

2016 2nd Quarter Correspondence

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STATE OF WISCONSIN
DEPARTMENT OF JUSTICE

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April 29, 2016

Kevin O'Brien
Tribune-Phonograph
Abbotsford, WI
tp@tpprinting.com

Dear Mr. O'Brien:

This letter is in response to your December 21, 2015 correspondence, which followed up our December 18, 2016 phone conversation. You expressed your concerns with the Abbotsford City Council and a potential violation of the Wisconsin Open Meetings Law, Wis. Stat. §§ 19.81 to 19.98. You wrote that you believe the "council used an overly broad interpretation of the bargaining exemption in 19.85(1)(e) to privately discuss hiring a new engineering firm to complete a sewer project that had been started by another firm."

The open meetings law acknowledges that the public is entitled to the fullest and most complete information regarding government affairs as is compatible with conducting government business. Wis. Stat. § 19.81(1). All meetings of government bodies shall be held publically and be open to all citizens at all times unless otherwise expressly provided by law. Wis. Stat. § 19.81(2). The provisions of the Open Meetings Law are to be construed liberally to achieve that purpose. Wis. Stat. § 19.81(4).

Wis. Stat § 19.85 lists exemptions in which meetings may be convened in closed session. Any exemptions to open meetings are to be viewed with the presumption of openness in mind. Such exemptions should be strictly construed. *State ex rel. Hodge v. Turtle Lake*, 180 Wis. 2d 62, 71, 508 N.W.2d 603 (1993). The exemptions should be invoked sparingly and only where necessary to protect the public interest and when holding an open session would be incompatible with the conduct of governmental affairs. "Mere government inconvenience is . . . no bar to the requirements of the law." *State ex rel. Lynch v. Conta*, 71 Wis. 2d 662, 678, 239 N.W.2d 313 (1976).

Every meeting must be initially convened in open session. At an open meeting, a motion to enter into closed session must be carried by a majority vote. No motion to convene in closed session may be adopted unless an announcement is made to those present the nature of the business to be considered at the proposed closed session and the specific exemption or exemptions by which the closed session is claimed to be authorized. Wis. Stat. § 19.85(1).

Every public notice of a meeting must give the time, date, place and subject matter of the meeting, including that intended for consideration at any contemplated closed session. Wis. Stat. § 19.84(2). The notice must be in such a form so as to reasonably apprise the public of this information. *Id.*

Notice of a contemplated closed session (and any motion to enter into closed session) must contain the subject matter to be considered in closed session. Merely identifying and quoting a statutory exemption is not sufficient. The notice or motion must contain enough information for the public to discern whether the subject matter is authorized for closed session. If a body intends to enter into closed session under more than one exemption, the notice or motion should make clear which exemptions correspond to which subject matter.

Furthermore, some specificity is required since many exemptions contain more than one reason for authorizing a closed session. For example, Wis. Stat. § 19.85(1)(e) provides an exemption for the following: "Deliberating or negotiating the purchasing of public properties, the investing of public funds, or conducting other specified public business, whenever competitive or bargaining reasons require a closed session." Merely quoting the entire exemption, without specifying the portion of the exemption under which the body intends to enter into closed session, may not be sufficient.

In this particular case, the meeting agenda you provided stated that the council would consider a motion to enter into closed session pursuant to two exemptions: Wis. Stat. §§ 19.85(1)(e) and (g). The agenda also stated the purpose of the closed session was to discuss "future providers of engineering services contract for the City." The agenda did not specify under which portion of these cited exemptions the council contemplated entering into closed session. In crafting a notice, it is advisable for a body to ask whether a person interested in a specific subject matter reading a notice would be aware that the body intends to discuss the specific subject matter. It is not clear from the facts presented whether the agenda accomplished this. Additionally, if any portion of a contemplated closed session can be held in open session, then a body should hold that portion in open session.

The Attorney General and DOJ'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 through the Wisconsin Department of Justice Office of Open Government website (<https://www.doj.state.wi.us/office-open-government/office-open-government-resources>). DOJ provides the full Wisconsin Open Meetings Law, maintains the 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 your correspondence, 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). In your correspondence and during our telephone conversation, you did not indicate that you filed a verified complaint. 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).

Although the Attorney General declines to pursue an enforcement action at this time, the other enforcement options may still be open to you. You may wish to contact a private attorney regarding this matter. The State Bar of Wisconsin operates an attorney referral service. The referral service is free; however, a private attorney may charge attorneys fees. You may reach it using the contact information below:

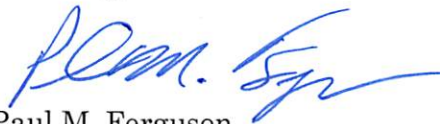
Lawyer Referral and Information Service
State Bar of Wisconsin
P.O. Box 7158
Madison, WI 53707-7158
(800) 362-9082
(608) 257-4666

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

DOJ 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

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May 18, 2016

Ms. Donna Tronca
[REDACTED]

Palmyra, WI 53156
[REDACTED]@centurytel.net

Dear Ms. Tronca:

The Department of Justice (DOJ) is in receipt of your February 4, 2016 correspondence to me in which you stated that you have concerns with paragraphs 4 and 5 of the Town of Palmyra's Board approved Resolution 2016-1 which created a Public Safety Services Committee. You specifically asked me to "clarify whether or not a Board appointed committee would be required to keep and publish minutes of their meetings." You also stated: "I understand that the Open Meetings law requires a governmental body to create and preserve a record of all motions and roll-call votes at its meetings, however, would a board appointed committee also be required to publish a full record of the proceedings of any open meeting of the Committee, even if no motions are made?"

The open meetings law applies to every meeting of a governmental body. The definition of a governmental body includes a "state or local agency, board, commission, council, department or public body corporate and politic created by constitution, statute, ordinance, rule or order[.]" Wis. Stat. § 19.82(1). The list of entities is broad enough to include essentially any governmental entity, regardless of what it is labeled. Purely advisory bodies are subject to the law, even though they do not possess final decision making power, as long as they are created by constitution, statute, ordinance, rule, or order. *See State v. Swanson*, 92 Wis. 2d 310, 317, 284 N.W.2d 655 (1979). An entity that fits within the definition of governmental body must comply with the requirements of the open meetings law.

In an effort to increase transparency, it is recommended to keep minutes of all meetings held by a governmental body, however, there is no requirement under the open meetings law for a governmental body to do so. Pursuant to Wis. Stat. § 19.88(3), the open meetings law only requires a governmental body to create and preserve a record of all motions and roll-call votes at its meetings. Meeting minutes are a common method that governmental bodies use to do so. However, as long as the governmental body is

Ms. Donna Tronca

May 18, 2016

Page 2

maintaining some type of record of all motions and roll-call votes, the Wis. Stat. § 19.88(3) requirement is being met.

The Attorney General and DOJ's Office of Open Government are committed to increasing government openness and transparency, and DOJ endeavors to offer guidance in these areas. As you may be aware, 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 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. These resources are available to help you interpret the Wisconsin Open Meetings Law.

Thank you for your correspondence and thank you for your attendance at the Attorney General's Open Government Summit. DOJ appreciates your concern and is dedicated to the work necessary to preserve Wisconsin's proud tradition of open government. If you have additional questions or concerns, DOJ maintains a Public Records Open Meetings (PROM) hotline to respond to individuals' open government questions. The PROM telephone number is (608) 267-2220.

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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May 23, 2016

Ms. Ellen Riley

[REDACTED]
Milwaukee, WI 53211

Dear Ms. Riley:

The Department of Justice (DOJ) is in receipt of your February 24, 2016 correspondence to me in which you stated that you have made public records requests to "Chief Daniel Mayer of the Cudahy Fire Department and Chief Poellot of the Cudahy Police Department and I have received nothing but the run-around since October of 2014" You stated that "I cannot afford an Attorney to file something with the Courts to force the City of Cudahy to comply with Stats. 19.31 – 19.37, I am requesting the assistance of your Office." Your correspondence concerns your records requests concerning a purported fire incident that occurred on May 4, 2012 at 3844 East Martin in Cudahy, Wisconsin. As you recall in your correspondence, you submitted a related public records request to DOJ on June 30, 2015 to which I responded, on July 17, 2015, that DOJ had no responsive records.

The public records law does not require a response to a public records request within a specific timeframe. 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 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, ¶ 85, 362 Wis. 2d 577, 866 N.W.2d 563 (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

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.

The Attorney General and DOJ's Office of Open Government is committed to increasing government openness and transparency, and DOJ endeavors to offer guidance in these areas. DOJ provides several open government resources through the Wisconsin Department of Justice website (<https://www.doj.state.wi.us/office-open-government/office-open-government>). DOJ provides the full Wisconsin Public Records Law, Wis. Stat. §§ 19.31 to 19.39, maintains a Public Records Law Compliance Guide 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). To obtain a writ of mandamus, the requester must establish four things: "(1) the petitioner has a clear legal right to the records sought; (2) the government entity has a plain legal duty to disclose the records; (3) substantial damages would result if the petition for mandamus was denied; and (4) the petitioner has no other adequate remedy at law." *Watton v. Hegerty*, 2008 WI 74, ¶ 8, 311 Wis. 2d 52, 751 N.W.2d 369.

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 in cases presenting issues of statewide concern. I interpret your correspondence as a request for the Attorney General to file an action for mandamus. However, as your matter does not present an issue of statewide concern, we respectfully decline to pursue an action for mandamus on your behalf.

In this instance, I contacted Chief Daniel Mayer of the Cudahy Fire Department and Cudahy Police Department Records Custodian Marcia Herrick regarding your matter. Chief Mayer indicated that the Fire Department received a public records request from you, dated January 20, 2016. Chief Mayer stated that the Fire Department did not have records of any such incident occurring on or about May 4, 2012. However, the Fire Department had records for a June 2012 fire at that location. Chief Mayer stated that the Fire Department provided these records to you in response to your request on March 30, 2016. Chief Mayer stated he has received no further communication from you regarding this request.

Ms. Herrick stated that the Police Department has not received a public records request from you regarding the fire incident. Ms. Herrick noted that the Police Department received a similar request from a separate individual. However, that individual was an incarcerated person, and generally, the right of an incarcerated person to request records pursuant to the public records law is limited to records that contain specific references to the person or his or her minor children.

Ms. Ellen Riley
May 23, 2016
Page 3

pursuant to the public records law is limited to records that contain specific references to the person or his or her minor children.

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. You may wish to contact a private attorney regarding this matter. The State Bar of Wisconsin operates an attorney referral service. The referral service is free; however, a private attorney may charge attorney fees. You may reach it using the contact information below:


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

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: Chief Daniel Mayer, Cudahy Fire Department
Chief Thomas D. Poellot, Cudahy Police Department



STATE OF WISCONSIN
DEPARTMENT OF JUSTICE

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May 18, 2016

Mr. Jay Doede, #449790
New Lisbon Correctional Institution
P.O. Box 4000
New Lisbon, WI 53950

Dear Mr. Doede:

The Department of Justice (DOJ) is in receipt of your correspondence to Clerk of Sauk County Vicki Meister, Attorney General Brad Schimel and me, received February 23, 2016, in which you stated that you "would like the Wisconsin Department of Justice to take official notice that I'm hereby moving the Clerk of Sauk County and her Open Records Department per Wis Stats §19.32 thru §19.37, that I'm seeking a copy of my own 'CRIMINAL COMPLAINT' in case number: 03-CF-25."

From your correspondence it appears that you are merely informing DOJ of your public records request to the Sauk County Clerk of Court, and are not requesting DOJ's assistance at this time. However, we would like to provide you with additional information about 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).

The public records law does not require a response to a public records request within a specific timeframe. 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 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, ¶ 85, 362 Wis. 2d 577, 866 N.W.2d 563 (an authority "can be swamped with public records requests and may need a substantial period of time to respond to any given request").

Under the public records law, "[A]n authority may charge a fee not exceeding the actual, necessary, and direct costs of four specific tasks: (1) 'reproduction and transcription'; (2) 'photographing and photographic processing'; (3) 'locating'; and (4) 'mailing or shipping.'" *Milwaukee Journal Sentinel v. City of Milwaukee*, 2012 WI 65, ¶ 54 (citation omitted) (emphasis

Mr. Jay Doede, #449790
May 18, 2016
Page 2

in original). An authority may require a requester prepay any such fees if the total amount exceeds \$5.00. Wis. Stat. § 19.35(3)(f).

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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Madison, WI 53707-7158
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<http://www.wisbar.org/forpublic/ineedalawyer/pages/lris.aspx>

DOJ's Office of Open Government offers several open government resources through the Wisconsin DOJ website (<https://www.doj.state.wi.us/office-open-government/office-open-government>). DOJ provides the full Wisconsin Public Records Law, Wis. Stat. §§ 19.31 to 19.39, maintains a Public Records Law Compliance Guide and provides a recorded webinar and associated presentation documentation.

DOJ 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



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June 24, 2016

Mr. David J. O'Leary
Rock County District Attorney
Rock County Courthouse
51 South Main Street
Janesville, WI 53545

Dear Attorney O'Leary,

I am responding to your May 13, 2016, letter to the Office of Open Government at the Wisconsin Department of Justice in which you requested assistance with an open meeting complaint your office received.

The Department of Justice has reviewed the materials you forwarded, including a May 11, 2016, letter to you from Superintendent Johnson, a meeting notice and minutes from the August 26, 2014, School Board meeting, and a recent newspaper article discussing concerns raised by a citizen group opposed to the School Board's decision.

I understand the School District and the citizens differ over whether proper notice was provided regarding action taken during the August 26, 2014, School Board meeting. At the meeting, the Board voted unanimously to approve entering into a contract with Beloit Health System and sharing the track at the Fruzen Intermediate School site. Pursuant to this vote, then District Superintendent Steve McNeal executed an agreement which, among other things, granted Beloit Health System an option to exchange title to property it owned at the Fruzen school site with property the School Board owned at a different location. The meeting notice, however, did not describe the nature of the potential agreement, who the agreement would be with, or what property it would affect. The notice only indicated the board would discuss the purchasing of public lands, where such discussion may occur in closed session. According to the meeting minutes, the

Mr. David J. O'Leary
June 24, 2016
Page 2

board discussed the topic in closed session before reconvening in open session to vote.

According to a May 9, 2016, Beloit Daily News article, certain citizens oppose the pending land swap and assert that the School Board violated the open meetings law by failing to properly notice the meeting that authorized the action they oppose. The article referenced a timeline provided by the School Board that indicates the board was engaged in further discussion and vote regarding the project, but it is unclear whether the citizens contest those actions.

In your letter, you asked the Attorney General to investigate and provide legal guidance regarding this open meetings complaint.

The Wisconsin Department of Justice, in the Wisconsin Open Meetings Law Compliance Guide,¹ discusses the law of meeting notices. Relevant portions of the Compliance Guide are attached to this letter. Briefly, meeting notices should provide sufficient information such that a person interested in a specific subject would be aware, upon reading the notice, that the subject might be discussed. The open meetings law's notice provision, Wis. Stat. § 19.84(2) sets forth a reasonableness standard that requires a case-specific analysis to determine whether the notice was legally sufficient under the particular circumstances.

Factors to consider include: "[1] the burden of providing more detailed notice, [2] whether the subject is of particular public interest, and [3] whether it involves nonroutine action that the public would be unlikely to anticipate." *State ex rel. Buswell v. Tomah Area Sch. Dist.*, 2007 WI 71, ¶ 28, 301 Wis. 2d 178, 732 N.W.2d 804. For example, in *Buswell*, the Court held that a public notice for a closed session for the purpose of "consideration and/or action concerning employment/negotiations with district personnel pursuant to Wis. Stat. § 19.85(1)(c)" was vague, misleading, and legally insufficient, where the school board tentatively approved a collective bargaining agreement between it and the teacher's union.

¹ Available at: <https://www.doj.state.wi.us/sites/default/files/dls/2015-OML-Guide.pdf>.

Mr. David J. O'Leary
June 24, 2016
Page 3

In the present matter, the allegedly faulty notice stated,

Building Projects and Land Updates

A motion may be made and a vote taken to reconvene the Board of Education in Closed Session pursuant to Section 19.85(1)(a) of the Wisconsin Statutes relative to deliberating or negotiating the purchasing of public properties, whenever competitive or bargaining reasons require a closed session.

In considering whether this notice was legally sufficient, we recommend considering the action taken by the School Board in light of the information provided to the public in the notice, and analyzing the facts according to the law outlined in *Buswell v. Tomah Area Sch. Dist.* Specifically, you may consider: the burden on the School Board of providing information in the notice sufficient to identify the properties being discussed and the nature of the real estate negotiations; whether competitive or bargaining reasons required secrecy; the level of public interest in the matter; and whether such actions and agreements related to school district property were typical. For your convenience, we have included a copy of *Buswell*.

As you know, the Attorney General has the authority under Wis. Stat. § 19.97 to enforce the open meetings law. We have interpreted your correspondence on this matter as a request to consider an enforcement action on behalf of the State of Wisconsin. Although the Attorney General is authorized to enforce the open meetings law, he generally exercises this authority only in cases presenting novel issues of law that coincide with matters of statewide concern. Upon careful review of the correspondence, news article, and meeting notice and minutes you provided, we have concluded that this matter—while certainly important to the citizens of Beloit—does not raise novel issues of law, or issues of statewide concern. Therefore, we respectfully decline to pursue an open meetings enforcement action at this time.

Please understand that the Attorney General's decision not to initiate an enforcement action in no way should be interpreted as an opinion on the merits of this case, or as a recommendation to you not to enforce.

The open meetings law is enforced under Wis. Stat. § 19.97. If the Attorney General and the district attorney decline to enforce a violation, a person may bring an action on his or her relation in the name, and on behalf, of the state, by first submitting a verified complaint to the district attorney. If the district

Mr. David J. O'Leary
June 24, 2016
Page 4

attorney takes no action on the verified complaint after 20 days, the person may commence the action. Reasonable attorneys fees are available if the plaintiff prevails.

We hope this information provides guidance to you in determining whether to initiate an enforcement action, or take action on a verified complaint should you receive one. The Department of Justice appreciates and shares your concern for government transparency and openness. We are dedicated to the work necessary to preserve Wisconsin's proud tradition of open government.

Sincerely,

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

Paul M. Ferguson
Assistant Attorney General
Office of Open Government

PMF:AMB:cla

Enclosures

When a specific statute prescribes the type of meeting notice a governmental body must give, the body must comply with the requirements of that statute as well as the notice requirements of the open meetings law.¹¹⁰ However, violations of those other statutory requirements are not redressable under the open meetings law. For example, the open meetings law is not implicated by a municipality's alleged failure to comply with the public notice requirements of Wis. Stat. ch. 985 when providing published notice of public hearings on proposed tax incremental financing districts.¹¹¹ Where a class 1 notice under Wis. Stat. ch. 985 has been published, however, the public notice requirement of the open meetings law is also thereby satisfied.¹¹²

- **Contents of Notice**

- **In General**

Every public notice of a meeting must give the "time, date, place and subject matter of the meeting, including that intended for consideration at any contemplated closed session, in such form as is reasonably likely to apprise members of the public and the news media thereof."¹¹³ The chief presiding officer of the governmental body is responsible for providing notice, and when he or she is aware of matters which may come before the body, those matters must be included in the meeting notice.¹¹⁴ The Attorney General's Office has advised that a chief presiding officer may not avoid liability for a legally deficient meeting notice by assigning to a non-member of the body the responsibility to create and provide a notice that complies with Wis. Stat. § 19.84(2).¹¹⁵

A frequently recurring question is how specific a subject-matter description in a meeting notice must be. Prior to June 13, 2007, this question was governed by the "bright-line" rule articulated in *State ex rel. H.D. Enterprises II, LLC v. City of Stoughton*.¹¹⁶ Under that standard, a meeting notice adequately described a subject if it identified "the general topic of items to be discussed" and the simple heading "licenses," without more, was found sufficient to apprise the public that a city council would reconsider a previous decision to deny a liquor license to a particular local grocery store.¹¹⁷

On June 13, 2007, the Wisconsin Supreme Court overruled *H.D. Enterprises* and announced a new standard to be applied prospectively to all meeting notices issued after that date.¹¹⁸ In *State ex rel. Buswell v. Tomah Area School District*, the Court held that a public notice for a closed session for the purpose of "consideration and/or action concerning employment/negotiations with district personnel pursuant to Wis. Stat. § 19.85(1)(c)" was vague, misleading and legally insufficient, where the school board tentatively approved a collective bargaining agreement between it and the teacher's union.¹¹⁹ In reaching that conclusion, the Court determined that "the plain meaning of Wis. Stat. § 19.84(2) sets forth a reasonableness standard, and that such a standard strikes the proper balance contemplated in Wis. Stat. §§ 19.81(1) and (4) between the public's right to information and the government's need to efficiently conduct its business."¹²⁰ This

¹¹⁰ Wis. Stat. § 19.84(1)(a).

¹¹¹ See Boyle Correspondence (May 4, 2005).

¹¹² Stalle Correspondence (Apr. 10, 2008).

¹¹³ Wis. Stat. § 19.84(2).

¹¹⁴ 66 Op. Att'y Gen. 68, 70 (1977).

¹¹⁵ Schuh Correspondence (Oct. 17, 2001).

¹¹⁶ *State ex rel. H.D. Enters. II, LLC v. City of Stoughton*, 230 Wis. 2d 480, 602 N.W.2d 72 (Ct. App. 1999).

¹¹⁷ *Id.* at 486-87.

¹¹⁸ *State ex rel. Buswell v. Tomah Area Sch. Dist.*, 2007 WI 71, 301 Wis. 2d 178, 732 N.W.2d 804.

¹¹⁹ *Id.* ¶¶ 6-7, 37-38, 41.

¹²⁰ *Id.* ¶ 3.

reasonableness standard “requires a case-specific analysis” and “whether notice is sufficiently specific will depend upon what is reasonable under the circumstances.”¹²¹ In making that determination, the factors to be considered include: “[1] the burden of providing more detailed notice, [2] whether the subject is of particular public interest, and [3] whether it involves non-routine action that the public would be unlikely to anticipate.”¹²²

The first factor “balances the policy of providing greater information with the requirement that providing such information be ‘compatible with the conduct of governmental affairs.’ Wis. Stat. § 19.81(1).”¹²³ The determination must be made on a case-by-case basis.¹²⁴ “[T]he demands of specificity should not thwart the efficient administration of governmental business.”¹²⁵

The second factor takes into account “both the number of people interested and the intensity of that interest,” though the level of interest is not dispositive, and must be balanced with other factors on a case-by-case basis.¹²⁶

The third factor considers “whether the subject of the meeting is routine or novel.”¹²⁷ There may be less need for specificity where a meeting subject occurs routinely, because members of the public are more likely to anticipate that the subject will be addressed.¹²⁸ “Novel issues may . . . require more specific notice.”¹²⁹

Whether a meeting notice is reasonable, according to the Court, “cannot be determined from the standpoint of when the meeting actually takes place,” but rather must be “based upon what information is available to the officer noticing the meeting at the time the notice is provided, and based upon what it would be reasonable for the officer to know.”¹³⁰ Once reasonable notice has been given, “meeting participants would be free to discuss any aspect of the noticed subject matter, as well as issues that are reasonably related to it.”¹³¹ However, “a meeting cannot address topics unrelated to the information in the notice.”¹³² The Attorney General has similarly advised, in an informal opinion, that if a meeting notice contains a general subject matter designation and a subject that was not specifically noticed comes up at the meeting, a governmental body should refrain from engaging in any information gathering or discussion or from taking any action that would deprive the public of information about the conduct of governmental business.¹³³

Whether a meeting notice reasonably apprises the public of the meeting’s subject matter may also depend in part on the surrounding circumstances. A notice that might be adequate, standing alone, may nonetheless fail to provide reasonable notice if it is accompanied by other statements or actions that expressly contradict it, or if the notice is misleading when considered in the light of long-standing policies of the governmental body.¹³⁴

¹²¹ *Id.* ¶ 22.

¹²² *Id.* ¶ 28.

¹²³ *Id.* ¶ 29.

¹²⁴ *Id.*

¹²⁵ *Id.*

¹²⁶ *Id.* ¶ 30.

¹²⁷ *Id.* ¶ 31.

¹²⁸ *Id.*

¹²⁹ *Id.*

¹³⁰ *Id.* ¶ 32.

¹³¹ *Id.* ¶ 34.

¹³² *Id.*

¹³³ I-05-93 (Apr. 26, 1993).

¹³⁴ Linde Correspondence (May 4, 2007); Koss Correspondence (May 30, 2007); Musolf Correspondence (July 13, 2007); Martinson Correspondence (Mar. 2, 2009).

In order to draft a meeting notice that complies with the reasonableness standard, a good rule of thumb will be to ask whether a person interested in a specific subject would be aware, upon reading the notice, that the subject might be discussed. In an unpublished, post-*Buswell* decision, the court of appeals determined that a meeting notice for a closed session of a school board under Wis. Stat. § 19.85(1)(c) for the purpose of “[d]iscussion of the role, duties, and responsibilities of the Library Director and evaluation of job performance and possible action” gave sufficient public notice of the board’s discussion of the discipline and termination of the library director.¹³⁵ The court reasoned that, under *Buswell*, the “sufficiency of the notice will be based on the knowledge of the person posting notice at the time when it is posted.”¹³⁶

○ Generic Agenda Items

Purely generic subject matter designations such as “old business,” “new business,” “miscellaneous business,” “agenda revisions,” or “such other matters as are authorized by law” are insufficient because, standing alone, they identify no particular subjects at all.¹³⁷ Similarly, the use of a notice heading that merely refers to an earlier meeting of the governmental body (or of some other body) without identifying any particular subject of discussion is so lacking in informational value that it almost certainly fails to give the public reasonable notice of what the governmental body intends to discuss.¹³⁸ If such a notice is meant to indicate an intent to simply receive and approve minutes of the designated meeting, it should so indicate and discussion should be limited to whether the minutes accurately reflect the substance of that meeting.¹³⁹

Likewise, the Attorney General has advised that the practice of using such designations as “mayor comments,” “alderman comments,” or “staff comments” for the purpose of communicating information on matters within the scope of the governmental body’s authority “is, at best, at the outer edge of lawful practice, and may well cross the line to become unlawful.”¹⁴⁰ Because members and officials of governmental bodies have greater opportunities for input into the agenda-setting process than the public has, they should be held to a higher standard of specificity regarding the subjects they intend to address.¹⁴¹

○ Action Agenda Items

The Wisconsin Court of Appeals has noted that “Wis. Stat. § 19.84(2) does not expressly require that the notice indicate whether a meeting will be purely deliberative or if action will be taken.”¹⁴² The *Buswell* decision inferred from this that “adequate notice . . . may not require information about whether a vote on a subject will occur, so long as the subject matter of the vote is adequately specified.”¹⁴³ Both in *Olson* and in *Buswell*, however, the courts reiterated the principle—first recognized in *Badke*¹⁴⁴—that the information in the notice must be sufficient to alert the public to the importance of the meeting, so that they can make an informed decision

¹³⁵ *State ex rel. Wanninger v. City of Manitowoc Pub. Library Bd.*, No. 2011AP1059, 2012 WL 1192048, ¶¶ 19-21 (Wis. Ct. App. Apr. 11, 2012) (unpublished).

¹³⁶ *Id.* ¶ 21 (citing *Buswell*, 2007 WI 71, ¶ 32).

¹³⁷ Becker Correspondence (Nov. 30, 2004); Heupel Correspondence (Aug. 29, 2006).

¹³⁸ Erickson Correspondence (Apr. 22, 2009).

¹³⁹ *Id.*

¹⁴⁰ Rude Correspondence (Mar. 5, 2004).

¹⁴¹ Thompson Correspondence (Sept. 3, 2004).

¹⁴² *State ex rel. Olson v. City of Baraboo Jt. Review Bd.*, 2002 WI App 64, ¶ 15, 252 Wis. 2d 628, 643 N.W.2d 796.

¹⁴³ *Buswell*, 2007 WI 71, ¶ 37 n.7.

¹⁴⁴ *Badke*, 173 Wis. 2d at 573-74 and 577-78.

whether to attend.¹⁴⁵ The *Olson* decision thus acknowledged that, in some circumstances, a failure to expressly state whether action will be taken at a meeting could be a violation of the open meetings law.¹⁴⁶ Although the courts have not articulated the specific standard to apply to this question, it appears to follow from *Buswell* that the test would be whether, under the particular factual circumstances of the case, the notice reasonably alerts the public to the importance of the meeting.¹⁴⁷

Another frequently asked question is whether a governmental body may act on a motion for reconsideration of a matter voted on at a previous meeting, if the motion is brought under a general subject matter designation. The Attorney General has advised that a member may move for reconsideration under a general subject matter designation, but that any discussion or action on the motion should be set over to a later meeting for which specific notice of the subject matter of the motion is given.¹⁴⁸

o Notice of Closed Sessions

The notice provision in Wis. Stat. § 19.84(2) requires that if the chief presiding officer or the officer's designee knows at the time he or she gives notice of a meeting that a closed session is contemplated, the notice must contain the subject matter to be considered in closed session. Such notice "must contain enough information for the public to discern whether the subject matter is authorized for closed session under § 19.85(1)."¹⁴⁹ The Attorney General has advised that notice of closed sessions must contain the specific nature of the business, as well as the exemption(s) under which the chief presiding officer believes a closed session is authorized.¹⁵⁰ Merely identifying and quoting from a statutory exemption does not reasonably identify any particular subject that might be taken up thereunder and thus is not adequate notice of a closed session.¹⁵¹ In *State ex rel. Schaeve v. Van Lare*, the Court held that a notice to convene in closed session under Wis. Stat. § 19.85(1)(b) "to conduct a hearing to consider the possible discipline of a public employee" was sufficient.¹⁵²

• Time of Notice

The provision in Wis. Stat. § 19.84(3) requires that every public notice of a meeting be given at least 24 hours in advance of the meeting, unless "for good cause" such notice is "impossible or impractical." If "good cause" exists, the notice should be given as soon as possible and must be given at least two hours in advance of the meeting.¹⁵³

No Wisconsin court decisions or Attorney General opinions discuss what constitutes "good cause" to provide less than twenty-four-hour notice of a meeting. This provision, like all other provisions of the open meetings law, must be construed in favor of providing the public with the fullest and most complete information about governmental affairs as is compatible with the conduct of governmental

¹⁴⁵ *Buswell*, 2007 WI 71, ¶ 26; *Olson*, 2002 WI App 64, ¶ 15.

¹⁴⁶ *Olson*, 2002 WI App 64, ¶ 15.

¹⁴⁷ Herbst Correspondence (July 16, 2008).

¹⁴⁸ Bukowski Correspondence (May 5, 1986).

¹⁴⁹ *Buswell*, 2007 WI 71, ¶ 37 n.7.

¹⁵⁰ 66 Op. Att'y Gen. 93, 98.

¹⁵¹ Weinschenk Correspondence (Dec. 29, 2006); Anderson Correspondence (Feb. 13, 2007).

¹⁵² *State ex rel. Schaeve v. Van Lare*, 125 Wis. 2d 40, 47, 370 N.W.2d 271 (Ct. App. 1985) (citation omitted).

¹⁵³ Wis. Stat. § 19.84(3).

SUPREME COURT OF WISCONSIN

CASE NO.: 2005AP2998

COMPLETE TITLE:

State of Wisconsin ex rel. Brian L. Buswell,
Plaintiff-Appellant-Petitioner,
v.
Tomah Area School District,
Defendant-Respondent.

REVIEW OF A DECISION OF THE COURT OF APPEALS
Reported at: 295 Wis. 2d 842, 721 N.W.2d 158
(Ct. App. 2006-Unpublished)

OPINION FILED: June 13, 2007

SUBMITTED ON BRIEFS:

ORAL ARGUMENT: January 11, 2007

SOURCE OF APPEAL:

COURT: Circuit
COUNTY: Monroe
JUDGE: Michael J. McAlpine

JUSTICES:

CONCURRED: ROGGENSACK, J., concurs (opinion filed).
CONCUR & DISSENT: BUTLER, JR., J., concurs in part, dissents in
part (opinion filed).
DISSENTED:
NOT PARTICIPATING:

ATTORNEYS:

For the plaintiff-appellant-petitioner there were briefs by *Jack D. Buswell* and *Arndt, Buswell & Thorn, S.C.*, Sparta, and oral argument by *Jack D. Buswell*.

For the defendant-respondent there was a brief by *Lori M. Lubinsky*, *Brian C. Hough*, and *Axley Brynerson, LLP*, Madison, and oral argument by *Lori M. Lubinsky*.

An amicus curiae brief was filed by *Thomas C. Bellavia*, assistant attorney general, on behalf of Attorney General *Peggy A. Lautenschlager*.

An amicus curiae brief was filed by *Melissa A. Cherney* and *Christine L. Galinat*, Madison, on behalf of the Wisconsin Education Association Council.

An amicus curiae brief was filed by *Michael J. Julka*, *Richard F. Verstegen*, and *Lathrop & Clark LLP*, Madison, on behalf of the Wisconsin Association of School Boards, Inc.

2007 WI 71

NOTICE

This opinion is subject to further editing and modification. The final version will appear in the bound volume of the official reports.

No. 2005AP2998
(L.C. No. 2005CV129)

STATE OF WISCONSIN

:

IN SUPREME COURT

State of Wisconsin ex rel. Brian L. Buswell,

Plaintiff-Appellant-Petitioner,

v.

Tomah Area School District,

Defendant-Respondent.

FILED

JUN 13, 2007

David R. Schanker
Clerk of Supreme Court

REVIEW of a decision of the Court of Appeals. *Rights declared. Reversed and cause remanded.*

¶1 ANN WALSH BRADLEY, J. The petitioner, Brian Buswell, seeks review of an unpublished court of appeals decision affirming a judgment that dismissed his claims that the Tomah Area School District violated the public notice requirements of Wisconsin's open meetings law.¹ He asserts that the court of

¹ See Buswell v. Tomah Area School Dist., No. 2005AP2998, unpublished slip op. (Wis. Ct. App. July 6, 2006) (affirming a judgment of the Circuit Court for Monroe County, Michael J. McAlpine, Judge); Wis. Stat. § 19.84 (2003-04) (all references to the Wisconsin Statutes are to the 2003-04 version unless otherwise noted).

appeals erred when it concluded that the Tomah Board of Education provided adequate notice that it would be considering the Tomah Education Association's master contract at its June 1, 2004, meeting and a new hiring procedure for coaches at both its June 1 and June 15, 2004, meetings.

¶2 Buswell advances that the notices violated Wis. Stat. § 19.84(2) because they were not reasonably likely to apprise members of the public of the subject matter of the meetings and that the notices are inconsistent with the policies for the open meetings law as set forth in Wis. Stat. §§ 19.81(1) and (4). In essence, Buswell contends that this court should adopt a reasonableness standard for determining the degree of specificity required in identifying the subject matter of a meeting in order to comply with the notice provision of the open meetings law.

¶3 We conclude that the plain meaning of Wis. Stat. § 19.84(2) sets forth a reasonableness standard, and that such a standard strikes the proper balance contemplated in Wis. Stat. §§ 19.81(1) and (4) between the public's right to information and the government's need to efficiently conduct its business. Applying that standard, we determine that the June 1 notice was insufficient under § 19.84(2) and contrary to the policies in §§ 19.81(1) and (4) because it failed to reasonably apprise members of the public that it would consider the Tomah Education Association's master contract at that meeting. We further determine, however, that the failure to detail the new hiring procedure for coaches contained in the new master

contract renders neither the June 1 nor the June 15 notice insufficient because it would not be reasonable to require such detail in these circumstances. Accordingly, we reverse the court of appeals and remand the cause to the circuit court for further proceedings.

I

¶4 In June 2004, the Tomah Board of Education ("Board") held two meetings regarding a new master contract between the Tomah Education Association ("TEA") and the Tomah Area School District ("School District") for the 2003-04 and 2004-05 school years. Prior to the June meetings, Tomah community members had expressed concerns over a proposal to include a provision giving priority to TEA members over other candidates for athletic coaching positions in the new TEA master contract. The record reflects that no previous TEA master contract contained a procedure for hiring athletic coaches.

¶5 Prior to the June 1 meeting, 16 community members, including Buswell, sent a letter to the Board regarding the School District's policy for hiring coaches. The letter expressed concern about the possibility that the Board would adopt a new hiring policy for coaches and objected to including any such policy in the new TEA contract.

¶6 On June 1, 2004, the School Board held a special meeting in closed session to discuss the provisions of the new TEA master contract. The Board had issued a public notice of the agenda which stated:

Contemplated closed session for consideration and/or action concerning employment/negotiations with District personnel pursuant to Wis. Stat. § 19.85(1)(c).²

¶7 During the June 1 closed session, the Board tentatively approved the TEA master contract subject to TEA ratification and ratification by the Board in open session. The new master contract included the preferential hiring procedure for coaches given to TEA members over other applicants who were not members of TEA.

¶8 On June 15, 2004, the Board held a regular meeting preceded by a public notice stating, in relevant part:

New Business—Consideration and/or Action on the Following:

. . .

TEA Employee Contract Approval

During the open session of the June 15 meeting, the Board officially ratified the TEA master contract that had been tentatively approved at the June 1 meeting.

¶9 Buswell filed suit against the School District, alleging it had violated the open meetings law by failing to: give adequate notice that (1) the Board would consider the TEA

² Wis. Stat. § 19.85(1) outlines the procedures and legitimate purposes for holding closed meetings. Section 19.85(1)(c) provides that closed sessions may be convened for:

Considering employment, promotion, compensation or performance evaluation data of any public employee over which the governmental body has jurisdiction or exercises responsibility.

master contract at the June 1 meeting; (2) the Board would consider the new hiring procedure for coaches contained within that contract at the June 1 meeting; and (3) the Board would consider ratification of the new hiring procedure for coaches at the June 15 meeting. The circuit court granted the School District's motion to dismiss for failure to state a claim, basing its ruling on the court of appeals decision in State ex rel. H.D. Enter. II, LLC v. City of Stoughton, 230 Wis. 2d 480, 602 N.W.2d 72 (Ct. App. 1999). The court of appeals affirmed the circuit court, concluding that notice of the meeting met the standard under H.D. Enterprises. Buswell v. Tomah Area School Dist., No. 2005AP2998, unpublished slip op., ¶7 (Wis. Ct. App. July 6, 2006). Buswell petitioned for review.

II

¶10 This case comes to the court on review of a motion to dismiss for failure to state a claim. In such a posture, a reviewing court takes as true the facts alleged in the complaint. Methodist Manor of Waukesha, Inc. v. Martin, 2002 WI App 130, ¶2, 255 Wis. 2d 707, 647 N.W.2d 409.

¶11 Our focus here is on the interpretation of Wisconsin's open meetings statutes. We must discern whether the notices provided for the two meetings complied with the open meetings law. The interpretation of a statute presents questions of law that we review independently of the determinations rendered by the circuit court and court of appeals. Haferman v. St. Clare Healthcare Found., Inc., 2005 WI 171, ¶15, 286 Wis. 2d 621, 707 N.W.2d 853.

III

¶12 Although the current version of Wisconsin's open meetings law has been in force for over 30 years, this court has never addressed the issue of the degree of specificity required in identifying the subject matter of a meeting in order to comply with the notice provision of the open meetings law. Buswell contends that the notices provided by the Board for its June 1 and June 15, 2004, meetings were too general and did not comply with § 19.84(2). That section provides in relevant part:

Every public notice of a meeting of a governmental body shall set forth the time, date, place and subject matter of the meeting, including that intended for consideration at any contemplated closed session, in such form as is reasonably likely to apprise members of the public and the news media thereof. . . .³

¶13 With respect to the June 1 meeting, Buswell claims that the notice was deficient because it did not indicate that the Board would act upon a new master contract with the TEA, and it did not state that the Board would act upon the new procedure for hiring coaches within the master contract. He argues that the notice would have had to mention both the TEA contract and the new hiring provision in order to be "reasonably likely to apprise members of the public" of the subject matter of the meeting. With respect to the June 15 meeting, Buswell claims

³ The statute requires that a notice be "reasonably likely to apprise members of the public and the news media" of the subject matter of the meeting. However, Buswell does not frame his argument in regards to adequate notice to the media. Rather, his arguments all address whether the notices reasonably apprise members of the public. Accordingly, this is the question we address.

that the notice was deficient because it did not state that the Board would act upon the new hiring provision for coaches.

¶14 Buswell further argues that the failure to indicate that the meetings would consider the TEA contract and new hiring provision is contrary to the policies of the open meetings law, as set forth in Wis. Stat. § 19.81(1) and (4). Section 19.81(1) provides:

In recognition of the fact that a representative government of the American type is dependent upon an informed electorate, it is declared to be the policy of this state that the public is entitled to the fullest and most complete information regarding the affairs of government as is compatible with the conduct of governmental business.

Section 19.81(4) adds that the open meetings subchapter "shall be liberally construed to achieve the purposes set forth in this section" Buswell maintains that these policies require more specific notice than that provided in the notices for the June 1 and June 15 meetings. At the heart of Buswell's argument is his contention that the court of appeals erred in failing to adopt and apply a reasonableness standard in determining whether the notices complied with Wisconsin's open meetings law.

¶15 The cornerstone of the court of appeals' analysis is the interpretation of § 19.84(2) in H.D. Enterprises. It involved a grocery store's application for a liquor license from the city of Stoughton. The city published notice of a council meeting at which it would consider the application. The published agenda for the meeting indicated that the council

would discuss the application by listing the item as "licenses." At the meeting, the council denied the license. 230 Wis. 2d at 482. The council, however, reconsidered the denial at a second meeting. The notice for the second meeting also listed the item as "licenses." At the second meeting, the council granted the license. Id.

¶16 The plaintiff filed a lawsuit alleging that the city had violated § 19.84(2). It argued that merely listing an agenda item as "licenses" does not provide specific enough information to reasonably apprise members of the public of the subject matter of the meeting, which was the reconsideration of the denial of the grocery store's application for a liquor license. Id. at 485. The court of appeals disagreed with the plaintiff. It determined that the word "licenses" sufficed to apprise members of the public of the subject matter of the meeting, and that the statute does not require "that the subject matter of a meeting be explained with any more specificity." Id. at 486. Rather, it adopted a bright-line rule that "the general topic of items to be discussed is sufficient to satisfy the statute." Id. at 487.

¶17 In the present case, the court of appeals determined that H.D. Enterprises compelled the conclusion that the notices were sufficient. Because the terms in the Board's notices—"employment/negotiations" and "TEA Employment Contract Approval"—are no more general than "licenses," the court of appeals reasoned that the Board provided sufficient subject

matter notice for its June 1 and June 15 meetings. Buswell, unpublished slip op., ¶7.

¶18 The court of appeals further indicated that it was required to follow H.D. Enterprises, but was sympathetic to Buswell's argument. It stated that "[w]hile we are sympathetic to Buswell's policy argument, and might have decided the issue differently prior to [H.D. Enterprises], we do not write on a clean slate." Id., ¶6. Instead, it noted that any arguments for changing the standard established in H.D. Enterprises must be directed to this court.

¶19 The School District maintains that very general terms such as "employment/negotiations" and "TEA Employment Contract Renewal" provided sufficient notice for the meetings. At oral argument the School District contended that under the H.D. Enterprises bright-line rule, even broader language, such as "District personnel," would have provided sufficiently specific notice. We, however, disagree that such a broad heading is per se "reasonably likely to apprise members of the public" that the subject of the meeting is a new master contract for teachers.

¶20 The court of appeals' and the School District's interpretation of H.D. Enterprises elevates a very general provision into a one-size-fits-all provision. Under their approach, a meeting is not required to have notice with any more specificity than a very general provision such as "licenses."

¶21 Allowing such broad language as "licenses" to constitute sufficient notice as a matter of law is contrary to the plain language of § 19.84(2) and the policies of the open

meetings law set out in §§ 19.81(1) and (4). We therefore reevaluate the approach of H.D. Enterprises. Rather than taking a bright-line approach, where any notice that is no more general than "licenses" is sufficient, we adopt a reasonableness approach, according to which notice must be reasonably specific under the circumstances.⁴ It is our view that such a

⁴ In a concurrence, Justice Roggensack contends that H.D. Enterprises did not establish a bright-line rule and accuses the majority of attacking a straw man. Concurrence, ¶¶56, 68 (citing State ex rel. H.D. Enter. II, LLC v. City of Stoughton, 230 Wis. 2d 480, 602 N.W.2d 72 (Ct. App. 1999)). This "straw man" interpretation, however, is the generally accepted interpretation by everyone other than that concurrence. It is the interpretation adopted by the Attorney General, the parties, the circuit court, and the court of appeals in this case. It is also the interpretation that comports with the actual language of H.D. Enterprises.

In an amicus brief, the Attorney General states that H.D. Enterprises created a "one-size-fits-all standard applicable to all notices." It concludes that the "bright-line standard of H.D. Enterprises is inconsistent with the 'reasonably apprise' standard established by the Legislature in Wis. Stat. § 19.84(2)."

Likewise, the petitioner concedes that "[a]fter H.D. Enterprises, if general notice provisions like 'licenses' . . . are acceptable, then all notices that are equally as general pass muster." The respondent also agrees, asserting that if the word "licenses" was deemed sufficiently specific under H.D. Enterprises, then "'Consideration and/or Action Concerning Employment Negotiations' is more than enough to apprise members of the public that the School Board may consider and/or act concerning the negotiations."

The circuit court and the court of appeals agree that H.D. Enterprises creates a bright-line rule. The circuit court determined that it was bound under H.D. Enterprises to conclude that the notice for the meetings was adequate. The court of appeals similarly concluded that notices that are no more general than "licenses" suffice under H.D. Enterprises. Buswell, unpublished slip op., ¶7.

reasonableness standard is required by the plain language and policies of the open meetings law.

¶22 To begin, the plain language of § 19.84(2) is not amenable to a bright-line rule. That section requires that public notice be "reasonably likely to apprise members of the public" (emphasis added). The use of the word "reasonably" suggests a balancing of factors. Such a balancing requires a case-specific analysis. In other words, whether notice is sufficiently specific will depend upon what is reasonable under the circumstances.

¶23 We find support for this determination in the reasoning of State ex rel. Badke v. Vill. Bd. of the Vill. of Greendale, 173 Wis. 2d 553, 494 N.W.2d 408 (1993). In Badke, a village board meeting regarding a controversial special use permit was held at a facility that was not quite large enough to accommodate the approximately 70 people who attended. Twenty people could enter only a foyer in the building, not the main meeting hall, and up to three people were denied entrance altogether. Some attendees testified that they could not adequately hear the proceedings from their spot in the foyer. Id. at 563.

¶24 The plaintiffs in Badke contended that because some citizens could not gain entrance and others could not hear what

Finally the very language of H.D. Enterprises supports the interpretation that notices no more general than "licenses" are per se adequate. "There is no requirement in the statute that the subject matter of a meeting be explained with any more specificity." 230 Wis. 2d at 486.

was said at the meeting, the meeting violated the requirement that meetings be "held in places reasonably accessible to members of the public and shall be open to all citizens at all times" Wis. Stat. § 19.81(2). This court determined that the words "reasonably accessible" suggests that "open to all citizens at all times" does not require absolute accessibility. Rather, it held that "reasonably" implies that reviewing courts must evaluate on a case-by-case basis in determining whether meetings are sufficiently accessible. Id. at 580. We determine that the word "reasonably" has similar effect in § 19.84(2).

¶25 The proposition that a statement of the general topic of a meeting should per se constitute sufficient notice runs contrary to the policies articulated in § 19.81(1). That section states that the "public is entitled to the fullest and most complete information regarding the affairs of government as is compatible with the conduct of governmental business." Such information extends to public notice of meetings under § 19.84(2). Badke, 173 Wis. 2d at 577-78.

¶26 We note, too, that § 19.81(1) states that the open meetings law is based on the premise that "representative government [depends] upon an informed electorate." We observe that government functions best when it is open and when people have information about its operations. It is not, however, merely a matter of enhancing the functions of government. Rather, the government must be accountable to the governed. It must be accountable to the people who underwrite government

finances and provide its legitimacy. Having access to information about the workings of government undercuts arguments of subterfuge and ultimately promotes public trust and confidence. Moreover, as this court determined in Badke, the notice requirement gives the public information about the business to be conducted that will alert them to the importance of the meeting, so that they can make an informed decision whether to attend. Badke, 173 Wis. 2d at 573-74 and 577-78.

¶27 Thus, the language of § 19.84(2) and the policies underlying the open meetings law do not abide a bright-line rule where the general topic of a meeting constitutes sufficient subject matter notice as a matter of law. Rather, they demand a reasonableness standard according to which notice must be reasonably specific under the circumstances of the case. Because the reasonableness standard is at odds with the application of a bright-line rule, we therefore overrule H.D. Enterprises.⁵

¶28 The reasonableness standard requires taking into account the circumstances of the case in determining whether

⁵ As noted in an amicus brief submitted by the Attorney General, this approach comports with the approach consistently advocated by the Attorney General, who is charged with interpreting the state's open meetings law under Wis. Stat. § 19.98. In the compliance guide for open meetings law published by the Department of Justice, the Attorney General urges that in noticing meetings, officers "should keep in mind that the public is entitled to the best notice that can be given at the time the notice is prepared." Wis. Dept. of Justice, Wisconsin Open Meetings Law: A Compliance Guide, p. 9 (Aug. 2005).

notice is sufficient. This includes analyzing such factors as the burden of providing more detailed notice, whether the subject is of particular public interest, and whether it involves non-routine action that the public would be unlikely to anticipate. See H.D. Enter., 230 Wis. 2d at 490 (Vergeront, J., dissenting).

¶29 The first factor, the burden of providing more specific information on the body noticing the meeting derives from § 19.81(1). It balances the policy of providing greater information with the requirement that providing such information be "compatible with the conduct of governmental affairs." Wis. Stat. § 19.81(1). Whether more detailed notice is compatible with the conduct of governmental affairs is determined on a case-by-case basis. Such a determination may include, but is not limited to, the time and effort involved in assessing what information should be provided in a notice and the inherent limitations of citizen boards. In Badke, this court aptly described the demands on public officials:

In Wisconsin, there are many parttime citizen boards that work long hours for relatively little or no pay. These boards' real compensation comes from the satisfaction of public service. It is very difficult for these boards to anticipate the myriad of situations that may call into question the parameters of the open meeting law. We recognize that most public officials diligently try to abide by the law

173 Wis. 2d at 570. The crucial point is that the demands of specificity should not thwart the efficient administration of governmental business.

¶30 In considering the second factor, we are persuaded that particular public interest in the subject matter of a meeting may require greater specificity in the hearing notice. Particular public interest may be a matter of both the number of people interested and the intensity of that interest. The level of interest, in and of itself, however, is not dispositive. Rather, it must be balanced with other factors on a case-by-case basis.

¶31 Third, the degree of specificity of notice may depend on whether the subject of the meeting is routine or novel. Where the subject of a meeting recurs regularly, there may be less need for specificity because members of the public are more likely to anticipate that it will be addressed. However, novel issues are more likely to catch the public unaware. Novel issues may therefore require more specific notice.

¶32 The determination of whether notice is sufficient should be based upon what information is available to the officer noticing the meeting at the time notice is provided, and based upon what it would be reasonable for the officer to know. Thus, whether there is particular public interest in the subject of a meeting or whether a specific issue within the subject of the meeting will be covered, and how that affects the specificity required, cannot be determined from the standpoint of when the meeting actually takes place. Rather, it must be gauged from the standpoint of when the meeting is noticed.

¶33 The School District raises several objections to the adoption of a reasonableness standard in determining whether a

notice complies with Wisconsin's open meetings laws. None is persuasive. First, quoting H.D. Enterprises, it asserts that a case-by-case analysis would "burden municipalities with an obligation to detail every issue that will be discussed under every agenda item during meetings when that is not mandated by statute." H.D. Enterprises, 230 Wis. 2d at 487. A notice must reasonably apprise members of the public of the subject matter of a meeting under the circumstances. A reasonableness standard will not require that every issue on every agenda always be enumerated because such a requirement would be unreasonable. Rather, general subject headings may suffice in cases where a general heading reasonably apprises members of the public of the subject matter of the meeting. In other cases, reasonably apprising members of the public may require greater specificity.

¶34 Second, the School District argues that a reasonableness standard would inappropriately constrain discussion at meetings of governmental bodies because their deliberations would be limited to the noticed narrow topics. We disagree. Under a reasonableness standard, meeting participants would be free to discuss any aspect of the noticed subject matter, as well as issues that are reasonably related to it. It is true that a meeting cannot address topics unrelated to the information in the notice. However, that is because the notice requirement functions to assure that members of the public are reasonably apprised of what is discussed at such meetings. The objection that other topics may not be freely addressed is

therefore not an objection to a reasonableness standard, but to the notice requirement itself.

¶35 Third, the School District argues that a reasonableness standard would impose an unacceptable burden on governmental bodies to predict and gauge public interest in every item on a meeting's agenda. While it is correct that a reasonableness standard will at times require that bodies anticipate and account for public interest when noticing meetings, it will not impose a per se requirement to predict and gauge public interest on each subject at every meeting. Where predicting and gauging public interest imposes an unreasonable burden, the bodies will not be required to do so.

¶36 Applying the reasonableness standard, we determine that the notice for the June 1 hearing was not sufficiently specific to be "reasonably likely to apprise members of the public" of the subject matter of the meeting. The June 1 notice stated: "Contemplated closed session for consideration and/or action concerning employment/negotiations with District personnel pursuant to Wis. Stat. § 19.85(1)(c)." This description is vague, for it could cover negotiations with any

group of district personnel or with any individual employee within the district.⁶

¶37 Moreover, the June 1 notice was misleading. It stated that the closed session was pursuant to Wis. Stat. § 19.85(1)(c).⁷ That section provides for closed sessions for

⁶ The Wisconsin Association of School Boards, Inc. and the Wisconsin Education Association Council submitted amicus briefs arguing that the Board was not a "governmental body" within the meaning of § 19.82(1) when it discussed the terms of a collective bargaining agreement at the June 1 meeting. That section excludes from the definition of "governmental body" entities "formed for or meeting for the purpose of collective bargaining under subch. I, IV or V of ch. 111." Wis. Stat. § 19.82(1). Because the Board met on June 1 in part to discuss provisions of the TEA master contract, the briefs argue that the Board was not required to follow the notice requirements of the open meetings law. Neither the School District nor Buswell raise this issue in briefs or in oral argument. Further, the record does not indicate that the Board met on June 1 for the purpose of collective bargaining. Rather, it indicates that it met to consider approval of the terms reached via collective bargaining. We therefore decline to address the issue here.

⁷ The School District argues that notice for closed sessions may be less specific than notice for open sessions due the fact that the public may not attend. It cites to Olson v. City of Baraboo Joint Review Bd. for the view that less detail is required where public input is not allowed, as in closed session. 2002 WI App 64, ¶15, 252 Wis. 2d 628, 643 N.W.2d 796. However, Olson implies only that adequate notice of a closed session may not require information about whether a vote on a subject will occur, so long as the subject matter of the vote is adequately specified. Id. We do not see a justification for a per se rule that notice for closed sessions may be less specific than notice for open sessions.

considering matters related to individual employees, not for considering collective bargaining agreements.⁸ As the School District conceded at oral argument, the appropriate statute to cite would have been § 19.85(1)(e).⁹ Because the notice was vague and misleading, it was not "reasonably likely to apprise

In contrast, the Attorney General contends in an amicus brief that closed sessions may require more specific notice than open sessions. We likewise do not see a justification for a per se rule that notice for closed sessions must always be more specific than notice for open sessions. Notice of closed sessions must contain enough information for the public to discern whether the subject matter is authorized for closed session under § 19.85(1).

⁸ The minutes for the June 1 meeting show that the Board considered applications for the position of high school principal, which would fall under § 19.85(1)(c). Thus, citing that statute is not misleading insofar as individual personnel matters were considered at the meeting. Rather, it is misleading because it suggests that only individual personnel matters were to be considered at the meeting.

⁹ Section 19.85(1)(e) provides for closed sessions when:

(e) Deliberating or negotiating the purchasing of public properties, the investing of public funds, or conducting other specified public business, whenever competitive or bargaining reasons require a closed session.

members of the public" of the subject matter of the meeting—in this case the TEA master contract.¹⁰

¶38 Examining the circumstances of this case, we determine that those factors support the conclusion that the June 1 notice required greater specificity. First, and most importantly, stating that the TEA master contract would be discussed at the June 1 meeting would not be a burden to the Board. It requires only a few words. Further, the notice for the June 15 meeting actually listed the TEA master contract on the agenda, and there is no contention that listing it there was a burden.

¶39 Second, the TEA master contract included a new hiring provision for coaches that was of interest to a number of people in the community. Several citizens had made the effort to petition the Board regarding whether to put a provision for hiring coaches into the master contract.

¶40 Third, the TEA master contract was not a routine subject insofar as it contained a new hiring provision for coaches to which a number of members of the community objected.

¹⁰ The School District cites to Olson v. City of Baraboo Joint Review Bd. for the proposition that incorrect information on a public notice does not render that notice inadequate. 252 Wis. 2d 628, ¶14. We agree that there is not a per se rule that § 19.84(2) is violated any time there is incorrect information on a public notice. Here, however, the notice does not specify whether the closed session is to consider individual employment matters or collective bargaining agreements, and the cited statute misleadingly suggests that the meeting will cover only individual employment matters. The mistake therefore compounds the inadequacy of the notice rather than being offset by other information in the notice. See id., ¶15.

This suggests that the notice should have mentioned the TEA master contract.

¶41 Thus, analyzing the circumstances of the case, we conclude that the Board did not provide sufficient notice for the June 1 meeting. The notice was vague and misleading. Under the circumstances, it was not sufficiently specific to be "reasonably likely to apprise members of the public" that the meeting concerned the TEA master contract.

¶42 Although we determine that the notice for the June 1 meeting required greater specificity than it provided as to the TEA master contract, we do not agree with Buswell's contention that the notice violated § 19.84(2) by failing to state that the Board would act upon the new hiring provision for coaches set forth within the master contract. Again, we apply the factors to the circumstances of the case to determine whether providing the more specific information would be reasonable.

¶43 The first of the factors, the burden of providing greater information, weighs against requiring that the notice for the June 1 meeting state that the Board would address the hiring provision. Admittedly, the second and third factors weigh in favor of requiring that the notice state that the Board would address the hiring provision. There was particular public interest in the hiring provision, and the hiring provision within the contract was novel. However, we determine that the burden of providing notice of particular provisions of collective bargaining contracts is great enough that requiring that information would be unreasonable under the circumstances.

¶44 Master contracts may be complex and contain any number of provisions. Requiring that school boards, or other similarly situated bodies, anticipate and list all of those provisions in a public notice would likely consume a disproportionate amount of their limited time and may require a significant effort. Moreover, as the School District argues, requiring that public notice list which individual provisions of collective bargaining agreements will be discussed in closed session could serve to undermine governmental bodies' bargaining positions, which would place a substantial burden on them. Thus, considering the balance of factors, we determine that the burden of including a particular contract provision in its notice for the June 1 meeting is substantial enough that it is not required under § 19.84(2).¹¹

¶45 We also reject Buswell's argument that the notice for the June 15 meeting was insufficient. Unlike the notice for the June 1 meeting, the notice for the June 15 meeting listed "TEA

¹¹ Justice Butler contends that for the same reason that it would not have been burdensome to provide notice that the TEA master contract would be under consideration at the June 1 meeting, it would also not be burdensome to provide notice of the new hiring provision for coaches, for in each case "a few words in the notice would have sufficed." Concurrence/dissent, ¶88. Admittedly, adding a few words about hiring coaches is not burdensome. However, the number of words required for a particular contract provision is not the only consideration. Rather, the question is what degree of specificity will be required in describing the particular aspects of a contract that will be under consideration. It is our determination that providing notice that a contract will be discussed at a meeting is not burdensome, but specifying the particular provisions of a multifaceted contract is significantly more burdensome.

Employee Contract Approval." Thus, a member of the public could determine that the TEA master contract would be discussed by reading the notice. As with the notice for the June 1 meeting, the notice for the June 15 meeting need not have specified that the new hiring provision for coaches would be part of the TEA contract. The burden of specifying particular provisions in a multifaceted contract would be too great. We acknowledge that given the level of interest in the subject matter, it may have been beneficial to list the new hiring provision that was contained in the TEA master contract. However, we do not mandate such specificity here.

IV

¶46 As discussed above, whether a public notice is sufficient under open meetings law is determined by applying a reasonableness standard and analyzing the specifics of the case. This is a departure from the bright-line rule announced in H.D. Enterprises, according to which a notice stating only the general topic to be discussed at the meeting is sufficient. 230 Wis. 2d at 486-87. Ordinarily, this court adheres to the doctrine that a decision which overrules an earlier decision is retrospective in operation. State v. Picotte, 2003 WI 42, ¶42, 261 Wis. 2d 249, 661 N.W.2d 381 (citing Harmann v. Hadley, 128 Wis. 2d 371, 377, 382 N.W.2d 673 (1986)). Yet, retroactive application of a new rule can be unsettling because of justifiable reliance on a contrary view of the law. This court

will therefore on occasion prospectively overrule past precedent to limit such unsettling effect. Harmann, 128 Wis. 2d at 378.¹²

¶47 Three factors inform the inquiry of whether our judicial determination should have retroactive versus prospective application. Wenke v. Gehl Co., 2004 WI 103, ¶70-71, 274 Wis. 2d 220, 682 N.W.2d 405. Those three factors are: (1) whether the decision establishes a new principle of law, either by overruling clear past precedent on which litigants may have relied, or by deciding an issue of first impression whose resolution was not clearly foreshadowed; (2) whether retroactive application would further or retard the operation of the new rule; and (3) whether retroactive application could produce substantial inequitable results. Id. at ¶71.

¶48 Applying these factors here, we reach the conclusion that the application of the reasonableness standard should be

¹² The technique of prospective overruling is often called "sunbursting," for Great Northern Ry. Co. v. Sunburst Oil & Refining Co., 287 U.S. 358 (1932); see Thomas E. Fairchild, Limitation of New Judge-Made Law to Prospective Effect Only: "Prospective Overruling" or "Sunbursting", 51 Marq. L. Rev. 254, 255 (1967-68). Courts may apply a new rule of law "prospectively" in different ways. A court may determine that the new rule will apply only to future events, and not to the case before it or any other case arising from conduct that has already occurred, as was the case in Sunburst Oil. Id. at 364; Harmann v. Hadley, 128 Wis. 2d 371, 378, 382 N.W.2d 673 (1986). A court may also apply the rule to the case in which the rule is announced, and to future events, but not to cases arising from conduct that has already occurred, as we are doing in the instant case. Harmann, 128 Wis. 2d at 378. In addition, a court may apply the new rule to cases in which the trial has not yet begun or in which the time for appeal has not yet expired. Id., citing Bielski v. Schulze, 16 Wis. 2d 1, 19, 114 N.W.2d 105 (1962).

given only prospective effect. First, our decision establishes a standard that is a departure from past precedent. Second, retroactive application would not further the operation of the new rule. The public cannot go back and attend meetings that may have been inadequately noticed when such meetings have already occurred. Third, and most importantly, retroactive application of the reasonableness standard may produce substantial inequitable results. It could jeopardize the legitimacy of past actions taken at all levels of government.

¶49 In order to reduce the burden on governmental bodies and mitigate any hardships that result from a change in the law, we will apply the rule announced here only to this case and to cases challenging future notices. Thus, any challenge to the specificity of the subject matter of a public notice under Wis. Stat. § 19.84(2) that was issued prior to the date this opinion is mandated will be examined under the requirements of H.D. Enterprises. We apply the new rule to this case because Buswell has acted as a relator on behalf of the state, pursuant to Wis. Stat. § 19.97(3). As such, he has worked to vindicate his and others' right to open government. State ex rel. Hodge v. Town of Turtle Lake, 180 Wis. 2d 62, 78, 508 N.W.2d 603 (1993). Applying the new rule in such a case may serve as an incentive for others to act similarly and to deter future misconduct.

V

¶50 Having determined that the June 1 notice was insufficient, and that we will apply the reasonableness standard

in this case, we turn to the question of remedy. In his amended complaint, Buswell requests voiding the hiring provision for coaches in the master contract adopted in the June meetings, forfeitures against any member of the board who knowingly attended a meeting violating the open meetings law, and reasonable attorney fees.

¶51 Voiding a contract provision is not an available remedy here. The court was advised that the master contract that adopted the hiring provision has expired. The argument that a provision in an expired master contract can be voided appears incongruous.

¶52 Similarly, forfeitures are not available as a remedy in this case. Section 19.96 provides for forfeitures by "[a]ny member of a governmental body who knowingly attends a meeting of such body held in violation" of the open meetings law. Our decision overrules the bright-line rule of H.D. Enterprises and establishes a reasonableness standard in its place. Members of governmental bodies who complied with the law as it then existed cannot be sanctioned for a violation based on an interpretation first announced today.

¶53 With respect to attorney fees, Wis. Stat. § 19.97(4) provides that a person bringing an action as relator on behalf of the state (as is the case here) for enforcement of the open meetings law may receive costs and attorney fees:

In such actions [i.e., where a person brings a case as a relator], the court may award actual and necessary costs of prosecution, including reasonable attorney fees to the relator if he or she prevails

¶54 Section 19.81(4) requires that the provisions of the open meetings law be liberally construed to advance the law's purposes. This court has interpreted that requirement to merit awarding attorney fees to the prevailing relator where doing so advances the purposes of the open meetings law. Hodge v. Town of Turtle Lake, 180 Wis. 2d at 78. Such is the case here. Awarding attorney fees to Buswell will provide an incentive to others to protect the public's right to open meetings and to deter governmental bodies from skirting the open meetings law. Accordingly, we remand the case to the circuit court to determine the appropriate award.¹³

VI

¶55 In sum, we adopt a reasonableness standard for determining the degree of specificity required in identifying the subject matter of a meeting in order to comply with the notice provision of the open meetings law. We conclude that the plain meaning of Wis. Stat. § 19.84(2) sets forth a reasonableness standard, and that such a standard strikes the proper balance contemplated in Wis. Stat. §§ 19.81(1) and (4) between the public's right to information and the government's need to efficiently conduct its business. Applying that standard, we determine that the June 1 notice was insufficient under § 19.84(2) and contrary to the policies in §§ 19.81(1) and (4) because it failed to reasonably apprise the public that it

¹³ The appropriate award of attorney fees is determined by the "lodestar" methodology. Anderson v. MSI Preferred Ins. Co., 2005 WI 62, ¶39, 281 Wis. 2d 66, 697 N.W.2d 73.

would consider the TEA's master contract at that meeting. We further determine, however, that the failure to detail the new hiring procedure for coaches contained in the new master contract renders neither the June 1 nor the June 15 notice insufficient because it would not be reasonable to require such detail in these circumstances. Accordingly, we reverse the court of appeals and remand the cause to the circuit court for further proceedings.

By the Court.—Rights declared. We reverse the court of appeals and remand the cause to the circuit court.

¶56 PATIENCE DRAKE ROGGENSACK, J. (*concurring*). Because I conclude that the June 1, 2004 notice of the open meeting was insufficient to satisfy Wis. Stat. § 19.84(2) (2005-06),¹ I join the mandate of the court. However, I write separately because in my view the notice for the June 1 meeting does not satisfy the requirements of State ex rel. H.D. Enterprises II, LLC v. City of Stoughton, 230 Wis. 2d 480, 602 N.W.2d 72 (Ct. App. 1999), in regard to § 19.84(2). I also write separately because instead of analyzing whether the subject matter of the notice given for the June 1 meeting is sufficient under H.D. Enterprises and § 19.84(2), the majority opinion sets up a straw-man, its "bright line rule," that it says H.D. Enterprises creates. Majority op., ¶¶16, 19, 22. The majority opinion then proceeds to overrule H.D. Enterprises by knocking down the straw-man that the majority opinion created. Majority op., ¶¶27, 52. In my view, the public would be better served by additional guidance about compliance with § 19.84(2) than is given either in H.D. Enterprises or in the majority opinion. Accordingly, I respectfully concur.

I. BACKGROUND

¶57 This case arises out of a citizen complaint by Brian Buswell (Buswell) that the board of the Tomah Area School District (the board) did not comply with the public notice

¹ All further references are to the 2005-06 version of the Wisconsin Statutes unless otherwise noted.

provisions of Wis. Stat. § 19.84(2), in regard to a June 1 meeting where both the TEA Employee Contract and the applicants for the position of high school principal were discussed. Buswell also alleges that the public notice provisions were violated for a second meeting held on June 15, 2004. He alleges that the "subject matter" of both meetings was not reasonably described in the respective notices because they did not give notice that the board would be considering new hiring procedures for athletic coaches that would give hiring preference to current TEA members. He also asserts that the notice for the June 1 meeting was misleading because that notice included a reference to Wis. Stat. § 19.85(1)(c), as the statutory basis for conducting part of the meeting in closed session. He asserts, and the City agrees, that § 19.85(1)(c) is not applicable to discussing the TEA Employee Contract in closed session.

¶58 The board contends that both notices were sufficient. The notice for the June 1 meeting provided:

Contemplated Closed Session for Consideration and/or
Action Concerning Employment/Negotiations with
District Personnel Pursuant to Wis. Stats.
19.85(1)(c).

The board admits that the statutory reference in the notice could have been misleading, but it asserts that State ex rel. Olson v. City of Baraboo Joint Review Board, 2002 WI App 64, 252 Wis. 2d 628, 643 N.W.2d 796, concludes that incorrect information in a notice of a public meeting is not fatal to the sufficiency of the notice. The board also contends that by

noticing that it would consider "TEA Employee Contract Approval" at the June 15 meeting, it complied with Wis. Stat. § 19.84(2).²

¶59 Prior to the June 1 board meeting, the community knew that there was a proposal for the TEA Employee Contract that would give priority to current TEA members in regard to hiring for coaching jobs. Majority op., ¶4. The question that is presented for this review is whether the notice of both meetings reasonably apprised the public and the news media of the subject matter of those meetings when the hiring of coaches was not mentioned, and in regard to the June 1 notice, whether, because the TEA Employee Contract was not mentioned, the notice was misleading as well.

II. DISCUSSION

A. Standard of Review

¶60 This review requires us to interpret various statutory provisions and to apply them to the facts presented herein. The interpretation and application of statutes are questions of law subject to our independent review. Jackson County v. DNR, 2006 WI 96, ¶10, 293 Wis. 2d 497, 717 N.W.2d 713.

B. Wisconsin Stat. § 19.84(2)

¶61 Wisconsin Stat. § 19.84(2) provides in relevant part:

Every public notice of a meeting of a governmental body shall set forth the time, date, place and subject matter of the meeting, including that intended for consideration at any contemplated closed session, in such form as is reasonably likely

² I agree with the majority opinion's conclusion that the notice for the June 15 meeting is sufficient to satisfy Wis. Stat. § 19.84(2), therefore, I do not address that notice further in this concurrence.

to apprise members of the public and the news media thereof.

Buswell does not challenge the sufficiency of the notice of the time, date or place of the meeting. Rather, he challenges the sufficiency of the subject matter described in the notice, claiming it is incomplete, misleading and does not reasonably apprise the public of what the board will discuss.

1. Notice of the June 1 Meeting

¶62 It is undisputed that the board intended to and did discuss two topics at the June 1 meeting under one subject matter topic: the TEA Employee Contract and applications for the position of high school principal. Therefore, the board was required to give public notice of both, if there are two different subject matters that were to be discussed during the meeting.

¶63 "Subject matter" is not defined in Wis. Stat. § 19.84 or elsewhere in the statutes that address open meeting requirements. Black's Law Dictionary describes "subject matter" as:

The issue presented for consideration; the thing in which a right or duty has been asserted; the thing in dispute.

Black's Law Dictionary 1466 (8th ed. 2004). This is a broad inclusive definition, but it gives us little guidance about how much particularity or in what form one should describe the subject matter that will be addressed at a meeting of a public body.

¶64 In H.D. Enterprises, the court of appeals addressed "subject matter" in the context of the Stoughton Common

Council's consideration of Pick 'N Save's application for a liquor license. H.D. Enterprises, 230 Wis. 2d at 482. Pick 'N Save's application had been published in accord with alcohol licensing requirements found in Wis. Stat. § 125.04(3). Id. at 482. The meeting agenda was used by the common council as public notice that it would consider the liquor license on January 27. Id. The agenda listed "licenses" as an agenda topic. Id. This notice was the first of three occasions on which the liquor license was discussed, before H.D. Enterprises alleged the City violated its public notice obligation. Id. The application for a liquor license was denied after that first common council meeting. Id. However, H.D. Enterprises did not allege that the notice insufficiently described the subject matter of the first meeting. Id. at 487.

¶65 At the second meeting, "licenses" again was listed on the common council's agenda that gave notice of the meeting. Id. at 482. Pick 'N Save's application was granted at that meeting. Id. H.D. Enterprise had not appeared at the second meeting, and it objected to the reconsideration of Pick 'N Save's application. Id. Therefore, approximately six days after the second meeting, the common council convened a third meeting that H.D. Enterprises attended and in which the common council considered H.D. Enterprises' request that it rescind Pick 'N Save's liquor license. Id. at 482-83. The common council refused to do so. Id. at 483. H.D. Enterprises then sued the City of Stoughton claiming that the term "licenses" was

too general a description of the subject matter of the second meeting to satisfy Wis. Stat. § 19.84(2). Id.

¶66 The circuit court concluded the notice was sufficient and H.D. Enterprises appealed. In concluding that "licenses" was a sufficient description of the subject matter to reasonably apprise the public, the court of appeals examined all the circumstances surrounding consideration of Pick 'N Save's application for a liquor license. Id. at 483-84 and 487. It noted that the notice for the common council's first consideration of the matter used "licenses" to describe the subject matter. Id. at 487. The court noted that H.D. Enterprises had appeared at that council meeting and therefore, it had experience with the City's use of that description. Id. The court of appeals noted that H.D. Enterprises did not complain about the lack of notice for the first meeting. Id. The court of appeals also balanced the burden to municipalities, which would be caused by detailing every facet of a subject matter that may be addressed under every agenda item, with the sufficiency of the notice to the public. Id.

¶67 The court of appeals opinion took guidance from State ex rel. Schaeve v. Van Lare, 125 Wis. 2d 40, 370 N.W. 271 (Ct. App. 1985), where Schaeve complained that the description of the subject matter of the meeting did not have enough particularity to comply with the statute. H.D. Enterprises, 230 Wis. 2d at 486. In Schaeve, it was contended that the subject matter set out in the notice was insufficient because it said only that the possible discipline of a public employee would be considered.

Schaeve, 125 Wis. 2d at 47. The court of appeals concluded there was "no requirement in the statute that the subject matter of a meeting must be explained with any more specificity." Id. at 47.

¶68 Contrary to the assertion in the majority opinion, its straw-man, the "bright-line rule," is nowhere mentioned or "announced" in H.D. Enterprises. See majority op., ¶46. Instead, H.D. Enterprises is based on the facts and circumstances that were relevant to the license that would be discussed at an upcoming common council meeting, as it had been in other meetings. H.D. Enterprises, 230 Wis. 2d at 482-83 and 485. H.D. Enterprises reasoned that "[s]ection 19.84(2), stats. requires that a public notice set forth the time, date, place and subject matter of a meeting in such form as is likely to reasonably apprise members of the public." Id. at 485.³ It established no rule that is applicable without consideration of the relevant facts and circumstances.

¶69 Moving to the case now before the court, upon consideration of the facts and circumstances of the notice provided by the board of the Tomah Area School District in regard to the June 1 meeting, I conclude it was insufficient under H.D. Enterprises's interpretation of Wis. Stat. § 19.84(2). I conclude that the board's notice of the June 1 meeting was insufficient based on three facts that are present

³ The City of Stoughton used entire meeting agendas as the public notices for its meetings. State ex rel. H.D. Enterprises v. City of Stoughton, 230 Wis. 2d 480, 482, 602 N.W.2d 72 (Ct. App. 1999).

here and for which countervailing facts were present in and important to the decision in H.D. Enterprises.

¶70 First, two very different topics were addressed under one heading in the notice for the board's June 1 meeting, e.g., the consideration of the applicants for the position of high school principal and the provisions for a new TEA Employee Contract. In H.D. Enterprises, the liquor license was the subject matter noticed and discussed at both meetings. Id. at 487.

¶71 Second, the provisions of the master TEA Employee Contract were going to be presented at the June 1 meeting, i.e., this was a brand-new contract for the board to consider. In H.D. Enterprises, the second notice given was the same as the first. Id. at 487. Because the liquor license was discussed by the common council under that topic previously, the public and the news media had experience in the subject matter as described in the notice. Id. H.D. Enterprises had attended a previous common council meeting that was noticed in the same form, by using the meeting agenda with the topic "licenses" as a subject matter. Id.

¶72 And, third, the notice for the June 1 meeting was misleading in regard to the TEA Employee Contract because the notice referenced Wis. Stat. § 19.85(1)(c) as the basis for the board's taking up the subject matter in closed session. Section 19.85(1)(c) is the appropriate cite for the consideration of applicants for the position of high school principal, but it does not apply to collective bargaining agreements such as the

TEA Employee Contract. Section 19.85(1)(e) is the section of the statutes that permits a public body to consider collective bargaining agreements in closed session. By failing to include both § 19.85(1)(c) and (e) in the notice, the board misled the public about both the subject matter of the closed meeting and the number of topics that would be discussed. In H.D. Enterprises, there was no allegation that the notice was misleading. Accordingly, I conclude that the notice of the June 1 meeting of the board did not set forth the subject matter in a form that reasonably apprised the public and the news media that the TEA Employee Contract would be discussed in the closed session portion of that meeting. Therefore, the notice for the June 1 meeting did not comply with the requirements of Wis. Stat. § 19.84(2), as interpreted in H.D. Enterprises.

¶73 However, even though I conclude that the notice for the June 1 meeting was not sufficient to satisfy Wis. Stat. § 19.84(2), as interpreted in H.D. Enterprises, it appears that the guidance given by H.D. Enterprises is not sufficient to assist in achieving compliance by those public bodies that are required to give public notice of the subject matter of

meetings.⁴ The statute requires that notice of the subject matter be set out "in such form as is reasonably likely to apprise" the public and the news media. I would advise, but not require, that public bodies adopt a standard format for their meeting agendas. The entire agenda for the meeting should then be used as the § 19.84(2) notice. This would give the public and the news media experience in what issues are apt to be addressed under recurring topics. I suggest that the agendas contain subtopics when more than one matter is to be discussed under one agenda topic. I also recommend including in the notice a statement that questions about the agenda can be addressed to a representative of the public body, whose name, phone number and an appropriate time to call would be listed. If the public body has described a subject matter in a way that generates questions or confusion about what is to be discussed, I suggest a more detailed agenda topic be employed for future meeting agendas. In that way, the public body will learn both

⁴ There are times when one authors an opinion and believes that the issues presented were sufficiently addressed, but in hindsight, they were not. As the author of H.D. Enterprises, I now find myself in a position similar to that of Justice Robert Jackson. When faced with a similar problem, he remarked, "The matter does not appear to me now as it appears to have appeared to me then." McGrath v. Kristensen, 340 U.S. 162, 178 (1950) (Jackson, J. concurring) (further citations omitted). H.D. Enterprises appears to me now a bit differently than it appears to have appeared to me in 1999. When it was written, the court of appeals decision in H.D. Enterprises appeared to provide sufficient guidance on the form in which the subject matter in a public notice should be provided in order to reasonably apprise the public and the news media of what would be discussed. However, now it appears more guidance was needed.

what specificity is required to describe the subject matter of the meeting and what form best assists the public and the news media in understanding what will transpire at meetings.

2. Other Concerns

¶74 I also part company with the majority opinion's use of State ex rel. Badke v. Village Board of the Village of Greendale, 173 Wis. 2d 553, 494 N.W.2d 408 (1993), as support for its contentions about the specificity with which the subject matter in a Wis. Stat. § 19.84(2) public notice is to be given. Majority op., ¶¶23-26. Badke never addresses or refers to the specificity of the subject matter in a public notice. And this is for good reason. In Badke, there was no notice of any type given that the village board was going to meet. Badke, 173 Wis. 2d at 569.

¶75 Furthermore, in regard to the specificity with which the subject matter of a meeting must be described in the notice, the majority opinion asserts that if the topic is of "particular public interest," "greater specificity" may be required in the notice. Majority op., ¶¶29-30. I see no qualifier in Wis. Stat. § 19.84(2). The public and the news media are those to whom reasonable notice is due. In my view, the majority opinion's requirement is an invitation for additional litigation claiming the notice was insufficient. For example, how is the public servant who prepares the notice to know that there is a "particular public interest?" Will the notice be insufficient if he or she should have known of a "particular public interest" but did not? Does he or she have a duty to learn of a

"particular public interest" in the subject matters that will be considered? Furthermore, does a member of the public who has an interest in the subject matter of the meeting but who has never expressed that interest to others deserve less complete notice?

¶76 I would not venture into these subjective woods. Rather, I conclude that the standard set by Wis. Stat. § 19.84(2) is an objective standard. Notice is to be reasonable. And, the persons to be noticed are simply the public, interested or not, and the news media, interested or not.

¶77 And finally, I disagree with the majority opinion's broad assertion that "[i]t is true that a meeting cannot address topics unrelated to the information in the notice." Majority op., ¶34. The majority opinion cites no authority for this conclusion. Does the majority opinion mean that the typical agenda item of "such other matters as may come before the body" can never provide sufficient notice under Wis. Stat. § 19.84(2) for a matter that unexpectedly is presented to the board and requires immediate attention? At least one attorney general did not believe that to be the case. 66 Op. Att'y Gen. 68, 70 (1977). Notice based on the facts and circumstances of the case affect when the notice given is sufficient to reasonably apprise the public and the news media.

¶78 Accordingly, for the reasons set forth above, I concur, joining only the mandate of the majority opinion.

¶79 LOUIS B. BUTLER, JR., J. (*concurring in part, dissenting in part*). I join those portions of the majority opinion which conclude that (a) Wis. Stat. § 19.84(2) (2003-04)¹ sets forth a reasonableness standard; (b) such a standard strikes the proper balance contemplated in Wis. Stat. § 19.81(1) and (4) between the public's right to information and the government's need to efficiently conduct its business; (c) applying the reasonableness standard, the June 1, 2004, notice was insufficient under § 19.84(2) and contrary to the policies in § 19.81(1) and (4) because it failed to reasonably apprise members of the public that the master contract of the Tomah Education Association ("TEA") would be considered at that meeting; (d) State ex rel. H.D. Enterprises II, LLC v. City of Stoughton, 230 Wis. 2d 480, 602 N.W.2d 72 (Ct. App. 1999), should be overruled; (e) this decision should be applied prospectively; and (f) this matter should be remanded to the circuit court to determine the appropriate award as to costs and attorney fees.

¶80 I write separately because I conclude that the majority fails to apply the reasonableness standard it adopts in this case to the question of whether the June 1 posting provided sufficient notice regarding the Tomah Board of Education's ("Board") consideration of a new hiring procedure for athletic coaches. Applying the majority's standard, I conclude that the

¹ All references to the Wisconsin Statutes are to the 2003-04 version unless otherwise noted.

June 1 notice was insufficient because it failed to reasonably apprise members of the public that the Board would be considering a proposal that was a matter of particular interest to the community, involved a non-routine action that the public was unlikely to anticipate, and could have easily been included in the notice.

¶81 The facts are accurately set forth in the majority opinion,² and will not be repeated in full here. Of import is the fact that in June 2004 the Board held two meetings regarding a new master contract between TEA and the Tomah Area School District ("School District") for the 2003-04 and 2004-05 school years. Prior to those meetings, a number of community members had expressed concerns over a proposed new procedure for hiring athletic coaches.³ No prior TEA master contract contained a procedure for hiring athletic coaches.

¶82 The public notice issued by the Board setting forth the agenda of the June 1 meeting stated, in relevant part:

Contemplated Closed Session for Consideration and/or
Action Concerning Employment/Negotiations with

² Majority op., ¶¶4-9.

³ The broad community interest exhibited in this case prior to the June 2004 meetings establishes that the public was aware that a proposal was under consideration for a new hiring policy giving priority to TEA members over other candidates for athletic coaching positions in the new TEA master contract. Majority op., ¶4. Consequently, I accept the majority's conclusion that the notice for the June 15 meeting, which listed TEA contract approval, was legally sufficient. See majority op., ¶45. Nevertheless, the better practice, given the level of public interest that was shown here, would have been to give notice that the procedures for hiring coaches would be discussed at the June 15 meeting.

District Personnel Pursuant to Wis. Stats.
19.85(1)(c).

Section 19.85(1)(c) provides that closed sessions may be convened for considering employment, promotion, compensation or performance of any public employee. The notice did not contain any information referencing the TEA master contract or any proposed hiring procedures for athletic coaches.

¶83 At issue is whether the notice provided for the June 1, 2004, meeting was too general and not in compliance with Wis. Stat. § 19.84(2). That section provides, in relevant part:

Every public notice of a meeting of a governmental body shall set forth the . . . subject matter of the meeting, including that intended for consideration at any contemplated closed session, in such form as is reasonably likely to apprise members of the public. . . .

¶84 Brian Buswell ("Buswell") contends that the June 1 notice was deficient because it did not indicate that the Board would act upon a new master contract with the TEA, and it did not indicate that the Board would act upon the new hiring provision for athletic coaches. The majority concludes, and I agree, that the notice failed to apprise the public that the TEA master contract would be under consideration at the June 1 meeting. Majority op., ¶36. I respectfully disagree with the majority's conclusion that the notice was sufficient with respect to the new hiring provision for athletic coaches. Majority op., ¶42.

¶85 The majority notes that with respect to the TEA master contract, the notice given was vague because it could cover any negotiations with any group of district personnel or with any

individual employee within the district. Id., ¶36. Moreover, it was misleading, as the statute referenced⁴ in the notice provides for closed sessions for individual employees, not for considering collective bargaining agreements. Id., ¶37.

¶86 The reasonableness standard adopted by the court takes into account such factors as the burden of providing more detailed notice, whether the subject is of particular interest, and whether it involves non-routine action that the public would be unlikely to anticipate. Id., ¶28. The majority first points out that it would not unduly burden the Board to include a few words in the notice about the fact that the TEA master contract would be discussed at the June 1 meeting. Id., ¶38. Second, the majority notes the TEA master contract included a hiring provision that was of interest to a number of people in the community, as several citizens had made an effort to petition the Board regarding whether to put a provision for the hiring of coaches into the master contract. Id., ¶39. Third, the majority recognizes that the TEA master contract was not a routine subject, as it contained a new provision for the hiring of coaches to which members of the community objected, the subject of which had never before been included in a TEA contract. Id., ¶¶4, 40.

¶87 For the very reasons the majority concludes the June 1 notice was insufficient with respect to the TEA master contract, I conclude the notice was insufficient with respect to the new provision regarding the hiring of athletic coaches. Thus, it is

⁴ Wis. Stat. § 19.85(1)(c).

incomprehensible that the majority would reject its own analysis when discussing the June 1 notice as it relates to the new provision for the hiring of coaches that is set forth in the TEA master contract. As to the coaches provision, the June 1 notice is still vague because it fails to discuss coaches or procedures to hire coaches at all, and could cover any negotiations with any group of district personnel or with any individual employee within the district. Moreover, the June 1 notice was still misleading as to the coaches provision, as Wis. Stat. § 19.85(1)(c) once again provides for closed sessions for individual employees, and not for considering new hiring provisions for athletic coaches in general. The majority inadequately explains how an insufficient notice as to a public meeting regarding the TEA master contract is sufficient with respect to an item buried within that very contract, particularly when the item in question has never before been the subject of contract negotiations and was of special interest to the public.

¶88 When applying the factors associated with the reasonableness standard, the majority concedes that the second and third factors⁵ weigh in favor of requiring notice that the Board would address the coaches provision. Majority op., ¶43.

⁵ These factors, again, include whether the subject is of particular interest, and whether it involves non-routine action that the public would be unlikely to anticipate. The public had already shown great interest in the athletic coach hiring provision, and the June 1 notice contemplated employment negotiations for any of the individual employees within the district, but did not provide for general hiring procedures for athletic coaches.

Thus, the majority's analysis stands on the first factor, the burden of providing greater information. Yet, just what was the burden? Once again, a few words in the notice would have sufficed, simply by indicating that the procedure for hiring athletic coaches would be discussed. For a matter of considerable public concern, this was no "burden."

¶89 If, as the majority concludes, the June 1 notice was insufficient to apprise members of the public that the TEA master contract would be considered at the June 1 meeting, then it was necessarily insufficient to apprise members of the public that a new provision regarding the hiring of athletic coaches contained within the TEA master contract would be considered.

¶90 "[T]he notice requirement gives the public information about the business to be conducted that will alert them to the importance of the meeting, so that they can make an informed decision whether to attend." Majority op., ¶26 (citing State ex rel. Badke v. Village Bd. of the Village of Greendale, 173 Wis. 2d 553, 573-74, 577-78, 494 N.W.2d 408 (1993)). I wholeheartedly concur. Yet, no informed decision to attend was possible here, as the notice failed to give the public any idea of what would be discussed at the meeting. The June 1 notice (1) fails to inform the public that the TEA master contract will be considered, and (2) fails to inform the public that a new hiring procedure for athletic coaches will be discussed. Accordingly, I would reverse the court of appeals as to both of these issues.

¶91 For the foregoing reasons, I respectfully concur in part and dissent in part from the court's decision and mandate.

No. 2005AP2998.1bb



STATE OF WISCONSIN
DEPARTMENT OF JUSTICE

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May 24, 2016

Mr. Ed Moline
[REDACTED]

Waukesha, WI 53189
[REDACTED]@AOL.COM

Mr. Merl Wagner
[REDACTED]

Mukwonago, WI 53149
[REDACTED]@outlook.com

Dear Mr. Moline and Mr. Wagner:

The Department of Justice (DOJ) is in receipt of your February 17, 2016 correspondence to Attorney General Brad Schimel in which you provided materials to DOJ for review regarding an "Open Meetings Complaint filed against 5 of the 7 members of the Big Bend Board." However, a copy of the complaint was not included with the information you provided. The only document provided was a February 12, 2016 correspondence to Waukesha County District Attorney Sue Oppen, which does not provide details concerning your matter, and a CD that purportedly includes "a video of a portion of the offenses." You stated that the "Big Bend Trustees have been appearing together as to the matter of the Rural Home Cemetery litigation without publishing the required municipal notices." You also stated you filed the complaint with District Attorney Oppen who "has not responded to two phone requests for a case number, or my last email to her"

The Attorney General and DOJ's Office of Open Government are committed to increasing government openness and transparency, and we appreciate your concern. Unfortunately, the information you provided is insufficient to properly assess your matter. However, I would like to provide you with some general information that you may find helpful.

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 issues of statewide concern. There is insufficient information in your correspondence to determine whether your matter presents issues of statewide concern. As a result, while you did not specifically request the Attorney General to file an enforcement action, nonetheless, we respectfully decline to pursue an enforcement action at this time.

Mr. Ed Moline
Mr. Merl Wagner
May 24, 2016
Page 2

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). In this case, it appears you filed such a complaint. 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).

You may wish to speak with a private attorney regarding your matter. The State Bar of Wisconsin operates an attorney referral service. The referral service is free; however, a private attorney may charge attorney fees. 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>

DOJ provides several open government resources through the Wisconsin Department of Justice website (<https://www.doj.state.wi.us/office-open-government/office-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.

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
ATTORNEY GENERAL

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FAX 608/267-2779

June 24, 2016

Mr. Brian Thomas

[REDACTED]
Oshkosh, WI 54901

[REDACTED]@new.rr.com

Dear Mr. Thomas:

The Department of Justice (DOJ) is in receipt of your February 18, 2016 email correspondence to Attorney General Brad Schimel in which you stated that you requested all documents regarding your January 13, 2016 arrest from the Winnebago County Sheriff's Department. You stated that you were asked by the arresting officer about your medical history, including medication that you were on, and that the Winnebago County Sheriff's Department refuses to release these documents to you saying "they have sent you all there is." You also stated that you spoke with "Gorte of the OPD and he says Winnebago County is in possession of these documents."

I contacted the Winnebago County Sheriff's Department and spoke with Records Clerk Jodi Noffke regarding this matter. I also had the opportunity to review documentation of your communications with her office. It seems, after you reached out to her office, that the Winnebago County Sheriff's Department located additional records responsive to your request and forwarded them to you. This occurred shortly after the date of your correspondence to DOJ. Based on the information presented to me, it appears your public records request is satisfied.

Authorities should take great care to undertake a thorough and diligent search for records responsive to public records requests to ensure that all responsive records are located. If a requester believes that an authority may have additional responsive records, a requester may communicate that to the authority, as you did in this matter. This matter demonstrates the importance of communication between an authority and a requester. DOJ's 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 and helps ensure government openness.

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). To obtain a writ of mandamus, the requester must establish four things: "(1) the petitioner has a clear legal right to the records sought; (2) the government entity has a plain legal duty to disclose the records; (3) substantial damages would result if the petition for mandamus was denied; and (4) the petitioner has no other adequate remedy at law." *Watton v. Hegerty*, 2008 WI 74, ¶ 8, 311 Wis. 2d 52, 751 N.W.2d 369.

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 in cases presenting issues of statewide concern. Although 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. The referral service is free; however, a private attorney may charge attorney fees. 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
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<http://www.wisbar.org/forpublic/ineedalawyer/pages/lris.aspx>

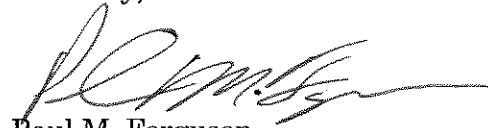
The Attorney General and DOJ's Office of Open Government is committed to increasing government openness and transparency, and DOJ endeavors to offer guidance in these areas. Several open government resources are available to you through the Wisconsin DOJ website (<https://www.doj.state.wi.us/office-open-government/office-open-government>).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

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

Mr. Brian Thomas
June 24, 2016
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,

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

Paul M. Ferguson
Assistant Attorney General
Office of Open Government

PMF:lah



STATE OF WISCONSIN
DEPARTMENT OF JUSTICE

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May 18, 2016

Mark Belling
1130 WISN
12100 W. Howard Avenue
Greenfield, WI 53228
markbelling@iheartmedia.com

Dear Mr. Belling:

The Department of Justice (DOJ) is in receipt of your May 16, 2016 email correspondence to Attorney General Brad Schimel in which you wrote, "This is a specific request for your office to intervene in an open records case in Waukesha County." Specifically, you asked that the Attorney General "intervene and either informally advise Arrowhead to comply, advise the Waukesha county District Attorney to start doing her job or outright prosecute Arrowhead for violating the law." While the Attorney General is authorized to enforce the public records law, he respectfully declines to intervene in this matter.

In your correspondence, you explained that you submitted a public records request to Arrowhead Union High School District seeking "any document" that would identify the private donor of \$400,000 for the controversial locker room at Arrowhead High School." Your correspondence included the school district's response to your request. Superintendent Laura Myrah denied your request pursuant to the public records balancing test. Her response indicated that the school district provided you with a copy of an "initial letter with the terms" of the donation. The response further stated,

The names of the donors will remain confidential and have been redacted, per the requirement at the time of the donations, as well as to comply with their continued insistence on anonymity; the district will uphold its pledge of confidentiality. Furthermore, under the balancing test, the compelling public interest in not disclosing the donors' identities, considering the significant negative impact on future anonymous donors/donations, outweighs the public interest in knowing the exact names of those who donated through a charitable organization

You also provided Waukesha County District Attorney Susan L. Oppers email stating that she concluded that the school district complied with the law. She wrote that she concurred that the "significant negative impact on future anonymous donors/donations" is a legitimate public interest in favor of nondisclosure.

As you are likely aware, the Wisconsin Public Records Law, Wis. Stat. §§ 19.31 to 19.39, authorizes requesters to inspect or obtain copies of "records" created or maintained by an "authority." Records are presumed to be open to public inspection and copying, but there are exceptions. Wis. Stat. § 19.31. Statutes, the common law, and the public records law balancing test, which weighs the public interest in disclosure of a record against the public interest in nondisclosure, provide such exceptions.

The balancing test is to be conducted on a case-by-case basis. A records custodian must balance the strong public interest in disclosure of a record against the public interest favoring nondisclosure. The private interest of a person mentioned or identified in a record is not a proper element of the balancing test, except indirectly. If there is a strong public interest in protecting an individual's private interest as a general matter, there is a public interest favoring the protection of the individual's private interest.

In this case, the school district determined there was a strong public interest in protecting the donor's individual private interest in remaining anonymous. Based on the information you provided, it appears the donation was made on the condition that the donor remain anonymous. Protecting the donor's individual privacy served a strong public interest: preventing significant negative impacts on future anonymous donors/donations. Based on the facts as presented, on its face, the school district's balancing test determination, as confirmed by District Attorney Oppers, appears reasonable.

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 public records law takes into account the fact that district attorneys or Attorney General may not always bring actions for mandamus upon request, and provides individuals with the option of commencing their own action.

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

Mr. Mark Belling
May 18, 2016
Page 3

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Sincerely,

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

Paul M. Ferguson
Assistant Attorney General
Office of Open Government



STATE OF WISCONSIN
DEPARTMENT OF JUSTICE

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April 7, 2016

Rep. Peter W. Barca
Assembly Minority Leader
Sen. Julie Lassa
24th State Senate District
Wisconsin Legislature
P.O. Box 7882
Madison, WI 53707-7882

Dear Representative Barca and Senator Lassa:

This letter is in response to your February 16, 2016 letter in which you raised concerns regarding requests for records that you made to the Wisconsin Economic Development Corporation (WEDC) in your role as WEDC Board members. You wrote that you requested records regarding 28 awards made by the agency that did not receive a formal staff review. You stated that you experienced delays in receiving records and when you received some records, the records included more than what you requested.

You requested that I consult with either the CEO of WEDC or their Chief Compliance Officer and advise them on the importance of complying with the law. The Attorney General and the Department of Justice (DOJ) Office of Open Government are committed to increasing government openness and transparency, and DOJ endeavors to offer guidance in these areas. I appreciate your concern and making us aware of this matter.

I contacted Hannah Renfro, WEDC Chief Legal Counsel and Compliance Officer regarding this matter. Ms. Renfro informed me that WEDC did not view your request as a public records request since it came from Board members. She stated that if they had received a public records request seeking the same records, they would likely have considered it insufficient and overly burdensome. *See Wis. Stat. § 19.35(1)(h).*¹

¹ Wis. Stat. 19.35(1)(h) states, in part, "A request under pars. (a) to (f) is deemed sufficient if it reasonably describes the requested record or the information requested. However, a request for a record without a reasonable limitation as to subject matter or length of time represented by the record does not constitute a sufficient request."

Ms. Renfro also said WEDC worked with either you or your respective offices regarding your request and decided to start with gathering records concerning one of the 28 loans. She indicated that her primary contact concerning the request was Cathy Friedl in Representative Barca's office. They processed the request as one coming from Board members and not the general public. As such, she stated that some information available to you as members would not necessarily be available to the general public if the request were processed pursuant to the Wisconsin Public Records Law, Wis. Stat. §§ 19.31 to 19.39.

During our conversation, I stressed the importance of communication between an authority and a requester. Regardless of whether a request is treated as an internal request or as a public records request, the importance of communication holds true. 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 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.

Regarding the timeliness issue, as you are likely aware, the public records law does not require a response to a public records request within a specific timeframe. 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 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, ¶ 85, 362 Wis. 2d 577, 866 N.W.2d 563 (an authority "can be swamped with public records requests and may need a substantial period of time to respond to any given request"). Again, Ms. Renfro indicated your request was processed as an internal request from Board members and not pursuant to the public records law. However, these same principals concerning timeliness apply regardless.

Finally, during our conversation, Ms. Renfro stated that she had a meeting planned with either you or representatives from your respective offices regarding this matter. Since my conversation with Ms. Renfro, I have not received a follow up call seeking assistance or a call indicating ongoing issues. It is my hope that any remaining issues have been resolved.

Rep. Peter W. Barca
Sen. Julie Lassa
April 7, 2016
Page 3

DOJ appreciates your concern regarding open government. If you are not already aware, DOJ offers several open government resources through its website (<https://www.doj.state.wi.us/office-open-government/office-open-government>). DOJ provides the full Wisconsin Public Records Law, maintains a Public Records Law Compliance Guide and provides a recorded webinar and associated presentation documentation.

DOJ is dedicated to the work necessary to preserve Wisconsin's proud tradition of open government. If we can be of any additional assistance, please contact the Office of Open Government at (608) 267-2220. 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: Hannah Renfro, WEDC Chief Legal Counsel and Compliance Officer



STATE OF WISCONSIN
DEPARTMENT OF JUSTICE

BRAD D. SCHIMEL
ATTORNEY GENERAL

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Deputy Attorney General

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Paul M. Ferguson
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FAX 608/267-2779

April 1, 2016

Ms. Jess Zellner
[REDACTED]@gmail.com

Dear Ms. Zellner:

The Department of Justice (DOJ) is in receipt of your emails, dated February 12 and 29, 2016, in which you stated that you "submitted an Open Records Request to the Wisconsin Humane Society in Racine asking them about their animal outcomes and return to owner statistics." You stated they denied your request because "[p]ursuant to Chapter 19 (19.32), the statute on public records and property does not apply to the Wisconsin Humane Society." Specifically you asked: "Is it true that the Wisconsin Humane Society does not have to comply with Wisconsin Open Records laws?" You also wrote that a newspaper article stated "the Wisconsin Human Society would receive over \$250,000 from the City of Racine in 2016 for the municipal animal control contract."

The purpose of the Wisconsin Public Records Law, Wis. Stat. §§ 19.31 to 19.39, is to shed light on the workings of government and the official acts of public officers and employees. *Bldg. & Constr. Trades Council v. Waunakee Cmty. Sch. Dist.*, 221 Wis. 2d 575, 582, 585 N.W.2d 726 (Ct. App. 1998). Only authorities are subject to the Wisconsin Public Records Law. The public records law defines an authority as any of the following having custody of a record:

a state or local office, elective official, agency, board, commission, committee, council, department or public body corporate and politic created by the constitution or by any law, ordinance, rule or order; a governmental or quasi-governmental corporation except for the Bradley center sports and entertainment corporation; a special purpose district; any court of law; the assembly or senate; a nonprofit corporation which receives more than 50% of its funds from a county or a municipality, as defined in s. 59.001(3), and which provides services related to public health or safety to the county or municipality; a university police department under s. 175.42; or a formally constituted subunit of any of the foregoing.

Wis. Stat. § 19.32(1).

Ms. Jess Zellner

April 1, 2016

Page 2

According to the Wisconsin Humane Society's website (<http://www.wihumane.org/about-us>), the Wisconsin Humane Society is a "private nonprofit organization," and they "receive no general government funding and we are not part of any national umbrella organization." Under the law, a nonprofit corporation that receives more than 50 percent of its funds from a county or a municipality and provides services related to public health or safety to the county or municipality is considered an authority under the public records law. Whether a nonprofit corporation is considered an authority under the public records law is a determination that can only be made on a case-by-case basis based on the facts as they relate to a particular nonprofit corporation. In this case, while you reference a newspaper article stating a contract figure, there is still insufficient information to determine whether the Wisconsin Humane Society falls within this definition.

You referenced a newspaper report that the Wisconsin Human Society would receive over \$250,000 for a municipal animal control contract. Under the public records law, "each authority shall make available for inspection and copying under s. 19.35(1) any record produced or collected under a contract entered into by the authority with a person other than an authority to the same extent as if the record were maintained by the authority." Wis. Stat. § 19.36(3). Thus, if an authority received a public records request for any such records, even if they were maintained by the contracted person, the authority would be responsible for making such records available for inspection or copying.

If you would like to learn more about the Wisconsin Public Records Law, DOJ's Office of Open Government offers several open government resources through the Wisconsin DOJ website (<https://www.doj.state.wi.us/office-open-government/office-open-government>). DOJ provides the full Wisconsin Public Records Law, maintains a Public Records Law Compliance Guide and provides a recorded webinar and associated presentation documentation.

DOJ appreciates your concern. The Attorney General and DOJ's Office of Open Government are committed to increasing government openness and transparency, and we are dedicated to the work necessary to preserve Wisconsin's proud tradition of open government. If you have additional questions, please contact the Office of Open Government's Public Records Open Meetings (PROM) Help Line at (608) 267-2220. 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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April 12, 2016

Albert Sprague

Hillsboro, WI 54634

Dear Mr. Sprague:

The Department of Justice (DOJ) is in receipt of your January 8, 2016 and December 6, 2015 letters to Pamela Majewski, legal associate with DOJ's Office of Open Government (OOG). Your letters concern both the Wisconsin Open Meetings Law, Wis. Stat. §§ 19.81 to 19.98, and the Wisconsin Public Records Law, Wis. Stat. §§ 19.31 to 19.39.

First, in your January letter, you ask if your email request is a valid request under the public records law. An email request is a valid public records request. Under the law, a "request may be made orally, but a request must be in writing before an action to enforce the request is commenced" under Wis. Stat. § 19.37. Wis. Stat. 19.35(1)(h). An email request constitutes a written request such that a requester who submits a request via email may avail herself or himself of the law's enforcement provisions. Please note that regardless of whether a request is made orally or in writing, in order to be deemed sufficient under the law, a request must reasonably describe the records or information requested. Wis. Stat. 19.35(1)(h).

In your January letter, you wrote the town denied your request in writing but did not provide the statutory basis for the denial. You did not include a copy of the town's response letter. Under the public records law, if a request is made orally, the authority may deny the request orally unless a demand for a written statement of the reasons denying the request is made by the requester within five business days of the oral denial. Wis. Stat. § 19.35(4)(b). If an authority denies a written request, in whole or in part, the authority must provide the requester with a written statement of the reasons for denying the written request. *Id.* In every written denial, the authority must inform the requester that if the record request was made in writing, the determination is subject to review by mandamus under Wis. Stat. § 19.37(1) or upon application to the Attorney General or a district attorney.

Second, in your December letter, you describe various incidents involving the Town of Greenwood and the Town Board. You wrote that the town "violated many of the State Statutes that deal with finances and open government." You asked for any help we can offer. The 22 incidents you listed fall into three categories, and I will address all three categories in turn.

Items numbered 1, 6, 7, 12, 13, 14, 15, 18, 20, 21, and 22 pertain to issues that are outside the scope of the OOG's responsibilities. The OOG works to increase government openness and transparency with a focus on the Wisconsin Open Meetings Law and the Wisconsin Public Records Law. Therefore, we cannot assist you with issues outside these areas of the law. You may wish to contact your local district attorney or a private attorney regarding the concerns you raised in these items.

Items numbered 2, 3, 10, and 17 pertain or appear to pertain to issues related to the open meetings law. Regarding item 2, there is insufficient information provided to determine whether there was any possible violation of the open meetings law. Furthermore, as I explained, I cannot assist you with any potential violations of statutes outside the OOG's scope.

Item 3 does not contain sufficient information such that I can fully evaluate the issue. The open meetings law pertains to the right of the public to attend and observe open sessions of meetings. The law does not require a governmental body to allow members of the public to speak or actively participate in the body's meeting. (Some other state statutes may require public hearings on certain matters.) However, the law does permit a body to set aside a portion of an open meeting as a public comment period. Wis. Stat. §§ 19.83(2) and 19.84(2). A body is free to determine for itself whether and to what extent it will allow such citizen participation.

Regarding items 10 and 17, the open meetings law only requires that a body create and preserve a record of all motions and roll-call votes at its meetings. Wis. Stat. § 19.88(3). Written minutes are the most common method of doing so. The law does not require a body to take more formal or detailed minutes of other aspects of the meetings. (Other state statutes may require particular minute-taking beyond that required by the open meetings law.) Nothing in the open meetings law requires public approval of meeting minutes before the body approves the minutes.

Items numbered 4, 5, 8, 9, 11, 16, and 19 pertain or appear to pertain to issues related to the public records law. Regarding item 4, there is insufficient information to fully assess the situation that you present. If the individual made a public records request to the Clerk for detailed budget information, the Clerk is required to provide all responsive records subject to the provisions of the public records law. The law does not require an authority to provide requested information if no record exists. *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).

Regarding item 5, it is unclear from the facts presented whether or not you made a public records request, and the Clerk denied your request for copies of records. The public records law authorizes requesters to inspect or obtain copies of records created or maintained by an authority. Records are presumed to be open to public inspection and copying, but there are exceptions. Wis. Stat. § 19.31. Statutes, case law, and the public records law balancing test, which weighs the public interest in disclosure of a record against the public interest in nondisclosure, provide such exceptions. If no such exceptions apply in the situation you reference, generally, a requester has the right to receive or make a copy of the requested records. The law states,

Except as otherwise provided by law, any requester has a right to inspect a record and to make or receive a copy of a record. *If a requester appears personally to request a copy of a record that permits copying, the authority having custody of the record may, at its option, permit the requester to copy the record or provide the requester with a copy substantially as readable as the original.*

Wis. Stat. § 19.35(1)(b) (emphasis added). The law also authorizes an authority to charge the actual, necessary, and direct cost of making such copies. Wis. Stat. § 19.35(3)(a). The authority has the discretion to provide you with copies or permit you to make a copy yourself (such as with a camera or camera phone). *Grebner v. Schiebel*, 2001 WI App 17, ¶ 7.

In item 8 of your letter, you wrote that the Clerk “admitted to destroying a record.” The public records law states, in part,

No authority may destroy any record at any time *after the receipt of a request* for inspection or copying of the record . . . until after the request is granted or until at least 60 days after the date that the request is denied If the court orders the production of any record and the order is not appealed, the record may not be destroyed until after the request for inspection or copying is granted.

Wis. Stat. § 19.35(5) (emphasis added). The public records law is silent as to the destruction of records when no request has been made. Record retention is governed by other statutes, particularly Wis. Stat. § 16.61 (state authorities) and Wis. Stat. § 19.21 (local authorities). It is unclear from the facts presented, whether you made a request prior to any destruction of the record.

In item 9, you wrote that the Clerk denied your request for a document that you received but lost. You provided insufficient information to evaluate this incident. As stated previously, if an authority denies a written request in whole or in part, the authority must provide a written statement of the reasons for the denial. Wis. Stat. § 19.35(4)(b).

Regarding item 11, you provide the status of a mandamus action that you filed. Your January letter updates this status by stating that the court denied the town's motion to dismiss.

Regarding item 16, I addressed the issue of the form of a request in my response to your January letter above.

Finally, in item 19 of your letter, you state that you made numerous public records requests but did not receive the requested documentation. The public records law provides enforcement provisions that I outline below.

The Attorney General and 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 DOJ's website (<https://www.doj.state.wi.us/office-open-government/office-open-government>). DOJ provides the full Wisconsin Open Meetings Law and Public Records Law, maintains an Open Meetings Law Compliance Guide and a Public Records 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. Although you did not specifically request the Attorney General to enforce the law as it pertains to your matter, nonetheless, we respectfully decline in this instance. 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).

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 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 enforcement of the open meetings law or 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. The referral service is free; however, a private attorney may charge attorneys fees. 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 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
ATTORNEY GENERAL

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Deputy Attorney General

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June 7, 2016

Mr. Russell Carollo

Pueblo, CO 81005

@gmail.com

Dear Mr. Carollo:

The Wisconsin Department of Justice (DOJ) is in receipt of your February 5, 2016 letter to me in which you stated "[t]his is my second informal appeal concerning the attached request I submitted pursuant to the Wisconsin Public Records Law (WPRL, ss. 19.31-19.39, Stats.) to Dennis P. Reilly, executive director of the Wisconsin Health and Education Facilities Authority." You stated that Mr. Reilly's responses to your requests have not been in compliance with the law and that he has made "no effort whatsoever to identify records responsive" to your request. You also provided a copy of Mr. Reilly's February 3, 2016 response to you regarding your recent renewed public records request.

In your correspondence, you stated that this was your second informal appeal, and you referenced your previous correspondence to me. While we have no record of any other correspondence from you, we appreciate you voicing your concerns. The Attorney General and 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 DOJ's website (<https://www.doj.state.wi.us/office-open-government/office-open-government>). DOJ provides the full Wisconsin Public Records Law, Wis. Stat. §§ 19.31 to 19.39, maintains a Public Records Law Compliance Guide and provides a recorded webinar and associated presentation documentation.

I spoke with Dennis P. Reilly, Executive Director of the Wisconsin Health and Educational Facilities Authority (WHEFA) regarding your matter. He stated that, via his February 3, 2016 letter, he communicated with you regarding your request. He explained what would be required to search for potentially responsive records based on the parameters of your request, and the potential costs associated with responding to your request.

Mr. Reilly's letter also sought clarification of your request. During our conversation, and as stated in his letter, he explained that WHEFA found your request insufficient pursuant to Wis. Stat. § 19.35(1)(h). As you are aware, you requested records related to Pointer Management, LLC and "any of its subsidiaries, affiliates and/or representatives." Based on the facts presented to me, you provided no timeframe for your request. Mr. Reilly sought more detail regarding the names of entities ("subsidiaries, affiliates and/or representatives") for which you sought records as well as a timeframe for your request. Mr. Reilly stated that he was willing to work with you regarding your request, but he has not heard from you since sending his February 3, 2016 letter.

Under the Wisconsin Public Records Law, a request "is deemed sufficient if it reasonably describes the requested record or the information requested." Wis. Stat. § 19.35(1)(h). A request "without a reasonable limitation as to subject matter or length of time represented by the record does not constitute a sufficient request." *Id.* Mr. Reilly stated that he seeks clarification from you because he believes your original request is insufficient and would be overly burdensome for WHEFA to process.

The public records law does not impose such heavy burdens on a record custodian that normal functioning of the office would be severely impaired, and does not require expenditure of excessive amounts of time and resources to respond to a public records request. *Schopper v. Gehring*, 210 Wis. 2d 208, 213, 565 N.W.2d 187 (Ct. App. 1997); *State ex rel. Gehl v. Connors*, 2007 WI App 238, ¶ 17, 306 Wis. 2d 247, 742 N.W.2d 530.

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. It is often mutually beneficial for a requester and an authority to work with each other regarding a request. This can provide for a more efficient processing of a request by the authority while ensuring that the requester receives the records that he or she seeks. If a request is broad or lacks a timeframe, it may be beneficial for the requester to clarify the request. Certainly, a requester may always expand his or her request if he or she desires additional records.

Regarding an authority's fees, under the public records law, "[A]n authority may charge a fee not exceeding the actual, necessary, and direct costs of four specific tasks: (1) 'reproduction and transcription'; (2) 'photographing and photographic processing'; (3) 'locating'; and (4) 'mailing or shipping.'" *Milwaukee Journal Sentinel v. City of Milwaukee*, 2012 WI 65, ¶ 54 (citation omitted) (emphasis in original). An authority may require a requester prepay any such fees if the total amount exceeds \$5.00. Wis. Stat. § 19.35(3)(f).

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

Mr. Russell Carollo

June 7, 2016

Page 3

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 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 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. The referral service is free; however, a private attorney may charge attorney fees. You may reach it using the contact information below:


Lawyer Referral and Information Service
State Bar of Wisconsin
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DOJ 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: Dennis P. Reilly, Executive Director of WHEFA



STATE OF WISCONSIN
DEPARTMENT OF JUSTICE

BRAD D. SCHIMEL
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June 24, 2016

Attorney James J. Gende II
Gende Law Office, S.C.
N28W23000 Roundy Dr., Suite 200
Pewaukee, WI 53072

Dear Attorney Gende:

The Department of Justice (DOJ) is in receipt of your January 18, 2016 letter to Attorney General Brad Schimel in which you stated that you "requested specific records regarding the in-custody death of James Perry from the City and County of Milwaukee, as well as the City's records related to the Collaborative Reform Initiative." You provided that as of the date of your letter, you had not received the requested records nor a time-table for when you would receive the requested records. You also provided a copy of all related correspondence. Finally, you requested DOJ to "review the basis for the City & County's failure to timely provide records in regards to Mr. Perry's in-custody death, as well as the City's failure to provide any written response to our request for records related to the Collaborative Reform Initiative with the U.S. Department of Justice."

I spoke with Assistant City Attorney Peter J. Block regarding your matter. He informed me that the City Attorney's Office fulfilled your request. It is also my understanding that the other entities to which you directed related requests responded.

The public records law does not require a response to a public records request within a specific timeframe. 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 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, ¶ 85, 362 Wis. 2d 577, 866 N.W.2d 563 (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.

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

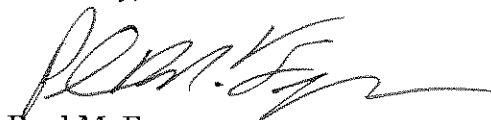
The public records law provides several remedies for a requester dissatisfied with an authority's response, or lack of response, to a public records request. A requester may file an action for mandamus, with or without an attorney, asking a court to order release of the records. Wis. Stat. § 19.37(1)(a).

Alternatively, the requester may submit a written request for the district attorney of the county where the record is found,¹ 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 in cases presenting issues of statewide concern. Although 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.

DOJ 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 Peter J. Block

¹ In Milwaukee County, the Milwaukee County Office of Corporation Counsel—not the district attorney—serves as legal counsel for the purposes of enforcement of the public records law.



STATE OF WISCONSIN
DEPARTMENT OF JUSTICE

BRAD D. SCHIMEL
ATTORNEY GENERAL

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Deputy Attorney General

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FAX 608/267-2779

April 14, 2016

Mr. Orville Seymer
CRG Network
P.O. Box 371086
Milwaukee, WI 53237

Dear Mr. Seymer:

The Department of Justice (DOJ) is in receipt of your February 18, 2016 correspondence concerning public records requests you submitted to the School District of Florence County. You wrote that the school district has exhibited an "unwillingness to release a number of records" that you requested and an "unwillingness to answer questions . . . regarding their unwillingness to release these records." You included copies of approximately 20 public records requests you submitted between August 10, 2015 and January 27, 2016 as well as seven responses from the school district or the school district's attorney from October 15, 2015 to February 3, 2016. You concluded by asking that I contact Superintendent Ben Niehaus and the school district's attorney "and ask that they release the requested records immediately."

I spoke with Superintendent Niehaus regarding this matter. He expressed concern about the school district's limited resources. His school district is a small one (it has approximately 400 students), and he has many responsibilities that would be handled by multiple employees at a larger school district. He stated that the school district receives many requests from you, often a few days apart. A review of your enclosed requests shows seven requests in December and 11 in January. He is concerned about the time and taxpayer expense involved with responding to the requests.

As you are undoubtedly aware, under the Wisconsin Public Records Law, Wis. Stat. §§ 19.31 to 19.39, records are presumed to be open to public inspection and copying (with some exceptions). Wis. Stat. § 19.31. You have the right to request whatever documents you wish. In speaking with Superintendent Niehaus, the importance of complying with the public records law was stressed. We also discussed the types of costs that are permitted under the law as well as the types of costs that are prohibited.

Communication between an authority and a requester is important. The Office of Open Government continues to encourage 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 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.

It is also helpful for a requester to make his or her request as clear as possible. This ensures the requester will receive a quicker response that provides the requester with the records he or she seeks. In order to facilitate more efficient response times, it may be beneficial for a requester to combine requests. For example, instead of submitting a number of separate requests in the same week, a requester could submit a single request seeking the same records. Thus, an authority need only process and complete the necessary clerical work for one request instead of multiple requests.

You raised the issue of timeliness. The Public Records law does not require a response to a public records request within a specific timeframe. 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 the authority to process the request, the extent of the request, and other related considerations.” *WIREDdata, 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, ¶ 85, 362 Wis. 2d 577, 866 N.W.2d 563 (an authority “can be swamped with public records requests and may need a substantial period of time to respond to any given request”). In your requests, you state that you will assume that your request is denied if you do not hear from the school district by a specified date. An authority is not obligated to respond within a timeframe unilaterally identified by a requester. The Office of Open Government advises that an authority provide a requester with an acknowledgment within a few business days after receiving a request.

You also discussed the costs associated with your requests. Under the Public Records Law, “[A]n authority may charge a fee not exceeding the actual, necessary, and direct costs of four specific tasks: (1) ‘reproduction and transcription’; (2) ‘photographing and photographic processing’; (3) ‘locating’; and (4) ‘mailing or shipping.’” *Milwaukee Journal Sentinel v. City of Milwaukee*, 2012 WI 65, ¶ 54 (citation omitted) (emphasis in original). An authority may require a requester prepay any such fees if the total amount exceeds \$5.00. Wis. Stat. § 19.35(3)(f). A number of your requests include descriptive identifiers: the date and time an email was sent; the “to” and “from” fields of an email; and the subject line of an email. While I do not know the specifics of the school district’s email and records retention systems, the location, review, and production of records responsive to such request is likely easier than for a less detailed request. A few of your requests ask for all emails to or from specific individuals over time periods of multiple months. It likely takes an authority longer to process such 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). 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. The public records issue you raised is important to you and those in your community; however, 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 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. The referral service is free; however, a private attorney may charge attorneys fees. 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 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. DOJ provides several open government resources on its website (<https://www.doj.state.wi.us/office-open-government/office-open-government>). DOJ provides the full Wisconsin Public Records Law, maintains a Public Records Law Compliance Guide and provides a recorded webinar and associated presentation documentation.

DOJ 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