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### Timeline of Sneak Attack on Open Records in Wisconsin

Late on July 2, the Wisconsin Joint Finance Committee released a final “wrap up” amendment to the 2015-2017 budget bill, called a Motion 999. Included in the amendment, which is supposed to only address budgetary policy, were devastating changes to the state’s open records laws.

The motion would have created: an unprecedented “legislator disclosure privilege” for state lawmaker to refuse to disclose a wide range of communications to the press and the public; a broad new exemption for “deliberative materials” that would allow politicians at all levels of government to deny open records requests; a mechanism allowing the Senate or Assembly to sidestep the public records law by “joint rule or policy.” In addition, the motion would have made all bill drafting files confidential.

The changes were quickly condemned by a bipartisan group of lawmakers and elected officials, liberal and conservative advocacy groups, open government proponents, news organizations and state residents. Because it was a budget bill that would have been retroactive to July 1, news outlets seeking to uncover what inspired the destruction of the law and who was behind it would have been blocked if the proposal had passed.

Initially, [no legislator would take credit](#) for the changes, and the proposal was withdrawn in a [hasty joint statement](#) on July 4 after a barrage of criticism from across the political spectrum. Assembly Speaker Robin Vos [told Wisconsin Public Radio](#), “We took it out, and it’s all going to go back to the way it was before.” But records released to CMD by the Legislative Reference Bureau (LRB) reveal that Vos is still pushing for legislation to erode the public records law.

Likewise, Governor Walker’s [claim](#) that “the changes didn’t come from us” and that “it was a mistake to even think about it in the budget” does not hold up to scrutiny. These records shed new light on Walker’s office’s role in the changes.

The documents obtained by CMD from Speaker Vos’ office and LRB show that:

- On July 23—almost three weeks after he co-signed a pledge not to move forward with the changes pending the finding of a study committee—Vos submitted a request for a stripped-down version of one of the earlier bills, which would allow the Legislature to override the public records law at will;
- The changes to the open records law had been in the works for months and were deliberately withheld for a last minute motion;

- After a June 3 meeting with Governor Walker, a Vos staffer wrote in an email to an LRB attorney that the “big draft” was “back on the table”;
- Two weeks after the meeting, the deliberative process changes were drafted per “governor’s request.”

## **Extended Timeline of Events**

**February 4:** CMD [breaks the story](#) of Governor Walker’s sweeping edits to the University of Wisconsin System’s mission statement in his budget bill, striking out language to the effect that the university should improve people’s lives “beyond the boundaries of the campus” in its “search for truth.” This was an attack on the progressive Wisconsin Idea, which has been a guiding principle for the state university system for more than a century. Instead, he wanted the university to “meet the state’s workforce needs.”

The story soon goes national with AP wires, *Washington Post* articles, and *New York Times* editorials.

**February 5:** Walker’s spokesperson Laurel Patrick tells media that the changes to the UW mission were a “drafting error,” and Walker made the same claim on Twitter. To get to the bottom of this, the *Milwaukee Journal Sentinel* began to page through the massive drafting files. It turned out that the changes were far from innocuous “drafting errors.” Instead, Walker officials from the Department of Administration (DOA) had specifically asked for the changes to the mission statement.

CMD submits a public records request asking for all communications between Walker’s office and the DOA “regarding the 2015-’17 Executive Budget Bill’s changes to ch. 36 of the Wisconsin Statutes.”

**March 6:** CMD files an open records request to the DOA after discovering that Walker officials instructed an LRB drafter to hide the unprecedented expansion of school vouchers from the state’s independent education agency—the Department of Public Instruction. This flew in the face of Walker’s assurances that the entire budget bill was “the result of months long work with staff, legislators and stakeholders.”

**May 8: Media outlets begin to receive unprecedented open records denials shielding internal deliberations.** CMD received almost identical denials to its two public records requests, one signed by David J Rabe, Assistant Legal Counsel for Walker, and the other by DOA Chief Legal Counsel Gregory D. Murray. The main two arguments are that: 1) the public interest in disclosing the records is not outweighed by the purported public interest in protecting the “deliberative process” involved in developing the budget; 2) the records requested do not constitute “records” as per the statutory definition, which excludes drafts and preliminary

documents. Walker's legal counsel David Rabe wrote:

"the public records law incorporates the common-law balancing test, which requires us to weigh the public interest in disclosure against any harm that could result from disclosure. *See, e.g., Wisconsin Newspress, Inc. v. Sch. Dist. of Sheboygan Falls*, 199 Wis. 2d 768, 777-78 (1996). Applying this standard, we have withheld certain documents consisting of preliminary analysis and deliberations created and exchanged by and among employees of DOA and employees of the Governor's office in preparation of the Governor's budget, before the budget legislation was introduced in the legislature.

By law, the Governor is the one responsible for the state's biennial budget, and the Department of Administration is mandated to prepare the budget under the direction of the Governor. *See* Wis. Stats. §§ 16.42–16.47. A candid, complete, and creative evaluation of the state's finances within DOA and within the Governor's office is inherent to the development of the Governor's executive budget. Making these internal discussions just as open to disclosure as the final version of the budget would inhibit the free exchange of ideas, opinions, proposals, and recommendations among those involved in deciding what to include in the final legislation. Disclosure of this narrow category of records—limited to discussions within DOA, within the Governor's office, and between the two--would discourage frank internal discussion and harm the quality of the final executive decision. Further, it would disincentivize the free exchange of emails and written documentation necessary to hone the precise language and calculations that are key to proper budget development. Without a doubt, this would significantly inhibit the efficiency and efficacy of the employees who develop the detailed language and financial calculations for the budget. In addition, disclosure would risk public confusion as a result of publishing non-final proposals, which may not ultimately have been adopted.

The public interests supporting nondisclosure here have long been nationally recognized, including in federal law. *See* Freedom of Information Act (FOIA), 5 USC § 552(b)(5); *Bureau of National Affairs v. U.S. Department of Justice*, 742 F.2d 1484 (D.C. Cir. 1984). Conversely, the public interest in accessing these particular records is limited. All legislation is publicly available once it is introduced, and numerous documents are produced and released to the public explaining and justifying the specifics of the executive budget. Thus, pursuant to the required balancing test, we have concluded that the public interest in protecting the quality of the executive decision-making process and maintaining the efficiency and efficacy of the budget writing process outweighs the public interest in the release of these materials."

Nearly identical denials were issued to several other organizations and media outlets, including the *Milwaukee Journal Sentinel* and the *Wisconsin State Journal*.

**May 19:** CMD files a public records lawsuit against Scott Walker for unlawfully withholding public records related to his office's alteration of the University of Wisconsin System's mission statement.

Walker's claim that his office can withhold records to protect the "deliberative process" is neither recognized by statute nor case law in Wisconsin, CMD's suit alleges. The filing of the lawsuit generates significant press attention, and CMD's position is publicly supported by open government advocates from across the political spectrum.

**May 25:**

**- 5:18 pm:** Andrew Hanus with Speaker Vos' office sends an email to LRB attorney Mike Gallagher:

"Could you please draft two different bills related to drafting files and the records law? Each bill would take the following components from the [LRB 2316] P3 we have been working on with Leg Council:

Bill #1:

- Close drafting files
- Allow legislative rule or policy to supersede the open records law

Bill#2:

- Allow legislative rule or policy to supersede the open records law
- Please put a rush on both of these. Thank you!"

**- 5:27 pm:** Andrew Hanus sends an email to Emily Pope with the Legislative Fiscal Bureau asking her to draft a motion that would exempt "commercial and scientific" research by the UW system from the public records law. This, he writes, **"would be something that would go in the last day under a Nygren motion."**

Already on May 25, a bill that would have introduced a legislative privilege and made all drafting files confidential was in its third iteration. But what is clear is that almost all of the public records provisions (with the exception of the deliberative process privilege) that made it into Motion 999 were already finalized six weeks prior to its introduction. Additionally, this second email—sent only minutes after the previous one—makes clear that the plan to jam this through with no public debate via the wrap-up motion was also worked out weeks in advance.

**June 3**

**- 8:37 am:** Vos Chief of Staff Jennifer Toftness sends an email to Hanus with the subject line "governor meeting."

"Do you want to come? We will likely talk about the open records thing today."

- **11:13 am:** After the meeting with Walker, Hanus sends an email to LRB attorney Michael Gallagher and Brian Larson with Legislative Council:

"Hi guys, sorry for the rollercoaster ride, but I think all of the privilege language (ie - the "big" draft) is back on the table. Could you combine that language with the latest language we have on drafting files and legislative records (which I think is LRB-2518/p3)? I know that we still have to deal with the initial applicability issue, but we will have to talk more about that."

Although Speaker Vos' office (through Hanus) initially called for a bill that would have primarily helped the legislature keep records secret, in the coming weeks the LRB would work on a bill to additionally allow the executive branch to withhold "deliberative materials" from disclosure—which is the same topic at issue in CMD's lawsuit against Walker.

**June 14, 11:23 pm:** Hanus sends his draft **talking points** for Gallagher and Larson to fact-check. There are two sets of talking points; both contain ludicrous assertions.

"I have prepared a one page summary/backgrounder on the draft we have worked on. The intended audience for this would be our members, but I'm sure there is a decent chance the press will get a hold of it if indeed we do this on Wednesday. I know the political side isn't your job, but would you mind checking this over for accuracy (or any other thoughts you might have)?"

### **June 15**

- **12:41 pm:** Larson sends an email to Hanus and Gallagher providing "more background on the deliberative process privilege," specifically the exception that exists in the federal Freedom of Information Act (FOIA):

"Generally speaking, FOIA contains an exemption for disclosure of documents that would normally be exempt from discovery in federal civil discovery. One of the privileges often cited by federal agencies in civil litigation is the 'deliberative process privilege.' The discussion of this privilege starts around 15 or 16 paragraphs from the top of the linked document. The privilege protects communications that are 'pre-decisional' and 'deliberative'."

The FOIA deliberative process exemption (often referred to as "Exemption 5") is a broad loophole in federal law regularly relied upon by federal agencies to keep an array of documents secret. Wisconsin has never had such an exemption in its public records law and adding one would significantly undermine transparency. Notably, Walker's office cited this exemption in their denial letter in support of their "deliberative process" policy argument.

- **3:23 pm:** Gallagher sends an email to Hanus with the subject line "**Governor's request**":

"In the interest of expediency, I am going to enter this as a separate Speaker Vos request and copy David Rabe from the Governor's office on it. I just talked to David. He is fine with proceeding that way. Let me know if you want to do it differently. It should go out tomorrow morning."

That same day, a drafting request form for a "deliberative process exception" is created with the named "requester" Robin Vos, and Gallagher as the drafter. The bill language declares that "deliberative materials" are excluded from the definition of "record" and not subject to disclosure under the public records law. The language states:

"Deliberative materials created to assist in making a final decision within an official government function, including but not limited to draft language, drafting correspondence, background information, briefings, advisory opinions, and other preliminary documents created to facilitate a final decision. Deliberative materials do not include communications with anyone outside government or with anyone who is not assisting in the decision-making process."

**June 17, 2:56 pm**

Larson writes to Hanus and Gallagher with comments on the new deliberative process language, noting that:

1. "...if the goal is to prompt our courts to apply concepts developed in federal common-law, then the state statute should expressly reference all of the elements, and *predecisional* is one of the two key elements that should probably be expressly included here."
2. Along the same lines, consider adding a carve-out for *factual information*.
3. I should also note, if the goal is to prompt WI courts to depart from federal common-law in some respects, then the same logic also applies. There would still be a need to expressly include the element in the state statute, and then specify how it should operate differently, etc..."

The drafters declined to include the terms "predecisional" and "factual information."

**June 22, 8:02 am:** Gallagher writes to Hanus, pointing out that the deliberative process language "could be unnecessary for the legislature" since legislators could withhold the same records under other provisions in the open records changes. However, he adds, "leaving it in probably broadens the ability of executive branch actors to withhold documents under open records" and he recommends it be removed – unless it was "specifically asked for by the governor. Your call. Let me know."

Clearly, the deliberative process language was "specifically asked for by the governor" since it was indeed left in the proposal.

**June 26, 9:43 am:** Hanus sends an email to Sen. Fitzgerald's aide Tad Ottman as well as to Gallagher and Larson:

"Would you be available for a meeting today at 2pm at LFB? I think we are very close to final language and would like to talk about the bill as whole (latest draft attached) and also discuss the final changes we are considering (discussed below)."

**July 2, 5 pm:** Rep. Nygren and Sen. Darling, who co-chair the Joint Finance Committee, [introduce Motion 999](#) with the sweeping changes to the state's public records law buried as items 28-32 out of 67. These would have:

- Exempted "deliberative materials" from the public records law. These are very broadly defined as anything "created or prepared in the process of reaching a decision concerning a policy or course of action";
- Created new "legislator disclosure privileges" giving legislators carte blanche to "refuse to disclose, and to prevent a current or former legislative staff member from disclosing" a vast array of communications, including correspondence with lobbyists and constituents;
- Made all drafting files confidential;
- Allowed the Senate or Assembly to sidestep the public records law by "joint rule or policy."

The motion passes along party lines in the Joint Finance Committee.

**July 3:** State media reports on the changes, which causes a furor. House Speaker Vos and Senate Majority Leader Fitzgerald are inundated by calls and emails, many from long-time supporters.

The open records obtained by CMD reveal dozens of emails along the lines of: "I have been a Republican voter for many, many years, and vote in every election to which I am entitled. ... Please know that if the proposal to restrict Wisconsin's open records law becomes law, I will never again vote for a Wisconsin Republican until Democrats once again take over our state government and remove this anti-citizen, pro-corruption provision from our laws." (Constituent writing to Rep. Vos)

**July 3, 1:48 pm** – Scrambling to defend the changes in the face of public outcry, Hanus asks Gallagher to research the "legislative privilege" in other states. Gallagher goes beyond the call of duty by sending Hanus a copy of a 2014 presentation he made on "legislative privilege"—or more specifically, the "speech and debate clause" contained in the U.S. constitution and many state constitutions--which contains explicit strategies on how to avoid disclosing communications between legislative attorneys and legislators. Although a narrow constitutional "speech and debate clause" is entirely distinct from the broad open records "legislative privilege" that

Vos was trying to create via the Motion #999, Gallagher's presentation would go on to serve as the basis of ludicrous talking points which are used by Vos in [radio interviews](#).

Gallagher writes in the email to Hanus:

"Andrew: You asked about the legislative privilege in other states and at the federal level. I am treating this as a confidential reference request. I hope this information helps. As I mentioned, all but 7 states have a legislative privilege (i.e., speech or debate clause) in their constitutions. For a list of states, see page 6 ... and the accompanying footnotes in the Huefner article attached.

I am also attaching my personal outline for the CLE I did for the LRB on this issue last year. It provides a summary of the federal legislative privilege and an analysis of the Wisconsin Supreme court's decisions in Benoit and LTRB."

Gallagher's CLE presentation from 2014, titled **"Legislative Privilege in the Age of Open Government"** provides an expansive interpretation of the "speech and debate clause," which he describes as "the legislative privilege." He takes the position of an advocate, arguing in favor of a broad reading of the "speech and debate clause," which was originally intended to protect members of parliament from the King, and today protects lawmakers and their aides from prosecution or civil suit for their speeches on the floor or other official acts.

This discussion of the speech and debate clause has little to do with the open records law. Wisconsin actually does have a speech and debate provision in its constitution, but this is entirely distinct from the state's open records law. Yet Vos will use poorly-constructed talking points lifted from Gallagher's presentation to tell the public repeatedly that "43 states have very similar legislative privileges" to imply that Wisconsin's open records law is behind the times and in need of change, when in fact it allows citizens to hold their legislators to account more effectively than most.

Gallagher's presentation concludes with a list of "other arguments a member or legislative staff might make" to prevent disclosure of documents—both in court and, apparently, pursuant to open records requests. These are: legislative privilege (i.e. the speech and debate clause), the attorney-client privilege, the work product privilege, and rules of proceedings.

**July 5:** Scott Walker and GOP leaders issue a joint statement reading in part:

"After substantive discussion over the last day, we have agreed that the provisions relating to any changes in the state's open records law will be removed from the budget in its entirety."



**July 23, 6:10 pm:** Despite the earlier statement, which Vos co-signed, Hanus asks Gallagher for a stripped-down version of one of the public records bills that would still allow the legislature to “set its own records retention policy by rule or official policy.” Gallagher replies he will get the bill drafted on Monday, July 27.

**July 27:** The drafting file reflects that Gallagher submitted a new request for a draft (2550/p4) that would have added the following overriding provision to the public records statutes:

“CERTAIN RECORDS OF THE LEGISLATIVE BRANCH. No provision of this section that conflicts with a rule or policy of the senate or assembly or joint rule or policy of the legislature shall apply to a public record that is subject to such rule or policy.”

**July 28:** Vos would partially deny some of CMD’s open records requests based on attorney-client privilege, per Gallagher’s presentation.

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