WISCONSIN LEGISLATIVE COUNCIL
AMENDMENT MEMO

2001 Assembly Bill 621	Assembly Substitute Amendment 2
Memo published: January 9, 2002	***Contact*: Dan Schmidt, Analyst (267-7251)**

A. IDENTIFICATION NUMBERS FOR PRIVATE COLLEGE STUDENTS

1. Current Law

Current law provides that the University of Wisconsin (UW) System, technical college boards, school boards and governing bodies of private schools are prohibited from assigning a student an identification number that is identical to, or incorporates that student's Social Security number.

2. Assembly Bill 621

The bill extends the prohibition on the use of a student's Social Security number as an identification number to all private institutions of higher education in Wisconsin. If enacted, this provision will take effect on January 1, 2007.

3. Substitute Amendment 2

The substitute amendment does not alter this provision of the bill.

B. PROHIBITING SOCIAL SECURITY NUMBERS ON INSURANCE CARDS

1. Current Law

Current law does not prohibit the use of an individual's Social Security number as an insurance identification number or prohibit the display of an individual's Social Security number on an insurance identification card.

2. Assembly Bill 621

The bill prohibits an insurer, including state and local government, from displaying an insured's Social Security number in any other manner on the insured's insurance identification card or other similar identification device.

3. Substitute Amendment 2

The substitute amendment eliminates this provision of the bill.

C. PROHIBITING PRISONER'S WHO PERFORM DATA ENTRY FROM ACCESSING AN INDIVIDUAL'S DATE OF BIRTH

1. Current Law

Current law prohibits the Department of Corrections from entering into a contract that would allow a prisoner who performs data entry or telemarketing services to access an individual's financial transaction card numbers, checking or savings account numbers or Social Security number.

2. Assembly Bill 621

The bill extends this prohibition to include access to an individual's date of birth.

3. Substitute Amendment 2

The substitute amendment does not alter this provision of the bill.

D. CONFIDENTIALITY OF PATIENT HEALTH CARE RECORDS

1. Current Law

Current law generally prohibits the disclosure of patient health care records without the informed consent of the patient or a person authorized by the patient. A number of exceptions to this prohibition exist under s. 146.82 (2) (a), Stats. Generally, these exceptions are limited to the exchange of information between health care providers, health care plans and appropriate state or local government agencies. A person who obtains a patient health care record under these exceptions may not disclose any of the health care information and must maintain the confidentiality of the data.

2. Assembly Bill 621

The bill prohibits an individual who receives a patient health care record without informed consent under s. 146.82 (2) (a), Stats., from using identifying information in the record to market a product or service to a patient or health care provider. The bill also expands the definition of health care provider to include a pharmacy, as well as a pharmacist, and expands the definition of patient health care record to include records related to the health of a patient that are ***owned by*** a health care provider. The bill establishes civil liability for a violation of the patient health care confidentiality laws in the amount of actual damages and up to $25,000 for exemplary damages plus costs and attorney fees. Finally, the

bill authorizes the Attorney General or a district attorney to enforce the patient health care record confidentiality laws.

3. Substitute Amendment 2

The substitute amendment modifies the prohibition on the use of patient health care information to allow the use of such information as is permitted under the privacy rules of the Federal Health Care Insurance Portability and Accountability Act of 1996. [See 45 C.F.R. Parts 160 and 164.] The substitute amendment also delays the effective date for this provision until April 14, 2003, for most health plans, or April 14, 2004, for small health plans[i], in order to match the effective date of the federal rules.

E. ACCESS TO PUBLIC RECORDS THAT CONTAIN PERSONALLY IDENTIFIABLE INFORMATION

1. Current Law

The current Open Records Law provides that, except as otherwise provided by law, any requester has a right to inspect any record as defined under s. 19.32 (2), Stats. [See s. 19.35, Stats.] In determining whether to release a record, an authority must generally rely on the common law procedure called the ***balancing test***. Under the balancing test, the custodian of the record must determine, on a case-by-case basis, whether releasing a record would result in harm to the public interest that outweighs the public interest in allowing inspection of the record. If the custodian finds that the harm to the public interest does outweigh the public interest in inspection, the record need not be disclosed. However, a ***strong presumption*** exists favoring disclosure that must be rebutted by the custodian for a denial to withstand judicial review. In *Woznicki v. Erickson*, 202 Wis. 2d 178 (1996), and *Milwaukee Teachers Education Association v. Milwaukee Board of School Directors*, 227 Wis. 2d 779 (1999), the Wisconsin Supreme Court established a procedural requirement for an authority who has made a decision to release an employee record that may implicate the privacy or reputational interests of the individual who is the subject of the record. In such cases, the supreme court stated that the subject of the record must be allowed a reasonable amount of time to contest the release of the record by filing a legal action seeking judicial review of the custodian's decision to release the record. The court did not establish any specific criteria for determining when privacy or reputational interests are affected or for providing notice to affected parties.

2. Assembly Bill 621

The bill generally provides that, except as otherwise provided by statute, no authority is required to notify a record subject prior to providing a requester with access to a record containing information pertaining to that record subject. The bill also generally provides that no person is entitled to a judicial review of an authority's decision to provide a requester with access to a record.

Conversely, in limited circumstances, the bill establishes a statutory procedure, similar to the procedure prescribed by the court, whereby an authority must notify a record subject to whom the record pertains prior to the release of the record. The procedure applies to records that contain the following:

a. Information concerning the authority's investigation into a disciplinary matter relating to an employee or a possible violation by an employee of a policy of the employee's employer, or of a statute, rule, regulation, or ordinance in connection with the employee's employment.

b. Information prepared or provided by an employer concerning the home address or telephone number of an employee of that employer, if the employee has not consented for the authority to provide access to that information.

c. Information relating to one or more employees that is used by the authority or by the employer of the employees for staff management planning or employee, including employee performance evaluations, judgments or recommendations concerning future salary adjustments or other employee wage treatments, management employee bonus plans, promotions, job assignments, letters of reference, or other comments or ratings relating to individual employees.

d. Information pertaining to an employee's employment examination, except an examination score if access to that score is not otherwise prohibited. This does not include information relating to the hiring or recruitment process that is exchanged between the Department of Employment Relations and an authority that is a unit of state government.

If an authority wishes to release a record that contains any of this information, the authority must notify the record subject, by certified mail with return receipt or in person, of the decision to release the record within 72 hours of the decision to release and prior to actually releasing the record. The record subject who receives such notice then has five days to notify the authority of his or her intent to seek a court order restraining the authority from releasing the record. The record subject also has 10 days from the receipt of the notice to commence a court action to restrain the release of the record.

An authority may not provide access to the record prior to 12 days after sending a notice to a record subject regarding the release of a record. If the record subject commences a court action seeking to restrain the release of the record, an authority may not provide access to the record pending the outcome of any court action or appeal. The court involved in such an action is expected to issue a decision within 30 days of the filing of an action and appeals are to be granted precedence over matters that are not accorded similar precedence by law.

The notice requirement established by the bill does not require notice under the following circumstances:

a. A state or local public official is the subject of the requested record.

b. An authority provides access to a record pertaining to an employee to the employee who is the subject of the record or to his or her bargaining representative.

c. An authority releases a record produced for equal rights, discrimination or fair employment law compliance purposes.

3. Substitute Amendment 2

The substitute amendment removes the receipt requirement for notice by certified mail under the aforementioned notification procedure. The substitute amendment further amends the bill's notification

provision by limiting the notice requirement to information concerning the authority's investigation into a disciplinary matter relating to an employee or a possible violation by an employee of a policy of the employee's employer, or of a statute, rule, regulation, or ordinance in connection with the employee's employment or any record obtained by an authority through a subpoena or search warrant.

The substitute amendment also adds an additional notice exclusion to those noted above for an authority that is charged with the responsibility to enforce a law, ordinance, rule or regulation that is applicable to individuals other than officers or employees of the authority or persons under contract with the authority unless the investigation involves an officer or employee of the authority or a person under contract with the agency.

Furthermore, the substitute amendment exempts certain employee personnel records from release under the Open Records Law unless access is specifically authorized or required by statute. Thus, under the substitute amendment, the following records may not be released except as provided:

a. Information prepared or provided by an employer concerning the home address or telephone number of an employee, unless the employee authorizes the authority to release such information.

b. Information relating to the current investigation of a possible criminal offense or possible misconduct connected with employment by an employee prior to the disposition of the investigation.

c. Information pertaining to an employee's employment examination, except an examination score if access to that score is not otherwise prohibited.

d. Information relating to one or more specific employees that is used by an authority or by the employer of the employees for staff management planning, including performance evaluations, judgments, or recommendations concerning future salary adjustments or other wage treatments, management bonus plans, promotions, job assignments, letters of reference, or other comments or ratings relating to employees.

The substitute amendment generally prohibits an authority from permitting access to a record that contains personally identifiable information about an employee, that is prepared or provided by a private employer and that is in the custody of a public authority, unless the employee who is the subject of the record authorizes the authority to release his or her identity.

Finally, the substitute amendment permits the Department of Employment Relations or its delegates to provide personnel information relating to the hiring and recruitment process to any agency.

F. AUTOPSY RECORDS

1. Current Law

Current law allows an individual to inspect or copy any public record unless otherwise provided by law or unless the record custodian demonstrates that the public interest in withholding the record outweighs the strong public interest in providing access to the record. Autopsy reports and accompanying materials are generally treated as public records under current law.

2. Assembly Bill 621

The bill provides that autopsy records, including photographs or other pictorial images, are confidential and establishes a general prohibition on the inspection or copying of such records under the Wisconsin Open Records Law. [See s. 19.35, Stats.] Except as required to complete a medical certification of death, the bill also prohibits the custodian of an autopsy record or an individual involved in conducting an autopsy from releasing any information to the public regarding the deceased that is learned as a result of an autopsy without permission from the deceased's next of kin.

3. Substitute Amendment 2

The substitute amendment narrows the provisions relating to the release of autopsy records without consent to photographs or pictorial images only. Under the substitute amendment, autopsy records other than photographs or pictorial images are subject to copying and inspection under s. 19.35 (1), Stats. The substitute amendment allows an individual to inspect photographs or other pictorial images taken during an autopsy, but prohibits the copying of such images under s. 19.35 (1), Stats., without the consent of the spouse or next of kin or unless a court orders the release. In addition, the substitute amendment provides that the custodian of an autopsy photograph or other pictorial image may disclose such material for educational use by a coroner, medical examiner or postsecondary educational institution, or to persons conducting health care peer reviews or health care quality assurance activities.

G. PRIVACY IMPACT STATEMENTS

1. Current Law

Current law does not require the preparation of privacy impact statements for legislation that may have an impact on personal privacy.

2. Assembly Bill 621

The bill requires that whenever a bill is introduced in either house of the Legislature that would have an impact on personal privacy, a privacy impact statement must be prepared in the same manner as the current fiscal note procedure. The statement must describe the personal privacy impact of the bill if it were enacted and must analyze the desirability of the impact from a public policy standpoint. Similar to the current fiscal note procedure, a bill that requires a privacy impact statement may not receive a public hearing until the chief clerk of the house in which the bill originates receives the statement.

The bill defines an ***impact on personal privacy*** as a bill that would do any of the following:

a. Provide for the creation of additional personally identifiable information that is not readily available to the public at the time the bill is introduced.

b. Create an activity that would constitute an intrusion upon the privacy of an individual, or alter an activity in such a way as to create such an intrusion.

c. Use the name, picture or likeness of an individual without the consent of the individual, or the consent of the individual's parent or guardian if the individual is a minor.

d. Permit or cause publicity to be given to the private life of an individual.

3. Substitute Amendment 2

The substitute amendment does not alter this provision of the bill.

H. POLICIES ON ENTERING LOCKER ROOMS

1. Current Law

Current law does not require organizations with locker rooms to establish locker room privacy policies.

2. Assembly Bill 621

The bill requires that every school board, private school, technical college district board, two-year collegiate campus of the UW System, private institution of higher education and professional sports team that has its home field or arena in Wisconsin to adopt a written locker room privacy policy. The policy must state who may enter and remain, in order to interview or seek information from any person, in a locker room that is used by an athletic team representing the organization. The policy must reflect the privacy interests of the members of the athletic teams who are representing the organization.

3. Substitute Amendment 2

The substitute amendment does not alter this provision of the bill.

I. TELEPHONE SOLICITATIONS

1. Current Law

Current law prohibits a telephone solicitor, or his or her employee or contractor, from making a telephone solicitation to a residential customer if that customer has registered his or her name in the state nonsolicitation directory maintained by the Department of Agriculture, Trade and Consumer Protection. Furthermore, current law prohibits a telephone solicitor from making a telephone solicitation to a nonresidential customer if the nonresidential customer has provided notice by mail to the telephone solicitor that the nonresidential customer does not wish to receive telephone solicitations. Current law does not address the use of caller identification blocking services by telephone solicitors.

2. Assembly Bill 621

The bill prohibits a telephone solicitor, or his or her employee or contractor, from using a caller identification blocking service when making a telephone solicitation. A blocking service is defined as a service that allows a person who makes a telephone call to withhold his or her telephone number or name from a person who receives the call and uses a caller identification service which allows the individual to identify the telephone number or name of a caller.

3. Substitute Amendment 2

The substitute amendment does not alter this provision of the bill.

J. PHOTOGRAPHS OF RESIDENTIAL PROPERTY

1. Current Law

Current law does not prohibit a taxation district from placing of photographs of real estate on the Internet for property tax-related purposes.

2. Assembly Bill 621

The bill prohibits a taxation district from putting photographs of residential property on the Internet.

3. Substitute Amendment 2

The substitute amendment eliminates this provision of the bill.

K. PRIVACY AND SECURITY INFORMATION OFFICERS

1. Current Law

Current law assigns general responsibility for the state's information technology and telecommunications systems to the Department of Electronic Government. The secretary of the Department of Electronic Government has the title of chief information officer. There is no privacy information officer or security information officer under current law.

2. Assembly Bill 621

The bill requires that the chief information officer appoint employees of the Department of Electronic Government to serve as privacy information officer and security information officer. The privacy information officer is to provide information concerning privacy protection laws and regulations to Department of Electronic Government employees and others who may be the subject of information maintained or processed by the department. The security information officer is to ensure the security of information maintained or processed by the Department of Electronic Government. The bill prohibits supervision of the functions of the privacy information officer and security information officer by a division administrator in the unclassified service.

3. Substitute Amendment 2

The substitute amendment does not alter this provision of the bill.

L. DISCLOSURE OF JUVENILE RECORDS

1. Current Law

Current law generally prohibits the disclosure of juvenile records with limited exceptions. The exceptions to this prohibition include exchanges between law enforcement agencies who may, with the approval of the juvenile court, exchange such information for the purpose of investigating alleged criminal gang activity and exchanges between juvenile courts for district attorney or corporate counsel review of a minor's prior proceedings under the Children's Code or the Juvenile Justice Code.

2. Assembly Bill 621

The bill expands the exceptions to allow the exchange of confidential juvenile records between a law enforcement agency and:

a. Another law enforcement agency as needed by the agency to pursue an investigation of any alleged criminal or delinquent activity;

b. A juvenile court, municipal court, or a district attorney, corporate counsel, municipal attorney or other person representing the interests of the public in a Children's Code or Juvenile Justice Code proceeding, as is necessary for the court to conduct or public representative to prepare for a proceeding in that court; or

c. A juvenile court intake worker as needed to provide intake services.

The bill also permits the exchange of confidential juvenile records between a juvenile or municipal court and:

a. A law enforcement agency as needed by the agency to pursue an investigation of any alleged criminal or delinquent activity;

b. Another juvenile court, municipal court, or a district attorney, corporate counsel, municipal attorney or other person representing the interests of the public in a Children's Code or Juvenile Justice Code proceeding, as is necessary for the court to conduct or public representative to prepare for a proceeding in that court; or

c. A juvenile court intake worker as needed to provide intake services.

A person who receives juvenile records under these exceptions must keep the information confidential and may only use the information for the purposes for which the information was requested.

3. Substitute Amendment 2

The substitute amendment deletes the use of the undefined term ***social welfare agency*** and substitutes the statutory definition of agency[ii] under the Children's Code and Juvenile Justice Code, respectively. The substitute amendment also clarifies that a law enforcement agency or court may release juvenile records, as specified under the bill, to any person designated by the court to provide

intake or dispositional services or to any other person employed by an agency as defined under the Children's Code and Juvenile Justice Code.

Assembly Substitute Amendment 2 to 2001 Assembly Bill 621 was recommended by the Assembly Committee on Personal Privacy by a vote of Ayes, 8; Noes, 0; on January 8, 2001.

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[i] A *small health plan* is defined as a health plan with fewer than 50 participants. [45 C.F.R. Part 160.103.]

[ii] Under the Children's Code [s. 48.38 (1) (a), Stats.] and the Juvenile Justice Code [s. 938.78 (1), Stats.], an agency is defined as the Department of Health and Family Services, a county department of social services or a licensed child welfare agency.