LRB-1965/P2ins  
RLR:.....

**Ins 2-2:**

(b) "Evaluation, review, study or assessment" includes...<sup>5</sup> <sup>or</sup>

\*\*\*NOTE: I do not think it is necessary, but we could add a clarification stating that an "evaluation, review, study, or assessment" includes any continuous, periodic, or single data collection, study, review, investigation, recommendation, corrective or other action or process language from WHA's definition of quality review activity.

**Ins 2-9:**

(d) "Quality review" means an evaluation, review, study, or assessment conducted for any of the following purposes:

1. To maintain or improve the quality of care or those services having an impact on care.
2. To reduce morbidity or mortality.
3. To pursue, enforce, or improve standards of qualification, competence, conduct, or performance.
4. To maintain or advance the appropriate or cost-effective use of health care services and resources.
5. To pursue compliance with applicable legal, ethical, or behavioral standards.
6. To pursue compliance with credentialing, accreditation, or regulatory activities, requirements, or standards, including periodic performance reviews and related activities for the Joint Commission on Accreditation of Healthcare Organizations.

\*\*\*NOTE: how does one pursue compliance with an activity?

7. To credential, or approve the credentialing of, health care entities.

8. To address the health or performance of individuals who are health care entities.

\*\*\*\*NOTE: What does it mean for an evaluator/review to "address" the health of an individual in the context of performing a review?

9. To measure progress toward or compliance with goals and standards used to further the purposes described in subd. 1. to 8., such as through quality improvement studies, morbidity and mortality studies, or utilization management studies.

\*\*\*\*NOTE: What does 9. add that is not covered by 1. to 8.? A study to determine whether an entity is making progress in improving care is a study for the purpose of improving care.

\*\*\*\*NOTE: This draft deletes the subjects of review listed in the /P1 and instead uses the purposes language from the WHA draft. I liked the concrete subject areas in /P1 better than purposes because they are less subjective. If you use a list of subjects rather than purposes, then we could make the "structure, process, and outcome of health care" covered subjects. (Is structure, the structure of the health care entity? Are processes those used by the health care entity to deliver care?)

delete  
+  
space

(e) "Records" includes, regardless of the type of communications medium or form, including oral communications, and whether in statistical form or otherwise, minutes, files, notes, reports, statements, memoranda, data bases, findings work product, and images.

close up

\*\*\*\*NOTE: This definition of records is from the first part of WHA's definition of "quality review records," except I removed "proceedings" from the definition, because I don't see how a proceeding can be a record. (Does WHA mean the minutes or record of the proceeding, not the proceeding itself?)

that

The potential downside of listing items to be included in a definition is that a court will construe the list as all-inclusive regardless of whether the statute says "includes" rather than "means." Therefore I think it is better to limit the list. I used a more limited list in the /P1.

might

(f) "State agency" means a department, board, examining board, affiliated credentialing board, commission, independent agency, council, or office in the executive branch of state government.

\*\*\*\*NOTE: This definition is for "state agency" as used in sub. (2) (a) (intro.), to clarify the types of state agencies that may not compel disclosure. It will also apply to sub. (2) (a) 1.

✓

(2) CONFIDENTIALITY AND PRIVILEGE. (a) Except as provided in sub. (3), all of the following are confidential and privileged; are not subject to discovery, subpoena, or any other means of legal compulsion requiring release or permitting inspection, including compulsion by a state agency; and are not admissible as evidence in any civil, criminal, or other judicial or administrative proceeding:

1. Records and information contained in records that are created or collected in preparation for or as part of a quality review that is conducted by the health care entity that is the subject of the review, either alone or with another health care entity, an employee or agent of the health care entity or entities, a fixed or ad hoc committee of the health care entity or entities, or a person to whom the health care entity or entities has granted authority to conduct the quality review, including records of any analysis, conclusions, or recommendations of persons conducting or participating in the quality review. ✓

2. Records and information contained in records that are created or collected in preparation for or as part of a quality review that is conducted by a state agency at the request of the health care entity that is the subject of the review. ✓

3. Records and information contained in records concerning a health care entity and relating to a quality review purpose under sub. (1) (d) 1. to 9. that are reported to the health care entity or to a person the health care entity has granted authority to conduct quality reviews. ✓

4. A request for records or information made as part of a quality review described under <sup>subd.</sup> 1. or 2. by a person conducting the review.

5. Information related to any oversight, monitoring, corrective action, or other action taken in response to a quality review described under subd. 1. or 2.

subds.

6. The product of aggregating or reorganizing records under sub. 1. to 5. that are voluntarily disclosed by a health care entity for the purpose of aggregation or reorganization.

(b) A person who conducts or participates in a quality review described under par. (a) 1. or 2. may not disclose whether the quality review was conducted or disclose action or lack of action taken as a consequence of the quality review.

(c) The confidentiality and privilege afforded to records and information under par. (a) is not waived by unauthorized or authorized disclosure of records or information. A person who receives records or information under par. (a) 1. to 6. may not further disclose them unless permitted to do so under sub. (3).

(d) Records under par. (a) 2. are not subject to inspection or copying under s.

19.35 (1).

the records or information

\*\*\*\*NOTE: What if the subject of a review is a government entity, for example a county mental health complex or county nursing home? Should all the confidentiality provisions and the exception to s. 19.35 (1) apply?

(3) EXCEPTIONS TO CONFIDENTIALITY AND PRIVILEGE.

no 1

(a) Subsection (2) does not apply to records or information maintained by or for a health care entity for the particular purpose of diagnosing, treating, or documenting care provided to an individual patient.

(b) A person mandated by Wisconsin or federal law to report may disclose a record or information from a record that is confidential and privileged under sub. (2) to make the mandated report.

\*\*\*\*NOTE: This exception allows disclosure of the record, not just the information in it is that ok? The exception allows disclosure, but does not make the disclosed record or information admissible in a court or administrative proceeding. Are there any instances in which an exception to inadmissibility is necessary?

em dash

(c) If the person who conducted a quality review described under sub. (2) (a) 1. takes an adverse action against a health care entity that is a subject of the review

or notifies the health care entity of a proposed adverse action, the person shall, upon request by the health care entity, disclose to the health care entity any records in the person's possession relating to the quality review. The person may at any time disclose to a health care entity records relating to a proposed adverse action by the person against a health care entity. Records<sup>e</sup> relating to the adverse action are admissible in any criminal, civil, or other judicial or administrative proceeding in which the health care entity contests the adverse action.

(e) If the health care entity that is the subject of records or information described under sub. (2) (a) provides written authorization for disclosure of the records, the records may be disclosed to the extent allowed in the written authorization.

(4) This section shall be liberally construed in favor of identifying records and information as confidential, privileged, and inadmissible as evidence.

\*\*\*NOTE: I added inadmissibility here - does it help?

dash

or information

or information

CONSTRUCTION, CS

**DRAFTER'S NOTE**  
**FROM THE**  
**LEGISLATIVE REFERENCE BUREAU**

LRB-1965/P2dn

RLR: /: : : :  
/

gjs

Public Reporting Activity <sup>underline and change to a period</sup> (P) The main concept behind public reporting activity provisions in the WHA draft seems to be that when a health care entity or reviewer provides quality review records or information to a 3rd party to aggregate or organize the records or information, the records or information do not lose their protected status, and the product of the aggregation or organization is also protected. Rather than labelling this as a separate concept, the bill specifies that records and information do not lose their protected status when disclosed and also specifies that the product of aggregation or organization is itself protected. Each health care entity that contributes information to a public reporting entity has to authorize disclosure of any report on the aggregated information. I'm not sure if WHA wants to require each health care entity to provide authorization, but I think the WHA draft requires such authorization, because the exception under the definition of quality review records for public reporting documents requires that such documents have been presented with "proper authority."

Permitted disclosure <sup>underline and period</sup> (P) The main function of the permitted disclosure provisions in the WHA draft is to require that if a reviewer is not independent of a health care entity, the reviewer must obtain written authorization from the health care entity before making any disclosure of quality review records or information concerning the health care entity that is not mandated by law (or required under one of the of the other exceptions to confidentiality). The WHA draft lists instances in which such a reviewer may disclose quality review records upon receiving written authorization. It is not necessary to list the scenarios in the bill, because the health care entity can control the purposes for which information may be released in its authorization. This bill simply provides as an exception to confidentiality, that if a person has written authorization from a health care entity, it may disclose records and information concerning the health care entity.

Application to government agencies <sup>underline and period</sup> (P)

I took regulatory and licensing agencies out of the definition of quality review entity so that the draft does not cover licensing and investigatory functions of the Department of Health and Family Services or the Department of Regulation and Licensing and its examining boards.

I added a provision specifying that if state agency conducts a review at the request of a health care entity, records related to the review are confidential and are not subject to inspection and copying as public records

Quality review records I think this draft covers all of the components of the definition of quality review records in the WHA draft (items a. through i. in the WHA draft)

- a. is covered in sub. 2 (a) 1. and 2.
- b. reported or presented records are covered under sub. (2) (a) 3.
- c. anything requested and collected is covered as collected under sub. (2) (a) 1. and 2. The actual request is covered under sub. (2) (a) 4.
- d. is covered under sub. (2) (a) 1. and 2. because such records are created or collected by a reviewer in the context of a review.
- e. is covered under sub. (2) (a) 1. and 2.
- f. sub. (2) (c) provides that records don't lose protected status if shared
- g. is covered under sub. (2) (a) 6. see note on public reporting
- i. is covered under sub. (2) (a) 5.



Confidentiality provisions

I do not understand the need to restate in WHA's (3) (a) 3. that the protections under par. (a) apply in any criminal, civil, or other judicial or administrative proceeding. What is the concern about different treatment of confidentiality and privilege?

Quality review entity definition

I didn't separately define the quality review entity, because I think whether an entity is a quality review entity depends in part on who it is reviewing.

The WHA definition covers reviews conducted by persons who have no connection to a health care entity and act independently of the health care entity. For example, if a professor or consumer organization conducts a study of resident satisfaction at a nursing home by sending surveys to all the residents, under the WHA bill the information the residents send to the reviewer is confidential, cannot be published or shared without the permission of the nursing home, and cannot be used in any court proceedings. Is this an intended result? Is one of WHA's goals to assure that reviews conducted by an employee or agent of a health care entity are covered regardless of whether the the health care entity formally authorizes the review I think this is covered in my language. (Also, I think that defining a quality review by the subject of the review rather than the purpose would help, because then the motivation of the reviewer is not relevant.)

Adverse action and health care entity

no B

restatement

of the idea

em-dash

em dash



I have not had time to revisit the definitions of "adverse action" and "health care entity" in light of Matthew's notes and therefore have made no changes from the /P1. I will review the definitions and comments before our next meeting.

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**DRAFTER'S NOTE**  
**FROM THE**  
**LEGISLATIVE REFERENCE BUREAU**

LRB-1965/P2dn  
RLR:cjs:ch

January 4, 2006

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