



Legislative Fiscal Bureau

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Joint Committee on Finance

Paper #295

Code of Ethics Investigations Funding (Ethics Board)

[LFB 2005-07 Budget Summary: Page 164, #2]

CURRENT LAW

The Ethics Board administers Wisconsin's lobbying law and the Code of Ethics for Public Officials. The agency has the authority to investigate the circumstances surrounding possible violations of the lobbying law or the ethics code. Investigations of a possible violation may occur as a result of either the filing of a verified complaint with the Board or the receipt of information from other sources.

The Ethics Board generally utilizes GPR funding to support its administration of the code of ethics and utilizes program revenues from lobbying registration fees to support its administration of Wisconsin's lobbying laws. Ethics Board staff have taken the position that lobbying fees may properly be used only to fund the costs of regulating lobbying activity and may not be used in connection with the administration of the code of ethics.

The Ethics Board has a separate GPR-funded biennial appropriation to fund the costs of code of ethics investigations. Base level funding in the appropriation is \$6,700 GPR annually.

GOVERNOR

Provide an additional \$43,300 GPR annually to the Board's biennial code of ethics investigations appropriation to support the costs of investigations of possible ethics code violations.

DISCUSSION POINTS

Background on the Funding of Ethics Code Investigations

1. The 1973-75 biennial budget act established what was then known as the Code of Ethics for State Public Officials and created the Ethics Board to administer and enforce the new code. The costs of Board operations, including investigations of ethics code violations, were funded from a GPR sum certain general program operations appropriation.

2. Subsequently, the 1974 budget adjustment act created a GPR-funded sum sufficient investigations appropriation for the Board. This sum sufficient appropriation supported the payment of expenses incurred by the Board beginning in 1974-75 for investigations under the ethics code. Further, the statutory purpose of the new sum sufficient appropriation prohibited its use for the conduct of investigations that could be funded instead from the Board's general program operations appropriation. This sum sufficient appropriation for investigations continued to exist through 1980-81. During that period, the appropriation funded investigative costs only once, when \$8,200 GPR was expended in 1979-80.

3. Chapter 20, Laws of 1981, repealed the Board's investigations sum sufficient appropriation. This action was taken as part of a general budget initiative by the Governor to reduce the number of state agency sum sufficient appropriations. Beginning in 1981-82, the Board was expected to cover investigative expenses from its general program operations appropriation. Further, no additional funding was appropriated to the Board for such investigative costs. During 1984-85 and 1985-86, the Board incurred investigation expenses of \$3,500 GPR and \$6,300 GPR, respectively, funded from base budget resources. The Board reserved base funding of \$5,000 GPR annually to meet possible investigation costs.

4. Beginning with the 1989-91 biennium, the Board began to advance what became a series of biennial budget proposals to provide additional funding or funding flexibility for ethics code investigation expenses. These proposals included the following:

- *1989-91 Biennium.* The Board requested \$40,000 GPR annually budgeted in unallotted reserve for ethics code investigation expenses. The Governor denied the request and instead recommended that the Governor be authorized, upon request of the Board, to appoint special counsel to assist the Board in code of ethics investigations. The special counsel would be funded from DOJ's special counsel sum sufficient appropriation. The Legislature deleted the recommendation.

- *1991-93 Biennium.* The Board requested a separate sum certain appropriation, funded at \$20,000 GPR annually, to support contracted legal services, investigators and related personnel, and other costs of ethics code investigations. The Governor denied the request and again recommended the same type of special counsel arrangement as had been advanced two years earlier. The Legislature deleted the recommendation.

- *1993-95 Biennium.* The Board requested that \$20,000 PR annually budgeted in

unallotted reserve be authorized under its general program operations appropriation supported from lobbying fees to support investigation costs and general administration of the lobbying law and ethics codes. [Board staff have now taken the position that lobbying fees revenues may not be used to fund the costs of administering or enforcing the ethics code.] The Governor denied the request and instead recommended providing \$15,000 GPR annually budgeted in unallotted reserve for investigative costs. The Legislature deleted the recommendation.

- *1995-97 Biennium.* The Board requested an amendment to DOJ's special counsel sum sufficient appropriation to authorize its use to fund ethics code and lobbying law investigation costs. Under the Board's 1995-97 request: (a) an annual report of Board expenditures from the DOJ appropriation would be submitted to the Joint Committee on Finance; and (b) Board-related use of the DOJ special counsel appropriation would be exempt from current law prohibitions against state agencies' employing an outside attorney without the approval of the Governor. The Governor denied the request.

- *1997-99 through 2003-05 Biennia.* During this period, the Board requested substantially the same type of investigation costs funding proposal in each succeeding biennium as had been requested in the 1995-97 biennium, but with the following modifications: (a) the Board would be required to submit quarterly investigation cost expenditure reports to the Joint Committee on Finance; and (b) annual Board expenditures from the DOJ appropriation would be limited to \$40,000, unless approved by the Committee under a 14-day passive review process. In each biennium the Governor denied the Board's request.

5. However, during this Committee's deliberations on the 2003-05 biennial budget, \$6,700 GPR annually of base funding was identified in the Board's general program operations appropriation as available to fund code of ethics investigation costs. A Committee recommendation to transfer these base level amounts to a newly-created biennial sum certain appropriation for ethics code investigations was subsequently included in the 2003-05 biennial budget act.

6. Notwithstanding this action under the 2003-05 biennial budget, the Board submitted a 2005-07 biennial budget request relating to the funding of ethics code investigations that would have done all of the following: (a) deleted the new code of ethics investigations biennial appropriation and associated base funding of \$6,700 GPR annually; (b) transferred these base funding amounts to the Board's general program operations appropriation; (c) authorized the Board to charge investigations and hearings costs related to potential ethics code or lobbying laws violations to a GPR sum sufficient appropriation [either an amended DOJ special counsel sum sufficient appropriation or a new sum sufficient appropriation created under the Board]; (d) charged all investigation and related costs incurred since July 1, 2004, retroactively to the sum sufficient appropriation; (e) limited annual Board spending from the sum sufficient appropriation to no more than 140% of the pay range maximum of the highest pay range to which senior criminal investigators in the classified state civil service are assigned [estimated at \$124,800 GPR annually], unless approved by the Finance Committee under a 14-day passive review procedure; and (f) exempted the Board from current requirements that no executive branch agency employ outside counsel without the Governor's approval. Quarterly reports of any expenditures from the sum

sufficient would also be submitted to the Joint Committee on Finance.

Governor's Recommendation on the Funding of Ethics Code Investigations

7. The Governor denied the Board's 2005-07 biennial budget request and instead recommended adding \$43,300 GPR annually to the agency's existing biennial investigations appropriation to address a likely funding shortfall due to what has become an increased volume of ethics code investigations in recent years.

8. The Governor recommended this approach to solving the Board's funding needs for ethics code investigations rather than providing the agency with a sum sufficient appropriation for such costs. Generally, sum sufficient appropriations have been authorized under the following types of circumstances:

- To provide funding under a constitutional, statutory or moral obligation (such as appropriations for debt service payments and supplemental retirement annuity payments);
- To make certain formula-driven aid payments (such as homestead tax credits);
- To provide necessary funding for public health and safety-related programs (such as disaster assistance, immunization and quarantine assistance programs);
- To provide funding for an essential government function where there is considerable variability with respect to the annual amount of funding required (such as the funding of insufficiencies in the state's self-funded risk management program); and
- To fund the general program operations of the chief agency of each constitutional branch of government (the operating appropriations for the Office of the Governor, the Senate, the Assembly, and the Supreme Court).

9. The Board's strongest case for a sum sufficient appropriation would likely be based on the fact that it is difficult to budget accurately for future investigation costs since it is seldom known in advance the number or complexity of cases that will arise in the following biennium. Consequently, the establishment of a sum sufficient would eliminate any uncertainty in funding the Board's investigation costs.

10. However, the following analysis suggests that the level of variability and amount of investigative expenses incurred from biennium to biennium probably do not justify granting the Board access to a sum sufficient appropriation to support these costs. Where a base level funding deficiency can be identified under an existing appropriation, this type of situation is typically addressed either through a funding supplementation under s. 13.10 of the statutes or by a budget modification.

11. In this case, the Governor has recommended providing \$43,600 GPR annually under the Board's existing biennial appropriation to address a funding deficiency. Combined with base

funding of \$6,700 GPR annually, a total of \$50,000 GPR annually would be appropriated. Under a biennial appropriation, the entire \$100,000 GPR for the fiscal biennium would then be available to the Board for expenditure at any time during the period to cover ethics investigation costs.

12. In reviewing the Governor's recommendation, an analysis of Board expenditures for investigations is useful to gauge the appropriateness of the proposed funding increase. The following table identifies the Board's total investigation expenditures, by fiscal year, for the past 10 complete biennia, plus the 2003-04 fiscal year.

**Annual Investigation Expenditures
(1983-84 through 2003-04)**

<u>Fiscal Year</u>	<u>Investigation Costs</u>
1983-84	\$0
1984-85	3,500
1985-86	6,300
1986-87*	35,000
1987-88	900
1988-89*	36,100
1989-90	3,900
1990-91	0
1991-92	700
1992-93*	12,700
1993-94*	28,600
1994-95*	37,700
1995-96	12,500
1996-97	10,200
1997-98	6,100
1998-99	7,500
1999-00	9,800
2000-01	2,600
2001-02*	17,900
2002-03*	76,500
2003-04*	61,100

*Years in which supplementations were granted under s. 13.10. In 1986-87, funding was provided under s. 14.11 from the DOJ special counsel appropriation.

13. Over the last 20 years, the Board's investigation costs have varied from biennium to biennium in a range from a low of \$3,500 in 1983-85 to a high of \$94,400 in 2001-03. However, current base level funding amounts available to the Board [\$13,400 GPR biennially] would have been sufficient to fund virtually all of the agency's investigation expenses in five of the last 10 biennia. [In one of those five biennia (1997-99), an additional \$200 GPR would still have been

required to fully fund those costs.]

14. Maximum biennial expenditures to date for investigation costs occurred during the 2001-03 biennium, when the Board expended \$94,400 GPR for this purpose. This historic pattern of expenditures would suggest that no more than \$47,200 GPR annually in a biennial appropriation would have been sufficient to fully fund the Board's maximum two-year investigative cost exposure over the past 10 fiscal biennia.

15. Budgeting investigation costs at a level sufficient to fund the Board's worst case scenario to date could have the effect of over-funding these costs. Another measure of the Board's investigation cost funding needs could be based on the average annual investigation costs incurred in the 10 fiscal years since 1983 with the highest expenditures for investigations. This analysis would suggest that \$32,800 GPR annually (for a biennial total of \$65,600 GPR) should be adequate for most Board investigation cost exposure. This level of funding would have been sufficient to fully fund the Board's investigation costs in eight of the last 10 biennia. If the Committee chooses to fund the Board's investigation costs based on this approach, it could provide an additional \$26,100 GPR annually, thereby reducing the amounts recommended by the Governor by \$17,200 GPR annually.

16. The Committee could also consider deleting the Governor's recommendation and maintaining base level funding of \$6,700 GPR annually in the Board's appropriation for ethics code investigations. As described above, this level of funding has been sufficient to fund the agency's investigation costs during approximately half of the preceding 10 fiscal biennia. If the Committee chooses to fund the Board's investigation costs based on this approach, it could reduce the amounts recommended by the Governor by \$43,300 GPR annually.

17. Under a base level funding option, if the Board incurs higher expenditure costs for ethics code investigations in 2005-07 than could be supported from available resources, the agency could turn to the Finance Committee for one or more supplementation requests under s. 13.10. In the event of repeated supplementations to the Board (as has occurred during the 2002-03 and 2003-04 fiscal years), the amounts available under the Finance Committee's supplemental appropriation would be decreased. [The Governor has recommended providing unreserved funding of \$150,000 annually in the Committee's biennial supplementation appropriation for GPR-supported emergency funding requests. In 2002-03, the Committee provided three supplementations to the Board from its GPR supplemental appropriation totaling \$76,500 GPR. In 2003-04, the Committee provided four such supplementations to the Board totaling \$47,900 GPR.]

Investigation Expenses

18. While the foregoing alternatives would adjust the Board's available investigation funding levels, they do not address cost elements that drive the Board's investigative expenditures.

19. While the Board cannot control the matters requiring investigation where there appears to be probable cause that a violation of the ethics code or lobbying law has occurred, the

Board does have some discretion over the amounts paid to special assistants retained to conduct its investigations. The Board's ability to manage its investigative workload within budgeted resources is governed, in part, by the hourly rates that it approves for such undertakings.

20. During 2003-04, the Board retained non-attorney special assistants for Board investigations at the rate of \$55 per hour. At the time, Board staff indicated a desire to shift a greater degree of its investigative work to such non-attorney special assistants. However, in the current fiscal year, the Board has entered into three contracts with attorneys to provide services as special assistants when required by the Board. The following table identifies the hourly rates for these special investigators for 2004-05.

Special Investigative Assistants (2004-05)

<u>Contracted Investigative Service</u>	<u>Hourly Rate</u>
Attorney A	\$150
Attorney B	100
Attorney C	75 *

*After \$11,500 in legal services have been billed in a calendar year, the rate increases to \$150 per hour.

21. A comparison of these rates to those paid by certain other state agencies finds the following: (a) the Office of the State Public Defender (SPD) is limited by statute to paying no more than \$40 per hour for attorney services provided by the private bar; (b) the Judicial Commission, as an agency of the judicial branch, has limited its investigative expenditures by retaining attorneys at the rate of \$70 per hour, pursuant to Supreme Court Rule 81.02(1); and (c) the Supreme Court's Office of Lawyer Regulation, which investigates allegations of attorney misconduct, currently retains attorneys as investigators at a rate of \$60 per hour. Beginning in 2005-07, the Office of Lawyer Regulation intends to compensate these attorney investigators at the rate of \$70 per hour under Supreme Court Rule 81.02(1).

22. The hourly rates used by these agencies are all below the contracted rates cited above for the Ethics Board special investigative assistants. There does not appear to be any aspect of the services required by the Ethics Board for its investigative services that would be materially different from the types of services engaged by the above agencies at a lower hourly cost.

23. In order to maximize the number of hours of contracted investigative services funded from the Board's budgeted resources, the Committee could consider providing by statute that the Ethics Board may not contract for ethics code or lobbying law investigative services at a rate that exceeds the amount provided by Supreme Court Rule 81.02(1) [currently \$70 per hour].

24. This approach could be advanced for the following reasons: (a) other state agencies have met their legal and investigation services needs at the proposed rate of \$70 per hour or less; (b) the Board itself has demonstrated an ability to retain qualified legal counsel at a reasonably

comparable rate of \$75 per hour (at least for the first \$11,500 in legal services provided by one of its special assistants during a calendar year); (c) Board staff have already indicated a desire to shift a greater degree of its investigative work to less costly non-attorney special assistants; and (d) linking the Board's hourly compensation rate for investigative assistants to the compensation rate under Supreme Court Rule 81.02(1) would provide a mechanism for future rate increases when determined appropriate by the Supreme Court.

25. Alternatively, the Committee could take no action at this time on the matter of Board compensation rates for special investigative assistants, based on the following considerations: (a) the Board has demonstrated a willingness to seek out more cost-effective non-attorney special investigative assistants; (b) state agencies, other than those cited above, are not generally limited to paying \$70 per hour when retaining outside counsel; and (c) Judicial Commission staff have expressed some reservations that the Commission's current \$70 per hour rate does not fully reimburse attorneys for their actual costs of providing legal services and may affect the Commission's future ability to retain and attract quality legal counsel.

26. Notwithstanding this latter concern, both the Commission and the Office of Lawyer Regulation have continued their investigations while retaining assistance at the rate of \$70 per hour or less. In the past, the Office of Lawyer Regulation has indicated an ability to retain qualified attorneys at these rates as some attorneys may view the investigations as a form of pro bono service to the bar and to the public.

ALTERNATIVES

1. Approve the Governor's recommendation to provide an additional \$43,300 GPR annually to the Board's biennial code of ethics investigations appropriation (for total funding of \$50,000 GPR annually) to finance the costs of investigations of possible violations of the code of ethics for state public officials and employees.

2. Provide an additional \$26,100 GPR annually to the Board's biennial code of ethics investigations appropriation (for total funding of \$32,800 GPR annually) to reflect the average annual investigation costs incurred in the 10 fiscal years since 1983 with the highest expenditures for investigations.

<u>Alternative 2</u>	<u>GPR</u>
2005-07 FUNDING (Change to Bill)	- \$34,400

3. Delete provision.

<u>Alternative 3</u>	<u>GPR</u>
2005-07 FUNDING (Change to Bill)	- \$86,600

4. *[Alternative 4 may be selected in addition to any of the above alternatives.]*
Stipulate that the Ethics Board may not pay more than the hourly compensation specified under Supreme Court Rule 81.02(1) to special assistants to assist the Board in ethics code and lobbying law investigations.

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