



Wisconsin Legislative Council

RULES CLEARINGHOUSE

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CLEARINGHOUSE RULE 23-049

Comments

[NOTE: All citations to “Manual” in the comments below are to the Administrative Rules Procedures Manual, prepared by the Legislative Council Staff and the Legislative Reference Bureau, dated November 2020.]

1. Statutory Authority

a. Proposed s. NR 854.11 establishes requirements and considerations relating to open records requests for certain records associated with applications under proposed ch. NR 854. It appears that this provision generally seeks to implement s. 281.346 (9) (e), Stats. This statute provides that certain records received by the department are “public record[s] as provided in subch. II of ch. 19” while also providing that “any record may be treated as confidential upon a showing to the secretary that the record or information is entitled to protection as a trade secret...or upon a determination by the department that domestic security concerns warrant confidential treatment”.

As indicated above, s. 281.346 (9) (e), Stats., generally authorizes the department to restrict access to certain records in a manner that would not otherwise be permitted under the Public Records Law. It appears that the department has recognized this, as various provisions within proposed s. NR 854.11 deviate from the provisions of subch. II of ch. 19, Stats. The department should consider providing further information within its explanation of department authority to indicate why these deviations may be necessary for determining whether confidential treatment of a record is warranted. The following deviations should be evaluated to determine their necessity or to provide further information regarding their justification:

- (1) Proposed s. NR 854.11 (2) (a) provides that the department may request that a records request be put into writing. However, s. 19.35 (1) (h), Stats., provides “a request may be made orally, but a request must be in writing before an action to enforce the request is commenced...”. Is a written request necessary for the department to evaluate security risk? Alternatively, the department could accept oral records requests to better align the provision with s. 19.35 (1) (h), Stats.
- (2) Proposed s. NR 854.11 (2) (b) provides that the department may request various pieces of identifying information from a requestor. Similarly, par. (d) provides that the department may request “the reason the information is requested and how it will be used”. While the former appears to reasonably align with s. 19.35 (1) (i),

Stats., the latter does not. Notably, the statute provides “no request... may be refused because the person making the request is unwilling to be identified or to state the purpose of the request... A requester may be required to show acceptable identification... whenever security reasons or federal law or regulations so require”. Is information regarding why a record is requested and how information from a request will be used necessary to evaluate whether a particular record merits confidential treatment? Further information could be provided to justify the deviation from s. 19.35 (1) (i), Stats.

- (3) Proposed s. NR 854.11 (3) provides, in part, that the department may place conditions on the use of information shared pursuant to a records request when these conditions are necessary to protect the public’s interest in domestic security. Neither the Public Records Law, nor s. 281.346, Stats., generally contemplates the creation of conditions on the use of information obtained through a records request. While s. 281.346 (9) (e), Stats., indicates that the department secretary may find that certain records merit confidential treatment (preventing disclosure entirely), the provision does not suggest that the department may create conditions on the use of information after it is disclosed. The department could provide further explanation regarding its authority with respect to this provision and why this provision is necessary.
- (4) Proposed s. NR 854.11 (3) also provides, in part, that the department “may provide the requested information in a different format when necessary to protect the public’s interest in domestic security”. This is not generally contemplated within s. 281.346 (9) (e), Stats. Courts have provided relatively limited guidance regarding the extent to which public records must be provided in the format specified by a requestor. However, in *Lueders v. Krug*, the Court of Appeals held that a requester was entitled to certain emails in electronic form when the requester specifically requested email records in electronic form. [2019 WI App 36.] The department could provide further information to describe its statutory authority with respect to this provision and why this provision is necessary.

2. Form, Style and Placement in Administrative Code

- a. Inclusion of a subsection, “(1)”, is unnecessary in s. NR 854.02, as there is no subsequent subsection “(2)” in that provision.
- b. In s. NR 854.06, it appears that sub. (2) (g) is identical to sub. (3).
- c. Section NR 854.12 (4) refers to a permit “issued in accordance with this chapter.” It does not appear that proposed ch. NR 854 authorizes the issuance of permits.

4. Adequacy of References to Related Statutes, Rules and Forms

- a. Several provisions in the proposed rule refer to a plan being submitted to the department for approval under “s. NR 854.04 (3) or (4).” See, for example, ss. NR 854.05 (2) (c), (3) (d), and (4) (b), 854.06 (1), and 854.07 (1). Should each of these provisions instead reference “s. NR 854.04 (2) or (3)”?
- b. Section NR 854.09 (2) refers to s. NR 854.04 (2) (b). That provision does not exist.

5. Clarity, Grammar, Punctuation and Use of Plain Language

a. In s. NR 854.01:

(1) Add a comma after “s. 281.348, Stats.”.

(2) Consider changing “requirements of” to “requirements under” to achieve consistency of usage throughout the chapter.

b. In s. NR 854.03 (18) (a), is the term “largely” sufficiently clear for the purposes of the proposed rule? For example, can the department identify an example of a water supply system that would be excluded from the definition because it serves too few residential customers relative to commercial and industrial customers?

c. In s. NR 854.03 (19), are there persons besides a consecutive water system intended to be excluded from the definition of “retail customer”? If not, could the definition be revised to say that a “retail customer” means a person who purchases water directly from a public water supply system, except a consecutive water system”? At present, it is unclear what role par. (b) plays in the definition.

d. In s. NR 854.04 (title), add a period after “**requirements**” and before “(1)”.

e. In s. NR 854.04 (3), remove the second period at the end of the subsection.

f. The department should revise s. NR 854.04 (4) for clarity. The intent of this subsection appears to be that the owner or operator of a public water supply system serving a small but growing population must have a plan in place before the system crosses the 10,000 population threshold for a plan. If that is accurate, changing “but the system projects” to “but is expected” and changing “system is projected” to “system begins” (or changing “system is projected to serve” to “system first serves”) would add clarity.

g. Section NR 854.05 (1) limits a planning period to between 10 and 20 years. It also requires an expiration date for a plan. It is ambiguous whether the expiration date of a plan must coincide with the end of a planning period. Should this be clarified?

h. In s. NR 854.05 (3) (d) 2., replace each comma after the colon with a semicolon.

i. In s. NR 854.05 (4) (a) 4., (5) (b), (c), (d), and (e), and (6) (e) 4., the temporal references to “last 10 years” and “past 10 years” may be ambiguous with regard to a plan that is updated under s. NR 854.04 (5) or revised under s. NR 854.10. If a plan is updated or revised, should it include a more recent 10-year look-back period? If so, this phrase could be replaced with “10 years preceding the new or [updated] [revised] plan”.

j. In s. NR 854.05 (4) (b) 1., should “amounts of withdrawal, amount of use, and non-revenue water” be changed to “amount of withdrawal, amount of use, and amount of non-revenue water”?

k. In s. NR 854.05 (5) (intro.), insert “the” before “public”.

l. In s. NR 854.05 (9) (intro.), replace “plans consistency” with “plan’s consistency”.

m. Section NR 854.08 (2) mentions “approvals with conditions”. This suggests that the department may impose conditions when approving a plan. However, s. NR 854.07 governs the department approval process and does not specify that conditions may be imposed or what those conditions may be. Department authority to impose conditions should be made explicit.

n. In s. NR 854.10 (1), it is not clear which revisions to an approved plan require department approval. Paragraphs (a) to (c) list revisions that require approval, but these are stated as revisions that “include” approval, suggesting that there may be other types of revisions that require approval. The subsection also refers to “applicable revisions” without further explanation of which revisions are applicable. This should be clarified.