



State of Wisconsin
2015 - 2016 LEGISLATURE

LRB-2550/P4
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PRELIMINARY DRAFT - NOT READY FOR INTRODUCTION

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1 AN ACT *to repeal* 13.92 (1) (a) 3. and 13.92 (1) (c); *to amend* 13.92 (intro.), 13.92
 2 (1) (e) 5. and 19.32 (2); and *to create* 13.97, 16.61 (14), 19.32 (1bb), 19.38 and
 3 905.17 of the statutes; **relating to:** privilege for communications involving
 4 legislators and legislative staff and records relating to those communications,
 5 exceptions to the public records law, and confidentiality of drafting records.

legislative

Analysis by the Legislative Reference Bureau

1. Legislative privilege.

This bill creates a statutory privilege making certain communications confidential and privileged from disclosure, including disclosure in court, that are between a legislator, or a person acting on the legislator's behalf, and legislative staff members in various contexts, including a legislator's personal staff, staff of the five nonpartisan legislative service agencies, and clerk and sergeant staff. The privilege only applies to communications made within the course of legislative business. The privilege also includes communications between a legislator, or a person acting on the legislator's behalf, and any other person, if the communication occurs within the course of legislative business. The draft defines "legislative business" broadly to include all aspects of the legislative process but excludes criminal conduct and political campaigning.

The bill also creates a privilege for all records relating to a privileged communication, and the bill creates a privilege for a legislator to refuse to disclose

retention

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and prevent a legislative staff member from disclosing information from which can be determined the identity of any person who communicates with the legislator in the course of legislative business.

The privileges created under the bill may only be waived by the express personal waiver of the legislator. A legislative staff member is required to assert and may not waive the privilege. Disclosure of a privileged communication or record by any person to any other person does not constitute a waiver, including if the disclosure is authorized.

2. Collaboration among nonpartisan legislative service agencies.

Under the bill, the nonpartisan legislative service agencies are required at all times to observe the confidential nature of all communications and records that may be privileged under the bill. However, the bill specifies that the confidentiality requirements placed on nonpartisan legislative service agencies, both under current law and under the bill, are not to be construed to prohibit staff of the legislative service agencies from communicating with each other for the purpose of serving the legislature and its members.

3. Public records.

The bill includes the following exceptions to the public records law:

1. The public records law applies to "authorities," including local governments, elected officials, and state agencies. The bill provides an exception to the public records law for communications and other materials, including opinions, analyses, briefings, background information, recommendations, suggestions, drafts, correspondence about drafts, and notes, that are created or prepared in the process of an authority reaching a decision concerning a policy or course of action, drafting a document, or formulating an official communication. The exception includes interauthority and intra-authority communications, but does not include: (a) communications with persons not authorized to participate in an authority's process of making a decision, drafting a document, or formulating an official communication; or (b) communications with persons other than an authority, unless the communication is within the scope of a contract between the person and an authority.

2. Under the bill, no provision of the public records law or records retention law that conflicts with a rule or policy of the senate or assembly or joint rule or policy of the legislature shall apply to a record that is subject to such rule or policy. A similar exception exists under current law for conflicting provisions of the open meetings law.

3. Under the bill, all records of a reference, drafting, or research request made to the Legislative Reference Bureau (LRB), including all drafting files, must remain confidential at all times. Currently, the LRB's reference and drafting services are required to be provided on a confidential basis, except that drafting records for legislation that has been introduced are made available for inspection and copying.

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

1 SECTION 1. 13.92 (intro.) of the statutes is amended to read:

2 13.92 Legislative reference bureau. (intro.) There is created a bureau to
3 be known as the "Legislative Reference Bureau," headed by the chief of legislative
4 reference bureau. The legislative reference bureau shall be strictly nonpartisan and
5 shall at all times observe the confidential nature of the reference or, drafting, and
6 research requests received by it, and all drafting files and other records relating to
7 those requests shall remain confidential at all times.

8 SECTION 2. 13.92 (1) (a) 3. of the statutes is repealed.

9 SECTION 3. 13.92 (1) (c) of the statutes is repealed.

10 SECTION 4. 13.92 (1) (e) 5. of the statutes is amended to read:

11 13.92 (1) (e) 5. Microfilming, optical imaging or electronic formatting of
12 reference materials and legislative drafting records under par. (a) 1. and 3.

13 SECTION 5. 13.97 of the statutes is created to read:

14 13.97 Confidentiality of privileged communications and records;
15 collaboration among legislative service agencies. (1) The legislative service
16 agencies under ss. 13.91, 13.92, 13.94, 13.95, and 13.96 shall at all times observe the
17 confidential nature of all communications, records, and information that may be
18 subject to the privilege under s. 905.17.

19 No (2) The confidentiality requirements imposed on nonpartisan legislative
20 service agencies under sub. (1) and ss. 13.91, 13.92, 13.94, 13.95, and 13.96 shall not
21 be construed to prohibit any staff member of a nonpartisan legislative service agency
22 from communicating with any staff member of another nonpartisan legislative
23 service agency for the purpose of serving the legislature and its members or from
24 disclosing any communication, record, or information in accord with a rule, custom,
25 policy, or practice of the legislature.

1 **SECTION 6.** 16.61 (14) of the statutes is created to read:

2 16.61 (14) CERTAIN RECORDS OF THE LEGISLATIVE BRANCH. No provision of this
3 section that conflicts with a rule or policy of the senate or assembly or joint rule or
4 policy of the legislature shall apply to a public record that is subject to such rule or
5 policy.

6 **SECTION 7.** 19.32 (1bb) of the statutes is created to read:

7 19.32 (1bb) “Deliberative materials” means communications and other
8 materials, including opinions, analyses, briefings, background information,
9 recommendations, suggestions, drafts, correspondence about drafts, and notes, that
10 are created or prepared in the process of reaching a decision concerning a policy or
11 course of action or in the process of drafting a document or formulating an official
12 communication. “Deliberative materials” include interauthority and
13 intra–authority communications, but do not include:

14 (a) Communications with persons who are not authorized to participate in the
15 process of reaching a decision, drafting a document, or formulating an official
16 communication.

17 (b) Communications with persons other than an authority, unless the
18 communication is within the scope of a contract between the person and an authority.

19 **SECTION 8.** 19.32 (2) of the statutes is amended to read:

20 19.32 (2) “Record” means any material on which written, drawn, printed,
21 spoken, visual, or electromagnetic information or electronically generated or stored
22 data is recorded or preserved, regardless of physical form or characteristics, ~~which~~
23 that has been created or is being kept by an authority. “Record” includes, but is not
24 limited to, handwritten, typed, or printed pages, maps, charts, photographs, films,
25 recordings, tapes, optical disks, and any other medium on which electronically

1 generated or stored data is recorded or preserved. "Record" does not include drafts,
2 notes, preliminary computations, and like materials prepared for the originator's
3 personal use or prepared by the originator in the name of a person for whom the
4 originator is working; deliberative materials; materials ~~which~~ that are purely the
5 personal property of the custodian and have no relation to his or her office; materials
6 to which access is limited by copyright, patent, or bequest; and published materials
7 in the possession of an authority other than a public library ~~which~~ that are available
8 for sale, or ~~which~~ that are available for inspection at a public library.

9 **SECTION 9.** 19.38 of the statutes is created to read:

10 **19.38 Legislative records.** No provision of this subchapter that conflicts with
11 a rule or policy of the senate or assembly or joint rule or policy of the legislature shall
12 apply to a record that is subject to such rule or policy.

13 **SECTION 10.** 905.17 of the statutes is created to read:

14 **905.17 Communications involving legislators and legislative staff;**
15 **records. (1) DEFINITIONS.** As used in this section:

16 (a) "Clerk staff" means all of the following:

17 1. The assembly chief clerk and employees assigned to the assembly chief
18 clerk's office.

19 2. The senate chief clerk and employees assigned to the senate chief clerk's
20 office.

21 (b) "Employee" includes paid and unpaid interns.

22 (c) 1. "Legislative business" means all aspects of the legislative process, shall
23 be broadly construed, and includes all of the following:

24 a. Researching, drafting, circulating, discussing, introducing, and amending
25 legislative proposals.

1 b. The development of public policy, including research, analysis,
2 consideration, and discussion of issues relevant to public policy.

3 c. All aspects of legislative proceedings.

4 d. All matters related to the policies, practices, and procedures of the legislative
5 branch.

6 e. All matters related to the work of a legislative committee.

7 f. Investigations and oversight.

8 g. Constituent relations.

9 h. All other powers, duties, and functions assigned by law, rule, custom, policy,
10 or practice to the legislature, one house of the legislature, a committee of the
11 legislature, or a member of the legislature.

12 2. “Legislative business” does not include criminal conduct or political
13 campaigning.

14 (d) “Legislative staff member” means a member of the clerk staff, sergeant
15 staff, nonpartisan staff, or personal staff.

16 (e) “Legislator” means a current or former member of the legislature or a
17 legislator-elect. For purposes of the privileges under this section, a legislator’s term
18 of office shall be considered to begin on the date of certification of the legislator’s
19 election to that office.

20 (f) “Nonpartisan staff” means the heads and employees of the nonpartisan
21 legislative service agencies under ss. 13.91, 13.92, 13.94, 13.95, and 13.96.

22 (g) “Personal staff” means the employees assigned to or interning in the office
23 of a legislator.

24 (h) “Record” means information that is inscribed on a tangible medium or that
25 is stored in an electronic or other medium and is retrievable in perceivable form.

1 (i) "Sergeant staff" means all of the following:

2 1. The assembly sergeant at arms and employees assigned to the assembly
3 sergeant at arms' office.

4 2. The senate sergeant at arms and employees assigned to the senate sergeant
5 at arms' office.

6 (2) GENERAL RULE OF PRIVILEGE. (a) A legislator has a privilege to refuse to
7 disclose and to prevent a legislative staff member from disclosing all of the following
8 communications, if made within the course of legislative business during the
9 legislator's term of office:

10 1. A communication between the legislator or a member of the legislator's
11 personal staff, or another person acting on behalf of the legislator, and a member of
12 the clerk staff or sergeant staff.

13 2. A communication between the legislator or a member of the legislator's
14 personal staff, or another person acting on behalf of the legislator, and a member of
15 the nonpartisan staff.

16 3. A communication between the legislator or a person acting on behalf of the
17 legislator and a member of the legislator's personal staff.

18 4. A communication between 2 or more members of the nonpartisan staff, clerk
19 staff, or sergeant staff related to the legislative business of a legislator.

20 5. A communication between 2 or more members of the legislator's personal
21 staff.

22 6. A communication between the legislator or a member of the legislator's
23 personal staff, or another person acting on behalf of the legislator, and any other
24 person.

1 (b) A legislator has a privilege to refuse to disclose and to prevent a legislative
2 staff member from disclosing all records relating to a communication made under
3 par. (a) 1. to 6.

4 (c) A legislator has a privilege to refuse to disclose and to prevent a legislative
5 staff member from disclosing information from which can be ascertained the identity
6 of any person who communicates with the legislator within the course of legislative
7 business during the legislator's term of office.

8 (d) Any privilege that may be claimed by a legislator under pars. (a) to (c)
9 continues to apply with respect to a former legislative staff member to the same
10 extent the privilege applied with respect to that legislative staff member when he or
11 she was a legislative staff member.

12 (e) A legislator's privilege to prevent a personal staff member from disclosing
13 a communication, record, or information under pars. (a) to (c) only applies with
14 respect to the personal staff of that legislator.

15 **(3) EXPRESS WAIVER REQUIRED.** (a) A privilege under this section may be waived
16 only by the express personal waiver of each legislator who may claim the privilege.

17 (b) Disclosure of a communication, record, or information that is privileged
18 under this section by any person to any other person, regardless of whether that
19 disclosure is authorized by the legislator and including a disclosure under s. 13.97
20 (2), shall not constitute a waiver.

21 (c) A legislative staff member or former legislative staff member shall assert
22 and may not waive a privilege under this section on behalf of a legislator who may
23 claim the privilege.

1 (4) CONSTRUCTION. Nothing in this section shall be construed to limit or restrict
2 in any way a privilege or other protection available to a legislator under common law
3 or any other law.

4 **SECTION 11. Initial applicability.**

5 (1) LEGISLATIVE PRIVILEGE. The treatment of section 905.17 of the statutes first
6 applies to actions or special proceedings that are commenced on the effective date of
7 this subsection.

8 (2) PUBLIC RECORDS. The treatment of section 19.32 (1bb) and (2) of the statutes
9 first applies to a request for inspection, copying, or disclosure of a record under
10 section 19.35 (1) of the statutes that is received on the effective date of this
11 subsection.

12 (3) DRAFTING RECORDS. The treatment of section 13.92 (intro.) and (1) (a) 3., (c),
13 and (e) 5. of the statutes first applies to a proposal introduced on the effective date
14 of this subsection.

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**2015-2016 DRAFTING INSERT
FROM THE
LEGISLATIVE REFERENCE BUREAU**

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Under this bill, no provision of the public records retention law that conflicts with a rule or policy of the senate or assembly or joint rule or policy of the legislature applies to a record that is subject to such rule or policy. A similar exception exists under current law for conflicting provisions of the open meetings law.

The bill also specifies that the confidentiality requirements placed on nonpartisan legislative service agencies under current law are not to be construed to prohibit staff of the legislative service agencies from communicating with each other for the purpose of serving the legislature and its members.

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