



MEMORANDUM

TO: Majority Leader Scott Fitzgerald
FROM: Rick Champagne, chief
DATE: June 15, 2020
SUBJECT: Legality of recording May 14, 2020, telephone conversation

From press reports and conversations with staff in your office, it is my understanding that a telephone call occurred on May 14, 2020, between Governor Tony Evers, Speaker Robin Vos, and you on matters relating to state action to suppress the outbreak of COVID-19 following the Supreme Court's decision in *Wisconsin Legislature v. Palm*.¹ Legislative staff were invited to listen in on the call, and two staff from the governor's office were announced by the governor as participating in the call—Chief of Staff Maggie Gau and Chief Legal Counsel Ryan Nilsestuen.² Apparently, without the knowledge or consent of Speaker Vos or you, the telephone call was recorded. Subsequently, the *Milwaukee Journal Sentinel*, through a public records request to the governor's office, obtained a copy of a recording of the telephone conversation.³ To date, the governor's office has not identified the person who recorded or authorized the recording of the telephone conversation.⁴

You have asked whether the recording of this telephone conversation without your knowledge or consent is in violation of law. Wis. Stat. § 968.31 (1) generally prohibits any person from intercepting a wire, electronic, or oral communication or disclosing or using a communication that was illegally intercepted. A person who violates either prohibition commits a Class H felony and is subject to a fine of not more than \$10,000 or a term of imprisonment for not more than six years or both.

There are exceptions to the prohibition against intercepting a communication, including what is generally called the one-party consent exception. Under Wis. Stat. § 968.31 (2) (c), a

¹ *Wisconsin Legislature v. Palm*, 2020 WI 42.

² Patrick Marley and Molly Beck, "[Republican Leaders Secretly Recorded by Gov. Tony Evers' Staff, Infuriating GOP Lawmakers](#)," *Milwaukee Journal Sentinel*, June 10, 2020.

³ *Id.*

⁴ Molly Beck and Patrick Marley, "[Republicans – and One Democrat – call for Gov. Evers to Fire Staffer Who Secretly Recorded Phone Call](#)," *Milwaukee Journal Sentinel*, June 11, 2020.

communication may be intercepted legally by a person who is a party to the communication or by another who has the prior consent of a person who is a party to the communication. In other words, it is not unlawful for a person who is a party to the communication to record or authorize another person to record the conversation without the knowledge or consent of the other parties.

With respect to the May 14, 2020, telephone conversation, the governor was clearly a party to the communication and Chief of Staff Gau and Chief Legal Counsel Nilsestuen were very likely parties to the communication as well, since they were announced by the governor as being on the call and they participated in conversations during the call. If any of these individuals recorded the telephone call, or authorized another person to record the call, the recording of the call would not violate Wis. Stat. § 968.31 (1). The recording would be lawful.

However, if another person in the governor's office recorded the telephone call without the prior consent or authorization of the governor, Chief of Staff Gau, or Chief Legal Counsel Nilsestuen, then the person may well have violated Wis. Stat. § 968.31 (1) since the person was not a party to the communication.

I hope this information is helpful. Please let me know if the LRB can be of further assistance.