

June: No ‘executive privilege’ for records

Written by By Christa Westerberg



The office of Wisconsin Gov. Scott Walker has crafted a new interpretation of the state’s open records law, claiming it can exempt records used in developing a final decision from disclosure. In this case, “new” is not “improved.”

Earlier this year, records requesters asked the office for its communications with the Department of Administration, after the governor’s proposed budget called for removing the “Wisconsin Idea” from the University of Wisconsin System’s mission statement.

The governor’s office, in response to these requests, [refused](#) to provide records containing “preliminary analysis and deliberations created and exchanged by and among employees of DOA and employees of the governor’s office,” before the budget was introduced.

Why? It said releasing these records would “discourage frank internal discussions” among budget-writing staff and “risk public confusion as a result of publishing non-final proposals,” which might not be adopted.

Wisconsin’s open records law creates a broad presumption of openness, and courts have held that exceptions must be “extremely narrow and well-defined.” The federal government and some states have recognized a “deliberative process” or “executive privilege” exemption to disclosure. But Wisconsin has not, and for good reason.

The public has the right to see what information the government used to reach a decision, and what alternatives were considered. Other bill-drafting records are routinely [made public](#) after legislation is introduced. These records also reveal who took part in decision-making — a critical issue in the “Wisconsin Idea” budget snafu, after some documents showed DOA specifically requested that change.

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When records are withheld, people inevitably wonder: What are they trying to hide? Public confidence in government is stronger when people can see the process as well as the result.

The Governor's records denials also suggest the public cannot be trusted with decision-making information, or lacks the capability to distinguish between final and non-final decisions. Yet Wisconsin has gone decades without recognizing an executive privilege to disclosure. Pandemonium has not ensued.

If anything, the need for transparency has grown stronger as the budget is increasingly used to make policy. People want to know the basis for changes that affect key areas of their lives, like long-term care, schools and transportation. They also deserve that information on a meaningful timeline, while there's still an opportunity to weigh in on changes before they are final.

Two of the denied records requesters have since filed lawsuits. The [Center for Media and Democracy](#) was the first. "(B)lowing a new hole in the public records law to keep (the Wisconsin Idea change a) secret would do grave damage to Wisconsin's traditions of clean and open government," [said](#) general counsel Brendan Fischer.

Katy and Jud Lounsbury and [The Progressive](#) magazine challenged the denial of a February request. Their complaint says the withheld records "are quintessentially the kinds of records that the public records law requires to be made available to the public and the press in response to records requests."

Opposition to an "executive privilege" exemption is shared across the ideological spectrum. Rick Esenberg, executive director and general counsel of the conservative Wisconsin Institute for Law and Liberty, recently [blogged](#) that the CMD denial was "wrong under our state law." He said the idea that records can be withheld "because it might be awkward to expose the government's deliberative processes ... is one that our state Legislature, in enacting the law, has rejected."

Let's hope their view wins out. Otherwise, custodians will have a dangerous new tool to deny

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access to decision-making that affects us all.

Your Right to Know is a monthly column distributed by the [Wisconsin Freedom of Information Council](http://www.wisfoic.org) (www.wisfoic.org), a nonprofit group dedicated to open government. Christa Westerberg, at attorney with McGillivray Westerberg & Bender, is the group's vice-president.