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GOP Talking Points and Rebuttal

GOP Talking Points Entitled “Records and Drafting File Changes (7.2.2015)”

GOP Talking Point 1: *Allows for freer collaboration among the legislative service agencies in their work for the legislature. Clarifies that service agencies are not prohibited from working together to serve the legislature.*

Fact: Nonpartisan professional staff already are “not prohibited from working together” and regularly speak to each other. If there is any question of whether one staffer can speak to another regarding a confidential bill draft or another sensitive matter, they can (and do) call the legislator to ask permission.

GOP Talking Point 2: *Drafting files are currently used mostly for “gotcha” games between political foes, which have become even worse since they have been posted on LRB’s website. Unlike many other states (such as Minnesota, Nebraska, and Vermont), Wisconsin has no confidentiality provision for the drafting files of introduced legislation. The result is a dramatic chilling effect between the Legislature and drafting attorneys.*

Fact: Wisconsin law protects the confidentiality of bill drafts while the legislation is being developed, but not after a bill has been introduced. A drafting file is an important historical document that shows the goals and intent of the requestor legislator and the evolution of a bill draft—not to mention whether a bill received input from lobbyists and special interest groups. In 2014, for example, a *Wisconsin State Journal* examination of drafting files showed a wealthy, divorced donor to Rep. Joel Kleefisch helping to write a bill that would have lowered his child support payments. If these amendments were enacted, those records—and the donor’s influence—would have been kept secret.

With these provisions, legislators are seeking to avoid embarrassing moments, such as when the Walker administration struck the Wisconsin Idea from the University of Wisconsin System’s mission statement and claimed it was a “drafting error.” As the *Milwaukee Journal Sentinel* discovered by looking at the bill’s drafting file, removing the Wisconsin Idea was the intention of Walker’s officials all along and the governor’s statement earned a [“Pants on Fire”](#) from Politifact.

Additionally, drafting files are relied upon not only by journalists, but also regularly used by judges and historians looking to interpret legislation.

GOP Talking Point 3: *Protects legislative intent. Legislative intent should be determined by committee action and floor debate, since the legislators in committee and on the floor don't even know the contents of a drafting file when they are voting on a bill.*

Facts: Contrary to this claim, historians and attorneys regularly rely on a legislator's request for a bill's drafting to establish legislative intent and the goals of the requestor legislator.

Bills are sometimes introduced at the behest of citizens or special interests, or by outside organizations such as [ALEC](#), and the drafting files can document their influence over legislation. Debate over amendments, both successful and rejected, are also important for establishing legislative intent as well as who benefits from a particular bill.

GOP Talking Point 4: *Protects the free flow of ideas. Authors need to be able to have candid discussions with drafting attorneys and not be afraid of making suggestions or discussing an idea*

Facts: Legislators and their staff are free to discuss any idea with nonpartisan legislative staff. All of the nonpartisan service agencies already operate under a statutory requirement that legislative requests and other specified information be kept confidential. This system has worked well in Wisconsin for decades.

GOP Talking Point 5: *Exempts deliberative materials from the records law*

- *Provides that materials such as draft language, drafting correspondence, background information, and other "pre-decisional" documents are not subject to the records law.*

Fact: According to the Motion 999 proposal, deliberative materials include: *"communications and other materials, including opinions, analyses, briefings, background information, recommendations, suggestions, drafts, correspondence about drafts, and notes, created or prepared in the process of reaching a decision concerning a policy or course of action or in the process of drafting a document or formulating an official communication."* This broadly-written exemption would enable any public official at any level of government (including state, city, county and school boards) to deny requestors any communication regarding the development of public policy.

The Walker administration called for this provision after the Center for Media and Democracy sued the governor for acting as if a "deliberative materials" exemption was already part of Wisconsin law.

In May, Walker refused to release records pertaining to his changes to the University of Wisconsin System Mission Statement, claiming they could be withheld to protect the "deliberative process." Although the federal Freedom of Information Act does recognize such a "deliberative process privilege," and federal agencies

regularly rely on it to keep secret a wide swath of materials, Wisconsin courts have not recognized such a privilege, making Wisconsin's public records law stronger than the federal law in this area.

Notably, Walker's role in this provision was revealed by the same drafting files that the legislature is seeking to keep secret.

GOP Talking Point 6 (7.2.2015): *Establishes legislative privilege for court proceedings*

- *Provides that a legislator may assert privilege (similar to spouses or attorneys and clients) to protect communications that they have with their staff, service agencies, and other people regarding legislative business.*

GOP Talking Point 6 from a different draft (7.3.2015): *Privilege: Codifies protection that already exists in other states, in Congress, and in Wisconsin case law. The proposal codifies a privilege for legislators that is similar to the privilege already afforded federal legislators (via the speech and debate clause) [and] to legislators in most other states.*

- *The proposal is consistent with Wisconsin Supreme Court precedent which, in [] legislative privilege exists under the state constitution, construed the privilege to [apply] as much as is "necessary to achieve its objective of protecting the integrity of the legislative process."*
- *Meaning, it needed "to reach matters that are an integral part of the processes by which members of the legislature participate with respect to the consideration of proposed legislation or with respect to other matters which are within the regular course of the legislative process."*
 - *State v. Beno, 116 Wis. 2d 122 (1984)*
- *This privilege would only apply to communications made in the course of legislative business and would not protect communications about criminal or campaign activity.*
- *Despite claims to the contrary, legislative privilege is not unusual. It exists in Congress and in most other states. **Today, there are at least 43 states that have [some] form of legislative privilege including Minnesota and Michigan.***

Facts: The above language conflates the attempted creation of an unprecedented "legislator disclosure privilege" with the Wisconsin Constitution's longstanding "speech and debate clause" (Article V Section 15), which has nothing to do with the open records law.

The new "privilege" created in the open records proposal would give legislators carte blanche to hide a vast array of communications, including correspondence with lobbyists and constituents. This is entirely distinct from the "speech and

debate” clause contained in the Wisconsin constitution (and many other state constitutions), which protects lawmakers and their aides from prosecution or civil suit for their speeches on the floor or other official acts. “Speech and debate” protections originated as a means of defending members of parliament from the King, not as a way to shield them from oversight by citizens.

43 states—including Wisconsin—have speech and debate clauses in their constitution, but contrary to what the talking points assert, 43 states do not use their speech and debate clauses to deny open records requests. In fact, legislators in states like Ohio that have tried hiding behind the speech and debate clause to dodge the open records law have been rebuffed by the courts.

The talking points are incorrect in claiming that “the proposal is consistent with Wisconsin Supreme Court precedent.” The 1984 *Benoit* case considered whether a legislator’s aide must testify in an investigation into tax fraud, and affirmed that the “speech and debate clause” is grounded in separation of powers doctrine; in other words, it is geared towards protecting the legislature from interference by other branches, not from accountability to the public.

This is not the first time Wisconsin legislators have used constitutional provisions to try evading the open records law. In 2012, CMD sued state senator Leah Vukmir after she claimed to have no records responsive to our request for ALEC documents. Vukmir initially claimed that she was immune from suit under a companion provision of the state constitution (Article IV Section 16) before [settling the case](#), turning over hundreds of pages of records, and paying \$15,000 in fees and damages.

GOP Talking Point 7: *Protects the free flow of ideas. Constituents need to be able to contact their legislator without fear of reprisal from political foes. The proposal gives legislators the right to refuse to disclose the identity of constituents who contact them about legislative business.*

Facts: Most constituent communications have long been subject to disclosure under the public records law. If a legislator thinks that a communication is particularly sensitive, such as an email reporting a crime or implicating other significant privacy concerns, the legislator can consult the DOJ and use the balancing test to weigh the public interest in disclosure against the public interest in protecting the identity of the requester.

Notably, this provision would reverse an open records victory recently won by a right-wing think tank. In 2011, the MacIver Institute brought suit against Democratic Senator Jon Erpenbach for withholding names of citizens who contacted him during the 2011 battle over collective bargaining. In April, a conservative appellate court in Waukesha issued a unanimous decision declaring that “public awareness of ‘who’ is attempting to influence public policy is essential for effective oversight of our government.”

GOP Talking Point 7: *Provides that the legislature may set its own rules for open records and records retention*

- ***Background***
 - *Current law exempts members of the legislature from the records retention statutes that apply to most state agencies (see Wis. Stat. 16.61(2)(b)(1.))*
 - *Likewise, current law already says that legislative rules on open meetings supersede the Open Meetings Law (see Wis. Stat. 19.87(2))*
 - *This proposal provides a similar mechanism for resolving conflicts between legislative policies and the Open Records Law*
- ***Enables the Legislature to adapt to changes in technology***
- ***Gives the legislature clear authority to set policies for records retention***
- ***Will ultimately provide requestors and records custodians with clarity and certainty, without costly and time-consuming litigation***

FACTS: This is an effort to put a positive spin on one the most extreme elements of the proposal. Allowing the legislature to override the public records law by adopting a new rule via a majority vote, and without going through the legislative process, would hand it the tools to gut the public records law as they please. Contrary to the talking points, this proposal has nothing to do with records retention: the legislature is already excluded from the records retention provisions that apply to local governments and some agencies.

Speaker Vos is still pushing for this provision. On July 23—three weeks after he co-signed a statement pledging not to move forward with the changes, but instead form a legislative study committee—Vos aide Andrew Hanus submitted a request to the Legislative Reference Bureau for a bill that would allow the legislature to “set its own records retention policy by rule or official policy.”

*For more information please contact Brendan Fischer at CMD: brendan@prwatch.org
September 2015*

Records and Drafting File Changes (7.2.2015)

These changes protect the free flow of ideas, protect constituents' ability to have open dialogue with their representatives, and allow easier updates to records laws to keep up with advances in technology

1. Allows for freer collaboration among the legislative service agencies in their work for the legislature
 - o Clarifies that service agencies are not prohibited from working together to serve the legislature
2. Closes LRB drafting files
 - o **Background**
 - Drafting files are currently used mostly for "gotcha" games between political foes, which have become even worse since they have been posted on LRB's website
 - Unlike many other states (such as Minnesota, Nebraska, and Vermont), Wisconsin has no confidentiality provision for the drafting files of introduced legislation
 - The result is a dramatic chilling effect between the Legislature and drafting attorneys
 - o **Protects legislative intent.** Legislative intent should be determined by committee action and floor debate, since the legislators in committee and on the floor don't even know the contents of a drafting file when they are voting on a bill
 - o **Protects the free flow of ideas.** Authors need to be able to have candid discussions with drafting attorneys and not be afraid of making suggestions or discussing an idea
3. Exempts deliberative materials from the records law
 - o Provides that materials such as draft language, drafting correspondence, background information, and other "pre-decisional" documents are not subject to the records law
4. Establishes legislative privilege for court proceedings
 - o Provides that a legislator may assert privilege (similar to spouses or attorneys and clients) to protect communications they have with their staff, service agencies, and other people regarding legislative business
 - o **Protects the free flow of ideas.** Legislators need to be able to have candid discussions with service agencies and staff. Staff provide no value if legislators are afraid to talk openly about policy ideas. The alternative is greater reliance on lobbyists and interest groups
 - The proposal provides a statutory privilege for legislators that is similar to the privilege already afforded federal legislators and to varying degrees legislators in the states
 - o **Protects constituents.** Constituents need to be able to contact their legislator without fear of reprisal from political foes. The proposal gives legislators the right to refuse to disclose the identity of constituents who contact them about legislative business
5. Provides that the legislature may set its own rules for open records and records retention
 - o **Background**
 - Current law exempts members of the legislature from the records retention statutes that apply to most state agencies (see Wis. Stat. 16.61(2)(b)1.)
 - Likewise, current law already says that legislative rules on open meetings supersede the Open Meetings Law (see Wis. Stat. 19.87(2))
 - This proposal provides a similar mechanism for resolving conflicts between legislative policies and the Open Records Law
 - o **Enables the Legislature to adapt to changes in technology**
 - o **Gives the legislature clear authority to set policies for records retention**
 - o **Will ultimately provide requestors and records custodians with clarity and certainty, without costly and time-consuming litigation**

GOPweb

JFC E-updates, talking points, columns, messaging and whatever else comes up during the budget process are posted on GOPweb.

It is our intention to keep you informed about what is in the budget and how it might impact you and your district. If you have any questions or suggestions of what you would like to see in a JFC update, please feel free to call Caroline Krause at 6-2344.

Records Update – Why It's Important

There have been some recent questions raised about the changes adopted during yesterday's JFC meeting pertaining to public records. Attached to this message are a series of talking points for your use on this matter.

Over the course of the next few days, we will have continued conversations with Senate colleagues and the governor's office about any need for potential changes. We plan to discuss the adopted changes during our next caucus meeting on Tuesday at 1p.m.

These changes reflect an effort to protect the free flow of ideas among legislators, protect constituents' ability to have open dialogue with their representatives, allow easier updates to records laws to keep up with advances in technology (text messages, visual voice mail are currently all records)

Allows for Collaboration. Currently, legislative service agencies have confidentiality restrictions that prevent them from disclosing information, even to each other. The proposal clarifies that service agencies may work together to serve the legislature.

Protects constituents. Constituents need to be able to contact their legislator without fear of reprisal from political foes. The proposal gives legislators the right to refuse to disclose the identity of constituents who contact them about legislative business, protecting the integrity of the legislator-constituent relationship.

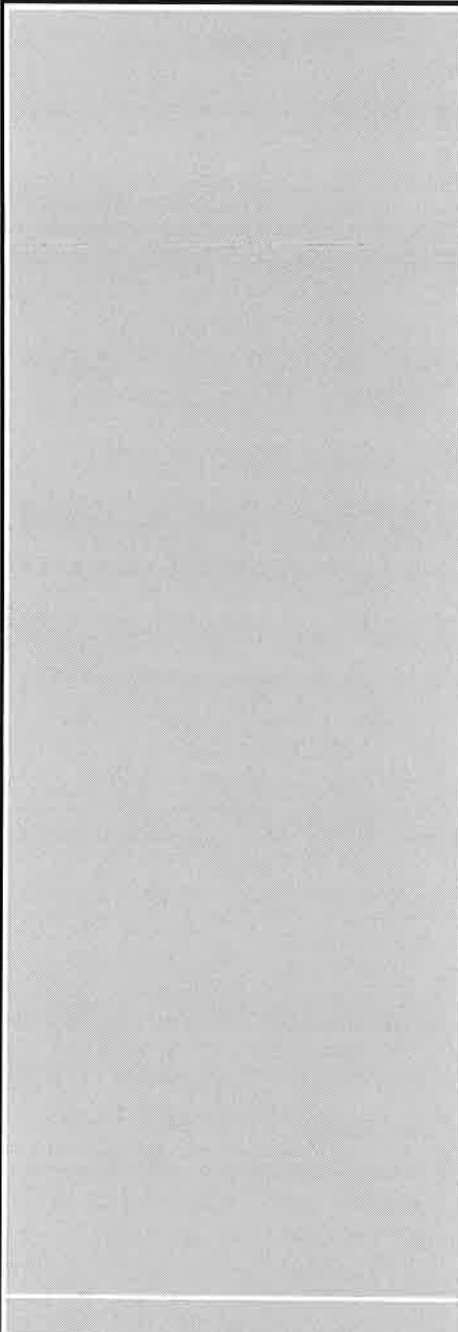
Protects legislative intent. Legislative intent should be determined by committee action and floor debate, since the legislators in committee and on the floor don't even know the contents of a drafting file when they are voting on a bill. This is how it works in Congress, because the Freedom of Information Act does not apply to Congress.

Protects the free flow of ideas. Legislators need to be able to have candid discussions with service agencies and staff. Staff provide no value if legislators are afraid to talk openly about policy ideas. The alternative is greater reliance on lobbyists and interest groups.

Privilege: Codifies protections that already exist in other states, in Congress, and in Wisconsin case law. The proposal codifies a privilege for legislators that is similar to the privilege already afforded federal legislators (via the speech and debate clause) to legislators in most other states.

- The proposal is consistent with Wisconsin Supreme Court precedent which, in finding that legislative privilege exists under the state constitution, construed the privilege to extend to "as much as is "necessary to achieve its objective of protecting the integrity of the legislative process."
- Meaning, it needed "to reach matters that are an integral part of the processes by which members of the legislature participate with respect to the consideration of proposed legislation or with respect to other matters which are within the regular course of the legislative process."

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- This privilege would only apply to communications made in the course of legislative business and would not protect communications about criminal or campaign activities.
 - Despite claims to the contrary, legislative privilege is not unusual. It exists in Congress and in most other states. **Today, there are at least 43 states that have form of legislative privilege including Minnesota and Michigan.**

Joint Committee on Finance

“I predict future happiness for Americans, if they can prevent the government from wasting the labors of the people under the pretense of caring for them.” Thomas Jefferson