

2015 4th Quarter Correspondence

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STATE OF WISCONSIN
DEPARTMENT OF JUSTICE

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ATTORNEY GENERAL

Andrew C. Cook
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October 2, 2015

Dale R. Neumann

[REDACTED]
Chippewa Falls, WI 54729-5307

Dear Mr. Neumann:

The Department of Justice (DOJ) is in receipt of your August 28, 2015 letter to Attorney General Brad Schimel in which you request the Attorney General bring an action for mandamus concerning a public records request you made to the Chippewa County District Attorney Steven H. Gibbs in 2013. Additionally, you asked, "Would you please let me know what you can do and will do to ensure that none of the records that I have requested are removed from my file before any records are sent to me[?]"

In your correspondence, you stated that you have not been provided the requested records in over two years. The Wisconsin Public Records Law, Wis. Stat. §§ 19.31 to 19.39, does not require a response to a public records request within a specific timeframe. *See also Journal Times v. Police & Fire Comm'rs Bd.*, 2015 WI 56, ¶ 85. In other words, after a request is received, there is no set deadline by which the authority must respond. However, the law states that upon receipt of a public records request, the authority "shall, as soon as practicable and without delay, either fill the request or notify the requester of the authority's determination to deny the request in whole or in part and the reasons therefor." Wis. Stat. § 19.35(4)(a). A reasonable amount of time for a response depends on the nature of the request, the staff and other resources available to process the request, the extent of the request and other related considerations. *WIREDATA, Inc. v. Vill. of Sussex*, 2008 WI 69, ¶ 56; *see Journal Times*, at ¶ 87 (an authority "can be swamped with public records requests and may need a substantial period of time to respond to any given request").

While the law requires an authority to fill a request or notify the requester of a determination to deny a request, the law does not require an authority to respond to a requester if the authority has no records responsive to a request. However, the DOJ's Office of Open Government advises that an authority notify a requester if they have no responsive records. *See Journal Times v. Police & Fire Comm'rs Bd.*, 2015 WI 56, ¶ 102 ("While it might be a better course to inform a requester that no record exists, the language of the public records law does not specifically require such a response.").

The Office of Open Government encourages authorities and requesters to maintain an open line of communication. This helps to avoid misunderstandings between an authority and a requester. If it becomes apparent to an authority that a public records request may require a longer response time, it may be prudent that the authority provide the requester with a letter providing an update on the status of the response and, if possible, indicating when a response might be anticipated. Similarly, if an authority receives an inquiry from a requester seeking an update on the status of the request, it is advisable for the authority to respond to the requester with an update.

In your correspondence, you asked the Attorney General what he can do to ensure that none of the records you requested are removed from your file before any such records are sent to you. Under the Public Records Law, an authority cannot destroy any record at any time after they receive a request to inspect or copy the record until after the request is granted or until at least 60 days after the date the request is denied. Wis. Stat. § 19.35(5). If the requester is a committed or incarcerated person, the authority cannot destroy any record until at least 90 days after the date the request is denied. *Id.* If an authority receives written notice that a mandamus action under Wis. Stat. § 19.37 has commenced, the authority cannot destroy the record until after the court issues the order related to the record and the deadline for appeal has passed, or if appealed, the order of the court hearing the appeal is issued. *Id.*

The Attorney General and the Department of Justice's Office of Open Government are committed to increasing government openness and transparency, and DOJ endeavors to educate and offer guidance to ensure openness and transparency. There are several open government resources available to you through the Wisconsin Department of Justice website (<http://www.doj.state.wi.us/dls/open-government>). DOJ provides the full Wisconsin Public Records Law, maintains a Public Records Law Compliance Outline and a Compliance Outline Supplement and provides a recorded webinar and associated presentation documentation. In addition to the statute itself, you may wish to consult pages 13-14 of the Compliance Outline for additional information regarding the timing of a response.

The Public Records Law provides several remedies for a requester dissatisfied with an authority's response, or lack of response, to a public records request. A requester may file an action for mandamus, with or without an attorney, asking a court to order release of the records. Wis. Stat. § 19.37(1)(a). A requester who prevails in such an action is entitled to reasonable attorney fees, damages of not less than \$100.00, and other actual costs. Wis. Stat. § 19.37(2). A court may award punitive damages if the court finds that an authority or legal custodian arbitrarily or capriciously denied or delayed response to a public records request or charged excessive fees. Wis. Stat. § 19.37(3). Please be advised, except for committed and incarcerated persons, an action for mandamus arising under the public records law must be commenced within three years after the cause of action accrues. Wis. Stat. § 893.90(2).

Alternatively, the requester may submit a written request for the district attorney of the county where the record is found, or the Attorney General, to file an action for mandamus seeking release of the requested records. Wis. Stat. § 19.37(1)(b). The Attorney General is authorized to enforce the Public Records Law; however, he generally exercises this authority

October 2, 2015

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only in cases presenting issues of statewide concern. While the public records issue that you raised is important to you and those in your community, it does not appear to raise issues of statewide concern. As a result, we respectfully decline to pursue an action for mandamus on your behalf.

However, in this case, I contacted District Attorney Gibbs regarding your matter. District Attorney Gibbs assured me that he intends to send you correspondence regarding your request soon.

Although we are declining to pursue an action for mandamus under the Public Records Law in this instance, the other remedies outlined above may still be available to you. Additionally, you may wish to contact a private attorney regarding this matter. The State Bar of Wisconsin operates an attorney referral service. You may reach it using the contact information below:

Lawyer Referral and Information Service
State Bar of Wisconsin
P.O. Box 7158
Madison, WI 53707-7158
(800) 362-9082
(608) 257-4666

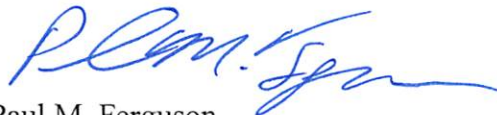
<http://www.wisbar.org/forpublic/ineedalawyer/pages/lris.aspx>

The referral service is free; however, a private attorney may charge attorneys fees. If you decide to consult an attorney, I suggest you provide him or her with all of the relevant documents and information.

The Department of Justice appreciates your concern. We are dedicated to the work necessary to preserve Wisconsin's proud tradition of open government. Thank you for your correspondence.

The information provided in this letter does not constitute an informal or formal opinion of the Attorney General pursuant to Wis. Stat. § 165.015(1).

Sincerely,



Paul M. Ferguson
Assistant Attorney General
Office of Open Government



**STATE OF WISCONSIN
DEPARTMENT OF JUSTICE**

**BRAD D. SCHIMEL
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**Andrew C. Cook
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October 2, 2015

Donna Dawn Konitzer, #105033
Columbia Correctional Institution
P.O. Box 900
Portage, WI 53901-0900

Dear Ms. Konitzer:

This letter is in response to your correspondence, received August 14, 2015 and addressed to former Deputy Attorney General Kevin M. St. John, concerning a public records request you made to the Department of Justice (DOJ) in 2012. You stated that, at the time, you did not have the money to pay the fee associated with the request. You said a money order in the amount of \$128.51 along with the DOJ invoice was sent to DOJ on February 24, 2015. DOJ does not have any such money order. As a result, we cannot release the records responsive to your public records request.

In your letter you state that you believe the cost of the records to be “exorbitant.” The fees charged by DOJ are in accordance with the Wisconsin Public Records Law, Wis. Stat. §§ 19.31 to 19.39. Pursuant to Wis. Stat. § 19.35(3), generally, an authority may impose a fee for the “actual, necessary and direct cost” of reproduction (copies) and transcription, photographing and photographic processing, locating (if the cost is \$50 or more) and mailing or shipping of a record. Wis. Stat. § 19.35(3)(a)-(d). An authority may require prepayment by a requester of any fee if the total amount exceeds \$5.00.

DOJ endeavors to educate and offer guidance to ensure openness and transparency. I would like you to be aware of several open government resources available to you through the Wisconsin Department of Justice website (<http://www.doj.state.wi.us/dls/open-government>). DOJ provides the full Wisconsin Public Records Law, maintains a Public Records Law Compliance Outline and a Compliance Outline Supplement and provides a recorded webinar and associated presentation documentation.

The Public Records Law provides several remedies for a requester dissatisfied with an authority’s response, or lack of response, to a public records request. A requester may file an action for mandamus, with or without an attorney, asking a court to order release of the records. Wis. Stat. § 19.37(1)(a). A requester who prevails in such an action is entitled to reasonable

October 2, 2015

Page 2

attorney fees, damages of not less than \$100.00, and other actual costs. Wis. Stat. § 19.37(2). A court may award punitive damages if the court finds that an authority or legal custodian arbitrarily or capriciously denied or delayed response to a public records request or charged excessive fees. Wis. Stat. § 19.37(3). A committed or incarcerated person must bring an action for mandamus challenging denial of a request for access to a record within 90 days after the request is denied by the authority. Wis. Stat. § 19.37(1m). The 90 day time period excludes Saturdays, Sundays and legal holidays. *See* Wis. Stat. § 19.345.

Alternatively, the requester may submit a written request for the district attorney of the county where the record is found, or the Attorney General, to file an action for mandamus seeking release of the requested records. Wis. Stat. § 19.37(1)(b). The Attorney General is authorized to enforce the Public Records Law; however, he generally exercises this authority only in cases presenting issues of statewide concern.

In addition to the remedies outlined above, you may wish to contact a private attorney regarding your public records matter. The State Bar of Wisconsin operates an attorney referral service. You may reach it using the contact information below:

Lawyer Referral and Information Service

State Bar of Wisconsin

P.O. Box 7158

Madison, WI 53707-7158

(800) 362-9082

(608) 257-4666

<http://www.wisbar.org/forpublic/inneedalawyer/pages/lris.aspx>

The referral service is free; however, a private attorney may charge attorneys fees. If you decide to consult an attorney, I suggest you provide him or her with all of the relevant documents and information.

The Department of Justice appreciates your concern. We are dedicated to the work necessary to preserve Wisconsin's proud tradition of open government. Thank you for your correspondence.

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Sincerely,



Paul M. Ferguson
Assistant Attorney General
Office of Open Government



**STATE OF WISCONSIN
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October 5, 2015

Thomas Daigle

[REDACTED]
Tomahawk, WI 54487
tdaigle@packagingcorp.com

Dear Mr. Daigle:

The Department of Justice (DOJ) is in receipt of your August 23, 2015 email correspondence to Attorney General Brad Schimel in which you asked: "Can a governmental body change or even address a issue that they had previously ruled on without proper notification to the parties concerned"? You stated that "we (Daigle's oak hills LLC along with County Materials Corp)" are applying for a conditional use permit (CUP) from Lincoln County and that the first step is to "get the blessing of the town board in which the CUP will be used." You stated that the town board "gave their blessing" to the project, but that "during their annual meeting the town (Skanawan) rescinded their decision without posting it as a topic of discussion because of a small vocal group who attended the meeting."

In your correspondence, you did not specifically ask for help or request the Attorney General to pursue an enforcement action. However, I will provide you with a summary of the relevant law and various open government resources offered by the DOJ.

Wisconsin Stat. § 19.84 sets forth the public notice requirements and specifies when, how and to whom notice must be given. Every public notice of a meeting must give the "time, date, place and subject matter of the meeting." Wis. Stat. § 19.84(2). Proper notice of the meeting must be given to the public, any members of the media who have submitted a written request for notice and the official newspaper designated by state statute or, if there is none, a news media likely to give notice in the area. Wis. Stat. § 19.84(1). However, under the Open Meetings Law, there is no requirement to provide direct notice to the parties concerned.

A separate statute may prescribe a different type of meeting notice for the type of meeting you describe. In such a case, a governmental body must comply with the requirements of such a statute as well as the notice requirements of the Open Meetings Law. Since the question of whether there is a such separate statute is outside the scope of the Open Meetings Law, the Office of Open Government offers no analysis on that particular aspect of your matter.

The Attorney General and the Department of Justice's Office of Open Government are committed to increasing government openness and transparency, and the DOJ endeavors to educate and offer guidance to ensure openness and transparency. There are several open government resources available to you through the Wisconsin Department of Justice website (<http://www.doj.state.wi.us/dls/open-government>). The DOJ provides the full Wisconsin Open Meetings Law, Wis. Stat. §§ 19.81 to 19.98, maintains an Open Meetings Law Compliance Guide and provides a recorded webinar and associated presentation documentation.

Under the Open Meetings Law, the Attorney General and the district attorneys have authority to enforce the law. Wis. Stat. § 19.97(1). Generally, the Attorney General may elect to prosecute complaints involving matters of statewide concern. In this case, while the open meetings issue that you raised is important to you and those in your community, it does not appear to raise issues of statewide concern. While you did not specifically request the Attorney General to file an enforcement action, nonetheless, we respectfully decline to pursue an enforcement action on your behalf.

More frequently, the district attorney of the county where the alleged violation occurred may enforce the law. However, in order to have this authority, an individual must file a verified complaint with the district attorney. Wis. Stat. § 19.97(1).

If the district attorney refuses or otherwise fails to commence an action to enforce the Open Meetings Law within 20 days after receiving the verified complaint, the individual may bring an action in the name of the state. Wis. Stat. § 19.97(4). (Please note a district attorney may still commence an enforcement action even after 20 days have passed.) Such actions by an individual must be commenced within two years after the cause of action accrues. Wis. Stat. § 893.93(2)(a).

In your correspondence, you did not indicate that you filed a verified complaint with the district attorney. Under the Open Meetings Law, the district attorney cannot act to enforce the law unless he or she receives a verified complaint. Therefore, to ensure the district attorney has the authority to enforce the law, you must file a verified complaint. This also ensures that you have the option to file suit, as explained in the previous paragraph, should the district attorney refuse or otherwise fail to commence an enforcement action. For further information, please see pages 23-24 of the aforementioned Open Meetings Law Compliance Guide and Wis. Stat. § 19.97 or contact a private attorney.

Although we are declining to pursue an action for enforcement action under the Open Meetings Law in this instance, the other remedies outlined above may still be available to you. Additionally, you may wish to contact your district attorney or a private attorney regarding this matter. The State Bar of Wisconsin operates an attorney referral service. You may reach it using the contact information below:

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The referral service is free; however, a private attorney may charge attorneys fees. If you decide to consult an attorney, I suggest you provide him or her with all of the relevant documents and information.

The Department of Justice appreciates your concern. We are dedicated to the work necessary to preserve Wisconsin's proud tradition of open government. Thank you for your correspondence.

The information provided in this letter does not constitute an informal or formal opinion of the Attorney General pursuant to Wis. Stat. § 165.015(1).

Sincerely,



Paul M. Ferguson
Assistant Attorney General
Office of Open Government

PMF:lah



**STATE OF WISCONSIN
DEPARTMENT OF JUSTICE**

**BRAD D. SCHIMEL
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**Andrew C. Cook
Deputy Attorney General**

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October 7, 2015

Monica Weitkuhn
mwalsh9899@yahoo.com

Dear Ms. Weitkuhn:

The Department of Justice (DOJ) is in receipt of your August 24, 2015 email correspondence to me in which you state that you would like to know how to “file a complaint against a government agency for withholding and/or delaying the release of the public records I requested almost 4 months ago.”

I am also in receipt of your August 25, 2015 email correspondence in which you state “I would like to file the following complaint against the City of Racine and Assistant City Attorney Nicole Larsen” and provide a timeline of events regarding your recent public records requests. You also request the “Wisconsin Department of Justice to conduct an investigation into my complaint against the City of Racine and Assistant City Attorney Nicole Larsen and their violation of the Open Records Law.”

Lastly, I am in receipt of your August 26, 2015 email correspondence in which you clarify the dates of emails requested and state that you think Attorney Larsen has “refused to release the emails/public records I requested.”

The Attorney General and the Department of Justice’s Office of Open Government are committed to increasing government openness and transparency, and the DOJ endeavors to educate and offer guidance to ensure openness and transparency. There are several open government resources available to you through the Wisconsin Department of Justice website (<http://www.doj.state.wi.us/dls/open-government>). The DOJ provides the full Wisconsin Public Records Law, Wis. Stat. §§ 19.31 to 19.39, maintains a Public Records Law Compliance Outline and a Compliance Outline Supplement and provides a recorded webinar and associated presentation documentation.

In your August 24, 2015 correspondence, you state that you have “already waited over 100 days without complaints” for the public records. The Public Records law does not require a response to a public records request within a specific timeframe. However, the law states that upon receipt of a public records request, the authority “shall, as soon as practicable and without

delay, either fill the request or notify the requester of the authority's determination to deny the request in whole or in part and the reasons therefor." Wis. Stat. § 19.35(4)(a). A reasonable amount of time for a response by a public records request "depends on the nature of the request, the staff and other resources available to the authority to process the request, the extent of the request, and other related considerations." *WIREData, Inc. v. Vill. of Sussex*, 2008 WI 69, ¶ 56, 310 Wis. 2d 397, 751 N.W.2d 736; see *Journal Times v. Police & Fire Comm'rs Bd.*, 2015 WI 56, ¶ 87 (an authority "can be swamped with public records requests and may need a substantial period of time to respond to any given request").

The Office of Open Government encourages authorities and requesters to maintain an open line of communication. This helps to avoid misunderstandings between an authority and a requester. If it becomes apparent to an authority that a public records request may require a longer response time, it may be prudent that the authority provide the requester with a letter providing an update on the status of the response and, if possible, indicating when a response might be anticipated. Similarly, if an authority receives an inquiry from a requester seeking an update on the status of the request, it is advisable for the authority to respond to the requester with an update.

I contacted Attorney Larsen regarding this matter. She stated that she responded to your request on July 2, 2015 with emails generated as a result of the investigation. She said that she construed your July 15, 2015 correspondence as broadening the scope of your initial request; therefore, she treated this as a new public records request. Attorney Larsen also stated that she had responded to all of your outstanding requests.

The Public Records Law provides several remedies for a requester dissatisfied with an authority's response, or lack of response, to a public records request. A requester may file an action for mandamus, with or without an attorney, asking a court to order release of the records. Wis. Stat. § 19.37(1)(a). A requester who prevails in such an action is entitled to reasonable attorney fees, damages of not less than \$100.00, and other actual costs. Wis. Stat. § 19.37(2). A court may award punitive damages if the court finds that an authority or legal custodian arbitrarily or capriciously denied or delayed response to a public records request or charged excessive fees. Wis. Stat. § 19.37(3).

Alternatively, the requester may submit a written request for the district attorney of the county where the record is found, or the Attorney General, to file an action for mandamus seeking release of the requested records. Wis. Stat. § 19.37(1)(b). The Attorney General is authorized to enforce the Public Records Law; however, he generally exercises this authority only in cases presenting issues of statewide concern. While the public records issue that you raised is important to you and those in your community, it does not appear to raise issues of statewide concern. As a result, we respectfully decline to pursue an action for mandamus on your behalf.

Although we are declining to pursue an action for mandamus under the Public Records Law in this instance, the other remedies outlined above may still be available to you. Additionally, you may wish to contact a private attorney regarding this matter. The State Bar of Wisconsin operates an attorney referral service. You may reach it using the contact information below:

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The referral service is free; however, a private attorney may charge attorneys fees. If you decide to consult an attorney, I suggest you provide him or her with all of the relevant documents and information.

The Department of Justice appreciates your concern. We are dedicated to the work necessary to preserve Wisconsin's proud tradition of open government. Thank you for your correspondence.

The information provided in this letter does not constitute an informal or formal opinion of the Attorney General pursuant to Wis. Stat. § 165.015(1).

Sincerely,



Paul M. Ferguson
Assistant Attorney General
Office of Open Government

PMF:lah

cc: Assistant City Attorney Nicole Larsen



**STATE OF WISCONSIN
DEPARTMENT OF JUSTICE**

**BRAD D. SCHIMEL
ATTORNEY GENERAL**

**Andrew C. Cook
Deputy Attorney General**

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FAX 608/267-2779**

October 8, 2015

Evan Braun

[REDACTED]
Milwaukee, WI 53081
ejbraun@uwm.edu

Dear Mr. Braun:

The Department of Justice (DOJ) is in receipt of your September 11, 2015 email correspondence to Attorney General Brad Schimel in which you state: "I am a member of UW student governance board. I believe the body has knowingly violated open meetings law. I wish to forward my complaint to the department of justice."

The Attorney General and the Department of Justice's Office of Open Government are committed to increasing government openness and transparency, and DOJ endeavors to educate and offer guidance to ensure openness and transparency. There are several open government resources available to you through the Wisconsin Department of Justice website (<http://www.doj.state.wi.us/dls/open-government>). DOJ provides the full Wisconsin Open Meetings Law, Wis. Stat. §§ 19.81 to 19.98, maintains an Open Meetings Law Compliance Guide and provides a recorded webinar and associated presentation documentation.

Under the Open Meetings Law, the Attorney General and the district attorneys have authority to enforce the law. Wis. Stat. § 19.97(1). Generally, the Attorney General may elect to prosecute complaints involving matters of statewide concern. In this case, you state that you "wish to forward my complaint" to DOJ. To date, the Office of Open Government has not received any such complaint. Of course, if you wish to submit your complaint to DOJ, you are free to do so.

More frequently, the district attorney of the county where the alleged violation occurred may enforce the law. However, in order to have this authority, an individual must file a verified complaint with the district attorney. Wis. Stat. § 19.97(1).

If the district attorney refuses or otherwise fails to commence an action to enforce the Open Meetings Law within 20 days after receiving the verified complaint, the individual may bring an action in the name of the state. Wis. Stat. § 19.97(4). (Please note a district attorney may still commence an enforcement action even after 20 days have passed.) Such actions by an individual must be commenced within two years after the cause of action accrues. Wis. Stat. § 893.93(2)(a).

In your correspondence, you did not indicate that you filed a verified complaint with the district attorney. Under the Open Meetings Law, the district attorney cannot act to enforce the law unless he or she receives a verified complaint. Therefore, to ensure the district attorney has the authority to enforce the law, you must file a verified complaint. This also ensures that you have the option to file suit, as explained in the previous paragraph, should the district attorney refuse or otherwise fail to commence an enforcement action. For further information, please see pages 23-24 of the aforementioned Open Meetings Law Compliance Guide and Wis. Stat. § 19.97 or contact a private attorney.

Additionally, you may wish to contact a private attorney regarding this matter. The State Bar of Wisconsin operates an attorney referral service. You may reach it using the contact information below:

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Sincerely,



Paul M. Ferguson
Assistant Attorney General
Office of Open Government



STATE OF WISCONSIN
DEPARTMENT OF JUSTICE

BRAD D. SCHIMEL
ATTORNEY GENERAL

Andrew C. Cook
Deputy Attorney General

114 East, State Capitol
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Madison, WI 53707-7857
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TTY 1-800-947-3529

October 19, 2015

Sent via email

Representative David Craig
P.O. Box 8952
Madison, WI 53708

Dear Representative Craig,

In your October 13, 2015 letter, you asked the following two questions:

1. Is the application of such an [personal] email, rather than an official state email account, ever justified or prudent under the law?

Though it is not explicitly prohibited by law, the Department of Justice (DOJ) regularly counsels against using personal email accounts for official state business.

2. Would the DOJ have concerns relating to the security and preservation of state records under the Open Records Law of communications via a "Gmail" account?

It is difficult to confidently track and retain records created on a personal email account such as Gmail. The risks of using a personal email account far outweigh the risks of using a state account in almost every instance.

Emails conducting government business sent or received on the personal account of an authority's officer or employee are public records, subject to disclosure.¹ An agency is responsible for developing a documented records retention policy for electronic records.² Electronic records must be maintained through the records life cycle, including creation, active use, preservation and management through to disposition.³ The records custodian of an agency is legally responsible for providing access to public records.⁴

¹ Wis. Dep't of Justice, *Wisconsin Public Records Law, Compliance Outline*, at 3 (Sept. 2012), available at <http://www.doj.state.wi.us/sites/default/files/dls/public-records-compliance-outline-2012.pdf>.

² Adm. 12.05.

³ Adm. 12.04(9).

⁴ Wis. Stat. § 19.34(2)

Regarding the prudence of using a non-state based or personal email account for official government business, DOJ regularly counsels agencies to avoid using personal email accounts because of risks associated with preservation of records, unsecured communication, and the public perception of employees using accounts not controlled by the records custodian. Though the law does not explicitly prohibit use of private email for state business, the risks of doing so generally outweigh the risks of using state email.

The risks associated with use of a state email account for investigatory purposes generally involve potential disclosure of sensitive or confidential information. However, Wisconsin law provides protections through both the Open Records Law and the Administrative Code.

Wisconsin Open Records Law includes statutory exceptions to prevent disclosure of information such as medical records and state employees' personal information, and also allows a records custodian to submit information to a balancing test before it is disclosed to a requestor.⁵ If the records custodian determines that the public interest in nondisclosure of sensitive information outweighs the public interest in disclosure, the information may be withheld. It is also DOJ policy to withhold any records of information or communications regarding a pending investigation.

Moreover, the state's Administrative Code prescribes the maintenance of electronic records, and also requires agencies to maintain confidentiality or restricted access to electronic records when necessary.⁶ Agencies *shall* "maintain electronic public records that are accessible, accurate, authentic, reliable, legible, and readable throughout the record life cycle."⁷ Agencies must also limit access to confidential electronic records to those persons authorized by law, administrative rule or established agency policy.⁸ Agency policies must be documented.⁹

With these protections in place, the risks of improper disclosure of a state email are limited. However, the risks of communicating with personal email are numerous, including preservation of records and security. The use of personal email accounts for state business creates significant problems for the records custodian by creating records over which he or she has no control. Records of private email are likely stored on servers controlled by the email provider. Records custodians have no ability to control the actions of the third party email provider, nor can the custodian retrieve emails that have been inadvertently or inappropriately deleted. Moreover, private email accounts may have different search and retrieval capabilities, and may have limited retention of sent messages.

Use of personal email for official state business also increases the burden of searching and identifying records responsive to a request because responsive emails may be comingled with the employee's purely personal email. Subjecting the entire personal account to a search for state records creates a heightened risk of exposing sensitive personal information of the employee.

Regarding email security, sensitive or confidential information sent through a personal account is at a heightened risk of exposure. The security of a personal email account is completely out of the control of the state, and it is impossible to know if sensitive information in such an account can be or has been obtained by a third party.

⁵ Wis. Dep't of Justice, *Wisconsin Public Records Law, Compliance Outline*, at 26 (Sept. 2012), available at <http://www.doj.state.wi.us/sites/default/files/dls/public-records-compliance-outline-2012.pdf>.

⁶ Adm. 12.05.

⁷ Adm. 12.05(1).

⁸ Adm. 12.05(3).

⁹ Adm. 12.05(2).

That an agency may require confidentiality or restricted access to records is not unique to the Government Accountability Board (GAB). Though the law does not explicitly prohibit use of a personal email account for state business, it is generally higher risk than using state email. The Open Records Law and Administrative Code together provide the necessary protections for agencies to perform investigations without using personal email to communicate. For emails sent or received by GAB employees, the GAB is the records custodian and is responsible for having documented confidentiality policies in place that sufficiently protect investigatory communications over state email.

Thank you for reaching out on these important issues.

Regards,



Delanie Breuer
Assistant Deputy Attorney General
Wisconsin Department of Justice



**STATE OF WISCONSIN
DEPARTMENT OF JUSTICE**

**BRAD D. SCHIMEL
ATTORNEY GENERAL**

**Andrew C. Cook
Deputy Attorney General**

**17 W. Main Street
P.O. Box 7857
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www.doj.state.wi.us**

**Paul M. Ferguson
Assistant Attorney General
fergusonpm@doj.state.wi.us
608/266-1221
TTY 1-800-947-3529
FAX 608/267-2779**

October 19, 2015

Kathleen Marsh
[REDACTED]

Townsend, WI 54175

Dear Ms. Marsh:

The Department of Justice (DOJ) is in receipt of your August 24, 2015 correspondence to the Office of Open Government in which you stated that you have been “working diligently to uncover the identity of the legislator who inserted the Section #999 27a language changing the composition of the Joint Service Committee on Retirement Systems.” You state that you have emailed Senators Scott Fitzgerald, Alberta Darling, Tom Tiffany and Representative John Nygren, but that they “refuse to answer.” You asked if the DOJ can help.

The DOJ cannot offer you legal advice or counsel concerning this issue as the DOJ may be called upon to represent members of the legislature. However, the Attorney General and the Department of Justice’s Office of Open Government are committed to increasing government openness and transparency, and the Department endeavors to offer guidance in these areas. I would like you to be aware of several open government resources available to you through the Wisconsin Department of Justice website (<http://www.doj.state.wi.us/dls/open-government>). The Department provides the full Wisconsin Public Records Law, Wis. Stat. §§ 19.31 to 19.39, maintains a Public Records Law Compliance Outline and a Compliance Outline Supplement and provides a recorded webinar and associated presentation documentation.

The Public Records Law provides several remedies for a requester dissatisfied with an authority’s response, or lack of response, to a public records request. A requester may file an action for mandamus, with or without an attorney, asking a court to order release of the records. Wis. Stat. § 19.37(1)(a).

Alternatively, the requester may submit a written request for the district attorney of the county where the record is found, or the Attorney General, to file an action for mandamus seeking release of the requested records. Wis. Stat. § 19.37(1)(b). The Attorney General is authorized to enforce the Public Records Law; however, he generally exercises this authority only in cases presenting issues of statewide concern. While you did not specifically request the Attorney General to file an action for mandamus, nonetheless, we respectfully decline to pursue an action for mandamus on your behalf at this time.

Although we are declining to pursue an action for mandamus under the Public Records Law in this instance, the other remedies outlined above may still be available to you. Additionally, you may wish to contact a private attorney regarding this matter. The State Bar of Wisconsin operates an attorney referral service. You may reach it using the contact information below:

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P.O. Box 7158
Madison, WI 53707-7158
(800) 362-9082
(608) 257-4666

<http://www.wisbar.org/forpublic/incedalawyer/pages/lris.aspx>

The referral service is free; however, a private attorney may charge attorneys fees. If you decide to consult an attorney, I suggest you provide him or her with all of the relevant documents and information.

The Department of Justice appreciates your concern. We are dedicated to the work necessary to preserve Wisconsin's proud tradition of open government. Thank you for your correspondence.

The information provided in this letter does not constitute an informal or formal opinion of the Attorney General pursuant to Wis. Stat. § 165.015(1).

Sincerely,



Paul M. Ferguson
Assistant Attorney General
Office of Open Government

PMF:lah



STATE OF WISCONSIN
DEPARTMENT OF JUSTICE

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Andrew C. Cook
Deputy Attorney General

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FAX 608/267-2779

October 21, 2015

Chris Jacobs, #186839
Columbia Correctional Institute
P.O. Box 900
Portage, WI 53901

Dear Mr. Jacobs:

The Department of Justice (DOJ) is in receipt of your September 14, 2015 correspondence to Attorney General Brad Schimel in which you stated, "I'm questioning if former Marathon CO District Atty, Rand Kreager collected compensation upon my June 1998 conviction of the Kunz murders." You also stated that the Office of Open Government denied your previous request in its letter dated August 27, 2015, "because I'm a prisoner." Additionally, you asked if former State Public Defender Investigator Kenneth Kjer collected "any compensation upon my June 1998 conviction in the Kunz murders."

In your correspondence, you stated that the Office of Open Government denied your previous request because you are incarcerated. This is not the case. In my previous response letter to you, I simply informed you as to your rights, as an incarcerated person, under the Public Records Law. Under the law, as an incarcerated person, your right to request records is limited to records that contain specific references to yourself or your minor children and are otherwise accessible to you by law. *See Wis. Stat. § 19.32(1c) and (3).*

Your latest correspondence mirrors your August 17, 2015 letter to DOJ. As I informed you in my previous response, while the law does not require that we answer your questions, we can inform you that DOJ does not have records responsive to your questions raised in your August 17, 2015 and September 14, 2015 correspondence. A copy of my August 27, 2015 letter is enclosed. Because DOJ does not have any records responsive to your question, we cannot fulfill your request.

My response to your current question is to again inform you that the Public Records Law "does not require an authority to provide requested information if no record exists, or to simply answer questions about a topic of interest to the requester." *Journal Times v. City of Racine Board of Police and Fire Commissioners*, 2015 WI 56, 55 (citation omitted); *see also State ex*

Chris Jacobs, #186839

October 21, 2015

Page 2

rel. Zinngrabe v. Sch. Dist. of Sevastopol, 146 Wis. 2d 629, 431 N.W.2d 734 (Ct. App. 1988). The Wisconsin Department of Administration may have records responsive to your question, and you may wish to contact them regarding your request.

The Attorney General and the DOJ's Office of Open Government are committed to increasing government openness and transparency, and the DOJ endeavors to offer guidance in these areas. I would like you to be aware of several open government resources available to you through the Wisconsin DOJ website (<http://www.doj.state.wi.us/dls/open-government>). The DOJ provides the full Wisconsin Public Records Law, Wis. Stat. §§ 19.31 to 19.39, maintains a Public Records Law Compliance Outline and a Compliance Outline Supplement and provides a recorded webinar and associated presentation documentation.

The Public Records Law provides several remedies for a requester dissatisfied with an authority's response, or lack of response, to a public records request. A requester may file an action for mandamus, with or without an attorney, asking a court to order release of the records. Wis. Stat. § 19.37(1)(a). A requester who prevails in such an action is entitled to reasonable attorney fees, damages of not less than \$100.00, and other actual costs. Wis. Stat. § 19.37(2). A court may award punitive damages if the court finds that an authority or legal custodian arbitrarily or capriciously denied or delayed response to a public records request or charged excessive fees. Wis. Stat. § 19.37(3).

Alternatively, the requester may submit a written request for the district attorney of the county where the record is found, or the Attorney General, to file an action for mandamus seeking release of the requested records. Wis. Stat. § 19.37(1)(b). The Attorney General is authorized to enforce the Public Records Law; however, he generally exercises this authority only in cases presenting issues of statewide concern.

Additionally, you may wish to contact a private attorney regarding this matter. The State Bar of Wisconsin operates an attorney referral service. You may reach it using the contact information below:

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The referral service is free; however, a private attorney may charge attorneys fees. If you decide to consult an attorney, I suggest you provide him or her with all of the relevant documents and information.

Chris Jacobs, #186839
October 21, 2015
Page 3

We are dedicated to the work necessary to preserve Wisconsin's proud tradition of open government. Thank you for your correspondence.

The information provided in this letter does not constitute an informal or formal opinion of the Attorney General pursuant to Wis. Stat. § 165.015(1).

Sincerely,



Paul M. Ferguson
Assistant Attorney General
Office of Open Government

PMF:lah



STATE OF WISCONSIN
DEPARTMENT OF JUSTICE

BRAD D. SCHIMEL
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Andrew C. Cook
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FAX 608/266-2779

August 27, 2015

Chris Jacobs, #186839
Columbia Correctional Institute
P.O. Box 900
Portage, WI 53901

Dear Mr. Jacobs:

This is in response to your correspondence, received on August 26, 2015, in which you asked, “[D]id Rand Kreager collect any compensation regards to me or the Kunz murders investigation?” The Department of Justice construes your correspondence as a public records request pursuant to the Wisconsin Public Records Law, Wis. Stat. §§ 19.31 to 19.39.

As an incarcerated person, your right to request records under the Public Records Law is limited to records that contain specific references to yourself or your minor children and are otherwise accessible to you by law. *See* Wis. Stat. § 19.32(1c) and (3).

In your letter, you asked a question to which you seek an answer. The Public Records Law “does not require an authority to provide requested information if no record exists, or to simply answer questions about a topic of interest to the requester.” *Journal Times v. City of Racine Board of Police and Fire Commissioners*, 2015 WI 56, 55 (citation omitted); *see also State ex rel. Zinngrabe v. Sch. Dist. of Sevastopol*, 146 Wis. 2d 629, 431 N.W.2d 734 (Ct. App. 1988).

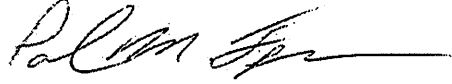
While the law does not require that we answer your question, in this case, as a courtesy to you, we can inform you that the Department of Justice does not have records responsive to your question. The Wisconsin Department of Administration may have records responsive to your question, and you may wish to contact them regarding your request.

Please note this response does not constitute a denial of your request where there are no existing records that are responsive to your request. *See State ex rel. Zinngrabe v. School Dist. of Sevastopol*, 146 Wis.2d 629, 632, 431 N.W.2d 734 (Ct. App. 1988). Therefore, the

Page 2

statutory provisions in Wis. Stat. § 19.37(1) for review by mandamus or upon application to a district attorney or the Attorney General do not apply. *Id.*

Sincerely,

A handwritten signature in black ink, appearing to read "Paul M. Ferguson", with a long horizontal flourish extending to the right.

Paul M. Ferguson
Assistant Attorney General
Office of Open Government

PMF:pjm



**STATE OF WISCONSIN
DEPARTMENT OF JUSTICE**

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October 21, 2015

Nancy and Pete Tews
Barnabas House
206 South Iowa Street
Dodgeville, WI 53533

Dear Mr. and Mrs. Tews:

The Department of Justice (DOJ) is in receipt of your August 17, 2015 correspondence to the Office of Open Government in which you stated that since 2011 you have received a version of a document called the "Current Confinements" from the Iowa County Jail. Recently, you have been told that the Iowa County Jail will not release the complete current confinement list due to safety and security reasons. You asked if the DOJ could provide you with information "regarding the release of this document in its complete form." You also requested that "[i]f you have any opinion as to whether the complete jail confinement list document has any information on it that should be kept from the public eye" to please let you know.

The Attorney General and the DOJ's Office of Open Government are committed to increasing government openness and transparency, and the DOJ endeavors to offer guidance in these areas. I would like you to be aware of several open government resources available to you through the Wisconsin DOJ website (<http://www.doj.state.wi.us/dls/open-government>). The DOJ provides the full Wisconsin Public Records Law, Wis. Stat. §§ 19.31 to 19.39, maintains a Public Records Law Compliance Outline and a Compliance Outline Supplement and provides a recorded webinar and associated presentation documentation.

In your correspondence, you stated that you were told you "had to use a specific form" to make your request. Pursuant to Wis. Stat. § 19.35(1)(h), requests for public records do not have to be in writing. No specific form is permitted to be required when making a request for public records. A request is sufficient if it is directed at an authority and reasonably describes the records or information requested. Wis. Stat. § 19.35(1)(h).

You also stated in your correspondence that you "continue to make the open records request" and that you continue to be told "they are checking into it and will not release the information." The Public Records law does not require an authority to respond to a request within a specific timeframe. However, the law states that upon receipt of a public records request, the authority "shall, as soon as

practicable and without delay, either fill the request or notify the requester of the authority's determination to deny the request in whole or in part and the reasons therefor." Wis. Stat. § 19.35(4)(a). A reasonable amount of time for a response by a public records request "depends on the nature of the request, the staff and other resources available to the authority to process the request, the extent of the request, and other related considerations." *WIREdata, Inc. v. Vill. of Sussex*, 2008 WI 69, ¶ 56, 310 Wis. 2d 397, 751 N.W.2d 73; see *Journal Times v. Police & Fire Comm'rs Bd.*, 2015 WI 56, ¶ 87 (an authority "can be swamped with public records requests and may need a substantial period of time to respond to any given request").

The Office of Open Government encourages authorities and requesters to maintain an open line of communication. This helps to avoid misunderstandings between an authority and a requester. If it becomes apparent to an authority that a public records request may require a longer response time, it may be prudent that the authority provide the requester with a letter providing an update on the status of the response and, if possible, indicating when a response might be anticipated. Similarly, if an authority receives an inquiry from a requester seeking an update on the status of the request, it is advisable for the authority to respond to the requester with an update.

In your correspondence you stated that you were told that the Iowa County Jail would not release the complete confinement list for "safety and security reasons." You also stated that the information can be found "in various places and in various ways, but having it all in one document is very convenient." An authority is not relieved of its obligations under the Public Records Law, including performing the balancing test, because information found in its records may be available from outside sources. Furthermore, while having all the information you seek in a single document may be convenient, an authority is not required to create a new record by extracting and compiling information from existing records in a new format. Wis. Stat. § 19.35(1)(L); see also *George v. Record Custodian*, 169 Wis. 2d 573, 579, 485 N.W.2d 460 (Ct. App. 1992).

Requested records fall into one of three categories: (1) absolute right of access; (2) absolute denial of access; and (3) right of access determined by the balancing test. *Hathaway v. Joint Sch. Dist. No. 1, Green Bay*, 116 Wis. 2d 388, 397, 342 N.W.2d 682 (1984). If neither a statute nor case law requires disclosure or creates a general exception to disclosure, the records custodian must decide whether the strong public policy favoring disclosure is overcome by some even stronger public policy favoring limited access or nondisclosure. This "balancing test," determines whether the presumption of openness is overcome by another public policy concern. *Hempel v. City of Baraboo*, 2005 WI 120, ¶ 4, 284 Wis. 2d 162, 699 N.W.2d 551.

I contacted Pam Steffes, administrator of the Iowa County Jail, and we discussed your matter. Ms. Steffes explained the current jail administration applied the balancing test and concluded that certain information previously provided would no longer be disclosed along with the requested records. Application of the balancing test is on a case-by-case basis. Based on the facts presented, the Office of Open Government cannot offer an opinion as to the application of the balancing test in this instance. It is also my understanding that there are no outstanding requests for the list.

The Public Records Law provides several remedies for a requester dissatisfied with an authority's response, or lack of response, to a public records request. A requester may file an action for mandamus, with or without an attorney, asking a court to order release of the records. Wis. Stat. § 19.37(1)(a). A requester who prevails in such an action is entitled to reasonable attorney fees,

damages of not less than \$100.00, and other actual costs. Wis. Stat. § 19.37(2). A court may award punitive damages if the court finds that an authority or legal custodian arbitrarily or capriciously denied or delayed response to a public records request or charged excessive fees. Wis. Stat. § 19.37(3).

Alternatively, the requester may submit a written request for the district attorney of the county where the record is found, or the Attorney General, to file an action for mandamus seeking release of the requested records. Wis. Stat. § 19.37(1)(b). The Attorney General is authorized to enforce the Public Records Law; however, he generally exercises this authority only in cases presenting issues of statewide concern. While the public records issue that you raised is important to you and those in your community, it does not appear to raise issues of statewide concern. While you did not specifically request the Attorney General to file an action for mandamus, nonetheless, we respectfully decline to pursue an action for mandamus on your behalf.

Although we are declining to pursue an action for mandamus under the Public Records Law in this instance, the other remedies outlined above may still be available to you. Additionally, you may wish to contact a private attorney regarding this matter. The State Bar of Wisconsin operates an attorney referral service. You may reach it using the contact information below:

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The referral service is free; however, a private attorney may charge attorneys fees. If you decide to consult an attorney, I suggest you provide him or her with all of the relevant documents and information.

The Department of Justice appreciates your concern. We are dedicated to the work necessary to preserve Wisconsin's proud tradition of open government. Thank you for your correspondence.

The information provided in this letter does not constitute an informal or formal opinion of the Attorney General pursuant to Wis. Stat. § 165.015(1).

Sincerely,



Paul M. Ferguson
Assistant Attorney General
Office of Open Government

PMF:lah
cc: Iowa County Jail (Attn: Pam Steffes)



**STATE OF WISCONSIN
DEPARTMENT OF JUSTICE**

**BRAD D. SCHIMEL
ATTORNEY GENERAL**

**Andrew C. Cook
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October 26, 2015

Lloyd Sellers, #170477
New Lisbon Correctional Institute
P.O. Box 4000
New Lisbon, WI 53950

Dear Mr. Sellers:

The Department of Justice (DOJ) is in receipt of your September 13, 2015 correspondence to Attorney General Brad Schimel in which you stated that you would like DOJ to take official notice of your request to Milwaukee County Deputy District Attorney James Martin for an “electronic or paper copy of the discovery materials provided to my trial counsel regarding my homicide conviction in Case.No. 94CF944268.” You also provided a copy of Deputy District Attorney Martin’s December 4, 2014 letter to you denying your earlier request for a copy of the discovery materials regarding your case.

In your correspondence you did not specifically ask for help or request the Attorney General to file an action for mandamus. However, I will provide you with a summary of the relevant law and various open government resources offered by DOJ.

As an incarcerated person, your right to request records under the Public Records Law is limited to records that contain specific references to yourself or your minor children and are otherwise accessible to you by law. *See* Wis. Stat. § 19.32(1c) and (3).

There is a general presumption that “public records shall be open to the public unless there is a clear statutory exception, unless there exists a limitation under the common law, or unless there is an overriding public interest in keeping the public record confidential.” *Hathaway v. Joint Sch. Dist. No. 1, City of Green Bay*, 116 Wis. 2d 388, 397, 342 N.W.2d 682 (1984). In this instance, however, access to prosecutors’ case files, whether open or closed, are exempt from disclosure. As explained in Deputy District Attorney Martin’s December 4, 2014 letter to you, the Wisconsin Supreme Court has determined that “the common law provides an exception which protects the district attorney’s files from being open to public inspection.” *State ex rel. Richards v. Foust*, 165 Wis. 2d 429, 433-34, 477 N.W.2d 608 (1991). You may wish to contact your trial or appellate counsel regarding your request.

The Attorney General and the DOJ's Office of Open Government are committed to increasing government openness and transparency, and DOJ endeavors to offer guidance in these areas. I would like you to be aware of several open government resources available to you through the Wisconsin DOJ website (<http://www.doj.state.wi.us/dls/open-government>). The DOJ provides the full Wisconsin Public Records Law, Wis. Stat. §§ 19.31 to 19.39, maintains a Public Records Law Compliance Outline and a Compliance Outline Supplement and provides a recorded webinar and associated presentation documentation.

The Public Records Law provides several remedies for a requester dissatisfied with an authority's response, or lack of response, to a public records request. A requester may file an action for mandamus, with or without an attorney, asking a court to order release of the records. Wis. Stat. § 19.37(1)(a). Alternatively, the requester may submit a written request for the district attorney of the county where the record is found, or the Attorney General, to file an action for mandamus seeking release of the requested records. Wis. Stat. § 19.37(1)(b). Please note that pursuant to Wis. Stat. § 59.42(2)(b)4., corporation counsel, not the district attorney, enforces the public records law in Milwaukee County. The Attorney General is authorized to enforce the Public Records Law; however, he generally exercises this authority only in cases presenting issues of statewide concern. While the public records issue that you raised is important to you and those in your community, it does not appear to raise issues of statewide concern. While you did not specifically request the Attorney General to file an action for mandamus, nonetheless, we respectfully decline to pursue an action for mandamus on your behalf.

Although we are declining to pursue an action for mandamus under the Public Records Law in this instance, the other remedies outlined above may still be available to you. Additionally, you may choose to contact a private attorney regarding this matter. The State Bar of Wisconsin operates an attorney referral service. You may reach it using the contact information below:

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The referral service is free; however, a private attorney may charge attorneys fees. If you decide to consult an attorney, I suggest you provide him or her with all of the relevant documents and information.

We are dedicated to the work necessary to preserve Wisconsin's proud tradition of open government. Thank you for your correspondence.

Lloyd Sellers, #170477

October 26, 2015

Page 3

The information provided in this letter does not constitute an informal or formal opinion of the Attorney General pursuant to Wis. Stat. § 165.015(1).

Sincerely,



Paul M. Ferguson
Assistant Attorney General
Office of Open Government

PMF:lah

cc: Deputy District Attorney James J. Martin



**STATE OF WISCONSIN
DEPARTMENT OF JUSTICE**

**BRAD D. SCHIMEL
ATTORNEY GENERAL**

**Andrew C. Cook
Deputy Attorney General**

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**Paul M. Ferguson
Assistant Attorney General
fergusonpm@doj.state.wi.us
608/266-1221
TTY 1-800-947-3529
FAX 608/267-2779**

October 27, 2015

Michael J. Bott

[REDACTED]
Oshkosh, WI 54902

Dear Mr. Bott:

In my July 31, 2015 letter to you, I responded to your July 6, 2015 letter in which you asked for help expediting your public records request to the Sheboygan County Clerk of Courts. In a letter dated August 19, 2015, you thanked me for my response and informed me that you received the requested documents. I am happy to hear you received the requested records.

In your August 19, 2015 letter, you also discussed circumstances concerning your criminal case. In your August 30, 2015 letter to me as well as your September 16, 2015 and October 7, 2015 letters on which I was copied, you elaborated on the matter. Based on your letters, it appears you seek assistance related to your criminal matter. As you said in your August 30, 2015 letter, you are "hoping that one of you [the recipients of the letter] may step forward to listen to my previous statements and current allegations, in an effort to implement a more just sentence."

In your August 19, 2015 letter, you cited my statement, made in my July 31, 2015 letter, regarding a commitment to increasing government openness and transparency. It is true that the Department of Justice's Office of Open Government (OOG) is committed to increasing government openness and transparency. However, the assistance you seek is outside the scope of the OOG's responsibilities. While the OOG works to increase government openness and transparency, we do so with a focus on the Wisconsin Open Meetings Law and the Wisconsin Public Records Law. As a result, we are unable to offer you the assistance or insight regarding your criminal matter that you seek.

While the OOG is unable to assist you with your criminal matter, you may wish to contact a private attorney regarding the matter. The State Bar of Wisconsin operates an attorney referral service. You may reach it using the contact information below:

Mr. Michael J. Bott
October 27, 2015
Page 2

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The referral service is free; however, a private attorney may charge attorneys fees. If you decide to consult an attorney, I suggest you provide him or her with all of the relevant documents and information.

While the OOG is unable to provide you with the assistance you seek, nonetheless, we appreciate your correspondence. Thank you.

Sincerely,



Paul M. Ferguson
Assistant Attorney General
Office of Open Government

cc: Michael Clutter, Conservation Warden, WI DNR
Richard B. Hahn, Esquire
Nathan Hatch, Detective, Sheboygan Co. Sheriff's Office
Jill Karofsky, Director of the Office of Crime Victim Services
Joel Urmanski, Assistant District Attorney, Sheboygan Co.



**STATE OF WISCONSIN
DEPARTMENT OF JUSTICE**

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TTY 1-800-947-3529
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November 2, 2015

Beth Esser
[REDACTED]

Spoooner, WI 54801
ee2078@charter.net

Dear Ms. Esser:

The Department of Justice (DOJ) is in receipt of your correspondence, dated September 17 and 24, 2015, regarding your attempts to access Washburn County employee wage information. Specifically, in your September 17, 2015 correspondence, you stated you “continue to be denied” this information from the Human Resources (HR) Director, and you asked what your next step is. In your September 24, 2015 correspondence, you asked, “How do I initiate mandamus procedure?”

The Attorney General and the Department of Justice’s Office of Open Government are committed to increasing government openness and transparency, and DOJ endeavors to educate and offer guidance to ensure openness and transparency. There are several open government resources available to you through the Wisconsin DOJ website (<http://www.doj.state.wi.us/dls/open-government>). DOJ provides the full Wisconsin Public Records Law, Wis. Stat. §§ 19.31 to 19.39, maintains a Public Records Law Compliance Outline and a Compliance Outline Supplement and provides a recorded webinar and associated presentation documentation.

In your September 17, 2015 correspondence, you stated that the HR Director denied your request for Washburn County employee wage listings and bonuses received during the past two years. I spoke with Cookie Frankenberg, Washburn County HR Director, regarding your request. Ms. Frankenberg informed me that she responded to your public records request on September 18, 2015 (with a letter dated September 17, 2015). She also stated that she communicated with you throughout the process and informed you that notice was required pursuant to Wis. Stat. § 19.356(9) (requiring an authority to serve written notice of a decision to release records on the record subject if the record subject is an officer or employee of the authority holding a local public office or a state public office). Providing notice pursuant to Wis. Stat. § 19.356 can increase the time it takes for an authority to respond to a public records request.

The Public Records law does not require a response to a public records request within a specific timeframe. However, the law states that upon receipt of a public records request, the authority “shall, as soon as practicable and without delay, either fill the request or notify the requester of the authority’s determination to deny the request in whole or in part and the reasons therefor.” Wis. Stat. § 19.35(4)(a). A reasonable amount of time for a response to a public records request “depends on the nature of the request, the staff and other resources available to the authority to process the request, the extent of the request, and other related considerations.” *WIREData, Inc. v. Vill. of Sussex*, 2008 WI 69, ¶ 56, 310 Wis. 2d 397, 751 N.W.2d 736; see *Journal Times v. Police & Fire Comm’rs Bd.*, 2015 WI 56, ¶ 87 (an authority “can be swamped with public records requests and may need a substantial period of time to respond to any given request”).

The Office of Open Government encourages authorities and requesters to maintain an open line of communication. This helps to avoid misunderstandings between an authority and a requester. If it becomes apparent to an authority that a public records request may require a longer response time, it may be prudent that the authority provide the requester with a letter providing an update on the status of the response and, if possible, indicating when a response might be anticipated. Similarly, if an authority receives an inquiry from a requester seeking an update on the status of the request, it is advisable for the authority to respond to the requester with an update.

Additionally, Ms. Frankenberg informed me that she did not provide bonus information to you in response to your request because such bonus information was tied to the employees’ performance evaluations. Wis. Stat. § 19.36(10)(d) states, in part, an authority shall not provide access to records containing information that an authority uses for staff management planning, including performance evaluations.

The Public Records Law provides several remedies for a requester dissatisfied with an authority’s response, or lack of response, to a public records request. A requester may file an action for mandamus, with or without an attorney, asking a court to order release of the records. Wis. Stat. § 19.37(1)(a). A requester who prevails in such an action is entitled to reasonable attorney fees, damages of not less than \$100.00, and other actual costs. Wis. Stat. § 19.37(2). A court may award punitive damages if the court finds that an authority or legal custodian arbitrarily or capriciously denied or delayed response to a public records request or charged excessive fees. Wis. Stat. § 19.37(3).

Alternatively, the requester may submit a written request for the district attorney of the county where the record is found, or the Attorney General, to file an action for mandamus seeking release of the requested records. Wis. Stat. § 19.37(1)(b). The Attorney General is authorized to enforce the Public Records Law; however, he generally exercises this authority only in cases presenting issues of statewide concern. While the public records issue that you raised is important to you and those in your community, it does not appear to raise issues of statewide concern. Although you did not specifically request the Attorney General file an action

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for mandamus in this matter, we respectfully decline to pursue an action for mandamus on your behalf.

Although we are declining to pursue an action for mandamus under the Public Records Law in this instance, the other remedies outlined above may still be available to you. Additionally, you may wish to contact a private attorney regarding this matter. The State Bar of Wisconsin operates an attorney referral service. You may reach it using the contact information below:

Lawyer Referral and Information Service
State Bar of Wisconsin
P.O. Box 7158
Madison, WI 53707-7158
(800) 362-9082
(608) 257-4666
<http://www.wisbar.org/forpublic/inneedalawyer/pages/lris.aspx>

The referral service is free; however, a private attorney may charge attorneys fees. If you decide to consult an attorney, I suggest you provide him or her with all of the relevant documents and information.

The Department of Justice appreciates your concern. We are dedicated to the work necessary to preserve Wisconsin's proud tradition of open government. Thank you for your correspondence.

The information provided in this letter does not constitute an informal or formal opinion of the Attorney General pursuant to Wis. Stat. § 165.015(1).

Sincerely,



Paul M. Ferguson
Assistant Attorney General
Office of Open Government

cc: Cookie Frankenberg