



STATE OF WISCONSIN
DEPARTMENT OF JUSTICE

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Representative Louis J. Molepske, Jr.
Wisconsin State Assembly
The State Capitol
Room 122 North
HAND DELIVERED

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Madison, WI 53703-2500
VIA FACSIMILE 608/251-1655

Rebecca Katers, Executive Director
Clean Water Action Council of Northeast Wisconsin
East Port Center
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Green Bay, WI 54302
VIA FACSIMILE 920/437-7326

Michael J. Serpe
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Kenosha County Executive's Office
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VIA FACSIMILE 262-653-2817

Re: Confidentiality of Legislative Drafting Materials

Dear Representative Molepske, Mr. Scheer, Ms. Katers & Mr. Serpe:

In recent days, each of you has inquired about the effect release to certain members of the public or individual lobbyists of Legislative Reference Bureau (LRB) bill drafts has on the confidential treatment afforded such drafts under Wisconsin law. I conclude that any LRB drafting materials that are released to any person, beyond those state officials clearly charged with developing legislation, loses its protected status and must be released upon request.

Pursuant to Wis. Stats. § 13.92(1)(c), "Records of drafting requests which did not result in legislation introduced shall remain confidential at all times..." This particular statutory requirement governs the Legislative Reference Bureau, but not individual legislators. In fact, there is no statutory basis upon which to infer that legislators, or the LRB, are generally exempt from the broad reach of Wisconsin's Public Records Law in the circumstances you describe. Despite the narrow privilege conferred, records custodians - whether a legislative office or the LRB - in possession of any legislative drafting materials that have been selectively released beyond the appropriate state officials, lose any claim to confidentiality and must be released under Wisconsin's Public Records Law.

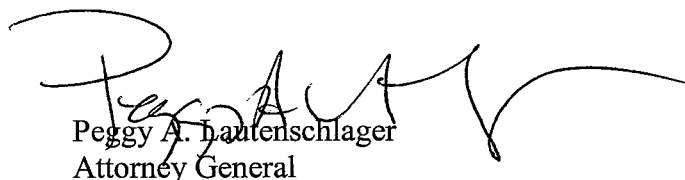
Changes in the manner in which the Legislature handles bill drafts over the last several years appears to be eroding the confidential status such bill drafts have consistently been given. For example, some of these practices result in a relatively widespread, yet selective, distribution of bill drafts by individual legislators to certain individuals or interest groups during a time when others are not afforded access to the same information. Holding public hearings on bill draft numbers rather than properly introduced legislation only compounds this problem, particularly if the bill drafts are not made available to all with interest in the topic well in advance of the hearing.

Prior legal analysis applying our state's Public Records Law (Wis. Stats. §19.32 et seq.) can provide some guidance in answering this question. Under Wis. Stats. §19.32(2), "drafts, notes and preliminary documents" are not considered public records. The basic principle behind this exception is the same as in the LRB exception---that some confidentiality is accorded for the work of public officials while it is truly a work in progress. This special treatment of drafts, however, is an exception which is narrowly construed, and is limited to documents circulated within the "preparer's level of authority." 77 Op. Att'y Gen. 100 (1988); *Fox v. Bock*, 149 Wis. 2d 403, 411, 417, 438 N.W.2d 589 (1989). See also, *Journal/Sentinel v. Shorewood School Board*, 186 Wis. 2d 443, 521 N.W. 2d 165 (Ct. App. 1994). Furthermore, drafts which cease to be used for their original purposes also lose their draft status. Noticing a draft for a public hearing, for instance, would result in the draft losing its confidential status.

Some may argue that legislators enjoy an attorney-client relationship with the LRB drafting attorneys. Even so, any claim of attorney-client privilege in the circumstances you describe are without merit. Once an individual legislator selectively releases draft documents to a third party, any such privilege, if it exists, would be extinguished.

Legislative offices are advised to carefully evaluate practices which result in the distribution of bill drafts to persons not in the immediate employ of the legislature, legislative or other state agency personnel with duties directly associated with analyzing bill drafts. Once distribution is made beyond those state officials clearly charged with developing legislation, the draft loses its protected status and any individual must be given access upon request.

Very truly yours,



Peggy A. Lautenschlager
Attorney General

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