

## **2016 3rd Quarter Correspondence**

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STATE OF WISCONSIN  
DEPARTMENT OF JUSTICE

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July 1, 2016

Mr. Pastori M. Balele  
[REDACTED]  
Madison, WI 53711  
[REDACTED]

Dear Mr. Balele:

The Department of Justice (DOJ) is in receipt of a copy of your March 26, 2016 correspondence to Patricia J. Burnard. In your letter to Ms. Burnard, you state: "Please let the undersigned know when he can send a police officer to get the transcript or record you said would be ready or available during the week of March 26, 2016. . . . This request is under the Wisconsin Open Record law." Your letter also states that you are asking Attorney General Brad Schimel and Vernon County District Attorney Timothy Gaskell "to take appropriate legal action to ensure . . . [Patricia Burnard] obey[s] the Open Record Law."

In your correspondence to Ms. Burnard, you state: "Under Wisconsin Open Record law, you're bound to make the record available within a certain period." 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.

Mr. Pastori Balele

July 1, 2016

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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. In this instance, 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 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

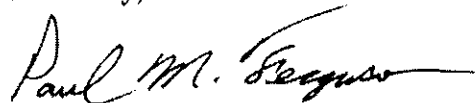
<http://www.wisbar.org/forpublic/inneedalawyer/pages/lris.aspx>

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. I would like you to be aware of several open government resources available to you through the Wisconsin 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.

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



STATE OF WISCONSIN  
DEPARTMENT OF JUSTICE

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July 1, 2016

Mr. J.T. (Jan) Hawke  
[REDACTED]

Middleton, WI 53562  
[REDACTED]

Dear Mr. Hawke:

The Department of Justice (DOJ) is in receipt of your April 6, 2016 email correspondence to Attorney General Brad Schimel in which you stated: "I have been requesting records from the Village of Iola[.] They have repeatedly refused my requests[.]" On April 12, 2016, you sent a follow up email to Attorney General Brad Schimel in which you stated that you "have been communicating by email with the village clerk (Dan Johnson) and the president of the village (Joel Edler)[.] In the past Atty. Bruce Meagher (village attorney) has been responding to my emails[.]"

You also provided two samples of email correspondence from Village Clerk Dan Johnson explaining the costs associated with the public records you requested. You then stated: "As you can see the figure of \$53.42 is way above what state allows (19.35(3))."

From your correspondence, it appears that your issue with the Village of Viola may be with the costs associated with the records you have requested. 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). Pursuant to Wis. Stat. § 19.35(3)(c), an authority may impose a fee for locating a record if the cost is \$50 or more. If an authority uses an hourly rate to calculate its location costs, generally, the rate for an actual, necessary, and direct charge for staff time should be based on the pay rate of the lowest paid employee capable of performing the task, even if a higher paid employee completed the location task. An authority may require a requester prepay any 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).

Mr. J. T. (Jan) Hawke  
July 1, 2016  
Page 2

Alternatively, the requester may submit a written request for the district attorney of the county where the record is found, or the Attorney General, to file an action for mandamus seeking release of the requested records. Wis. Stat. § 19.37(1)(b). The Attorney General is authorized to enforce the public records law; however, he generally exercises this authority only in cases presenting issues of statewide concern. While you did not specifically request the Attorney General to file an action for mandamus, 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 attorney fees. You may reach it using the contact information below:

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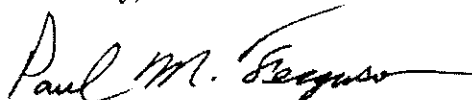
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The Attorney General and DOJ's Office of Open Government are committed to increasing government openness and transparency, and DOJ endeavors to offer guidance in these areas. I would like you to be aware of several open government resources available to you through the Wisconsin DOJ website (<https://www.doj.state.wi.us/office-open-government/office-open-government>). The 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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July 7, 2016

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

Dear Mr. Seymer:

This letter is in response to your April 26, 2016 letter, which in turn was in response to my April 14, 2016 letter to you. My April 14, 2016 letter concerned various public records requests you made to the School District of Florence County as outlined in your February 9, 2016 letter.

In your April 26, 2016 letter, you expressed concerns regarding the phrase "near simultaneous public records requests" as used by the school district, regarding the assessment of location fees, in response to your public records requests. That phrase does not appear in the text of the Wisconsin Public Records Law, Wis. Stat. §§ 19.31 to 19.39. The law states, in part, "[A]n authority may impose a fee upon a requester for locating a record, not exceeding the actual, necessary and direct cost of location, if the cost is \$50 or more." Wis. Stat. § 19.35(3)(c). The law does not expressly authorize the aggregation of location costs for multiple requests from the same requester that occur close in time.

As stated in my April 14, 2016 letter to you, the school district is concerned about the time and taxpayer expense involved with responding to public record requests. This concern is likely what led to the school district's aggregation of location costs associated with your requests. To be clear, the Department of Justice (DOJ) is dedicated to open and transparent government and endeavors to promote open government principles and educate authorities and the public alike on such matters. DOJ and the Office of Open Government (OOG) encourage authorities to consider public records requests with these principles in mind.

The public records law begins with a presumption of complete public access; however, such access must be "consistent with the conduct of governmental business." Wis. Stat. § 19.31. Some authorities with limited resources struggle to balance their obligations under the law with the taxpayer expense incurred by fulfilling their obligations. This is one of the reasons why the OOG encourages communication between an authority and a requester. Since the law does not expressly authorize an authority to aggregate location costs for "near simultaneous public records requests," DOJ cannot sanction such an approach. However,

ensuring open and transparent government is a responsibility shared by everyone. Authorities have a responsibility to follow the public records law and the public has a responsibility to act in good faith in submitting public records requests. Based on the information provided to me previously, you submitted a number of public records requests, sometimes as many as four in the span of one week. To ease the burden on an authority and the taxpayers, such requests—which were related in this case—could be combined into one request.

In your letter, you also reiterated other concerns about location fees. Wis. Stat. § 19.35(3) details what fees an authority may assess. Such fees are permissible; an authority is not required to assess them. Consequently, if you made a similar request to multiple authorities, it is possible that some authorities may choose to assess such permissible fees and others may choose not to assess them.

As stated in my previous letter to you, a number of your requests include descriptive identifiers. I stated that, while I did not know the specifics of the school district's email and records retention systems, the location, review, and production of records responsive to such requests is likely easier than for a less detailed request. I also stated that a few of your requests ask for all emails to or from specific individuals over time periods of multiple months. Your April 26, 2016 letter asked, "Please show me the requests in which I asked for all e-mails to or from specific individuals over time periods of multiple months . . . ." It was not my intention to enter into a back-and-forth exchange over the specifics of each and every request you submitted to the school district. My intention was to provide information regarding the public records law. However, for clarity's sake, examples of such requests include those dated August 10, 2015, March 21, 2016, and April 6, 2016. (The latter two were provided by the school district.) The law provides that an authority may charge the "actual, necessary and direct cost of location" (if it is \$50 or more). Wis. Stat. § 19.35(3)(c). The point I intended to make in my previous letter was that such costs will vary depending on the request and that detailed, specific requests may help keep such costs low.

In my April 14, 2016 letter, in declining to pursue a mandamus action, I stated that the Attorney General generally exercises his authority to enforce the public records law in cases presenting issues of statewide concern, and your matter did not appear to present such issues. In your April 26, 2016 letter, you state that you are investigating Thomas Woznicki, and you believe that the matter has statewide significance. To clarify, I was referring to public records issues of statewide concern. Again, because your matter does not present a public records issue of statewide concern, we respectfully decline to pursue a mandamus action on your behalf.

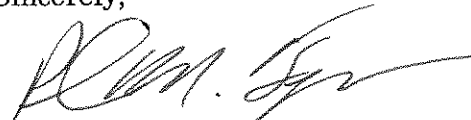
Finally, in my April 14, 2016 letter, I outlined the enforcement options available under the public records law. One such option is for a requester to submit a written request for the district attorney of the county where the record is found. You responded by stating that "it was highly unlikely that any D.A. would have the time or the resources to pursue any such claim." However, it is not clear from your letter whether you have submitted such a request. While it is possible that a district attorney may choose not to pursue a claim, if you have not submitted one, then this enforcement option remains open to you as does the law's provision permitting a requester to file an action for mandamus.

Mr. Orville Seymer  
July 7, 2016  
Page 3

Thank you for your continued concern. DOJ remains committed to preserving Wisconsin's proud tradition of open government.

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



STATE OF WISCONSIN  
DEPARTMENT OF JUSTICE

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July 7, 2016

Rick deMoya  
[REDACTED]

Dear Mr. deMoya:

The Department of Justice (DOJ) is in receipt of your letter, dated May 17, 2016, to Attorney General Brad D. Schimel in which you request the Attorney General "bring an action for mandamus asking the Dane County Circuit Court to order the Wisconsin Department of Veterans Affairs (DVA) to release a copy of the record(s) requested by me on April 17, 2016 . . . but denied by the DVA on May 12, 2016 . . . ." You also requested that DOJ Division of Criminal Investigation (DCI) "review the alleged DVA willful and intentional denial" of your request "when the DVA had full knowledge that such a record existed."

In a March 23, 2016 email to me, you asked, "Are part of the responsibilities of your office to investigate complaints of perceived abuse in open government?" I responded, in part, by writing that the public records law (as well as the Wisconsin Open Meetings Law) includes an enforcement provision. The public records law's enforcement provision 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). In your May 17, 2016 correspondence, you pursue the latter option.

The authority against which you request the Attorney General bring an enforcement action is the Wisconsin Department of Veterans Affairs (WDVA). The Attorney General and DOJ may be called upon to represent WDVA, a state agency. As a result, DOJ must respectfully decline to pursue an action for mandamus on your behalf. Although we are declining to pursue an action for mandamus under the public records law in this instance, the other remedies outlined above may still be available to you. Additionally, you may choose to contact a private attorney regarding this matter.

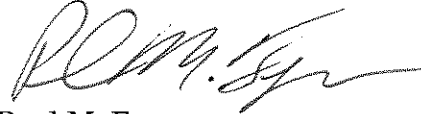
July 7, 2016

Page 2

Although DOJ is declining to pursue a mandamus action, I will send a copy of this letter to WDVA so that they are aware of your dissatisfaction with this public records matter. 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,

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

Cc: Daniel Buttery, WDVA  
Chad Koplien, WDVA



**STATE OF WISCONSIN  
DEPARTMENT OF JUSTICE**

**BRAD D. SCHIMEL  
ATTORNEY GENERAL**

**Andrew C. Cook  
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July 7, 2016

Nico Savidge  
Wisconsin State Journal  
[NSavidge@madison.com](mailto:NSavidge@madison.com)

Dear Mr. Savidge:

Please accept this letter as the Attorney General's response to your June 10, 2016 email correspondence in which you stated that the Wisconsin State Journal seeks an opinion from the Attorney General regarding recent action by the University of Wisconsin System and government boards in general. You described circumstances surrounding a meeting of the University Board of Regents concerning the 2016-17 operating budget.

In your correspondence you sought answers to several questions. Please note that the Department of Justice (DOJ) cannot offer you legal advice or counsel concerning this issue as DOJ may be called upon to represent the University of Wisconsin. However, DOJ can provide general information regarding 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, in response to your questions.

First, you asked, "Did the UW System or its Board of Regents violate state open meetings law by not publicly posting its proposed operating budget until 90 minutes before that budget was approved?" The open meetings law requires notice of the date, time, place and subject matter of a meeting 24 hours in advance of the meeting. Wis. Stat. § 19.84. There is no requirement under the open meetings law that the board post its proposed budget ahead of time.

Second, you inquired, "Did the UW System or its Board of Regents violate state open records law by not providing a document that had been shared with Regents when that document was requested?" 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

July 7, 2016

Page 2

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").

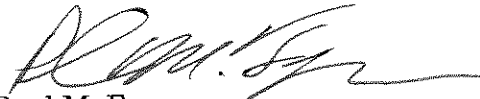
Third, you wrote, "The Regents' president has indicated that withholding public documents such as the budget could be "routine" in the future . . . . Would such a policy be legal?" As stated in response to your first question, the open meetings law does not require that the board post the budget prior to its meeting. Therefore, a routine policy to not post the budget ahead of time would not be a violation of the open meetings law. However, an authority must treat a public records request for a copy of the budget pursuant to the public records law as outlined below in response to your last inquiry.

Finally, you asked, "When government boards, commissions and other entities share meeting materials with their members and staff, are those entities required to make those documents publicly available?" Relatedly, you also asked, "If those documents are requested under open records law, have already been shared with members and pertain to agenda items that will be discussed in open session, should the records be provided immediately, and without subjecting them to the balancing test?" In response to the first part of your question, it depends on whether or not the requested document is a draft, and therefore, not a "record" under the public records law. See Wis. Stat. § 19.32(2). As for your second question, if the requested document is a "record," an authority's records custodian must still review the record. For every requested record, a records custodian must determine if there is a statutory or common law prohibition on release of all or part of the record; then, the authority/custodian must apply the balancing test, which weighs the public interest in disclosure of a record against the public interest in nondisclosure. See Wis. Stat. § 19.35(1)(a). A records custodian must conduct the balancing test on a case-by-case basis.

Thank you for your correspondence. DOJ 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.

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: Tomas Stafford, University of Wisconsin  
John Diedrich, Milwaukee Journal Sentinel  
Karen Herzog, Milwaukee Journal Sentinel



STATE OF WISCONSIN  
DEPARTMENT OF JUSTICE

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July 26, 2016

The Honorable Joseph G. Sciascia  
Dodge County Circuit Court  
Dodge County Justice Facility  
210 W. Center St.  
Juneau, WI 53039-1091

Dear Judge Sciascia:

This letter is in response to your undated letter to Attorney General Brad Schimel. Your letter followed our telephone conversation in February regarding the same issue. In your letter, you stated that you are the chairman of the Dodge County Security and Facilities Committee (DCSFC), formed pursuant to Supreme Court rule, and the committee includes a number of elected officials. You wrote, "The question has come up as to whether or not the committee is required to comply with the open meeting law." You stated the committee's duties include reviewing, discussing and addressing security vulnerabilities. You voiced concern over this information becoming public. You said that you have been asked to request the Attorney General's opinion on this matter.

The Wisconsin Open Meetings Law, Wis. Stat. §§ 19.81 to 19.98, 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 publicly 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).

A meeting occurs when a convening of members of a governmental body satisfies two requirements. See *State ex rel. Newspapers, Inc. v. Showers*, 135 Wis. 2d 77, 398 N.W.2d 154 (1987). The first requirement under the so-called *Showers* test is that there must be a purpose to engage in governmental business (the purpose requirement). Second, the number of members present must be sufficient to determine the governmental body's course of action (the numbers requirement). A meeting does not include any social or chance gathering or conference that is not intended to avoid the requirements of the open meetings law.

Regarding the purpose requirement, a body is engaged in governmental business when its members gather to simply hear information on a matter within the body's realm of authority. See *State ex rel. Badke v. Vill. Bd. of Vill. of Greendale*, 173 Wis. 2d 553, 573-74, 494 N.W.2d 408 (1993). Thus, mere attendance at an informational meeting on a matter

within a body's realm of authority satisfies the purpose requirement. The members of the body need not discuss the matter or even interact. *Id.* at 574-76. This applies to a body that is only advisory and that has no power to make binding decisions. *See State v. Swanson*, 92 Wis. 2d 310, 317, 284 N.W.2d 655 (1979).

Regarding the numbers requirement, a quorum is the minimum number of a body's membership necessary to act. Certainly a majority of the members of a governmental body constitutes a quorum. However, a negative quorum, the minimum number of a body's membership necessary to prevent action, also meets the numbers requirement. As a result, determining the number of members of a particular body necessary to meet the numbers requirement is fact specific and depends on the circumstances of the particular body.

The Wisconsin Supreme Court has held that bodies created by the Court, pursuant to its superintending control over the administration of justice, are not governed by the open meetings law. *State ex rel. Lynch v. Dancey*, 71 Wis. 2d 287, 238 N.W.2d 81 (1976). The Supreme Court created a rule requiring the presiding judge for each county to appoint a security and facilities committee. SCR 68.05. The Supreme Court designated the composition of the committee and its tasks. *Id.* Therefore, as a body created by a rule of the Supreme Court, generally, such a security and facilities committee is not subject to the open meetings law's requirements.

However, the open meetings law still applies to other governmental bodies should a sufficient number plan to attend or regularly attend a meeting of a security and facilities committee and the subject matter of the meeting is within their body's realm of authority. The Supreme Court stated,

[W]hen, as here, one-half or more of the members of a governmental body attend a meeting of another governmental body in order to gather information about a subject over which they have decisionmaking responsibility, such a gathering is a 'meeting' within the meaning of the open meeting law, unless the gathering is social or chance. We also conclude that the meetings at issue in this case were clearly not social or chance gatherings. The [governmental body's] members' attendance as a group at the . . . project meetings was a regular occurrence, with expectations among the members that at least one-half or more of their membership would be in attendance. These factors remove their attendance from the 'social or chance' gathering exception of the open meeting law. These were not social or chance gatherings. Their attendance as a group did not occur on a sporadic basis, was not haphazard, irregular, nor spontaneous. Notice of these meetings was required.

*Badke*, 173 Wis. 2d at 577.

For the open meetings law to apply to other governmental bodies, first, a sufficient number of members of other governmental bodies must regularly attend or plan to attend

The Honorable Joseph G. Sciascia

July 26, 2016

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DCFSC meetings—either because they are members of the DCFSC or simply for informational purposes (unless the attendance of members of other governmental bodies is a social or chance gathering not intended to avoid the law's requirements). Second, the subject matter of the DCFSC meetings must be within the other governmental bodies' realm of authority. If these two requirements are met, any such governmental bodies must follow the requirements of the open meetings law, including providing proper notice of their meetings.

It is not the DCFSC's responsibility to provide such notice and ensure such compliance with the open meetings law. Each governmental body with sufficient members in attendance, as explained above, is responsible for ensuring its compliance with the law. The chief presiding officer of a governmental body or such a person's designee is required to provide public notice of a meeting. Wis. Stat. § 19.84(1)(b).

Around the same time we spoke initially regarding this issue, the Department of Justice (DOJ) received a request to review a similar situation in Winnebago County. Since you may be interested in reviewing our response to that matter, as a courtesy, enclosed, please find a copy of DOJ's correspondence in response to that request.

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.

Thank you for your concern regarding the application of the open meetings law. DOJ is dedicated to the work necessary to preserve Wisconsin's proud tradition of open government.

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

Enclosure



STATE OF WISCONSIN  
DEPARTMENT OF JUSTICE

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July 26, 2016

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John A. Bodnar  
Winnebago County Corporation Counsel  
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Oshkosh, WI 54903-2808

Dear Mr. Ceman and Mr. Bodnar:

Please accept this letter as the Wisconsin Department of Justice's (DOJ) response to Mr. Ceman's February 23, 2016 email correspondence to DOJ Division of Legal Services (DLS) Administrator David V. Meany in which you requested DOJ investigate possible "systemic violations of Wisconsin's Open Meetings laws" in Winnebago County. This letter also serves to respond to Mr. Bodnar's June 27, 2016 letter regarding the same matter.

Mr. Ceman relayed that over approximately the last four years, the Winnebago County's Judicial Courthouse and Security Committee (JCSC) has been regularly attended by a quorum of two subcommittees of the Winnebago County Board of Supervisors (County Board): the Judiciary and Public Safety Committee (JPSC) and Facilities and Property Management Committee (FPMC). The JCSC is a courthouse security committee formed pursuant to SCR 68.05. Mr. Ceman stated that no notices or agendas for these meetings were published in advance.

Mr. Bodnar wrote that the JCSC includes both the chairperson of the County Board and the District Attorney as members pursuant to SCR 68.05(1)(b) and (f), respectively. According to Mr. Bodnar, a long-standing practice in the county is that the Circuit Court judge acting as chairperson of the JCSC appoints the chairpersons of both the JPSC and

FPMC.<sup>1</sup> Both the JPSC and FPMC are made up of five County Board members. The chairman of the JPSC is also a member of the FPMC, and the chairman of the FPMC is also a member of the JPSC. The County Board chairman acts as *ex officio* member of both subcommittees. According to Mr. Bodnar, both subcommittees only have the authority to make recommendations to the County Board.

Mr. Ceman stated that he spoke with Mr. Bodnar who agreed that for over four years, a quorum of both subcommittees attended the JCSC meetings without notice. This was done in accordance with Mr. Bodnar's advice that the JCSC was exempt from the requirements of the Wisconsin Open Meetings Law, Wis. Stat. §§ 19.81 to 19.98, since the JCSC was created by rule of the Wisconsin Supreme Court. Mr. Bodnar stated that this advice was largely based on a 2012 email correspondence from Assistant Attorney General Thomas C. Bellavia and a 2012 email correspondence from District Court Administrator Jon J. Bellows, relaying information provided to him by Marcia Vandercook of the State Court Operations Office. Mr. Ceman stated that he informed Mr. Bodnar that the exemption applies to the JCSC not the quorum of the JPSC and FPMC in attendance.

To resolve the alleged violations, Mr. Ceman stated that he proposed that the two subcommittees reconvene to hold the discussions and votes from the past four years with proper notice and an agenda. Furthermore, Mr. Ceman proposed that the subcommittee members should be replaced with new members from the County Board to ensure there was no "rubber-stamping" of past decisions. Mr. Ceman said it appeared that his proposed resolutions were rejected.

Mr. Ceman also wrote that, after he expressed his concern over the JCSC not posting an agenda prior to their meetings, the county adopted a boiler-plate notice on all their public notices. The boiler-plate notice essentially states that any county board subcommittee may have a quorum at any county meeting. Mr. Ceman stated that he believes this is a systemic problem.

In Mr. Ceman's letter, he also informed DOJ that Mr. Bodnar raised the issue of a potential conflict of interest with the District Attorney's Office investigating and potentially prosecuting these alleged violations. Specifically, accusations have been leveled against District Attorney Christian Gossett, who was a part of the JCSC meetings in question, that the initial investigation into this matter was for retaliatory purposes because the DA's Office does not agree with the JCSC's decisions. Mr. Ceman acknowledged that the DA's Office has a stake in this matter and that all ten attorneys in the DA's office opposed the JCSC's decision related to the expansion of the county courthouse.

As a result of this potential conflict of interest, Mr. Ceman requested that DOJ investigate. Mr. Ceman believes the issue presented is one of statewide importance for two

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<sup>1</sup> Unlike the County Board chairperson and the District Attorney, neither of the subcommittee chairpersons are required to serve on the JCSC. In addition to requiring certain individuals to serve as members of a county's security and facilities committee, the rule permits "[s]uch other persons as the committee considers appropriate" to serve. SCR 68.05(1)(L).

reasons: (1) The JSCS expanded its membership beyond the Supreme Court mandated members to include members of other governmental bodies that could advance the JCSC's agenda without complying with the open meetings law's notice requirements; and (2) the recently adopted boiler-plate language on all notices is a means to circumvent the open meetings law, thereby allowing "county business to be conducted at random without any practical notice to the public."

Mr. Bodnar stated that the County Board subcommittee members have made a good faith effort to comply with the open meetings law, and they reasonably believed their actions complied with advice received from the Attorney General's Office. Furthermore, according to Mr. Bodnar, the Office of Corporation Counsel has made an effort to assure compliance with the law following the DA's Office's complaint. Finally, Mr. Bodnar wrote that the law in this area is not completely clear.

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 governmental bodies shall be held publicly 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).

A meeting occurs when a convening of members of a governmental body satisfies two requirements. *See State ex rel. Newspapers, Inc. v. Showers*, 135 Wis. 2d 77, 398 N.W.2d 154 (1987). The first requirement under the so-called *Showers* test is that there must be a purpose to engage in governmental business (the purpose requirement). Second, the number of members present must be sufficient to determine the governmental body's course of action (the numbers requirement). A meeting does not include any social or chance gathering or conference that is not intended to avoid the requirements of the open meetings law.

Regarding the purpose requirement, a body is engaged in governmental business when its members gather to simply hear information on a matter within the body's realm of authority. *See State ex rel. Badke v. Vill. Bd. of Vill. of Greendale*, 173 Wis. 2d 553, 573-74, 494 N.W.2d 408 (1993). Thus, mere attendance at an informational meeting on a matter within a body's realm of authority satisfies the purpose requirement. The members of the body need not discuss the matter or even interact. *Id.* at 574-76. This applies to a body that is only advisory and that has no power to make binding decisions. *See State v. Swanson*, 92 Wis. 2d 310, 317, 284 N.W.2d 655 (1979).

Regarding the numbers requirement, a quorum is the minimum number of a body's membership necessary to act. Certainly a majority of the members of a governmental body constitutes a quorum. However, a negative quorum, the minimum number of a body's membership necessary to prevent action, also meets the numbers requirement. As a result, determining the number of members of a particular body necessary to meet the numbers requirement is fact specific and depends on the circumstances of the particular body.

The Wisconsin Supreme Court has held that bodies created by the Court, pursuant to its superintending control over the administration of justice, are not governed by the open meetings law. *State ex rel. Lynch v. Dancey*, 71 Wis. 2d 287, 238 N.W.2d 81 (1976). The Supreme Court created a rule requiring the presiding judge for each county to appoint a security and facilities committee. SCR 68.05. The Supreme Court designated the composition of the committee and its tasks. *Id.* Therefore, as a body created by a rule of the Supreme Court, generally, such a security and facilities committee is not subject to the open meetings law's requirements. However, the open meetings law still applies to other governmental bodies should a sufficient number plan to attend or regularly attend a meeting of a security and facilities committee and the subject matter is within their body's realm of authority. The Supreme Court stated,

[W]hen, as here, one-half or more of the members of a governmental body attend a meeting of another governmental body in order to gather information about a subject over which they have decisionmaking responsibility, such a gathering is a 'meeting' within the meaning of the open meeting law, unless the gathering is social or chance. We also conclude that the meetings at issue in this case were clearly not social or chance gatherings. The [governmental body's] members' attendance as a group at the . . . project meetings was a regular occurrence, with expectations among the members that at least one-half or more of their membership would be in attendance. These factors remove their attendance from the 'social or chance' gathering exception of the open meeting law. These were not social or chance gatherings. Their attendance as a group did not occur on a sporadic basis, was not haphazard, irregular, nor spontaneous. Notice of these meetings was required.

*Badke*, 173 Wis. 2d at 577.

Mr. Bodnar stated that the *Badke* decision concerned members of a governmental body attending a meeting of another governmental body. Mr. Bodnar believes there is confusion among members of governmental bodies as to whether *Badke* is completely applicable when members of a governmental body attend meetings of non-governmental bodies. This apparent confusion would call into question whether a violation of the law exists when members of the subcommittees attend a meeting of the JCSC, which is not subject to the open meetings law. However, this confusion is clarified when one applies the *Showers* test.

Based on the facts presented, the JCSC discusses matters within both subcommittees' realm of authority. A quorum of both the JPSC and FPMC—three members of each of the five member subcommittees—regularly attend meetings of the JCSC. As such, the members' attendance is not a social or chance gathering. Therefore, a number of members of the JPSC and FPMC sufficient to determine the bodies' actions (what recommendations to make) are present at a meeting at which the purpose is to conduct governmental business. Regardless

of whether or not the JCSC is subject to the open meetings law, based on the facts presented, the convening of members of the JPSC and FPMC at JCSC meetings meets both *Showers* test requirements. As a result both subcommittees must follow the requirements of the open meetings law, including providing proper notice of their meetings.

It should be noted that it is not the JCSC's responsibility to provide such notice and ensure such compliance with the open meetings law. Each governmental body is responsible for ensuring its compliance with the law. The chief presiding officer of a governmental body or such a person's designee is required to provide public notice of a meeting. Wis. Stat. § 19.84(1)(b). Therefore, in the scenario presented, the chief presiding officer or such person's designee for both the JPSC and FPMC would need to provide notice.

As you both know, 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.* A boiler-plate notice on a particular governmental body's agenda that states that any county board subcommittee *may* have a quorum in attendance at that particular governmental body's meeting is not sufficient notice. Such a notice is not reasonably likely to apprise members of the public and the news media of the time, date, place and subject matter of a meeting because it does not provide notice of an actual meeting of a governmental body. It merely communicates the time, date, place and subject matter of a *possible* meeting of any number of governmental bodies.

In some cases, the use of boiler-plate notice is meant to balance the requirements of the law with the practical difficulties involved with governmental bodies that consist of a number of members and various subcommittees. However, as stated previously, 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. The use of boiler-plate notices is not in keeping with the open meetings law's declaration of policy. This type of notice of a possible meeting is not the fullest and most complete information regarding governmental affairs to which the public is entitled.

Mr. Bodnar raises the question of how the subcommittees can provide proper notice for a meeting for which neither subcommittee has control over the agenda. However, the answer may be found in the JCSC and both subcommittees' shared concern with ensuring compliance with the open meetings law. For example, based on this shared concern, the JCSC and both subcommittees can work to ensure that the subcommittees are provided with an agenda prior to the JCSC meetings such that they can provide notice compliant with the open meetings law.

In a case such as the present one, separate notices for both the JPSC and FPMC are not required. A single notice may be used. However, such a notice must clearly and plainly indicate that a joint meeting will be held and give the names of each of the governmental bodies involved. The notice must also be published and/or posted in each place where meeting notices are generally published or posted for each governmental body involved. Providing proper notice in this way is compatible with the conduct of government business.

I spoke with Mr. Bodnar regarding this matter. As he wrote in his letter, he has educated the governmental body members on the requirements of the law. Mr. Bodnar's letter indicates that the body members in this case are concerned with ensuring compliance with the law. However, Mr. Bodnar discussed the practical difficulties of managing the many members of the various governmental bodies and ensuring that they comply with the law. The bottom line is that members of every governmental body have a legal obligation to ensure compliance with the open meetings law. An unwillingness or inability to follow the law opens the body's members to the penalties detailed in the law's enforcement provisions. *See Wis. Stat. § 19.97.*

In his correspondence, Mr. Ceman detailed his proposed cures for any open meetings violations that occurred. The cures were for the two subcommittees to reconvene and hold the discussions and votes of the past four years anew with proper notice. Under the enforcement provisions of the open meetings law, an action taken at a meeting of a governmental body held in violation of the law is voidable, upon action brought by the Attorney General or the district attorney. *Wis. Stat. § 19.97(3).* "However, any judgment declaring such action void shall not be entered unless the court finds, under the facts of the particular case, that the public interest in the enforcement [of the law] outweighs any public interest which there may be in sustaining the validity of the action taken." *Id.* A recommendation to void four years' worth of decisions is not one to be made without a thorough understanding and weighing of all relevant facts. Based on the information provided, DOJ will not make a recommendation as to how to cure any potential violation.

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.

As you both know, 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. DOJ has looked into this matter at Mr. Ceman's request and completed a thorough review of the information provided by Mr. Ceman and Mr. Bodnar. Based on this review and on the indication that members of the governmental bodies involved are serious about ensuring compliance, DOJ believes this explanatory letter addresses the matter in an appropriate fashion. As such, DOJ respectfully declines to pursue an enforcement action in this matter at this time.

It should be noted, for members of the general public, that if a district attorney refuses or otherwise fails to commence an action to enforce the open meetings law within 20 days after receiving a verified complaint, the individual who filed the verified complaint may bring

Scott A. Ceman  
John A. Bodnar  
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Page 7

an action in the name of the state. Wis. Stat. § 19.97(4). (Of course, 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).

DOJ appreciates your concern for government openness and transparency and compliance with the open meetings law. We hope you share our dedication to the work necessary to preserve Wisconsin's proud tradition of open government.

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 "Paul M. Ferguson", with a long horizontal flourish extending to the right.

Paul M. Ferguson  
Assistant Attorney General  
Office of Open Government

Cc: The Honorable Karen L. Seifert



STATE OF WISCONSIN  
DEPARTMENT OF JUSTICE

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August 2, 2016

Mr. Bradley Jaeck  
[REDACTED]

Elmwood Park, WI 53405  
[REDACTED]

Dear Mr. Jaeck:

The Department of Justice (DOJ) is in receipt of your April 11, 2016 correspondence to Attorney General Brad Schimel in which you provided a copy of an email chain concerning an open meetings matter. You stated that “[o]ver the past few months we have had an issues with a very few people (trustees) deliberately keeping some financial information from the rest of the residents” regarding the sale of a piece of property the Village of Elmwood Park purchased with public funds approximately five or six years ago. You stated the trustees “had numerous closed meetings without any input from the residents” and that the residents complained that “they should have some input on the sale, the conditions of the sale and the price.” You also stated that when the property was purchased, there were many open meetings, a public forum, it was published in the local paper, and all records were public. You provided that the “residents are extremely upset as their money is being used and wasted privately in closed meetings” and “minutes were not provided.”

Under the Wisconsin Open Meetings Law, Wis. Stat. §§ 19.81 to 19.98, a closed session is authorized for “[d]eliberating 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.” Wis. Stat. § 19.85(1)(e). This exemption is not limited to deliberating or negotiating the purchase of public property or the investing of public funds. Therefore, the sale of public properties may also fall under the exemption.

Governmental officials must keep in mind, however, that this exemption applies only when “competitive or bargaining reasons require a closed session.” Wis. Stat. § 19.85(1)(e). When a governmental body seeks to convene in closed session under Wis. Stat. § 19.85(1)(e), the burden is on the body to show that competitive or bargaining interests require closure. *State ex rel. Citizens for Responsible Dev. v. City of Milton*, 2007 WI App 114, ¶¶ 6-8, 300 Wis. 2d 649, 731 N.W.2d 640. Only aspects of a matter that fall within a specific exemption may be discussed in a closed session. If aspects of a matter do not properly fall within an

exemption—for example, if portions of a discussion do not involve competitive or bargaining reasons requiring a closed session—those aspects must be discussed in an open meeting.

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. While your matter is important to you and those in your community, it does not appear to present an issue 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.

More frequently, the district attorney of the county where the alleged violation occurred may enforce the law. However, in order to have this authority, an individual must file a verified complaint with the district attorney. Wis. Stat. § 19.97(1). If the district attorney refuses or otherwise fails to commence an action to enforce the open meetings law within 20 days after receiving the verified complaint, the individual may bring an action in the name of the state. Wis. Stat. § 19.97(4). (Please note a district attorney may still commence an enforcement action even after 20 days have passed.) Such actions by an individual must be commenced within two years after the cause of action accrues. Wis. Stat. § 893.93(2)(a).

In your correspondence, you also mentioned that meeting minutes were not provided. 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 maintaining some type of record of all motions and roll-call votes, the Wis. Stat. § 19.88(3) requirement is met.

The Wisconsin Public Records Law, Wis. Stat. §§ 19.31 to 19.39, may provide you a means to obtain information regarding the matter. 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.

The public records law contains no general exemption for records created during a closed session. Thus, a custodian must release such items unless the particular record at issue is subject to a specific statutory exemption or the custodian concludes that the harm to the public from its release would outweigh the benefit to the public. *De Moya Correspondence* (June 17, 2009). There is a strong presumption under the public records law that release of records is in the public interest. As long as the reasons for convening in closed session continue to exist, however, the custodian may be able to justify not disclosing any information that requires confidentiality. However, the custodian still must separate information that

Mr. Bradley Jaeck  
August 2, 2016  
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can be made public from that which cannot and must disclose the former, even if the latter can be withheld. In addition, once the underlying purpose for the closed session ceases to exist, all records of the session must then be provided to any person requesting them. 67 Op. Att'y Gen. 117, 119 (1978).

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. 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 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.

DOJ appreciates your concern for government transparency. 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,

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

Paul M. Ferguson  
Assistant Attorney General  
Office of Open Government

PMF:lah



STATE OF WISCONSIN  
DEPARTMENT OF JUSTICE

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August 2, 2016

Ms. Barbara McNulty  
[REDACTED]

Racine, WI 53405  
[REDACTED]

Dear Ms. McNulty:

The Department of Justice (DOJ) is in receipt of your April 6, 2016 correspondence to Attorney General Brad Schimel in which you stated: "A closed session was held to discuss a offer to purchase presented to a village and was approved in closed session. Is the information on that offer now public information or does it remain a secret from the closed session?"

Under the Wisconsin Open Meetings Law, Wis. Stat. §§ 19.81 to 19.98, a closed session is authorized for "[d]eliberating 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." Wis. Stat. § 19.85(1)(e). This exemption is not limited to deliberating or negotiating the purchase of public property or the investing of public funds.

Governmental officials must keep in mind, however, that this exemption applies only when "competitive or bargaining reasons require a closed session." Wis. Stat. § 19.85(1)(e). When a governmental body seeks to convene in closed session under Wis. Stat. § 19.85(1)(e), the burden is on the body to show that competitive or bargaining interests require closure. *State ex rel. Citizens for Responsible Dev. v. City of Milton*, 2007 WI App 114, ¶¶ 6-8, 300 Wis. 2d 649, 731 N.W.2d 640.

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, 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.

The public records law contains no general exemption for records created during a closed session. Thus, a custodian must release such items unless the particular record at

Ms. Barbara McNulty

August 2, 2016

Page 2

issue is subject to a specific statutory exemption or the custodian concludes that the harm to the public from its release would outweigh the benefit to the public. De Moya Correspondence (June 17, 2009). There is a strong presumption under the public records law that release of records is in the public interest. As long as the reasons for convening in closed session continue to exist, however, the custodian may be able to justify not disclosing any information that requires confidentiality. However, the custodian still must separate information that can be made public from that which cannot and must disclose the former, even if the latter can be withheld. In addition, once the underlying purpose for the closed session ceases to exist, all records of the session must then be provided to any person requesting them. 67 Op. Att'y Gen. 117, 119 (1978).

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. 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 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.

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,

A handwritten signature in dark 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

BRAD D. SCHIMEL  
ATTORNEY GENERAL

Andrew C. Cook  
Deputy Attorney General

17 W. Main Street  
P.O. Box 7857  
Madison, WI 53707-7857  
www.doj.state.wi.us

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

August 2, 2016

Mr. Albert Sprague

[REDACTED]  
Hillsboro, WI 54634

Dear Mr. Sprague:

The Wisconsin Department of Justice (DOJ) is in receipt of your March 30, 2016 correspondence to Attorney General Brad Schimel in which you stated that you were "writing to express my frustration with the enforcement of the Open Records Statutes" and that you "would appreciate any assistance you can offer me." You requested records from the Town of Greenwood in Vernon County and filed a mandamus action when you did not receive the records you requested. You stated that "the Town did provide the records I requested in my Petition including one they had claimed to have destroyed." You stated that "[h]aving obtained all the records I requested in my Petition, I thought I had prevailed. To my surprise, the Judge ruled that I did not." You stated that the "Judge's decision sends a message to this Clerk and others in the State . . . that you do not have to comply with the Open Records Law and if you violate it you will not be held accountable." You also provided that "the Judge stated in his decision that the Town did not knowingly violate the Open Records Law." You also wrote, "I realize I could appeal the Court's decision but I have already expended too much on this effort." Finally, you provided a copy of the transcript from the Judge's oral ruling on your Petition for a Writ of Mandamus.

The Wisconsin Public Records Law, Wis. Stat. §§ 19.31 to 19.37, 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). In this case, you pursued a mandamus action and were represented by an attorney. Alternatively, a 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.

"[T]he court shall award reasonable attorney fees, damages of not less than \$100, and other actual costs to the requestor if the requester prevails in whole or in substantial part in any action filed under sub. (1) relating to access to a record or part of a record under s. 19.35 (1) (a)." Wis. Stat. § 19.37(2)(a). See *Journal Times v. City of Racine Bd. Of Police & Fire Comm'rs*, 2014 WI App 67, ¶¶ 10-11 (citation omitted) (even if release of records renders

mandamus action moot, authority still may be liable for requester's attorneys fees and costs if mandamus action was a cause of the records release). Punitive damages may be awarded to a requester if the court finds that an authority or legal custodian arbitrarily or capriciously denied or delayed response to a request or charged excessive fees. *Capitol Times Co. v. Doyle*, 2011 WI App 137, ¶¶ 6, 11, 337 Wis. 2d 544, 807 N.W.2d 666.

To establish that he or she has "prevailed," the requester must show that the prosecution of the mandamus action could "reasonably be regarded as necessary to obtain the information" and that a "causal nexus" exists between the legal action and the records custodian's disclosure of the requested information. *Eau Claire Press Co. v. Gordon*, 176 Wis. 2d 154, 499 N.W.2d 918 (Ct. App. 1993).

In this case, you indicated that you filed a mandamus action, and subsequently, you received the records you requested. I understand you are frustrated with the court's decision that you did not substantially prevail in your case. Our legal system provides an appellate process for a party dissatisfied with a court's decision. As you noted, you could have appealed the court's decision, but you chose not to do so. You were also represented by counsel with whom you had the opportunity to consult concerning your legal options. In light of these facts, and because this matter does not appear to present an issue of statewide concern, we respectfully decline to take any action in this matter at this time.

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. I would like you to be aware of several open government resources 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.

DOJ appreciates your concern regarding government transparency. We remain 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

Andrew C. Cook  
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August 8, 2016

Mr. Scott Folz  
[REDACTED]

Holcombe, WI 54745  
[REDACTED]

Dear Mr. Folz:

The Department of Justice (DOJ) is in receipt of your February 8, 2016 and March 9, 2016 email correspondence to DOJ's Office of Open Government in which you stated that you are "concerned about having a local attorney proceed with a case against the County of Rusk, State of Wisconsin." Your correspondence relates to your previous correspondence to DOJ in late 2015.

To the extent your February 8, 2016 email correspondence concerns the same public records issue relayed in your previous correspondence, as I stated in my December 16, 2015 letter to you, 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 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. It is unclear from your correspondence whether you submitted a written request for the district attorney to file an action for mandamus. If you have not already done so, this option remain available to you.

As I also stated in my December 16, 2015 letter, you may also 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

Mr. Scott Folz  
August 8, 2016  
Page 2

attorneys fees. In your March 9, 2016 correspondence, you stated that you "checked with the Lawyer referral site" and that there is nothing available in your area. You may wish to contact the service again and ask for the closest lawyer to your area, if you have not already done so. 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>

As I outlined in my December 16, 2015 letter, DOJ offers 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, Wis. Stat. §§ 19.31 to 19.39, maintains a Public Records Law Compliance Guide and provides a recorded webinar and associated presentation documentation.

Finally, as I also stated in my previous response letter, if you feel that you are a victim of a crime, you may contact the DOJ Office of Crime Victim Services (OCVS) at (608) 264-9497. Additionally, the information on the OCVS website (<http://www.doj.state.wi.us/ocvs/office-crime-victim-services>) may be helpful to you.

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

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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August 8, 2016

Mr. John Chaffee  
[REDACTED]

Prairie du Chien, WI 53821  
[REDACTED]

Dear Mr. Chaffee:

The Department of Justice (DOJ) is in receipt of your March 27, 2016 email correspondence to Attorney General Brad Schimel regarding the Prairie du Chien Chamber of Commerce.

First you asked: "Should the City Administrator be recording the minutes of council meeting [sic] and all subcommittee meetings as voting member of the council and as paid representative of the community under the open record laws?"

The Wisconsin Open Meetings Law, Wis. Stat. §§ 19.81 to 19.98, 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, so 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 that governmental bodies keep minutes of all meetings; however, there is no requirement under the open meetings law for a governmental body to do so. 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. Wis. Stat. § 19.88(3). Meeting minutes are a common method that governmental bodies use to do so. However, so long as the governmental body is maintaining some type of record of all motions and roll-call votes, the Wis. Stat. § 19.88(3) requirement is satisfied.

Mr. John Chaffee  
August 8, 2016  
Page 2

You also asked, "If there are problems should a referendum that is on the April ballot be delayed to insure that the communities interest [sic] are upheld?" Additionally, you stated that you believe "the council has be going through the motions and not keeping the community informed . . . I believe a review of ordinances is necessary." You asked us to "review the Prairie du Chien Chamber of Commerce site specifically the ordinance section on the Council" and inform you of "potential issues that affect the open meeting laws."

The Attorney General and DOJ's Office of Open Government (OOG) are committed to increasing government openness and transparency. However, the assistance you seek concerning a referendum and ordinances is outside the scope of the OOG's responsibilities. While the OOG works to increase government openness and transparency, we do so with a focus on the Wisconsin Open Meetings Law and the Wisconsin Public Records Law, Wis. Stat. §§ 19.31 to 19.39. Therefore, the OOG cannot assist you concerning the referendum and ordinance issues.

While we appreciate your concern regarding the open meetings law, the OOG does not have the resources to conduct a review of a particular governmental body's ordinances to search for potential open meetings law issues. As a result, we cannot review the Prairie du Chien Chamber of Commerce Council ordinances for such issues. If you have specific questions or concerns related to the open meetings law, you may write to us regarding those questions or concerns at any time. DOJ also maintains a Public Records Open Meetings (PROM) helpline to respond to individuals' open government questions. The PROM telephone number is (608) 267-2220.

I would also like you to be aware of several open government resources that are available to you through DOJ's website (<https://www.doj.state.wi.us/office-open-government/office-open-government-resources>). DOJ provides the full Wisconsin Open Meetings Law, maintains an Open Meetings Law Compliance Guide and provides a recorded webinar and associated presentation documentation.

You may wish to contact a private attorney regarding your concerns. 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  
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<http://www.wisbar.org/forpublic/ineedalawyer/pages/Iris.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.

Mr. John Chaffee  
August 8, 2016  
Page 3

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Sincerely,

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Paul M. Ferguson  
Assistant Attorney General  
Office of Open Government

PMF:lah



STATE OF WISCONSIN  
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TTY 1-800-947-3529  
FAX 608/267-2779

August 9, 2016

Mr. Jon Franke  
[REDACTED]

Yuba, WI 54634  
[REDACTED]

Dear Mr. Franke:

The Department of Justice (DOJ) is in receipt of your March 15, 2016 and April 7, 2016 correspondence addressed to me. In your letters, you alleged the Vernon County Board and various subcommittees violated the Wisconsin Open Meetings Law, Wis. Stat. §§ 19.81 to 19.98. You stated that you filed verified complaints with Vernon County District Attorney Timothy J. Gaskell, and the District Attorney has declined to take action on your behalf. You stated that you "feel that action needs to be taken."

The open meetings law acknowledges that the public is entitled to the fullest and most complete information regarding government affairs as is compatible with the conduct of government business. Wis. Stat. § 19.81(1). All meetings of government bodies shall be held publicly 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).

Previously, you submitted correspondence concerning the open meetings law to which I responded in a letter dated December 28, 2015. At that time, I wrote that under the open meetings law, public notice of all meetings of a governmental body must be given 24 hours prior to the meeting to the following: (1) the public; (2) to news media who have filed written request for such notice; and (3) to the official newspaper (designated under Wis. Stat. §§ 985.04, 985.05 and 985.06) or, if there is no such paper, to a news medium likely to give notice in the area. Wis. Stat. §§ 19.84(1) and (3).

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.*

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).

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)(c) provides an exemption for the following: "Considering employment, promotion, compensation or performance evaluation data of any public employee over which the governmental body has jurisdiction or exercises responsibility." 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 your correspondence, you raised the issue of meeting minutes. 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. 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. Wis. Stat. § 19.88(3). Meeting minutes are a common method that governmental bodies use to do so. However, so long as the governmental body is maintaining some type of record of all motions and roll-call votes, the Wis. Stat. § 19.88(3) requirement is satisfied.

You also stated that you have other concerns including "some of the committees being formed NOT by resolution of the County Board, But by the County Board chair and 6 board members WHICH IS NOT A QUORUM of the county board . . . without . . . knowledge of the full county board." It is not clear from the information provided what your specific questions is. Furthermore, there is insufficient information to review this aspect of your correspondence adequately.

However, I would like to provide you with some general information on subunits and obligations under the open meetings law. A "formally constituted subunit" of a governmental body is itself a "governmental body" within the definition in Wis. Stat. § 19.82(1). A subunit is a separate, smaller body created by a parent body and composed exclusively of members of the parent body. 74 Op. Att'y Gen. 38, 40 (1985). If, for example, a fifteen member county board appoints a committee consisting of five members of the county board, that committee would be considered a "subunit" subject to the open meetings law. This is true despite the fact that the five-person committee would be smaller than a quorum of the county board. Even a committee with only two members is considered a "subunit," as is a committee that is only advisory and that has no power to make binding decisions. Dziki Correspondence (Dec. 12, 2006).

Finally, you stated in each letter that you filed a verified complaint with District Attorney Gaskell. You included a March 30, 2016 response from DA Gaskell, in which he stated, in part, "We have taken steps to correct the improper notice for the meetings you have set forth." DA Gaskell also stated, "My position is that I do not believe anyone intentionally violates the Open Records/Public Meetings Law and will give the folks an opportunity to comply and if they do not, then the violations will be pursued." In your letter received April 11, 2016, you asked: "If I am not mistaken is not it the duty under oath of the district attorney to protect the public from crimes outlined in state statutes?"

As you know, under the open meetings law, the Attorney General and the district attorneys have authority to enforce the law. Wis. Stat. § 19.97(1). Generally, the Attorney General may elect to prosecute complaints involving matters of statewide concern. In this case, while the open meetings issues you raised are important to you and those in your community, it does not appear to raise issues of statewide concern. As a result, we respectfully decline to pursue an enforcement action on your behalf at this time.

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). You may file a verified complaint for each alleged violation or you may combine each of the alleged violations in a single verified complaint. You availed yourself of this enforcement option by filing a verified complaint with DA Gaskell. However, DA Gaskell chose not to commence an enforcement action.

Although you are disappointed with the District Attorney's decision regarding your complaint, the law does not require a district attorney to commence an enforcement action upon receipt of a written request to do so. *See* Wis. Stat. § 19.97(4). A district attorney has broad discretion to decide whether to bring an action for enforcement. *See State v. Karpinski*, 92 Wis. 2d 599, 607, 285 N.W.2d 729 (1979). The open records law takes into account the fact that district attorneys may not always commence actions for enforcement and provides individuals with the option of commencing their own action pursuant to Wis. Stat. § 19.97(4).

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

Mr. Jon Franke  
August 9, 2016  
Page 4

may still commence an enforcement action even after 20 days have passed.) Such actions by an individual must be commenced within two years after the cause of action accrues. Wis. Stat. § 893.93(2)(a).

In your March 15, 2016 correspondence, you stated that you "would like to bring as a individual, action in the name of the state under, Wis. Stat. 19.97 (4)." This option remains available to you, and you may do this on your own or with the assistance of an attorney. If you wish to contact 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 attorneys fees. You may reach it using the contact information below:

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

As I informed you previously, there are several open government resources available to you through the Wisconsin DOJ website (<https://www.doj.state.wi.us/office-open-government/office-open-government-resources>). 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.

DOJ appreciates your ongoing concerns. We remain 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: District Attorney Timothy J. Gaskell



STATE OF WISCONSIN  
DEPARTMENT OF JUSTICE

BRAD D. SCHIMEL  
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FAX 608/267-2779

August 16, 2016

Russell Carollo  
[REDACTED]

Colorado Springs, CO 80910  
[REDACTED]

Dear Mr. Carollo:

This is in response to your email correspondence, received on August 12, 2016, in which you wrote, "I am responding to your attached letter dated June 7, 2016, in which you request modification of my public records request (WHEFA POINTER FOIA)." You added, "I hereby limit the request to all records from Jan. 1, 2012 to Dec. 31, 2014."

My June 7, 2016 letter to you was in response to your February 5, 2016 letter to me concerning a public records request you submitted to the Wisconsin Health and Educational Facilities Authority (WHEFA). In my letter, I informed you that I spoke with Dennis P. Reilly, Executive Director of WHEFA, regarding your matter, and he explained that he sent a February 3, 2016 letter to you seeking clarification of your request, but he had not heard from you. It appears your August 12, 2016 letter to me is a modification of your public records request directed to WHEFA. I did not intend my letter to be a request for you to send me your clarified request. To the extent my letter may have been confusing, I apologize. In addition to providing you with public records law information, the purpose of my letter was to communicate to you that I spoke with WHEFA, and they informed me that they were waiting to hear from you about clarifying your request.

I have taken the liberty of forwarding your August 8, 2016 letter regarding your modified request to Mr. Reilly at WHEFA. As a result of this apparent miscommunication, DOJ will take no further action regarding this matter at this time. I suggest you contact WHEFA directly regarding your request modification.

Sincerely,

Paul M. Ferguson  
Assistant Attorney General  
Office of Open Government

PMF:pjm

Cc: Dennis P. Reilly, WHEFA Executive Director



STATE OF WISCONSIN  
DEPARTMENT OF JUSTICE

BRAD D. SCHIMEL  
ATTORNEY GENERAL

Andrew C. Cook  
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August 29, 2016

Chief Deputy John C. Hanrahan  
Racine County Sheriff's Office  
717 Wisconsin Avenue  
Racine, WI 53403-1237  
[John.Hanrahan@GoRacine.org](mailto:John.Hanrahan@GoRacine.org)

Dear Chief Deputy Hanrahan:

This letter is a response to your March 2, 2016 email correspondence concerning an alleged violation of the Wisconsin Open Meetings Law, Wis. Stat. §§ 19.81 to 19.98. You stated that you would like the Department of Justice (DOJ) to handle the investigation in order to avoid even the perception of a conflict of interest by the Racine County Sheriff's Office.

We reviewed the materials you provided including emails to and/or from the complainant, Bill Gabbey, the Racine County District Attorney's Office, and the Racine County Sheriff's Office. The materials also included two newspaper articles concerning the matter.

This summary of the basic facts of this matter are derived from the information provided. On September 17, 2013, Mr. Gabbey emailed Racine County District Attorney Rich Chiapete regarding an open meetings law question. Mr. Gabbey was concerned the Racine Unified School District Board of Education filled a vacancy on the board by secret ballot voting. Mr. Gabbey expressed his belief that the use of secret ballot voting violated the open meetings law.

The emails you provided show that DA Chiapete initially responded that he would look into it, and for nearly two years thereafter, Mr. Gabbey repeatedly emailed to check on the status of the matter. On July 23, 2015, in response to Mr. Gabbey's status inquiry, DA Chiapete stated that Mr. Gabbey's emails were filtered into his junk mail for an unknown reason, and he would check into it. On December 16, 2015, Mr. Gabbey checked the status of the matter again. On February 22, 2016, after more status inquiries by Mr. Gabbey, DA Chiapete forwarded the matter to the Sheriff's Office asking for someone to follow up. In doing so, DA Chiapete indicated that the DA's Office sent the matter to the Sheriff's Office

previously, but he never heard back. He indicated that he communicated to Mr. Gabbey the fact that the DA's Office does not conduct the investigation.

An exchange of emails between the Sheriff's Office and DA's Office followed in which the Sheriff's Office indicated it did not feel comfortable handling the matter. The Sheriff's Office also indicated that it first became aware of the matter on February 22, 2016. As you indicated in your correspondence, the Sheriff's Office is uncomfortable handling the matter because Mr. Gabbey was a former chief deputy of the Sheriff's Office and the board member elected as a result of the purported secret ballot was a former City of Racine police officer. To avoid any potential of a conflict of interest, you contacted DOJ.

The materials you provided also included two newspaper articles. The first, dated September 17, 2013, reported that the school board filled a vacant seat on the board the previous day, September 16, 2013, via secret ballot voting. The second article, dated July 17, 2015, reported a similar vote to fill an open seat via secret ballot voting, which occurred on July 2, 2015. The article also quoted the school board president as stating that secret ballot voting was the manner in which the board always filled such vacant seats. The article also reported a second meeting and vote, following a tie in the initial voting, in which the ballots were not secret. The second news article raised the issue of whether the secret ballot violated the open meetings law. The article quotes the school district's attorney, Gib Berthelsen, as saying, "It's an honest mistake and when they found out about it they corrected it."

The open meetings law acknowledges that the public is entitled to the fullest and most complete information regarding government affairs as is compatible with the conduct of government business. Wis. Stat. § 19.81(1). All meetings of government bodies shall be held publicly 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).

The open meetings law states, "Unless otherwise specifically provided by statute, no secret ballot may be utilized to determine any election or other decision of a governmental body except the election of the officers of such body in any meeting." Wis. Stat. § 19.88(1). This language is clear and unambiguous. A governmental body may not use a secret ballot except to elect officers of the body.

The facts presented show that the board used secret ballot voting to fill a vacancy of the body, not to elect an officer. This occurred on two occasions: September 16, 2013 and July 2, 2015. The July 17, 2015 newspaper article quotes a school board member as saying, "That's the way it's always been done." Despite such an established practice by a governmental body, the open meetings law dictates when a secret ballot is permissible, not adherence to past practice. It appears the board recognized that such secret ballots were improper and have taken steps to correct its actions moving forward.

In your letter, you stated that you would like DOJ to handle the investigation. You also stated that, based on a previous telephone conversation to our office, you understood that DOJ would review the matter and determine whether to pursue it further.

Under the open meetings law, the Attorney General and the district attorneys have authority to enforce the law. Wis. Stat. § 19.97(1). Your correspondence requested that DOJ investigate the matter due to a potential conflict after the DA's Office requested the Sheriff's Office investigate. Generally, DOJ does not serve in the role of investigator for district attorneys looking into alleged open meetings law violations. One of the district attorney's responsibilities, if he or she elects to pursue an open meetings law complaint, is to locate an entity to conduct any necessary investigations. Generally, the Attorney General may elect to prosecute complaints involving matters of statewide concern. While you did not request DOJ consider an enforcement action—just the investigation—please be advised that 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 materials you provided, we have concluded that this matter—while certainly important to the citizens of Racine County—does not raise novel issues of law or issues of statewide concern. Therefore, we respectfully decline to pursue any further investigation or an open meetings enforcement action at this time.

As you are aware, the more frequent means of enforcement of the open meetings law is through the district attorney of the county where the alleged violation occurred. However, in order to have this authority, an individual must file a verified complaint with the district attorney. Wis. Stat. § 19.97(1). It is unclear from the information provided whether Mr. Gabbey filed a verified complaint. As explained in DOJ's Wisconsin Open Meetings Law Compliance Guide, a verified complaint must be signed by the individual and notarized. The verified complaint should include available information that will be helpful to investigators, such as: identifying the governmental body and any members thereof alleged to have violated the law; describing the factual circumstances of the alleged violations; identifying witnesses with relevant evidence; and identifying any relevant documentary evidence. The facts presented do not indicate that Mr. Gabbey filed a verified complaint, only that Mr. Gabbey submitted an email inquiry.

A district attorney has broad discretion to decide whether to bring an action for enforcement. See *State v. Karpinski*, 92 Wis. 2d 599, 607, 285 N.W.2d 729 (1979). The open records law takes into account the fact that district attorneys may not always commence actions for enforcement and provides individuals with the option of commencing their own action pursuant to Wis. Stat. § 19.97(4). 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.) Reasonable attorneys fees are available if the plaintiff prevails.

Such actions by an individual must be commenced within two years after the cause of action accrues. Wis. Stat. § 893.93(2)(a). By contrast, an enforcement action brought by a district attorney or by the Attorney General must be commenced within six years after the cause of action accrues. See Wis. Stat. § 893.93(1)(a). Based on the facts presented, it appears that over two years have passed since the alleged September 16, 2013 violation occurred, which places the matter outside the two year statute of limitation for an individual to bring

an enforcement action. However, an enforcement action by the district attorney is not yet barred. The alleged July 2, 2015 violation is still within both statutes of limitation.

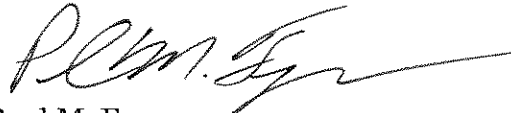
Please understand that the Attorney General's decision not to investigate further or initiate an enforcement action in no way should be interpreted as an opinion on the merits of this case, or as a recommendation to the District Attorney or Mr. Gabbey to not enforce or investigate the matter further.

DOJ offers several open government resources through its 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. These resources are available to help individuals interpret the Wisconsin Open Meetings Law.

We hope this information provides guidance to those involved in determining whether to enforce or investigate this matter further. DOJ appreciates and shares your concern for government openness and transparency. We are dedicated to the work necessary to preserve Wisconsin's proud tradition of open government.

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: Gib Berthelsen, von Briesen & Roper  
Rich Chiapete, District Attorney  
Bill Gabbey



STATE OF WISCONSIN  
DEPARTMENT OF JUSTICE

BRAD D. SCHIMEL  
ATTORNEY GENERAL

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Paul M. Ferguson  
Assistant Attorney General  
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608/266-1221  
TTY 1-800-947-3529  
FAX 608/267-2779

August 30, 2016

Ms. Lisa Kay Peters  
[REDACTED]  
Green Bay, WI 54303

Dear Ms. Peters:

This is a response to your letter, dated April 25, 2016, in which you asked for the assistance of the Department of Justice (DOJ) concerning a public records request you submitted to the city of Green Bay. In your letter, you stated that the city contracts with a private veterinary clinic for services related to impounding stray animals. Initially, you requested statistics from the veterinary clinic, and the clinic refused your request. Then, you submitted a public records request to the city. You stated that the city referred you to the clinic's website that included some statistics but not all the statistics you sought.

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, 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.

It is unclear whether you requested information or records containing the information you sought. When submitting a public records request, a requester should take care to ask for records containing the information they seek, as opposed to simply asking a question or asking for information. This is important because the public records law "does not require an authority to provide requested information if no record exists, or to simply answer questions about a topic of interest to the requester." *Journal Times v. City of Racine Board of Police and Fire Commissioners*, 2015 WI 56, 55 (citation omitted); see also *State ex rel. Zinngrabe v. Sch. Dist. of Sevastopol*, 146 Wis. 2d 629, 431 N.W.2d 734 (Ct. App. 1988).

Your request concerned statistics regarding a contractor's work for the city of Green Bay. Initially, you made a request to the contractor. The public records law only applies to authorities, as that term is defined in the law. See Wis. Stat. § 19.32(1). However, the law states, in part, "[E]ach 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

Ms. Lisa Kay Peters

August 30, 2016

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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). Based on the facts available to me, the records you requested may constitute records "produced or collected under a contract entered into by the authority with a person other than an authority," and thus, they may be subject to disclosure under the public records law. A proper request for such records should be directed to the authority and not the contractor. In this case, you submitted your request to the clinic initially, and then, you properly submitted it to the city.

On July 7, 2016, I we discussed this matter with you on the telephone. That same day, following our conversation, I contacted Lisa Wachowski, the office manager of the Green Bay Police Department with whom you corresponded regarding your request. We discussed contractor's records in general and the fact that an authority is responsible for records produced or collected under a contract even if the contractor maintains the records. Ms. Wachowski said that she would look into the matter further. I invited Ms. Wachowski to provide my contact information to the city attorney in the event someone wished to discuss this matter further. To date, I have not received any follow up calls seeking assistance or indicating ongoing issues. It is my hope that the matter has been resolved.

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 in cases presenting novel issues of law that coincide with matters of statewide concern. While your matter may be important to you and those in your community, it does not appear to raise any novel issues of law that coincide with matters of statewide concern. Therefore, 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 at this time.

Although we are declining to pursue an action for mandamus 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>

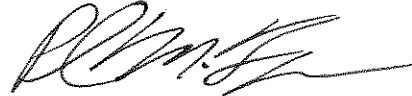
Ms. Lisa Kay Peters  
August 30, 2016  
Page 3

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 DOJ's 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.

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

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 stylized flourish at the end.

Paul M. Ferguson  
Assistant Attorney General  
Office of Open Government

Cc: Lisa Wachowski, Green Bay Police Department  
Vanessa R. Chavez, City Attorney



STATE OF WISCONSIN  
DEPARTMENT OF JUSTICE

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September 1, 2016

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

Dear Mr. Seymer,

Thank you for contacting our Office of Open Government regarding your ongoing dispute with the Florence County School District. The Office of Open Government was envisioned to be a resource for government transparency available to all citizens, as well as our clients, agencies, and other Assistant Attorneys General (AAG). The goals for the Office are to respond to public records requests, provide guidance and information on government transparency laws, and to attempt to mediate disputes.

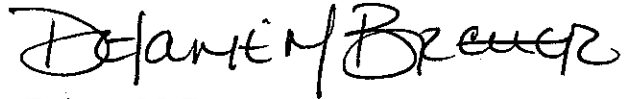
The Office receives a significant number of correspondence like yours, and attempts to respond to them in the order received. AAG Ferguson has worked diligently to respond to your most recent correspondence. He has received additional documents from the School District and is currently reviewing and analyzing them in order to help mediate the dispute.

However, the Office of Open Government has limited resources. We have spent a significant amount of time and resources on your particular issue, and while we are working to respond to your most recent letter, we appreciate your patience. As you know, there are many areas of the public records law that are still unsettled. While we continue to work hard to provide solid advice to citizens, it is impossible to bring a mandamus action every time we are asked.

As we have explained in previous correspondence, 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 or submit a written request for the local district attorney or the Attorney General to file an action for mandamus. The Attorney General is authorized to enforce the public records law, but generally, he exercises this authority in cases presenting novel issues of law that coincide with matters of statewide concern. Even if the Attorney General declines to pursue an action for mandamus, the other remedies may still be available.

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

Sincerely,

A handwritten signature in black ink, reading "Delanie M. Breuer". The signature is written in a cursive, flowing style with a large initial "D" and "B".

Delanie M. Breuer  
Assistant Deputy Attorney General

DMB:pjm



STATE OF WISCONSIN  
DEPARTMENT OF JUSTICE

BRAD D. SCHIMEL  
ATTORNEY GENERAL

Andrew C. Cook  
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September 8, 2016

Mark Belling  
1130 WISN  
12100 W. Howard Avenue  
Greenfield, WI 53228  
[markbelling@iheartmedia.com](mailto:markbelling@iheartmedia.com)

Dear Mr. Belling:

The Department of Justice (DOJ) is in receipt of your August 12, 2016 email correspondence in which you wrote, "I again request your assistance in getting the Arrowhead School District to comply with the state open meetings law." According to your email, the matter concerns a teacher soliciting financial support for an AAU basketball team—which is not associated with the school district—using a school district email account.

You submitted a public records request, dated August 4, 2016, seeking copies of any document, including emails, in which school district resources were used to solicit support for an AAU basketball team and any responses received concerning such solicitations. The timeframe of your request was May 2015. In response, the school district provided you with one outgoing email and one incoming email responsive to your request. The school district redacted the name and email address of the individual with whom the teacher corresponded.

In redacting the information, the school district relied on the public records balancing test. The school district stated that the individual required anonymity "related to each and every grant (donation) provided to Arrowhead High School and any other associated organization or through an Arrowhead employee." The school district also stated that "the compelling public interest in not disclosing the an [sic] anonymous donor's identity, considering the significant negative impact on future anonymous donors/donations, outweighs the public interest in knowing the exact names of those who donated to Arrowhead Union High School District or other organizations associated with Arrowhead and/or its employees."

You stated that the request was unsolicited, and you have no information indicating the individual donated money to the AAU team. You also state that the "solicitation was for an organization unrelated to the school so any concern about impact on school donations is irrelevant." You write that the school district "seems interested in concealing the identity of a person in a public record solely because it sought to seek to protect his anonymity in a

separate and unrelated public record.” You added that you did not know whether the individuals are the same person. You close your correspondence by requesting that we advise the school district that they must produce the records unredacted or commence an enforcement action if they refuse.

Previously, you sought DOJ’s intervention regarding a related issue concerning the school district. In that case, the school district denied your request because it would disclose the identity of a donor (or donors) who donated to the school district on the condition of confidentiality. In response to your correspondence, I explained the public records law authorizes requesters to inspect or obtain copies of “records” created or maintained by an “authority,” and records are presumed to be open to public inspection and copying with some exceptions. 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.

In the previous case, the school district determined there was a strong public interest in protecting the donor’s individual private interest in remaining anonymous. Protecting the donor’s individual privacy served the strong public interest of preventing significant negative impacts on future anonymous donations. Waukesha County District Attorney Susan L. Oppen declined to pursue enforcement. Likewise, the Attorney General declined to intervene. We concluded, based on the facts presented, that the school district’s balancing test determination appeared reasonable.

As I explained in my response to your previous correspondence, the balancing test is to be conducted on a case-by-case basis. Thus, the school district must apply the balancing test to the present matter’s distinct circumstances. In the present case, at issue are two emails between a teacher and a potential donor. The teacher used the school email account to solicit funds for a private organization. The school provided the emails with the redactions explained above because, it appears, the potential donor conditioned a previous gift on his or her anonymity. (It is unclear from the facts presented whether the potential donor in the present matter is the same as the subject of your previous correspondence.)

I spoke with Superintendent Laura Myrah regarding this matter. We discussed the records and the school district’s response. We also discussed DOJ’s response to your previous correspondence and the differences of circumstances of the present matter. I also spoke with the school district’s attorney, Tom O’Day. Attorney O’Day stated the school district’s position, which is twofold. First, the school district viewed the two emails as purely personal material that did not evince a violation of law or policy. Relying on *Schill v. Wisconsin Rapids Sch. Dist.*, 2010 WI 86, 327 Wis. 2d 572, 786 N.W.2d 177, he stated the school district was not required to disclose the emails as a result. Essentially, the school district’s position is that its disclosure of the emails in any form—including the redacted form they provided—went above and beyond what the public record law required. Second, Attorney O’Day stressed that even if the emails were subject to disclosure, the public records balancing test weighed in favor of non-disclosure for the reasons stated in the school district’s response letter. According to the school district, the name of an individual who requested anonymity as a condition of a previous donation did not warrant disclosure because of a compelling public interest in

avoiding a negative impact on future anonymous donations that outweighed the public interest in disclosure.

The Wisconsin Supreme Court has said that purely personal emails, evincing no violation of law or policy, sent or received by employees or officers on an authority's computer system are not subject to disclosure in response to a public records request. *Schill v. Wisconsin Rapids Sch. Dist.*, 2010 WI 86, ¶ 9 & n.4 (Abrahamson, C.J., lead opinion), ¶ 148 & n.2 (Bradley, J., concurring), ¶ 173 & n.4 (Gableman, J., concurring), 327 Wis. 2d 572, 582, 786 N.W.2d 177, 183. However, despite the lead opinion in *Schill*, DOJ's position is that purely personal emails sent or received on government email accounts are records under the public records law, and therefore, such emails are subject to disclosure. In *Schill*, the court held 5-2 that the public records law did not require an authority to disclose such emails. Three justices reached this decision by concluding such emails were not "records." The remaining four justices concluded the emails were "records," but two agreed they did not need to be disclosed under the balancing test. While this area of the law is unsettled, it is reasonable to conclude that should the court again take up the question of whether personal emails sent or received on government email accounts are records, a majority will hold that such emails are records subject to disclosure.

In the present case, while the solicitation did not pertain to government business, the email was sent via a government email account, and there is a strong public interest in how government resources are used. The fact that a donor requested confidentiality as a condition of a gift is a consideration in determining whether to withhold the identity of the donor. However, here, the records reflect no request for confidentiality for a donation, or potential donation, to the school district. The emails concerned a solicitation for a donation to a private organization. In a particular case, an authority, in applying the balancing test, may conclude that the public interest in maintaining that donor's anonymity outweighs the public interest in disclosure of the donor's name. However, such a determination does not give all of the donor's communications with the authority a permanent exemption from disclosure under the public records law. The balancing test must be applied on a case-by-case basis.

In this case, factors that the authority could consider include, but are not limited to: a school employee used a school email account; the employee sent the email unsolicited to a private citizen; the request for funds was for a private entity; the private citizen is possibly a donor to the school district; the possible donor may have contributed on the condition of confidentiality; the public's interest in knowing how school resources are used; the public's interest in encouraging donations; the public's interest in any possible quid pro quo related to donations; and the relationship between this solicitation and previous donations. Based on the facts presented, unlike our previous response to your correspondence, we cannot say unequivocally that the school district's balancing test determination appears reasonable. However, ultimately, it is the authority and the records custodian's responsibility to apply the balancing test based on the totality of the circumstances. DOJ cannot make that balancing test determination for the school district.

As I mentioned in my previous correspondence, 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

Mr. Mark Belling  
September 8, 2016  
Page 4

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 novel issues of law that coincide with matters of statewide concern. While the present matter is important, it primarily concerns the application of the balancing test to a particular set of circumstances, and it does not appear to raise any novel issues of law that coincide with matters of statewide concern. Therefore, the Attorney General respectfully declines to take any further action in this matter, including filing an action for mandamus on your behalf, at this time. 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. Although we are declining to pursue an action for mandamus in this instance, the other remedies outlined above may still be available to you.

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

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: Laura Myrah, Superintendent  
Tom O'Day, Godfrey & Kahn



STATE OF WISCONSIN  
DEPARTMENT OF JUSTICE

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ATTORNEY GENERAL

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September 8, 2016

Laura Myrah, Superintendent  
Arrowhead Union High School  
South Campus/District Office  
700 North Avenue  
Hartland, WI 53029  
[myrah@arrowheadschoools.org](mailto:myrah@arrowheadschoools.org)

Tom O'Day  
Godfrey & Kahn  
One East Main Street, Suite 500  
P.O. Box 2719  
Madison, WI 53703  
[today@gklaw.com](mailto:today@gklaw.com)

Dear Superintendent Myrah and Attorney O'Day:

Previously, we spoke separately concerning correspondence, dated August 12, 2016, which the Department of Justice (DOJ) received from Mr. Mark Belling. In his correspondence, Mr. Belling sought DOJ's assistance in ensuring Arrowhead Union High School District's compliance with the Wisconsin Public Records Law, Wis. Stat. §§ 19.31 to 19.39.

Mr. Belling informed DOJ that he submitted a public records request, dated August 4, 2016, to the school district requesting copies of any document, including emails, in which school district resources were used to solicit support for an AAU basketball team and any responses received concerning any such solicitations. In response, the school district provided Mr. Belling with two emails: one email sent from a school district employee and one email sent in response. The school district redacted the name and email address of the individual with whom the school district employee corresponded.

In redacting the information, the school district relied on the public records balancing test. The school district stated that the individual required anonymity "related to each and every grant (donation) provided to Arrowhead High School and any other associated organization or through an Arrowhead employee." The school district also stated that "the compelling public interest in not disclosing the an [sic] anonymous donor's identity, considering the significant negative impact on future anonymous donors/donations,

outweighs the public interest in knowing the exact names of those who donated to Arrowhead Union High School District or other organizations associated with Arrowhead and/or its employees.”

Mr. Belling was concerned that the school district appeared “interested in concealing the identity of a person in a public record solely because it sought to seek to protect his anonymity in a separate and unrelated public record.” Mr. Belling closed his correspondence by requesting that we advise the school district to produce the records unredacted or commence an enforcement action.

Earlier this year, Mr. Belling sought DOJ’s assistance regarding a related issue concerning the school district. In that case, the school district denied Mr. Belling’s request because it would disclose the identity of a donor (or donors) who donated to the school district on the condition of confidentiality. The school district determined that protecting the donor’s individual privacy served the strong public interest of preventing significant negative impacts on future anonymous donations. Waukesha County District Attorney Susan L. Oppen declined to pursue enforcement. We concluded, based on the facts presented, that the school district’s balancing test determination appeared reasonable, and we declined to intervene.

Based on my discussion with Attorney O’Day, it appears the school district’s position can be summarized by two key points. First, the school district views the two emails as purely personal material that did not evince a violation of law or policy, and therefore, the school district was not required to disclose them. Attorney O’Day referenced the Wisconsin Supreme Court’s decision in *Schill v. Wisconsin Rapids Sch. Dist.*, 2010 WI 86, 327 Wis. 2d 572, 786 N.W.2d 177. In providing the emails in any form, including with redactions, the school district went above and beyond the requirements of the public records law. Second, Attorney O’Day stressed that even if the emails were subject to disclosure, the public records balancing test weighed in favor of nondisclosure. The school district did not disclose the name of an individual who requested anonymity as a condition of a previous donation because of a compelling public interest in avoiding a negative impact on future anonymous donations, which outweighed the public interest in disclosure.

Regarding Attorney O’Day’s first point, he is correct that the Wisconsin Supreme Court has said that purely personal emails, evincing no violation of law or policy, sent or received by employees or officers on an authority’s computer system are not subject to disclosure in response to a public records request. *Schill v. Wisconsin Rapids Sch. Dist.*, 2010 WI 86, ¶ 9 & n.4 (Abrahamson, C.J., lead opinion), ¶ 148 & n.2 (Bradley, J., concurring), ¶ 173 & n.4 (Gableman, J., concurring), 327 Wis. 2d 572, 582, 786 N.W.2d 177, 183. In *Schill*, the court held 5-2 that the public records law did not require an authority to disclose such emails. Three justices reached this decision by concluding such emails were not “records”; the remaining four justices concluded the emails were “records,” but two agreed they did not need to be disclosed under the balancing test. While this area of the law is unsettled, it is reasonable to conclude that a majority of the court will hold that such emails are records subject to disclosure if they take up the issue again. Despite *Schill*’s lead opinion, it is DOJ’s

position that purely personal emails sent or received on government email accounts are records under the public records law, and therefore, such emails are subject to disclosure.<sup>1</sup>

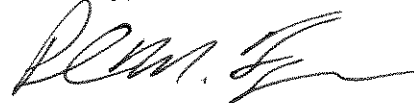
Concerning your second point, the balancing test is to be conducted on a case-by-case basis. The circumstances of the present matter are distinct from the circumstances of the matter about which Mr. Belling wrote to DOJ earlier this year. Therefore, the school district must apply the balancing test again to the present matter's distinct circumstances. In the present case, while the solicitation did not pertain to government business, the email was sent via a government email account, and there is a strong public interest in how government resources are used. The fact that a donor requested confidentiality as a condition of a gift is a consideration in determining whether to withhold the identity of the donor. However, here, the records reflect no request for confidentiality for a donation, or potential donation, to the school district. The emails concerned a solicitation for a donation to a private organization. In a particular case, an authority, in applying the balancing test, may conclude that the public interest in maintaining that donor's anonymity outweighs the public interest in disclosure of the donor's name. However, such a determination does not give all of the donor's communications with the authority a permanent exemption from disclosure under the public records law.

In the present case, the school district had many factors to consider in applying the balancing test. Based on the facts presented, unlike our response to Mr. Belling's earlier correspondence, we cannot say unequivocally that the school district's balancing test determination appears reasonable. Ultimately, it is each authority and records custodian's responsibility to apply the balancing test based on the totality of the circumstances.

At this time, DOJ has declined to pursue an enforcement action. However, the school district's present stance may invite litigation. DOJ reserves its right to revisit the situation if necessary. We encourage the school district to ensure that it keeps the public records law's presumption of complete public access in the fore as it applies the balancing test to the present case and public records requests in the future.

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: Mark Belling, 1130 WISN

---

<sup>1</sup> The legislature authorized the Attorney General to advise any person about the applicability of the public records law. Wis. Stat. § 19.39. The Supreme Court has stated, "The legislature has accorded the Attorney General, who supervises and directs the Department of Justice, special significance in interpreting the Public Records Law." *Juneau Cty. Star-Times v. Juneau Cty.*, 2013 WI 4, ¶ 36 n. 18, 345 Wis. 2d 122, 137, 824 N.W.2d 457, 464. As a result, while not binding on the Court, the Attorney General's opinion and advice may be given persuasive effect. *Id.* (citation omitted).



STATE OF WISCONSIN  
DEPARTMENT OF JUSTICE

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ATTORNEY GENERAL

Andrew C. Cook  
Deputy Attorney General

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FAX 608/267-2779

September 9, 2016

Ms. Marlyce M. Kawleski

Junction City, WI 54443

Dear Ms. Kawleski:

The Department of Justice (DOJ) is in receipt of your March 16, 2016 correspondence to me regarding your ability to videotape Town of Eau Pleine, Portage County, monthly town board meetings. You stated: "I am now requesting that the verbal information given to me by your office be provided to me in writing. Specifically that 19.90 of the Open Meeting Law does allow videotaping of open public meetings."

I spoke with you on March 8, 2016 regarding this topic. We discussed Wis. Stat. § 19.90 and the enforcement provisions of the Wisconsin Open Meetings Law, Wis. Stat. §§ 19.81 to 19.98. The 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).

The open meetings law also grants citizens the right to tape record or videotape meetings held in open session so long as doing so does not disrupt the meeting. The law explicitly states that a governmental body must make a reasonable effort to accommodate anyone who wants to record, film, or photograph an open session meeting so long as the activity does not interfere with the conduct of the meeting or the rights of the participants. Wis. Stat. § 19.90. The open meetings law does not require a governmental body to permit recording of an authorized closed session. 66 Op. Att'y Gen. 318, 325 (1977); Maroney Correspondence (Oct. 31, 2006). In light of the law's declaration of policy found in Wis. Stat. § 19.81, governmental bodies should construe Wis. Stat. § 19.90 liberally to achieve the law's intended purpose of openness and transparency.

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 cases presenting novel issues of law that coincide with matters of statewide concern. While your matter is important, it does not appear to present novel issues of law that coincide with matters 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.

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).

Although we are declining to pursue an enforcement action at this time, 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>

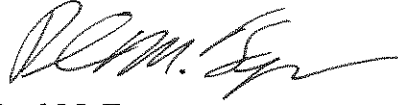
The Attorney General and DOJ's Office of Open Government are committed to increasing government openness and transparency, and DOJ endeavors to offer guidance in these areas. DOJ offers several open government resources through its website (<https://www.doj.state.wi.us/office-open-government/office-open-government>). DOJ provides the full Wisconsin Open Meetings Law, maintains an Open Meetings 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.

Ms. Marlyce M. Kawleski  
September 9, 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

Cc: Louis J. Molepske, Jr., Portage County District Attorney  
Jack Kawleski, Town Chairman, Eau Pleine

---

**From:** Breuer, Delanie M.  
**Sent:** Wednesday, September 14, 2016 11:34 AM  
**To:** Orville Seymer  
**Cc:** Ferguson, Paul M.  
**Subject:** RE: Follow up to Sept. 1, 2016 letter re: Florence School District.  
**Attachments:** Sept 13 letter to Paul Ferguson and Delanie Breuer20160913\_15193487.pdf

Dear Mr. Seymer,

Thank you for your letter. We have copied the school district on past correspondence with you, and will re-send all of our written responses, as well as this email, to them so they are aware of DOJ's position on the situation.

I agree that government transparency is an issue of great importance to all of us at DOJ, but as noted in my previous letter, the Office of Open Government is staffed by one Assistant Attorney General and two support staff members, and has limited resources to continue pursuing this matter. I would recommend you contact the school district directly, or move forward with a mandamus action, if you feel the school district is continuing to violate Wisconsin's Open Government laws.

Regards,  
Delanie

Delanie Breuer  
Assistant Deputy Attorney General  
Wisconsin Department of Justice  
Breuerdm@doj.state.wi.us

-----Original Message-----

From: Orville Seymer [mailto:legal@execpc.com]  
Sent: Tuesday, September 13, 2016 3:33 PM  
To: Breuer, Delanie M. <Breuerdm@doj.state.wi.us>  
Subject: Follow up to Sept. 1, 2016 letter re: Florence School District.

Dear Ms. Breuer and Mr. Ferguson

Attached you will find a follow up to your Sept. 1st letter regarding the Florence School Dist.

Thank You

Orville Seymer



STATE OF WISCONSIN  
DEPARTMENT OF JUSTICE

BRAD D. SCHIMEL  
ATTORNEY GENERAL

Andrew C. Cook  
Deputy Attorney General

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September 16, 2016

Mayor CoryAnn St. Marie-Carls

[REDACTED]  
St. Francis, WI 53235  
[REDACTED]

Dear Mayor St. Marie-Carls:

The Department of Justice (DOJ) is in receipt of your letters, dated January 22, 2016 (and amended February 1, 2016) and February 11, 2016, in which you requested assistance for several alleged open meetings violations by the St. Francis City Council.

In your January 22, 2016 correspondence, you stated that “[t]here was a deceptive and incorrect – official posting of the a [sic] closed session to follow the City of St. Francis City Council meeting – the content on the agenda, was not the actual content of the meeting.” You also stated that three citizens, after waiting for two hours, were incorrectly told that there would not be an open session after the closed session but “[i]ndeed there was an open session with a motion and action made.”

The Wisconsin Open Meetings Law, Wis. Stat. §§ 19.81 to 19.98, 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).

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.” Wis. Stat. § 19.84(2). 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.” *State ex rel. Buswell v. Tomah Area Sch. Dist.*, 2007 WI 71, ¶ 34, 301 Wis. 2d 178, 732 N.W.2d 804. However, “a meeting cannot address topics unrelated to the information in the notice.” *Id.* 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. I-05-93 (Apr. 26, 1993).

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).

Generally, the open meetings law gives wide discretion to a governmental body to decide whom to admit into a closed session. A governmental body may admit into a closed session anyone whose presence the body determines is necessary for the consideration of the subject matter of the meeting. If the governmental body is a subunit of a parent body, the subunit must allow members of the parent body to attend its open session and closed session meetings, unless the rules of the parent body or subunit provide otherwise. Wis. Stat. § 19.89.

A governmental body may not commence a meeting, convene in closed session, and subsequently reconvene in open session within twelve hours after completion of a closed session, unless public notice of the subsequent open session is given "at the same time and in the same manner" as the public notice of the prior open session. Wis. Stat. § 19.85(2). The notice need not specify the time the governmental body expects to reconvene in open session if the body plans to reconvene immediately following the closed session. If the notice does specify the time, the body must wait until that time to reconvene in open session. When a governmental body reconvenes in open session following a closed session, the presiding officer has a duty to open the door of the meeting room and inform any members of the public present that the session is open. Claybaugh Correspondence (Feb. 16, 2006).

In your correspondence you also stated that "[c]itizens have questioned me on the lack of record for these multiple CLOSED SESSION meetings, the Clerk is present but never takes any notes." 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 maintaining some type of record of all motions and roll-call votes, the Wis. Stat. § 19.88(3) requirement is being met.

In your February 11, 2016 correspondence you stated "[p]lease review Narrative and bullet points 1-4 as outlined with attachments." However, it is unclear as to whether you are asking any specific questions with regard to the narrative and bullet points. While you also ask for the "procedure in this regard [sic]," it is unclear from this statement what procedure you seek. The Attorney General and DOJ's Office of Open Government (OOG) are committed to increasing government openness and transparency, with a focus on the Wisconsin Open Meetings Law and the Wisconsin Public Records Law, Wis. Stat. §§ 19.31 to 19.39. It appears

that the assistance you seek in this portion of your correspondence may be outside the scope of the OOG's responsibilities. Therefore, the OOG cannot assist you concerning this aspect of your correspondence. If you have specific issues or questions regarding the narrative you provided related to the open meetings law or the public records law, you may write to us with those questions or concerns at any time.

From your correspondence, it appears that you are familiar with the open government resources that are available to you through the Wisconsin DOJ website (<https://www.doj.state.wi.us/office-open-government/office-open-government-resources>). DOJ provides the full Wisconsin Open Meetings Law, 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. If, after reviewing these resources, you have additional questions or concerns, you may write to us at any time. DOJ also maintains a Public Records Open Meetings (PROM) help line to respond to individuals' open government questions. The PROM telephone number is (608) 267-2220.

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 cases presenting novel issues of law that coincide with matters of statewide concern. While your matter is important, it does not appear to present novel issues of law that coincide with matters 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.

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).

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:

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Mayor CoryAnn St. Marie-Carls  
September 16, 2016  
Page 4

DOJ appreciates your concern for government transparency. 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,

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

Paul M. Ferguson  
Assistant Attorney General  
Office of Open Government

PMF:lah



STATE OF WISCONSIN  
DEPARTMENT OF JUSTICE

BRAD D. SCHIMEL  
ATTORNEY GENERAL

Andrew C. Cook  
Deputy Attorney General

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FAX 608/267-2779

September 19, 2016

Mr. Troy Klein

[REDACTED]  
Fitchburg, WI 53711-7418

Dear Mr. Klein:

The Department of Justice (DOJ) is in receipt of your correspondence received on March 24, 2016, in which you asked: "Does the requirement of a Records Officer to 'organize all records' infer that the records shall be organized in such a manner that false negatives do not occur?" You also stated, "if the manual or electronic filing is organized such that there is no way of verifying that a record in the State of Wisconsin's possession, but is otherwise 'lost' because the tracking of the manual or electronic record is insufficient, has the Records Officer meet [sic] their obligation to 'organize all records' when the answer to a requester is 'no such record'?"

The Attorney General and DOJ's Office of Open Government (OOG) are committed to increasing government openness and transparency. The OOG works to increase government openness and transparency with a focus on 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. Based on the information you provided in your correspondence, it appears the subject matter of your inquiry is outside this scope. However, we can provide you with general information about the public records law that you may find helpful.

From your correspondence, it is unclear what you mean by "the requirement of a Records Officer to 'organize all records'" or the origin of this quoted phrase. Each head of a Wisconsin department or independent agency must appoint a records and forms officer who is "responsible for compliance by the department or independent agency with all records and forms management laws and rules . . ." Wis. Stat. § 15.04(1)(j).

Regarding record retention, 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). Wis. Stat. § 946.72(1) states, in part, "Whoever with intent to injure or defraud destroys, damages, removes or conceals any public record is guilty of a Class H felony."

Under the public records law, if an authority does not have a record that a requester seeks, obviously, it cannot provide it. "[T]he public records law does not require an authority to provide requested information if no record exists, or to simply answer questions about a topic of interest to the requester." *Journal Times v. City of Racine Bd. of Police & Fire Comm'rs*, 2015 WI 56, ¶ 55, 362 Wis. 2d 577, 866 N.W.2d 563; see also *State ex rel. Zinngrabe v. Sch. Dist. of Sevastopol*, 146 Wis. 2d 629, 431 N.W.2d 734 (Ct. App. 1988). An authority is not required to create a new record by extracting and compiling information from existing records in a new format. See Wis. Stat. § 19.35(1)(L). See also *George v. Record Custodian*, 169 Wis. 2d 573, 579, 485 N.W.2d 460 (Ct. App. 1992).

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

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

If you would like to learn more about the public records law, 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. The OOG manages a Public Records Open Meetings (PROM) Help Line at (608) 267-2220 as well.

DOJ appreciates your concern. DOJ is committed to increasing government openness and transparency, and we are dedicated to the work necessary to preserve Wisconsin's proud tradition of open government. Thank you for your correspondence

Mr. Troy Klein  
September 19, 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

PMF:lah



STATE OF WISCONSIN  
DEPARTMENT OF JUSTICE

BRAD D. SCHIMEL  
ATTORNEY GENERAL

Andrew C. Cook  
Deputy Attorney General

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608/266-1221  
TTY 1-800-947-3529  
FAX 608/267-2779

September 20, 2016

Mr. Larry Wetenkamp

[REDACTED]

Newald, WI 54511

[REDACTED]

Dear Mr. Wetenkamp:

The Department of Justice (DOJ) is in receipt of your April 18, 2016 email correspondence to Attorney General Brad Schimel in which you stated "the town board (2 of 3 members) in where I live is violating the open minutes laws and having secret ballots and spending money on numerous things that have not been brought up for a public notification or anything." You also stated that you have "called the local forest county DA office 3 times and can not get any call back from them" and that you "don't know what else to do about this."

The Attorney General and DOJ's Office of Open Government (OOG) are committed to increasing government openness and transparency. The OOG works to increase government openness and transparency with a focus on 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. To the extent the subject matter of your correspondence pertains to matters outside the scope of the OOG, we are unable to assist you. However, we can address the areas within the OOG's scope by providing you with general information about the open meetings law that you may find helpful.

The open meetings law acknowledges that the public is entitled to the fullest and most complete information regarding government affairs as is compatible with the conduct of governmental business. Wis. Stat. § 19.81(1). All meetings of governmental 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).

Under the open meetings law, public notice of all meetings of a governmental body must be given by communication from the governmental body's chief presiding officer or his or her designee to the following: (1) the public; (2) to news media who have filed a written request for such notice; and (3) to the official newspaper (designated under Wis. Stat. §§ 985.04, 985.05 and 985.06) or, if there is no such paper, to a news medium likely to give

notice in the area. Wis. Stat. § 19.84(1). In addition to these requirements, other statutes may also set forth the type of notice required for a meeting of a governmental body.

It is important to note that notice to the public and notice to a news medium are separate requirements. A governmental body is not required to pay for, and the news medium is not required to publish, notice provided to the news medium. However, if a governmental body seeks to provide notice to the public by paid publication in a news medium, the chief presiding officer must ensure that the notice is published.

Public notice of every meeting of a governmental body must be provided at least 24 hours prior to the commencement of such a meeting. Wis. Stat. § 19.84(3). If, for good cause, such notice is impossible or impractical, shorter notice may be given, but in no case may the notice be less than two hours in advance of the meeting. *Id.* Furthermore, the law requires separate public notice for each meeting of a governmental body at a time and date “reasonably proximate to the time and date of the meeting.” Wis. Stat. § 19.84(4).

Ultimately, public notice of a meeting must give the “time, date, place and subject matter of the meeting . . . in such form as is reasonably likely to apprise members of the public and the news media thereof.” Wis. Stat. § 19.84(2). For additional information on the notice requirements of the open meetings law, you may wish to read pages 13 through 18 of the Open Meetings Law Compliance Guide available through DOJ’s website (<https://www.doj.state.wi.us/office-open-government/office-open-government>).

No secret ballot may be used to determine any election or decision of a governmental body, except the election of officers of a body. Wis. Stat. § 19.88(1). The open meetings law requires a governmental body to create and preserve a record of all motions and roll-call votes at its meetings. Wis. Stat. § 19.88(3). This requirement applies to both open and closed sessions. De Moya Correspondence (June 17, 2009). Written minutes are the most common method used to comply with the requirement, but they are not the only permissible method. It can also be satisfied if the motions and roll-call votes are recorded and preserved in some other way, such as on a tape recording. I-95-89 (Nov. 13, 1989). As long as the body creates and preserves a record of all motions and roll-call votes, it is not required by the open meetings law to take more formal or detailed minutes of other aspects of the meeting. Other statutes outside the open meetings law, however, may prescribe particular minute-taking requirements for certain governmental bodies and officials that go beyond what is required by the open meetings law. I-20-89 (Mar. 8, 1989). *See, e.g.*, Wis. Stat. §§ 59.23(2)(a) (county clerk); 60.33(2)(a) (town clerk); 61.25(3) (village clerk); 62.09(11)(b) (city clerk); 62.13(5)(i) (police and fire commission); 66.1001(4)(b) (plan commission); 70.47(7)(bb) (board of review).

Although Wis. Stat. § 19.88(3) does not indicate how detailed the record of motions and roll-call votes should be, as mentioned previously, the general legislative policy of the open meetings law is 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.” Wis. Stat. § 19.81(1). In light of that policy, it seems clear that a

governmental body's records should provide the public with a reasonably intelligible description of the essential substantive elements of every motion made, who initiated and seconded the motion, the outcome of any vote on the motion, and, if a roll-call vote, how each member voted. De Moya Correspondence (June 17, 2009).

Nothing in the open meetings law prohibits a body from making decisions by general consent, without a formal vote, but such informal procedures are typically only appropriate for routine procedural matters such as approving the minutes of prior meetings or adjourning. In any event, regardless of whether a decision is made by consensus or by some other method, Wis. Stat. § 19.88(3) still requires the body to create and preserve a meaningful record of that decision. Huebscher Correspondence (May 23, 2008).

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 presenting novel issues of law that coincide with matters of statewide concern. While your matter is important to you and those in your community, it does not appear to present novel issues of law that coincide with matters 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.

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).

We are providing a copy of this letter to Forest County District Attorney Charles Simono in the event he is unaware of your concerns. The open meetings law does not require a district attorney to commence an enforcement action upon receipt of a written request to do so. *See* Wis. Stat. § 19.97(4). A district attorney has broad discretion to decide whether to bring an action for enforcement. *See State v. Karpinski*, 92 Wis. 2d 599, 607, 285 N.W.2d 729 (1979). The open meetings law takes into account the fact that district attorneys may not always commence actions for enforcement and provides individuals with the option of commencing their own action pursuant to Wis. Stat. § 19.97(4). This option remains available to you.

You may also 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's fees. You may reach the service using the contact information below:

Mr. Larry Wetenkamp  
September 20, 2016  
Page 4

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

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

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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: Charles Simono, Forest County District Attorney



STATE OF WISCONSIN  
DEPARTMENT OF JUSTICE

BRAD D. SCHIMEL  
ATTORNEY GENERAL

Andrew C. Cook  
Deputy Attorney General

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608/266-1221  
TTY 1-800-947-3529  
FAX 608/267-2779

September 20, 2016

Mr. Paul A. Johnson

[REDACTED]  
Spooner, WI 54801  
[whitepineinvestigations@gmail.com](mailto:whitepineinvestigations@gmail.com)

Dear Mr. Johnson:

The Department of Justice (DOJ) is in receipt of your April 12, 2016 correspondence to me regarding your June 16, 2015 public records request made to the Spooner Area School District. It appears that you are dissatisfied with the video recording that is available for the June 15, 2016 meeting. You stated that "[i]t is my belief that the entire video is an open record and needs to be provided, even after the point of the board going into recess . . . . While the district may choose to put an edited version on their website which is what they have done . . . my request needs to be satisfied."

In addition to your correspondence, you provided a copy of a June 17, 2015 email to you from former Spooner Area School District Superintendent Michelle Schwab in which she explained the board's video recording process. Specifically, Ms. Schwab stated, "The record of the board meetings are created when the board is in session and that record is then posted to our website as a video recording." Ms. Schwab added, "If the board goes into recess or closed session, the recording is paused as the board is no longer in session conducting business in public."

As you are likely aware, the Wisconsin Public Records Law, Wis. Stat. §§ 19.31 to 19.39, "does not require an authority to provide requested information if no record exists, or to simply answer questions about a topic of interest to the requester." *Journal Times v. City of Racine Board of Police and Fire Commissioners*, 2015 WI 56, 55 (citation omitted); *see also State ex rel. Zinngrabe v. Sch. Dist. of Sevastopol*, 146 Wis. 2d 629, 431 N.W.2d 734 (Ct. App. 1988). Under the Wisconsin Open Meetings Law, Wis. Stat. §§ 19.81 to 19.98, a governmental body is not required to video-record its meetings. (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. Wis. Stat. § 19.88(3).) If a body decides to video-record its meetings voluntarily, there are no requirements under the open meetings law on how those meetings should be recorded. If you are dissatisfied with the way in which the board chooses to record their meetings, the open meetings law permits individuals to attend and record open sessions of meetings themselves. *See* Wis. Stat. § 19.90.

Following a Freedom of Information Council meeting on July 21, 2016, we spoke, and you explained your matter further. You indicated that, in response to your public records request, the school district withheld portions of a video recording not because they did not exist but because the school district said such portions of the video did not depict an open session of the meeting. As such, the school district's position was that they did not need to disclose them.

Generally, if a governmental body records its meetings, any such recordings are records subject to disclosure under the public records law. Under the public records law, requesters may seek 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 a record contains both information that is subject to disclosure and information that is not subject to disclosure, the authority must provide the portion of the record subject to disclosure and redact that which is not subject to disclosure. Wis. Stat. § 19.36(6). If an authority denies a written request, in whole or in part, the authority must provide a written statement of the reasons for denying the request. Wis. Stat. § 19.35(4)(b).

If a governmental body has a video recording of a meeting and events surrounding the meeting, generally, the entire recording would be subject to disclosure. While a video recording may include portions recorded outside the body's open session, such portions are likely still a record under the public records law. Exceptions to disclosure may apply to such portions, as they may for any record; in such a case, the requester is entitled to a written explanation for any denials of his or her written request.

On August 29, 2016, I spoke with Shannon Grindell of the Spooner Area School District regarding this matter. We discussed the public records law and the fact that, generally, a video recording such as that at issue in this matter is a record subject to disclosure. Ms. Grinnell stated that she would reach out to you. That same day, I left you a telephone voicemail message updating you on the matter. To date, 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.

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). Except for committed and incarcerated persons, an action for mandamus arising under the public records law must be commenced within three years after the cause of action accrues. Wis. Stat. § 893.90(2).

Alternatively, the requester may submit a written request for the district attorney of the county where the record is found, or the Attorney General, to file an action for mandamus seeking release of the requested records. Wis. Stat. § 19.37(1)(b). The Attorney General is

Mr. Paul A. Johnson  
September 20, 2016  
Page 3

authorized to enforce the public records law; however, he generally exercises this authority in cases presenting novel issues of law that coincide with matters 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 at this time.

Although, we are declining to pursue an action for mandamus in this instance at this time, 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

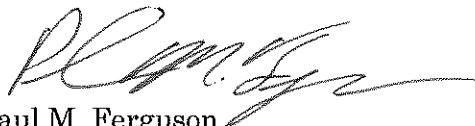
<http://www.wisbar.org/forpublic/ineedalawyer/pages/lris.aspx>

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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: John Burnett, Interim Superintendent  
Shannon Grindell



STATE OF WISCONSIN  
DEPARTMENT OF JUSTICE

BRAD D. SCHIMEL  
ATTORNEY GENERAL

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FAX 608/267-2779

September 21, 2016

Ms. Joy Waterbury

Dalton, WI 53926

Dear Ms. Waterbury:

The Department of Justice (DOJ) is in receipt of your April 19, 2016 email correspondence to Attorney General Brad Schimel in which you stated that you are a County Board Supervisor and your "County's Corporation Counsel rendered a legal opinion regarding a decision rendered in a joint meeting of two committees. Because of attorney/client privilege, the Corp Counsel decided a closed session meeting was needed. The closed session was properly posted on the agenda, however no statute number was cited." You added that the "[r]eason for closed session was 'Corporation Counsel legal opinion in regard to Joint Meeting.' The contents of the legal opinion dealt with research of statutes and our County's policies and procedures." Finally, you stated that you are "concerned this agenda item was not closed session material" and asked "[w]hat do you think?"

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)." *State ex rel. Buswell v. Tomah Area Sch. Dist.*, 2007 WI 71, ¶ 37, n.7, 301 Wis. 2d 178, 732 N.W.2d 804. 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. 66 Op. Att'y Gen. 93, 98. Merely identifying and quoting from a statutory exemption does not reasonably identify any particular subject that might be discussed during a closed session and thus is not adequate notice of a closed session. Weinschenk Correspondence (Dec. 29, 2006); Anderson Correspondence (Feb. 13, 2007). 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. *State ex rel. Schaeve v. Van Lare*, 125 Wis. 2d 40, 47, 370 N.W.2d 271 (Ct. App. 1985) (citation omitted).

Every meeting of a governmental body must initially be convened in open session. Wis. Stat. §§ 19.83 and 19.85(1). Before convening in closed session, the governmental body must follow the procedure set forth in Wis. Stat. § 19.85(1) which requires that the governmental body pass a motion, by recorded majority vote, to convene in closed session. If a motion is unanimous, there is no requirement to record the votes individually. *Schaeve*, 125 Wis. 2d at 51. Before the governmental body votes on the motion, the chief presiding officer must announce and record in open session the nature of the business to be discussed and the specific statutory exemption which is claimed to authorize the closed session. 66 Op. Att’y Gen. 93, 97-98. Stating only the statute section number of the applicable exemption is not sufficient because many exemptions contain more than one reason for authorizing closure.

In your correspondence, you wrote that the corporation counsel stated the closed session was necessary because of “attorney/client privilege.” The exemption in Wis. Stat. § 19.85(1)(g) authorizes a closed session for “[c]onfering with legal counsel for the governmental body who is rendering oral or written advice concerning strategy to be adopted by the body with respect to litigation in which it is or is likely to become involved.” The presence of the governmental body’s legal counsel is not, in itself, sufficient reason to authorize closure under this exemption. The exemption applies only if the legal counsel is rendering advice on strategy to adopt for litigation in which the governmental body is or is likely to become involved. The information provided is insufficient to evaluate whether the subject matter of the corporation counsel’s legal opinion and related discussion concerned litigation strategy such that it would properly fall within the exemption.

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 cases presenting novel issues of law that coincide with matters of statewide concern. While your matter is important, it does not appear to present novel issues of law that coincide with matters 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.

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).

You may also 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’s fees. You may reach it using the contact information below:

Ms. Joy Waterbury  
September 21, 2016  
Page 3

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 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. 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 Open Meetings Law, maintains an Open Meetings Law Compliance Guide, and provides a recorded webinar and associated presentation documentation.

DOJ appreciates your concern for government transparency. 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,

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

Paul M. Ferguson  
Assistant Attorney General  
Office of Open Government

PMF:lah



STATE OF WISCONSIN  
DEPARTMENT OF JUSTICE

BRAD D. SCHIMEL  
ATTORNEY GENERAL

Andrew C. Cook  
Deputy Attorney General

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Assistant Attorney General  
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608/266-1221  
TTY 1-800-947-3529  
FAX 608/267-2779

September 26, 2016

Dr. J.D. Palarski  
Tri County Veterinary Center  
1055 Truman Street  
Kimberly, WI 54136

Dear Dr. Palarski:

The Department of Justice (DOJ) is in receipt of your correspondence addressed to Attorney General Brad Schimel, dated May 5, 2015 (but faxed on May 5, 2016), in which you stated that you are forwarding "correspondences about December 2015 crimes against my business." You stated that you have contacted your local police department and district attorney's office regarding this incident and that both agencies have since closed their files. You also stated that you "ultimately received no response to my Open Records Request" made to the district attorney's office. You stated that you "would STILL like the 'records' associated with and documenting the obviously flawed reflective decision making process used by police AND the DA's office." Finally, you stated that you are forwarding your public records request to the Attorney General's office for an explanation as to why the alleged crimes "went essentially uninvestigated by law enforcement and the District Attorney....while ignoring simple Open Records Requests."

DOJ's Office of Open Government (OOG) works to increase government openness and transparency with a focus on 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. Based on the information you provided in your correspondence, it appears some of subject matter of your correspondence is outside this scope. However, we can address your correspondence to the extent it concerned the public records law.

In your correspondence, it is unclear if the police department and district attorney's office denied your public records requests or if they have not responded to your requests. 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”).

The OOG 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 for the authority to send the requester 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.

There is a general presumption that “public records shall be open to the public unless there is a clear statutory exception, unless there exists a limitation under the common law, or unless there is an overriding public interest in keeping the public record confidential.” *Hathaway v. Joint Sch. Dist. No. 1, City of Green Bay*, 116 Wis. 2d 388, 397, 342 N.W.2d 682 (1984). However, access to prosecutors’ case files, whether open or closed, are exempt from disclosure. The Wisconsin Supreme Court has determined that “the common law provides an exception which protects the district attorney’s files from being open to public inspection.” *State ex rel. Richards v. Foust*, 165 Wis. 2d 429, 433-34, 477 N.W.2d 608 (1991).

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

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 novel issues of law that coincide with matters of statewide concern. While the public records issue that you raised is important, it does not appear to raise novel issues of law that coincide with matters 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 at this time.

Although we are declining to pursue an action for mandamus 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’s fees. You may reach the service using the contact information below:

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In your correspondence, you also raised concerns regarding areas outside the OOG's scope, specifically, your frustrations about the investigations into the alleged December 2015 crimes against your business. Enclosed, please find a copy of Director Tina Virgil's May 18, 2016 letter to you advising that "you contact your local police or sheriff's departments, as they are the agencies with jurisdiction to investigate and prosecute crimes occurring in their areas." Director Virgil also suggested contacting the supervisor of the person with whom you dealt previously, and, if necessary, the police chief or the sheriff. Finally, Director Virgil wrote that if "the district attorney agrees a crime may have occurred, he or she may be able to assist in getting law enforcement to undertake an investigation."

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

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

Enclosure



STATE OF WISCONSIN  
DEPARTMENT OF JUSTICE

BRAD D. SCHIMEL  
ATTORNEY GENERAL

Andrew C. Cook  
Deputy Attorney General

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P.O. Box 7857  
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608/266-1221  
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FAX 608/267-2779

September 26, 2016

Attorney Tom Kamenick  
Wisconsin Institute for Law & Liberty  
1139 E. Knapp Street  
Milwaukee, WI 53202-2828

Dear Mr. Kamenick:

The Department of Justice (DOJ) is in receipt of your April 20, 2016 correspondence addressed to me requesting advice regarding the Wisconsin Open Meetings Law, Wis. Stat. §§ 19.81 to 19.98. You wrote that in 2011, an owner of land in the Village of Big Bend "was granted a conditional use permit by the Village to dump fill material on the eastern portion of his land, a former landfill." You provided that the Village's Plan Commission met numerous times in closed session regarding the individual's request for another conditional use permit "to continue the filling of the western portion of his property," known as "Phase II." You asked for "advice on whether these closed sessions are proper."

The open meetings law acknowledges that the public is entitled to the fullest and most complete information regarding government affairs as is compatible with the conduct of government business. Wis. Stat. § 19.81(1). All meetings of government bodies shall be held publicly 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 provides 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.

In your correspondence, you provided that the Village's Plan Commission cited the Wis. Stat. § 19.85(1)(e) exemption as their reasoning for going into numerous closed sessions. You also provided a portion of the Plan Commission's February 26, 2015 meeting minutes, specifically, the minutes stated, "It was suggested the Commission meet in closed session to put together the conditions for Phase II." Under the open meetings law, a closed session is

authorized for “[d]eliberating 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.” Wis. Stat. § 19.85(1)(e). The Wis. Stat. § 19.85(1)(e) exemption is not limited to deliberating or negotiating the purchase of public property or the investing of public funds. Therefore, “put[ting] together the conditions” may fall under the “conducting other specified public business” portion of the Wis. Stat. § 19.85(1)(e) exemption.

Governmental officials must keep in mind, however, that this exemption is restrictive not expansive. The exemption applies only when “competitive or bargaining reasons *require* a closed session.” Wis. Stat. § 19.85(1)(e) (emphasis added). Only aspects of a matter that fall within a specific exemption may be discussed in a closed session. If aspects of a matter do not properly fall within an exemption, those aspects must be discussed in an open meeting. Additionally, the discussion must involve competitive or bargaining reasons requiring a closed session, otherwise, the discussion must take place in an open meeting.

Based on the facts presented, I am unable to make a factual determination as to whether the closed sessions you discussed were proper. However, please note that when a governmental body seeks to convene in closed session under Wis. Stat. § 19.85(1)(e), the burden is on the body to show that competitive or bargaining interests require closure. *State ex rel. Citizens for Responsible Dev. v. City of Milton*, 2007 WI App 114, ¶¶ 6-8, 300 Wis. 2d 649, 731 N.W.2d 640. “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).

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 presenting novel issues of law that coincide with matters of statewide concern. In this case, while the open meetings issues you raised are important, they do not appear to be novel issues of law that coincide with matters of statewide concern. As a result, we respectfully decline to pursue an enforcement action on your behalf at this time.

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). You may file a verified complaint for each alleged violation, or you may combine each of the alleged violations in a single 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).

There are several open government resources available to you through the Wisconsin DOJ website (<https://www.doj.state.wi.us/office-open-government/office-open-government-resources>). DOJ provides the full Wisconsin Open Meetings Law, maintains an Open

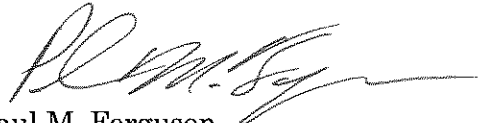
Attorney Tom Kamenick  
September 26, 2016  
Page 3

Meetings Law Compliance Guide, and provides a recorded webinar and associated presentation documentation.

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

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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ATTORNEY GENERAL

Andrew C. Cook  
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Assistant Attorney General  
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TTY 1-800-947-3529  
FAX 608/267-2779

September 23, 2016

Mr. Bill Schanen IV  
Ozaukee Press  
125 E. Main Street  
Port Washington, WI 53074

Dear Mr. Schanen:

The Department of Justice (DOJ) is in receipt of your April 14, 2016 correspondence addressed to me in which you requested "an opinion regarding the City of Port Washington's use of Wis. Stat. 19.85(1)(e) to close meetings of the Common Council." Specifically, you asked "can the Common Council meet in closed session with a prospective buyer/developer or property owner under this exemption to the open meetings law?" You provided details of two examples of this scenario occurring.

As you are likely aware, the Wisconsin Open Meetings Law, Wis. Stat. §§ 19.81 to 19.98, acknowledges that the public is entitled to the fullest and most complete information regarding government affairs as is compatible with the conduct of government business. Wis. Stat. § 19.81(1). All meetings of government bodies shall be held publicly 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. Generally, the open meetings law gives wide discretion to a governmental body to admit into a closed session anyone whose presence the body determines is necessary for the consideration of the subject matter of the meeting.

Under the open meetings law, a closed session is authorized for "[d]eliberating 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.” Wis. Stat. § 19.85(1)(e). This exemption is not limited to deliberating or negotiating the purchase of public property or the investing of public funds. Therefore, the sale and development of public properties may also fall under the exemption.

Governmental officials must keep in mind, however, that this exemption is restrictive not expansive. The exemption applies only when “competitive or bargaining reasons *require* a closed session.” Wis. Stat. § 19.85(1)(e) (emphasis added). Only aspects of a matter that fall within a specific exemption may be discussed in a closed session. If aspects of a matter do not properly fall within an exemption—for example, if portions of a discussion do not involve competitive or bargaining reasons requiring a closed session—those aspects must be discussed in an open meeting.

Despite the details you provided, I am unable to make a factual determination as to whether the closed sessions were proper in either of your two examples. It is possible that circumstances exist in which competitive or bargaining reasons required a closed session. As such, we respectfully decline to offer a formal opinion regarding the city’s use of this particular exemption to close meetings of the Common Council. However, it is important to note that when a governmental body seeks to convene in closed session under Wis. Stat. § 19.85(1)(e), the burden is on the body to show that competitive or bargaining interests require closure. *State ex rel. Citizens for Responsible Dev. v. City of Milton*, 2007 WI App 114, ¶¶ 6-8, 300 Wis. 2d 649, 731 N.W.2d 640. Additionally, “[m]ere 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).

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 presenting novel issues of law that coincide with matters of statewide concern. 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).

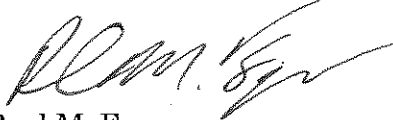
DOJ offers several open government resources available through its website (<https://www.doj.state.wi.us/office-open-government/office-open-government-resources>). DOJ provides the full Wisconsin Open Meetings Law, maintains an Open Meetings Law Compliance Guide, and provides a recorded webinar and associated presentation documentation.

DOJ appreciates your concerns regarding government transparency. We are dedicated to the work necessary to preserve Wisconsin’s proud tradition of open government. Thank you for your correspondence.

Mr. Bill Schanen IV  
September 23, 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 stylized flourish extending from the end.

Paul M. Ferguson  
Assistant Attorney General  
Office of Open Government

PMF:lah



STATE OF WISCONSIN  
DEPARTMENT OF JUSTICE

BRAD D. SCHIMEL  
ATTORNEY GENERAL

Andrew C. Cook  
Deputy Attorney General

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608/266-1221  
TTY 1-800-947-3529  
FAX 608/267-2779

September 26, 2016

Mr. Gary Kohlenberg  
[REDACTED]

Dear Mr. Kohlenberg:

The Wisconsin Department of Justice (DOJ) is in receipt of your April 27, 2016 email correspondence to me in which you stated that you recently requested a public record from a governmental agency and was told "the request would only be fulfilled in person." You stated you "would like a copy of the public record transmitted to me from the governmental agency via fax, email or USPS. What is the interpretation of the Public Records law regarding the transmission of the document?" Earlier in the day on April 27, 2016, we discussed your matter via telephone; you sent the follow-up email because you wished to receive a written explanation of the aspects of the law that we discussed.

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, 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.

A request for records is sufficient if it is directed to an authority and reasonably describes the records or information requested. Wis. Stat. § 19.35(1)(h). There are no "magic words" that are required, and no specific form is permitted to be required in order to submit a public records request. Under the public records law, there is no requirement that a request must be made or fulfilled in person. *See* Wis. Stat. § 19.35(1)i ("Except as authorized under this paragraph, no request . . . may be refused because the person making the request is unwilling to be identified or to state the purpose of the request"). Additionally, generally, an authority may not refuse a request because the request is received by mail unless prepayment of a fee is required under Wis. Stat. § 19.35(3)(f). Wis. Stat. § 19.35(1)(i). "A legal custodian may impose reasonable restrictions on the manner of access to an original record *if the record is irreplaceable or easily damaged.*" Wis. Stat. § 19.35(1)(k) (emphasis added).

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 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.

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 in cases presenting novel issues of law that coincide with matters 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 at this time.

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 the service 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>

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.

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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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September 26, 2016

Ms. Denise Wiedemeier  
[REDACTED]

Dear Ms. Wiedemeier:

The Department of Justice (DOJ) is in receipt of your April 25, 2016 email correspondence to Attorney General Brad Schimel. In your correspondence, you stated that you are a town board supervisor in the Town of Peshtigo. You expressed concerns about matters related to open meetings and other town issues. You stated that you are "looking for direction on what can be done to resolve all the turmoil."

The Attorney General and DOJ's Office of Open Government (OOG) are committed to increasing government openness and transparency. The OOG works in furtherance of this with a focus on 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. The OOG is only authorized to provide assistance within this scope. You wrote that you and other board members received threats, and you are "scared to do what is right." I suggest that you contact local law enforcement or your district attorney regarding any such threats.

In your correspondence, you indicated you called and left a message regarding your concerns. DOJ's Office of Open Government (OOG) maintains a Public Records/Open Meetings (PROM) help line. The OOG has no record of you leaving such a message with the PROM line (although it is possible that you left a message via another DOJ telephone line). For future reference, you may reach the OOG's PROM line at (608) 267-2220.

You stated that several road projects were completed without board approval. The "board voted 3 to 2 to not pay one of the projects. . . . and now our town chairman is trying to file charges against us for a walking quorum." There is insufficient information to determine whether a walking quorum may have occurred. Also, based on the information you provided, I am unable to determine what specific questions you have regarding the open meetings law. Therefore, I will provide you with general information concerning the open meetings law, including walking quorums and the law's enforcement provisions.

As you are likely aware, the open meetings law acknowledges that the public is entitled to the fullest and most complete information regarding government affairs as is compatible with the conduct of government business. Wis. Stat. § 19.81(1). All meetings of government bodies shall be held publicly 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).

A “walking quorum” is a series of gatherings among separate groups of members of a governmental body, each less than quorum size, who agree, tacitly or explicitly, to act uniformly in sufficient number to reach a quorum. *State ex rel. Newspapers v. Showers*, 135 Wis. 2d 77, 92, 398 N.W.2d 154 (1987) (quoting *State ex rel. Lynch v. Conta*, 71 Wis. 2d 662, 687, 239 N.W.2d 313 (1976)). In *Conta*, the Court recognized the danger that a walking quorum may produce a predetermined outcome and thus render the publicly-held meeting a mere formality. *Conta*, 71 Wis. 2d at 685-88. The Court commented that any attempt to avoid the appearance of a “meeting” through use of a walking quorum is subject to prosecution under the open meetings law. *Id.* at 687. Additionally, the requirements of the open meetings law cannot be circumvented by using an agent or surrogate to poll the members of governmental bodies through a series of individual contacts.

The essential feature of a “walking quorum” is the element of agreement among members of a body to act uniformly in sufficient numbers to reach a quorum. Where there is no such express or tacit agreement, exchanges among separate groups of members may take place without violating the open meetings law. The signing, by members of a body, of a document asking that a subject be placed on the agenda of an upcoming meeting thus does not constitute a “walking quorum” where the signers have not engaged in substantive discussion or agreed on a uniform course of action regarding the proposed subject. In contrast, where a majority of members of a body sign a document that expressly commits them to a future course of action, a court could find a walking quorum violation. Furthermore, the use of email voting to decide matters fits the definition of a “walking quorum” violation of the open meetings law.

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 presenting novel issues of law that coincide with matters of statewide concern. 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).

Ms. Denise Wiedemeier

September 26, 2016

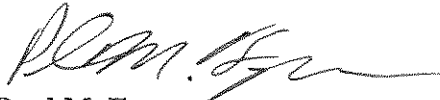
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DOJ appreciates your concern. We are dedicated to the work necessary to preserve Wisconsin's proud tradition of open government. Thank you for your correspondence.

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Sincerely,

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

Paul M. Ferguson  
Assistant Attorney General  
Office of Open Government

PMF:lah



**STATE OF WISCONSIN  
DEPARTMENT OF JUSTICE**

**BRAD D. SCHIMEL**  
ATTORNEY GENERAL

Andrew C. Cook  
Deputy Attorney General

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608/266-1221  
TTY 1-800-947-3529  
FAX 608/267-2779

September 27, 2016

Jeff Brudos, Administrator  
Town of Shelby  
2800 Ward Avenue  
La Crosse, WI 54601

Timothy Candahl, Chairman  
Shelby Town Board  
W4709 Cherrywood Dr.  
La Crosse, WI 54601

Dear Sirs:

The Department of Justice (DOJ) is in receipt of two pieces of anonymous correspondence, received on May 24, 2016 and June 16, 2016, alleging violations of the Wisconsin Open Meetings Law, Wis. Stat. §§ 19.81 to 19.98. The alleged violations primarily concern proper notice of meetings. Enclosed, please find a copy of both pieces of correspondence. I am writing to make you aware of these allegations, and provide general information regarding proper notice in the event there are notice issues.

The Attorney General and DOJ's Office of Open Government (OOG) are committed to increasing government openness and transparency, and DOJ endeavors to offer guidance in these areas. 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 Open Meetings Law. Additionally, DOJ maintains an Open Meetings Law Compliance Guide and provides a recorded webinar and associated presentation documentation. The OOG works to increase government openness and transparency with a focus on 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. The OOG also manages a Public Records/Open Meetings (PROM) help line, which you may reach by calling (608) 264-2220.

As you are undoubtedly aware, the open meetings law acknowledges that the public is entitled to the fullest and most complete information regarding government affairs as is compatible with the conduct of governmental business. Wis. Stat. § 19.81(1). All meetings of governmental 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).

As mentioned previously, the primary concern raised by the correspondence regards notice. Under the open meetings law, public notice of all meetings of a governmental body must be given by communication from the governmental body's chief presiding officer or his or her designee to the following: (1) the public; (2) to news media who have filed a written request for such notice; and (3) to the official newspaper (designated under Wis. Stat. §§ 985.04, 985.05 and 985.06) or, if there is no such paper, to a news medium likely to give notice in the area. Wis. Stat. § 19.84(1). In addition to these requirements, other statutes may also set forth the type of notice required for a meeting of a governmental body.

It is important to note that notice to the public and notice to a news medium are separate requirements. A governmental body is not required to pay for, and the news medium is not required to publish, notice provided to the news medium. However, if a governmental body seeks to provide notice to the public by paid publication in a news medium, the chief presiding officer must ensure that the notice is published.

Public notice of every meeting of a governmental body must be provided at least 24 hours prior to the commencement of such a meeting. Wis. Stat. § 19.84(3). If, for good cause, such notice is impossible or impractical, shorter notice may be given, but in no case may the notice be less than two hours in advance of the meeting. *Id.* Furthermore, the law requires separate public notice for each meeting of a governmental body at a time and date "reasonably proximate to the time and date of the meeting." Wis. Stat. § 19.84(4).

Ultimately, public notice of a meeting must give the "time, date, place and subject matter of the meeting . . . in such form as is reasonably likely to apprise members of the public and the news media thereof." Wis. Stat. § 19.84(2). For additional information on the notice requirements of the open meetings law, you may wish to read pages 13 through 18 of the Open Meetings Law Compliance Guide available through DOJ's website (<https://www.doj.state.wi.us/office-open-government/office-open-government>).

The correspondence also appeared to raise the issue of a quorum of the Town Board attending a meeting of the Parks and Vacant Land Committee, apparently without proper notice. A meeting occurs when a convening of members of a governmental body satisfies two requirements. *See State ex rel. Newspapers, Inc. v. Showers*, 135 Wis. 2d 77, 398 N.W.2d 154 (1987). The first requirement under the so-called *Showers* test is that there must be a purpose to engage in governmental business (the purpose requirement). Second, the number of members present must be sufficient to determine the governmental body's course of action (the numbers requirement). A meeting does not include any social or chance gathering or conference that is not intended to avoid the requirements of the open meetings law.

Regarding the purpose requirement, a body is engaged in governmental business when its members gather to simply hear information on a matter within the body's realm of authority. *See State ex rel. Badke v. Vill. Bd. of Vill. of Greendale*, 173 Wis. 2d 553, 573-74, 494 N.W.2d 408 (1993). Thus, mere attendance at an informational meeting on a matter within a body's realm of authority satisfies the purpose requirement. The members of the body need not discuss the matter or even interact. *Id.* at 574-76. This applies to a body that is only advisory and that has no power to make binding decisions. *See State v. Swanson*, 92 Wis. 2d 310, 317, 284 N.W.2d 655 (1979).

Mr. Jeff Brudos and Mr. Timothy Candahl

September 27, 2016

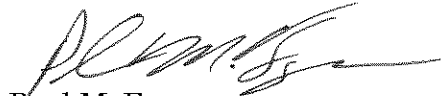
Page 3

The anonymous correspondence also referenced the filling of openings on boards and committees, which raised the issue of voting. The open meetings law states, "Unless otherwise specifically provided by statute, no secret ballot may be utilized to determine any election or other decision of a governmental body except the election of the officers of such body in any meeting." Wis. Stat. § 19.88(1). This language is clear and unambiguous. A governmental body may not use a secret ballot except to elect officers of the body.

DOJ is dedicated to the work necessary to preserve Wisconsin's proud tradition of open government. We hope you appreciate that we brought this matter to your attention. If you wish to discuss this matter, please contact me. Thank you.

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 dark ink, appearing to read "Paul M. Ferguson", with a long horizontal flourish extending to the right.

Paul M. Ferguson  
Assistant Attorney General  
Office of Open Government

PMF:lah

Enclosures



- Home
- About Town of Shelby
- Administration
- Assessor
- Calendar of Events
- Clerk/Treasurer
- Elections/Voting Information
- Fire Department
- Inspection Department
- Land Use Planning
- Online Bill Pay
- Ordinances
- Park & Rec
- Park and Vacant Land
- Police Department
- Refuse & Recycling
- Roads
- Sanitary District #2
- Shelby Town Board
- Shelby Planning Commission

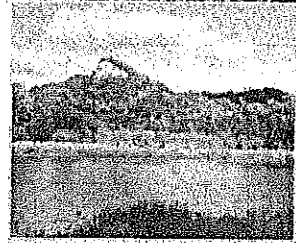
[Park and Vacant Land](#) » [Park and Vacant Land Agendas](#) » [2016 Agendas](#)

## 2016 Agendas

1/13/2016 canceled

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- [Voter Public Access](#)
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- [Shelby Youth Ball](#)

2600 Ward Avenue, La Crosse, Wisconsin 54601 | Office Hours: Mon-Fri 8am to 4pm | Phone: 608.788.1032 | Fax: 608.788.6540 | [Home](#) | [Contact Us](#) | [Site Map](#)  
Website Development by [Webteam, Inc.](#)

TOWN OF SHELBY VIOLATES OPEN RECORDS  
LAW:

January 13<sup>th</sup> meeting cancelled?

# TODAY IN YOUR BACKYARD

Barbara Ulrich Jan 12, 2016

f t e h

## ENTERTAINMENT

**Tuesday Nite Music Club**, with The Feral Cats, 6:30 to 9:30 p.m., Leo & Leona's, Newburg Corners, 608-453-3637.

## FAMILY

**Kids' Praise**, for children ages birth to 5 with caregiver, 9 to 10 a.m., St. Paul's Lutheran Church, Onalaska, 608-783-2552.

**Story time**, for children ages 3 to 6, 6:30 to 7:15 p.m., Holmen Area Library, Holmen. 608-526-4198

**Story time**, for children ages 3 to 6, 6:30 to 7:15 p.m., Hazel Brown Leicht Memorial Library, West Salem, 608-786-1505.

## GOVERNMENT

**Onalaska Town Board meeting**, 6:30 p.m., Onalaska Town Hall.

## RECREATION

**Duplicate bridge**, 7 to 10:30 p.m., South Side Senior Center, 1220 Denton St., 608-797-3587.

**Casino night**, 8 to 10 pm. Overtime Sports Bar, 1920 Ward Ave., 608-796-1886.

Meeting not posted in the Jan 12<sup>th</sup> issue of the LaCrosse Tribune....

# TODAY IN YOUR BACKYARD

Emily Pyrek Jan 13, 2016



## COMMUNITY

**American Legion Junior Shooting Sports**, 6 to 8 p.m., ages 8 to 18, equipment provided, free, American Legion Post 220, 103 Legion Drive, Soldiers Grove, 608-734-3037.

## ENTERTAINMENT

**Dan Berger's Songwriter's Corner**, 6 p.m. to 10:05 a.m., songwriters showcase, Double Deuce Bar & Grill, 1305 Bainbridge St., La Crosse, 608-790-8222.

## FAMILY

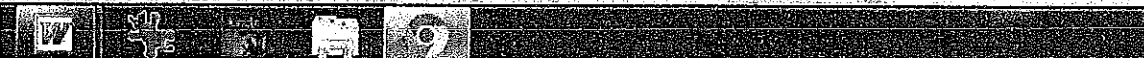
**Terrific Twos**, 9:30 to 10 a.m., La Crosse Public Library, 800 Main St., 608-789-7161.

**Story time at La Crosse County Library**, 10:15 to 11 a.m., ages 3 to 6, Hazel Brown Leicht Memorial Library, 201 Neshonoc Road, West Salem, 781-9568, ext 5.

**Family Story time**, 10:45 to 11:15 a.m. and 5:30 to 6 p.m., South Community Library, 1307 S. 16th St., 608-789-7161.

## FOOD

**Homemade pizza**, 5 to 8 p.m., American Legion Post 226, 731 Sand Lake Road, Onalaska, \$4.608



Meeting not posted in the Jan 13<sup>th</sup> issue of the LaCrosse Tribune, either....

**Homemade pizza**, 5 to 8 p.m., American Legion Post 336, 731 Sand Lake Road, Onataska, \$4, 608-783-3300.

**Pearl Street Brewery tasting**, 6 to 8 p.m., free, Eagle's Nest Sports Bar, 1914 Campbell Road, 608-782-7764.

## HEALTH

**Cleanses: Necessary or Not?**, 6 to 7:30 p.m., teas and herbal samples, People's Food Co-op, 315 Fifth Ave. S., \$10 members, \$20 nonmembers, 608-784-5798.

## RECREATION

**Euchre and 500**, 12:45 p.m., South Side Senior Center, 1220 Denton St., \$1, 608-782-2444.

**CheezLand Uke Band**, 6 to 8:30 p.m., Moose Lodge, 1932 Ward Ave., \$3, 608-781-8288.

**Trivia**, 7 to 9 p.m., Greengrass Cafe, 1904 Campbell Road, 608-782-0825.

**Bingo**, 7 to 9 p.m., Overtime Sports Bar, 1920 Ward Ave., 608-796-1996.

**Trivia**, 7:30 to 10 p.m., Sloopy's Bar & Grill, 163 Copeland Ave., 608-785-0245.

**Dave Kiral**, 7:30 to 10:30 p.m., Harry J. Olson Senior Center, 1607 North St., \$5, 608-783-3865.

**Karaoke**, 9 p.m. to 2 a.m., Smokey's Bar and Grill, 112 Mill St., Holmen, 608-526-4984.

## SPEAKERS AND PROGRAMS

**/ermicomposting** with guest speaker Joe Klinge, 7 a.m., People's Food Co-op, 315 Fifth Ave. S., 608-788-4104.



**TOWN OF SHELBY**  
**Parks and Vacant Land Committee Minutes**

DATE & TIME: Wednesday January 13, 2016 at 6:00 PM

LOCATION: Shelby Town Hall Meeting Room

PRESENT: Tom Ehler, Terri Schlichenmeyer, Steve Brubaker, Jean Wiggert, Josh Blum and Gene Roberts

ABSENT:

ALSO PRESENT: Town Chair Tim Candah and Jeff Brudos, Town Administrator

**MEETING HELD WITH 2 CHAIRS IN ATTENDANCE**

1. Meeting called to order at 6:05 by Tim Ehler
2. Motion by Blum, second by Wiggert to approve the minutes of the November 18, 2015 meeting with the correction that Josh Blum was in attendance. Motion passed
3. Discussion on the survey to be taken for parks. Survey Monkey would charge for the service, based on the number of questions being asked. Survey to be put on Shelby web site, possible filling in and submitting electronically. Place survey on counter at Town Hall and have available for the election.
4. Discussion on the disk golf course in Mormon Coulee Park. There have been issues with players going on private property, being inconsiderate with persons walking in the park and acting threateningly toward adjoining property owners. Course has had a great deal of use this fall, due to late winter, also increased traffic. Discussion on the course layout, and delineating where the Town land and private land are separate. Neighbors Todd Fisher and Frank Hewines spoke about the issue. Motion by Roberts to recommend to the Shelby Board that goals 5 and 9 be removed and the design be examined between now and when the weather conditions make it possible to relocate course holes if necessary. Also to consult with neighboring communities relative to the plans for disk golf courses. Motion seconded by Brubacker and passed.
5. Discussion on property lines between the park and private property in Mormon Coulee Park. The Frank Hewines property has a garage right next to the park land and his garage may not be able to be accessed if a fence is constructed on the property line. There is a temporary fence that has been installed.
6. Discussion on the Mark Kay property as a way to access the Lommen property located on top of the bluff west of Wedgewood Valley. Blum and Roberts will view the property.
7. Discussion on the Arbor Hills walking trail. Potential trail would connect Arbor Hills with Wedgewood Valley.
8. Discussion on the Highway 14/35/61 intersection. Discussion on a round a bout at this location.
9. Question on the potential for a bike/walking trail along Hwy 14/61. It was stated this is being considered in the discussions with the City on a boundary agreement.
10. Brudos stated the park land at the end of Battlestone Station Road has been tilled up and planted with milkweed, for butterflies. The large Cottonwood trees in Mormon Coulee Park will be removed as they are getting towards the end of their life span and are dangerous.
11. Next meeting February 17, 2016 at 6:00 PM
12. Meeting adjourned at 7:25 PM.



Department of Justice  
P.O. Box 7857  
Madison, WI 53701-7857

I am writing to call attention to a problem with the Town of Shelby in La Crosse County. For a long time, they've held meetings without posting them according to the law and not posting other important information that people have asked for.

#### PARKS AND VACANT LAND COMMITTEE

- They say this is an "advisory board" but this board makes decisions sometimes. Meetings are rarely, if ever, posted in the local newspaper. Citizens have requested more public notice but the township says they will do a better job and they never do.
- On the township website ([www.townofshelby.com](http://www.townofshelby.com)), under Park and Vacant Land, there is a meeting for 1/13/16 that is marked as cancelled. It was not posted in the local newspaper or on the paper's website but the meeting WAS HELD and two township chairmen were in attendance. Proof can be seen under Parks 2016 "minutes" on the same website. Clear violation of the law.
- There was a meeting in February, but no minutes are posted.
- The meeting on 3/23/16 WAS HELD, though the town's website says it was cancelled.
- There was a meeting on 5/31/16 and it was not in the newspaper OR on the Park and Vacant Land agenda page. There is no sign that it was held or even planned but it was.

These things are sometimes listed on the calendar page, but citizens would have to know where to look because it's not on the Parks comm.. page.

#### TOWNSHIP MEETINGS, etc.

Important town business is lumped under "Administrator's Reports." These are NOT posted on the website or anywhere; citizens have to ask each time for those reports in order to know what's town business..

People have asked many times that ALL reports be posted on line and are transparent but this has not been done. A lot of things are hidden in the administrator's report until it's too late for concerned citizens to do anything about them.

REC'D JUN 16 09:11:00

When there are openings on any extra boards or committees, the vacancy is never posted or talked about in meetings. Board members contact their friends and cronies and appoint them before citizens can voice an opinion.

#### SANITARY BOARD MEETINGS

- These are rarely, if ever, posted in the local newspaper. This board makes decisions separate from the Township Board and they are accountable to themselves. They admit that they can and do make important decisions without Board input.
- There was a meeting on 5/17/16 for an issue that people are against and it was not in the local newspaper. It was on the township website on the calendar of events, but nowhere else on the site. An agenda WAS NOT on the "Sanitary Department" section on the website. Because the issue was mostly hidden in the Admin. Report, not a lot of people even knew the project was in the works.
- There was a meeting set on this issue for 6/7/16 and it was not on the township website at all. Not anywhere, not even on the calendar of Events. It was not in the local newspaper, not on the local newspaper's website. Citizens who wished to attend this meeting would have NO idea that it was held.
- Letters to people in the neighborhood were supposedly sent but not all area residents received the letters.
- A meeting was scheduled for 6/9/16. It was not in the newspaper, nor was it on the newspaper's website. It was on the Calendar of events for the township, but NO agenda was posted. It was not posted on the door of either township building. Citizens who wanted to attend the meeting had no idea it was being held. As for the location, it's anybody's guess.

This is very sloppy information giving. It might also be breaking the law again and again. It is not helping this township one bit.

Citizens of this township have asked for more transparency but have not received it. We'd like to know what our government is doing.

Please help.



STATE OF WISCONSIN  
DEPARTMENT OF JUSTICE

BRAD D. SCHIMEL  
ATTORNEY GENERAL

Andrew C. Cook  
Deputy Attorney General

17 W. Main Street  
P.O. Box 7857  
Madison, WI 53707-7857  
[www.doj.state.wi.us](http://www.doj.state.wi.us)

Paul M. Ferguson  
Assistant Attorney General  
[fergusonpm@doj.state.wi.us](mailto:fergusonpm@doj.state.wi.us)  
608/266-1221  
TTY 1-800-947-3529  
FAX 608/267-2779

September 27, 2016

Ms. Jeanne Smith  
[REDACTED]  
Exeland, WI 54835

Dear Ms. Smith:

The Department of Justice (DOJ) is in receipt of your May 5, 2016 correspondence to former Attorney General J.B. Van Hollen in which you stated that you submitted three public records requests to the Town of Radisson. You wrote that in response to your second request, Chairman of the Town Board Phil Quade called you and stated that he refused to answer your request. Finally, you stated that "I am not only asking you to enforce my open records request, but I am also asking for someone to look into the matters I have alluded to in this letter."

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. DOJ offers several open government resources 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.

The OOG works to increase government openness and transparency with a focus on 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. Based on the information you provided in your correspondence, it appears some of the subject matter of your correspondence is outside this scope. However, we can address your correspondence to the extent it concerns the public records law.

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.

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").

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

Pursuant to Wis. Stat. § 19.35(4)(b), "If an authority denies a written request in whole or in part, the requester shall receive from the authority a written statement of the reasons for denying the written request." Specific policy reasons, rather than mere statements of legal conclusion or recitation of exemptions, must be given. *Pangman & Assocs. v. Zellmer*, 163 Wis. 2d 1070, 1084, 473 N.W.2d 538 (Ct. App. 1991); *Vill. of Butler v. Cohen*, 163 Wis. 2d 819, 824-25, 472 N.W.2d 579 (Ct. App. 1991). In every written denial, the authority must also inform the requester that "if the request for the record was made in writing, then the determination is subject to review by mandamus under s. 19.37(1) or upon application to the attorney general or a district attorney." Wis. Stat. § 19.35(4)(b).

I contacted Chairman Phil Quade regarding this matter. Chairman Quade stated that he previously sent you copies of meeting minutes in response to your requests. He also stated that he spoke with your spouse at a board meeting in Spring 2016, and your spouse indicated the Chairman's response was sufficient. To the extent you seek additional records, Chairman Quade stated that he offered the opportunity for you to inspect the board's records. If you do not feel the Chairman has satisfied your request, or if you want to inspect or receive copies of additional records, you may wish to contact the Chairman to specify what additional records you wish to inspect or receive.

Under the 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.* It is helpful for public records requests to be as specific as possible. This helps avoid any confusion the authority may

have regarding the request, thereby ensuring the requester receives the records they seek in a timely fashion.

The OOG 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 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 in cases presenting novel issues of law that coincide with matters of statewide concern. While the public records issue that you raised is important to you, it does not appear to raise novel issues of law that coincide with matters of statewide concern. Therefore, 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 at this time, 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's fees. You may reach the service 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>

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

Ms. Jeanne Smith  
September 23, 2016  
Page 4

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

Cc: Chairman Phil Quade, Town of Radisson



STATE OF WISCONSIN  
DEPARTMENT OF JUSTICE

BRAD D. SCHIMEL  
ATTORNEY GENERAL

Andrew C. Cook  
Deputy Attorney General

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FAX 608/267-2779

September 26, 2016

Ms. Elisabeth A. Holmes  
Blue River Law, P.C.  
P.O. Box 293  
Eugene, OR 97440

Dear Ms. Holmes:

The Wisconsin Department of Justice (DOJ) is in receipt of your April 20, 2016 correspondence to Wisconsin Department of Natural Resources (DNR) former Chief Legal Counsel Timothy Andryk and me. You wrote that your law firm represents Lynn and Nancy Utesch and that your letter was a "pre-litigation request that DNR immediately publicly retract its 'Do Not Respond' list, that it remove [your] clients from the list, that it make a public apology to [your] clients regarding the same, and that DNR publicly recognize that the rights provided to [sic] under the Wisconsin Public Records law to request information are not subject to the arbitrary and capricious action(s) of DNR staff."

Wisconsin Attorney General Brad D. Schimel and DOJ's Office of Open Government (OOG) are committed to increasing government openness and transparency. The OOG works in furtherance of this with a focus on 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. DOJ may be called upon to represent other Wisconsin state agencies, including DNR. Therefore, the OOG cannot address the substance of your letter at this time.

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

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