

## 2017 1st Quarter Correspondence

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STATE OF WISCONSIN  
DEPARTMENT OF JUSTICE

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January 4, 2017

Ms. Alison Christ

Strum, WI 54770

Dear Ms. Christ:

The Department of Justice (DOJ) is in receipt of your June 22, 2016 correspondence to me in which you provided "documents that accompany the issues we have discussed" regarding your public records requests to Dr. Kellie Manning, District Administrator of the School District of Eleva-Strum. You stated that "[a]fter two attempts and a third one pending, I have become frustrated with Kellie Manning's responses to my open records requests." You stated that you received "partial information and information that I hadn't been seeking instead of the records I specifically asked for." We spoke via telephone regarding a number of your concerns in June, July, August, and September of this year.

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 Public Records Law, Wis. Stat. §§ 19.31 to 19.39, maintains a Public Records Law Compliance Guide and provides a recorded webinar and associated presentation documentation. I am addressing issues identified in your written correspondence, many of which we have discussed via telephone previously.

The Wisconsin 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").

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).

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). Furthermore, 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, 462 (Ct. App. 1992). Sometimes, an authority may receive a question from an individual that is intended to be a public records request. If the authority knows a record would answer the individual's question, it is advisable for the authority to simply provide the record to the requester (or contact the requester to see if he or she would like the record). If a requester seeks particular information from an authority via a public record request, the requester should ensure that he or she phrases the request such that it seeks records containing the desired information and that it does not simply ask a question.

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). The amount of such fees may vary depending on the authority. The law permits an authority to impose a fee for locating records if the cost is \$50.00 or more. Wis. Stat. § 19.35(3)(c). An authority may require a requester prepay any such fees if the total amount exceeds \$5.00. Wis. Stat. § 19.35(3)(f).

The documentation you provided included a statement of fees identifying copy costs for seven pages of records (at \$0.25 per page) and costs for 15 minutes of labor. DOJ charges

\$0.15 per page for hard copies of records; in calculating this fee, DOJ incorporated all "actual, necessary, and direct costs" of copying records. It is unclear from the information you provided what the labor costs entailed. Only seven pages were copied and any location costs would need to amount to \$50.00 or more. It is advisable that authorities document the costs associated with responding to public records requests so that fee disputes may be more easily resolved.

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

I contacted Dr. Manning regarding your matter. We discussed your concerns as well as responses to public records requests and the importance of communication between an authority and a requester. We also discussed the fees permissible under the public records law. (It should be noted that Dr. Manning did not have all of the information regarding your requests, including the fees charged, with her during our conversation.) I also summarized the resources that DOJ and the Office of Open Government provides regarding open government.

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 novel issues of law that coincide with matters 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 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.

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:

Ms. Alison Christ  
January 4, 2017  
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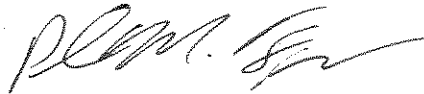
Lawyer Referral and Information Service  
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<http://www.wisbar.org/forpublic/inedalawyer/pages/lris.aspx>

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

Cc: Dr. Kellie Manning



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DEPARTMENT OF JUSTICE

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March 1, 2017

Ms. Maryjo Cohen

[REDACTED]  
Eau Claire, WI 54701

Dear Ms. Cohen:

The Wisconsin Department of Justice (DOJ) is in receipt of your July 9, 2016 correspondence to me in which you stated you were seeking an opinion regarding "whether a Wisconsin municipality (Eau Claire, Wisconsin) can use what [you] believe to be a quasi-governmental organization as a means to deny the public the protections afforded by open record procedures, open meetings, and a municipality's open public bidding ordinance."

Wisconsin law provides that the Attorney General must, when asked, provide the legislature and designated Wisconsin state government officials with an opinion on legal questions. Wis. Stat. § 165.015. The Attorney General may also give formal legal opinions to district attorneys and county corporation counsel under certain circumstances. Wis. Stat. § 165.25(3) and 59.42(1)(c). The Attorney General cannot provide you with the opinion you requested because you do not meet this criteria. However, I can provide you with 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 the three questions you presented in your correspondence, which I will address in turn below.

1. "Based on the facts provided, is the ECCA [Eau Claire Confluence Arts, Inc.] a 'quasi-governmental corporation' subject to open meetings and open records law[?]"

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

The open meetings law applies to meetings of a governmental body. A governmental body is defined as:

[A] state or local agency, board, commission, council, department or public body corporate and politic created by constitution, statute, ordinance, rule or order; a governmental or quasi-governmental corporation except for the Bradley Center sports and entertainment corporation; a local exposition district under subch. II of ch. 229; a long-term care district under s. 46.2895; or a formally constituted subunit of any of the foregoing, but excludes any such body or committee or subunit of such body which is formed for or meeting for the purpose of collective bargaining under subch. I, IV, V, or VI of ch. 111.

Wis. Stat. § 19.82(1).

The definition of a governmental body includes a “quasi-governmental corporation,” which is not defined in the statute. DOJ cannot make factual determinations, and in any event, the information you provided is insufficient to thoroughly evaluate whether the ECCA is a “quasi-governmental corporation” subject to the open meetings law. However, a court may find some of the information you provided helpful in applying an in-depth analysis as discussed below.

The Wisconsin Supreme Court discussed the definition of “quasi-governmental corporation” in *State v. Beaver Dam Area Development Corp.* (“BDADC”). *State v. Beaver Dam Area Dev. Corp.*, 2008 WI 90, 312 Wis. 2d 84, 752 N.W.2d 295. In that decision, the Court held that a “quasi-governmental corporation” does not have to be *created* by the government or be *per se* governmental, but rather is a corporation that significantly resembles a governmental corporation in function, effect, or status. *Id.* ¶¶ 33-36. The Court further held that each case must be decided on its own particular facts, under the totality of the circumstances. The Court set forth a non-exhaustive list of factors to be examined in determining whether a particular corporation sufficiently resembles a governmental corporation to be deemed quasi-governmental, while emphasizing that no single factor is outcome determinative. *Id.* ¶¶ 7-8, 63 n.14, and 79. The factors set out by the Court in *BDADC* fall into five basic categories: (1) the extent to which the private corporation is supported by public funds; (2) whether the private corporation serves a public function and, if so, whether it also has other, private functions; (3) whether the private corporation appears in its public presentations to be a governmental entity; (4) the extent to which the private corporation is subject to governmental control; and (5) the degree of access that government bodies have to the private corporation’s records. *Id.* ¶ 62.

The purpose of the public records law is to shed light on the workings of government and the official acts of public officers and employees. *Bldg. & Constr. Trades Council v. Waunakee Cmty. Sch. Dist.*, 221 Wis. 2d 575, 582, 585 N.W.2d 726 (Ct. App. 1998). The public records law only applies to “records” in the custody of an “authority.”

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.

An analysis of whether an entity is an "authority," and therefore, subject to the public records law, begins with the definition of "authority." The definition of "authority" under the public records law shares similarities with the definition of "governmental body" under the open meetings law. The Wisconsin public records law defines an authority as any of the following having custody of a record:

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

Wis. Stat. § 19.32(1).

As explained in my response to your first question, DOJ cannot make factual determinations, and the information you provided is insufficient to evaluate fully the applicability of the public records law in this instance. A court will likely be interested in learning how the ECCA was created. If an entity falls under the definition of "authority," it is subject to the public records law.

2. "If the ECCA is not a 'quasi-governmental corporation,' are its records subject to the contractor record under Wis. Stat. § 19.36(3), such that the City of Eau Claire is obligated to produce its records as if they were the City's own?"

Again, DOJ cannot make such a factual determination, and in any event, the information you provided is insufficient to make such a determination. A "record" is any material on which written, drawn, printed, spoken, visual, or electromagnetic information or electronically generated or stored data is recorded or preserved, regardless of physical form or characteristics, which has been created or is being kept by an authority. Wis. Stat. § 19.32(2). A "record" also includes contractors' records. Each authority must make available for inspection and copying any record produced or collected under a contract entered into by the authority with a person other than an authority to the same extent as if the record were maintained by the authority. Wis. Stat. § 19.36(3).



Ms. Maryjo Cohen

March 1, 2017

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3. "Is the ECCA subject to Eau Claire's open bidding ordinance, or is the use of the ECCA to otherwise avoid the open bidding ordinance unlawful?"

The assistance you seek is outside the scope of the Office of Open Government's responsibilities. While the Office of Open Government works to increase government openness and transparency, we do so with a focus on the Wisconsin Open Meetings Law and the Wisconsin Public Records Law. As a result, we are unable to offer you the assistance or insight regarding your question related to Eau Claire's open bidding ordinance. You may wish to contact the district attorney's office or legal counsel regarding your concerns.

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).

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 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 at this time.

As mentioned previously, 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:

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

Ms. Maryjo Cohen

March 1, 2017

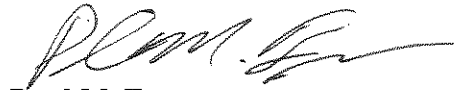
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The Attorney General and DOJ's Office of Open Government are committed to increasing government openness and transparency, and DOJ endeavors to offer guidance in these areas. DOJ offers several open government resources through its website (<https://www.doj.state.wi.us/office-open-government/office-open-govern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



Paul M. Ferguson  
Assistant Attorney General  
Office of Open Government

PMF:lah



STATE OF WISCONSIN  
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March 16, 2017

Ms. Kelly Helinski  
[REDACTED]

Milwaukee, WI 53219  
[REDACTED]

Dear Ms. Helinski:

The Wisconsin Department of Justice (DOJ) is in receipt of your August 30, 2016 email correspondence to Attorney General Brad Schimel in which you stated that you are "trying to obtain a form so I can have my arrest record removed from public record." You ask for a form or link to a form.

The assistance you seek is outside the scope of the Office of Open Government's responsibilities. The Office of Open Government works to increase government openness and transparency with a focus on the Wisconsin Open Meetings Law and the Wisconsin Public Records Law. As a result, we are unable to offer you the assistance you seek. You may wish to contact the Wisconsin Court System regarding your matter. The Frequently Asked Questions section of the Wisconsin Court System's website may also be of assistance to you (<https://wcca.wicourts.gov/faq.xsl;jsessionid=CB47063B37C5D8E484EEF9A4D11F7688.ren der6#Faql>).

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:

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


Ms. Kelly Helinski  
March 16, 2017  
Page 2

If you would like to learn more about the Wisconsin public records law and open meetings law, DOJ's Office of Open Government offers several open government resources through the Wisconsin DOJ website (<https://www.doj.state.wi.us/office-open-government/office-open-government>). DOJ provides the full Wisconsin Public Records Law, Wis. Stat. §§ 19.31 to 19.39, and Wisconsin Open Meetings Law, Wis. Stat. §§ 19.81 to 19.98, maintains a Public Records Law Compliance Guide and Open Meetings Law Compliance Guide, and provides recorded webinars and associated presentation documentation.

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

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Sincerely,



Paul M. Ferguson  
Assistant Attorney General  
Office of Open Government

PMF:lah



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March 16, 2017

Ms. Linda May

[REDACTED]  
West Allis, WI 53214

Dear Ms. May:

The Department of Justice (DOJ) is in receipt of your August 14, 2016 correspondence to me in which you provided a "copy and response to an open records request [you] made to Milwaukee County Sheriffs" for my review. You stated, "Please note redactions in policy & procedure – why?" You also included a copy of a new public records request you made to the Milwaukee County Sheriff's Office.

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. Requested records fall into one of three categories: (1) absolute right of access; (2) absolute denial of access; and (3) right of access determined by the balancing test. *Hathaway v. Joint Sch. Dist. No. 1 of Green Bay*, 116 Wis. 2d 388, 397, 342 N.W.2d 682 (1984). If neither a statute nor the common law requires disclosure or creates a general exception to disclosure, the records custodian must decide whether the strong public policy favoring disclosure is overcome by some even stronger public policy favoring limited access or nondisclosure. This balancing test, determines whether the presumption of openness is overcome by another public policy concern. *Hempel v. City of Baraboo*, 2005 WI 120, ¶ 4, 284 Wis. 2d 162, 699 N.W.2d 551. If a records custodian determines that a record or part of a record cannot be disclosed, the custodian must redact that record or part of that record. See Wis. Stat. § 19.36(6).

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." The statement must be specific and sufficient to provide the requester with adequate notice of the reasons for denial. 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).

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). An authority cannot fulfill a request for a record if the authority has no such record. While the public records law does not require an authority to notify a requester that the requested record does not exist, it is advisable that an authority do so. It appears that the Sheriff’s Office informed you of this in response to portions of your request.

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, 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.

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

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Ms. Linda May  
March 16, 2017  
Page 3

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, sweeping horizontal line 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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February 20, 2017

Ms. Susan Meinecke  
[REDACTED]

Grafton, WI 53024-1118

Dear Ms. Meinecke:

The Department of Justice (DOJ) is in receipt of your July 7, 2016 correspondence in which you expressed your concerns regarding the actions of the Grafton School District Board of Education (BOE). You stated that you found "numerous meetings that were not properly noticed, impromptu meetings among a few members of the BOE where School District business was conducted, and an overall attitude of not thinking it is important to share information with the tax payers." You also provided documentation that you believe shows the BOE knowingly violated the open meetings law. You wrote, "I would appreciate any help you can give in fixing these problems and holding this Board of Education accountable."

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).

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

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.

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).

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.*

In your correspondence, you stated that “the BOE has established two ‘ad hoc’ committees . . . comprised entirely of BOE elected officials.” DOJ cannot make factual determinations; however, if the two “ad hoc” committees are subunits of the BOE, then they are subject to 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).

Groups that include both members and non-members of a parent body are not “subunits” of the parent body. Nonetheless, such groups frequently fit within the definition of a “governmental body”—*e.g.*, as advisory groups to the governmental bodies or government officials that created them.

In your correspondence you stated it is “disturbing that the minutes from the meetings are vague and incomplete.” In an effort to increase transparency, DOJ recommends 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, 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 satisfied.

Although Wis. Stat. § 19.88(3) does not indicate how detailed the record of motions and votes should be, as stated, 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).

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).

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 important, your matter 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.

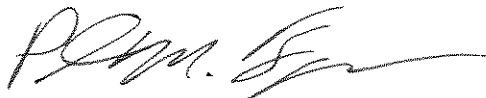
More frequently, the district attorney of the county where the alleged violation occurred may enforce the law. However, in order to have this authority, an individual must file a verified complaint with the district attorney. Wis. Stat. § 19.97(1). If the district attorney refuses or otherwise fails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

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.

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: Terry Ziegler, President, Grafton School District Board of Education



STATE OF WISCONSIN  
DEPARTMENT OF JUSTICE

BRAD D. SCHIMEL  
ATTORNEY GENERAL

Paul W. Connell  
Deputy Attorney General

Delanie M. Breuer  
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FAX 608/267-2779

January 3, 2016

Mr. Daniel J. Mueller, #587185  
Racine Correctional Institution  
Jefferson East  
P.O. Box 900  
Sturtevant, WI 53177

Dear Mr. Mueller:

The Department of Justice (DOJ) is in receipt of your June 1, 2016 and October 11, 2016 letters to Attorney General Brad Schimel in which you requested the Attorney General's assistance in obtaining specific documents that "pertain to polygraph examinations" that you were "mandated to participate in as a condition" of your "sex offender treatment and supervision." You stated that your public records request to the Department of Corrections (DOC) for these documents was denied and your subsequent appeal to DOC was also denied. You also stated that you contacted the district attorney for assistance, however, in a May 16, 2016 letter, the district attorney declined to assist you.

The Attorney General and DOJ's Office of Open Government appreciate your concern about this issue. However, DOJ cannot offer you legal advice or counsel concerning this issue as DOJ may be called upon to represent DOC. However, I contacted DOC Assistant Legal Counsel Makda Fessahaye regarding your matter, and I informed her of your concerns.

DOJ is 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 public records law, maintains a Public Records Law Compliance Guide, and provides a recorded webinar and associated presentation documentation. While we cannot offer you legal advice or counsel, we can provide you with some general information regarding the public records law.

It should be noted that, as an incarcerated person, your right to request records under the Wisconsin Public Records Law, Wis. Stat. §§ 19.31 to 19.39, is limited to records that contain specific references to yourself or your minor children and are otherwise accessible to you by law. See Wis. Stat. § 19.32(1c) and (3).

The public records law 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. Requested records fall into one of three categories: (1) absolute right of access; (2) absolute denial of access; and (3) right of access determined by the balancing test. *Hathaway v. Joint Sch. Dist. No. 1 of Green Bay*, 116 Wis. 2d 388, 397, 342 N.W.2d 682 (1984). If neither a statute nor the common law requires disclosure or creates a general exception to disclosure, the records custodian must decide whether the strong public policy favoring disclosure is overcome by some even stronger public policy favoring limited access or nondisclosure. This balancing test, determines whether the presumption of openness is overcome by another public policy concern. *Hempel v. City of Baraboo*, 2005 WI 120, ¶ 4, 284 Wis. 2d 162, 699 N.W.2d 551. If a records custodian determines that a record or part of a record cannot be disclosed, the custodian must redact that record or part of that record. See Wis. Stat. § 19.36(6).

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. As stated, DOJ may be called upon to represent DOC. 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.

In your June 1, 2016 correspondence, you indicated that the district attorney declined to assist you with this matter. The law does not require a district attorney to bring a mandamus action upon receipt of a written request to do so. See Wis. Stat. § 19.37(1)(b). 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. § 19.37(1)(a).

It is important to note that the public records law states that no action for mandamus may be commenced by an incarcerated person later than 90 days after the date the request was denied. Wis. Stat. § 19.37(1m). (For requesters who are not committed or incarcerated, 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).) The information you provided indicates that you submitted your public records request prior to October 15, 2015, the date of DOC's initial denial. The date of your initial correspondence to DOJ, June 1, 2016, was more than 90 days from this date.

Mr. Daniel J. Mueller, #587185

January 3, 2016

Page 3

You may wish to contact a private attorney regarding your public records matter. Your correspondence indicates you may already have counsel. If you do not have counsel, 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

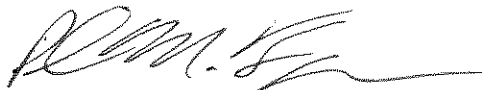
(608) 257-4666

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

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: Makda Fessahaye



STATE OF WISCONSIN  
DEPARTMENT OF JUSTICE

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FAX 608/267-2779

January 5, 2017

Sudepto Mukherji

[REDACTED]  
Milwaukee, WI 53207

Dear Mr. Mukherji:

The Department of Justice (DOJ) is in receipt of your June 24, 2016 correspondence to Attorney General Brad Schimel in which you asked for assistance regarding a public records request you made to University of Wisconsin-Milwaukee Public Records Officer Julie Kipp on February 12, 2016, for "records of communications regarding my employment and job performance." You stated that you received a partial response which included emails, but that significant portions were redacted under the exception for staff management planning in accordance with Wis. Stat. §§ 103.13(6)(d) and 19.36(10)(d) and the balancing test. You asked our office to "take every action under the law, up to and including a mandamus action," to obtain compliance with your request. On January 3, 2017, you sent an "update[d] and amend[ed] request for assistance" in which you included additional information including Ms. Kipp's December 30, 2016 supplemental response letter to you.

The Attorney General and DOJ's Office of Open Government appreciate your concerns regarding the Wisconsin public records law, Wis. Stat. §§ 19.31 to 19.39. However, DOJ cannot offer you legal advice or counsel concerning your public records request as DOJ may be called upon to represent the University of Wisconsin-Milwaukee, which is part of the University of Wisconsin System.

However, I spoke with Ms. Kipp regarding your matter. I informed Ms. Kipp of your concerns regarding the university's response to your public records request. Ms. Kipp informed me that she continues to communicate with you regarding your request.

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

Sudepto Mukherji

January 4, 2017

Page 2

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. As stated, DOJ may be called upon to represent the University of Wisconsin-Milwaukee, therefore, the Attorney General respectfully declines to take any action in this matter, including filing 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. You may also wish to contact a private attorney regarding your public records 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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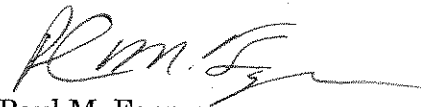
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DOJ appreciates your concern. We are dedicated to the work necessary to preserve Wisconsin's proud tradition of open government. Thank you for your correspondence.

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: Julie Kipp





STATE OF WISCONSIN  
DEPARTMENT OF JUSTICE

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February 21, 2017

Mr. Kenneth A. Roberts

Mauston, WI 53948-0800

Dear Mr. Roberts:

The Department of Justice (DOJ) is in receipt of your July 4, 2016 and August 9, 2016 correspondence to Attorney General Brad Schimel regarding your public records request for "statements that were included in a [REDACTED] that was prepared by Angie Wester a social worker employed here at the facility in regards to [REDACTED]" You stated that your requests to Angie Wester for "the authors and origins of the information in question" have had no positive responses. You also stated the two petitions for writ of mandamus you filed with the Juneau County Circuit Court "have failed." You are now requesting the assistance of the Attorney General to bring an action to obtain the records.

First, it should be noted that a committed or incarcerated individual's right to request records under the Wisconsin Public Records Law, Wis. Stat. §§ 19.31 to 19.39, is limited to records that contain specific references to the individual or the individual's minor children and are otherwise accessible to you by law. *See* Wis. Stat. § 19.32(1c) and (3). Based on the information you provided, the records you requested pertain to you, therefore, you may request them pursuant to 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.

It is unclear whether you simply asked Ms. Wester for information or requested records containing that information. 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). Additionally, an authority cannot fulfill a request for a record if the authority has no such record. While the public records law does not require an authority to notify a requester that the requested record does not exist, it is advisable that an authority do so.

Based on the information you provided, it appears you were provided with the information you requested or copies of records containing the information you requested, to the extent such records existed. I reviewed the exhibits attached to your Petition for Writ of Mandamus. In your Exhibit (1), Angie Wester writes, "All information from [REDACTED] and your staffing are taken from your progress notes or from the staffing itself. You are welcome to review your progress notes . . . I would encourage you to attend your staffing's in the future so you are able to ask more questions and provide input." In your Exhibit (2), Angie Wester writes, "[T]he information in your [REDACTED] was presented at your staffing by unit staff. If you disagree with statements, you may submit a correction amendment form." In your Exhibit (5), Angie Wester stated, "My response has not changed. The people who attended your staffing or contributed to your plan is listed on the [REDACTED] and specific progress notes can be found in your chart, which you are welcome to review."

If communication is the issue, the Office of Open Government encourages authorities and requesters to maintain an open line of communication. This helps to avoid misunderstandings between an authority and a requester. It is often mutually beneficial for a requester and an authority to work with each other regarding a request. This can provide for a more efficient processing of a request by the authority while ensuring that the requester receives the records that he or she seeks.

As you are aware, 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. As you have already done, 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 novel issues of law that coincide with matters of statewide concern. While this matter is important, it does not appear to present novel issues of law that coincide with matters of statewide concern. As a result, 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's fees. You may reach the service using the contact information below:

Mr. Kenneth A. Roberts  
February 21, 2017  
Page 3

Lawyer Referral and Information Service  
State Bar of Wisconsin  
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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



STATE OF WISCONSIN  
DEPARTMENT OF JUSTICE

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March 16, 2017

Ms. Patricia Williams  
williamscareerplacement@yahoo.com

Dear Ms. Williams:

The Wisconsin Department of Justice (DOJ) is in receipt of your July 22, 2016 email correspondence to me in which you forwarded email correspondence between you and the Department of Workforce Development (DWD) concerning a public records request you made to DWD. In your email to me you stated: "I am still having trouble with DWD. I am trying to get a 1 Page document. Is there anything else, that you can do about this matter?"

You first raised your concerns to me in a July 20, 2016 email. I responded to you via email the same day informing you that DOJ cannot offer you legal advice or counsel concerning the issue as DOJ may be called upon to represent DWD. However, I did contact DWD regarding your concerns. DWD informed me that they were processing your request, and I passed that information along to you. Two days later, you indicated you had not received the requested record yet.

In reviewing the email correspondence you provided, it appears that DWD responded to your request by email, dated July 22, 2016. DWD informed you that the "agreement you have received is our complete record; there is no signature page." 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). An authority cannot fulfill a request for a record if the authority has no such record. While the public records law does not require an authority to notify a requester that the requested record does not exist, it is advisable that an authority do so. In this case, DWD did advise you that no such record existed.

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).

Ms. Patricia Williams

March 16, 2017

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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. As stated, DOJ may be called upon to represent DWD. 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 also wish to contact a private attorney regarding your public records 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. One 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>

DOJ is 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 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. While we cannot offer you legal advice or counsel, we can provide you with some general information regarding the public records law.

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

BRAD D. SCHIMEL  
ATTORNEY GENERAL

Paul W. Connell  
Deputy Attorney General

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

February 8, 2017

Ms. Linda Zillmer  
[REDACTED]

Birchwood, WI 54817  
[REDACTED]

Dear Ms. Zillmer:

The Department of Justice (DOJ) is in receipt of your email, dated June 15, 2016, in which you stated that you are "seeking assistance in locating an Attorney General opinion regarding elected officials abstaining from voting." You provided that the Sawyer County Board is developing policies and procedures "regarding supervisors who need to abstain from [v]oting, the draft says that there is an Attorney General opinion stating the supervisor should leave the room." You stated that you cannot find the opinion and that you disagree with the policy. You stated that you would "also like clarification as to whether requiring a supervisor to leave open session is a violation of the Open Meetings law."

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. The OOG can address your matter to the extent it concerns the open meetings law.

I reviewed the portion of the Sawyer County Board of Supervisors Policy and Procedure Manual that references an Attorney General's opinion. Based on the information you provided and the information found in the manual, we searched our files, but we could not locate such an opinion.

The open meetings law contains a provision on the exclusion of members. Wis. Stat. § 19.89 states, in part, "No duly elected or appointed member of a governmental body may be excluded from any meeting of such body." Therefore, a duly elected or appointed member of the Sawyer County Board of Supervisors cannot be excluded from a meeting of the board. The law also provides, "Unless the rules of a governmental body provide to the contrary, no member of the body may be excluded from any meeting of a subunit of that governmental body." Wis. Stat. § 19.89. Thus, a member of the Sawyer County Board of Supervisors may not be excluded from a meeting of a subunit of the board, such as a committee, unless the rules of the board provide otherwise.

I contacted Tom Hoff, Sawyer County Administrator, regarding this matter. Mr. Hoff could not locate the Attorney General's opinion referenced in the manual, but he indicated he would look into it further. Based on our conversation, it appeared that the portion of the manual you described likely was meant to apply to the full board and not a subunit of the board. We discussed Wis. Stat. § 19.89, and Mr. Hoff stated that the matter would be reviewed.

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).

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

Ms. Linda Zillmer  
February 8, 2017  
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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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FAX 608/267-2779

February 1, 2017

Ms. Linda Zillmer  
[REDACTED]

Birchwood, WI 54817  
[REDACTED]

Dear Ms. Zillmer:

This is in response to your email, dated June 29, 2016, in which you stated that you have been told by the Birchwood Public Charter School Governance Board president that "they have obtained a legal opinion that the BPCS governance board is not bound by the Open Meetings and Public Records laws." You wrote that the "Birchwood Public Charter Schools were authorized by the Birchwood Public School Board and are operated with the funds of the Birchwood Public School District." You stated that the board denied your public records request seeking a copy of "the legal opinion that the charter schools' governance board need not comply with Open Meetings law." You asked for advice regarding the compliance requirements for public charter schools.

Your correspondence concerns both public records and open meetings. I will address each area of the law in turn. The purpose of the Wisconsin Public Records Law, Wis. Stat. §§ 19.31 to 19.39, is to shed light on the workings of government and the official acts of public officers and employees. *Bldg. & Constr. Trades Council v. Waunakee Cmty. Sch. Dist.*, 221 Wis. 2d 575, 582, 585 N.W.2d 726 (Ct. App. 1998). The public records law only applies to records in the custody of an authority.

An analysis of whether an entity is an "authority," and therefore, subject to the public records law, begins with the definition of "authority." The Wisconsin public records law defines an authority as any of the following having custody of a record:

a state or local office, elective official, agency, board, commission, committee, council, department or public body corporate and politic created by the constitution or by any law, ordinance, rule or order; a governmental or quasi-governmental corporation except for the Bradley center sports and entertainment corporation; a special purpose district; any court of law; the assembly or senate; a nonprofit corporation which

receives more than 50% of its funds from a county or a municipality, as defined in s. 59.001(3), and which provides services related to public health or safety to the county or municipality; a university police department under s. 175.42; or a formally constituted subunit of any of the foregoing.

Wis. Stat. § 19.32(1).

The information you provided is insufficient to evaluate fully the applicability of the public records law. However, you stated that you requested a copy of "the legal opinion" upon which the board relied to support its contention that it need not comply with the open meetings law. If an entity falls under the definition of "authority," and is thus subject to the public records law, some records may not be subject to disclosure.

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.

Based on the information you provided, it is possible the requested record could be attorney-client privileged communication. If this is the case, an authority could properly withhold such a record because attorney-client privileged communications are not subject to disclosure under the public records law. *George v. Record Custodian*, 169 Wis. 2d 573, 582, 485 N.W.2d 460 (Ct. App. 1992); *Wisconsin Newspress, Inc. v. School Dist. of Sheboygan Falls*, 199 Wis. 2d 768, 782-83, 546 N.W.2d 143 (1996). However, there is insufficient information to confirm if this is the case.

Regarding your inquiry concerning the open meetings law, based on the information you provided, it is not possible to evaluate whether the Birchwood Public Charter School Governance Board is a "governmental body" subject to the open meetings law. The Wisconsin Open Meetings Law, Wis. Stat. §§ 19.81 to 19.98, applies to meetings of a governmental body. A governmental body is defined as:

[A] state or local agency, board, commission, council, department or public body corporate and politic created by constitution, statute, ordinance, rule or order; a governmental or quasi-governmental corporation except for the Bradley Center sports and entertainment corporation; a local exposition district under subch. II of ch. 229; a long-term care district under s. 46.2895; or a formally constituted subunit of any of the foregoing, but excludes any such body or committee or subunit of such body which is formed for or meeting for the purpose of collective bargaining under subch. I, IV, V, or VI of ch. 111.

Wis. Stat. § 19.82(1).

The definition of a governmental body includes a “quasi-governmental corporation” which is not defined in the statutes, but the Wisconsin Supreme Court discussed its definition in *State v. Beaver Dam Area Development Corp. (“BDADC”). State v. Beaver Dam Area Dev. Corp.*, 2008 WI 90, 312 Wis. 2d 84, 752 N.W.2d 295. In that decision, the Court held that a “quasi-governmental corporation” does not have to be *created* by the government or be *per se* governmental, but rather is a corporation that significantly resembles a governmental corporation in function, effect, or status. *Id.* ¶¶ 33-36. The Court further held that each case must be decided on its own particular facts, under the totality of the circumstances and set forth a non-exhaustive list of factors to be examined in determining whether a particular corporation sufficiently resembles a governmental corporation to be deemed quasi-governmental, while emphasizing that no single factor is outcome determinative. *Id.* ¶¶ 7-8, 63 n.14, and 79. The factors set out by the Court in *BDADC* fall into five basic categories: (1) the extent to which the private corporation is supported by public funds; (2) whether the private corporation serves a public function and, if so, whether it also has other, private functions; (3) whether the private corporation appears in its public presentations to be a governmental entity; (4) the extent to which the private corporation is subject to governmental control; and (5) the degree of access that government bodies have to the private corporation’s records. *Id.* ¶ 62. In applying the *BDADC* analysis to the present matter, it is important that all relevant information be available.

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.

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 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 at this time.

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

Ms. Linda Zillmer  
February 1, 2017  
Page 4

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).

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Sincerely,



Paul M. Ferguson  
Assistant Attorney General  
Office of Open Government

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