

2017 3rd Quarter Correspondence

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July 28, 2017

Attorney Dustin Brown
Godfrey & Kahn, S.C.
One East Main Street, Suite 500
P.O. Box 2719
Madison, WI 53701-2719

Dear Attorney Brown:

The Department of Justice (DOJ) is in receipt of your August 26, 2016 correspondence in which you requested an opinion from the Wisconsin Attorney General as to “whether a public school principal holds ‘local public office’ as that term is defined in the public records law.”

In your correspondence, you stated that the Hortonville Area School District (the district) denied your clients’ request for a climate study of the Hortonville Middle School. You wrote that the district provided a copy of the study with information concerning the middle school’s principal redacted. In partly denying the request, the district relied, in relevant part, on Wis. Stat. § 19.36(10)(d), which prohibits the disclosure of information related to one or more specific employees that is used for staff management planning. Your question is whether the principal holds local public office by virtue of holding an appointive office or position of a local governmental unit in which the principal serves as the head of a department, agency, or division of the local governmental unit and therefore is not an employee to whom the Wis. Stat. § 19.36(10)(d) exemption applies.

The Attorney General and the Office of Open Government appreciate your concern and your request for an opinion. 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 provide 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. Nonetheless, DOJ is committed to increasing government openness and transparency, and I can provide you with some guidance regarding the Wisconsin Public Records Law, Wis. Stat. §§ 19.31 to 19.39, pursuant to Wis. Stat. § 19.39.

Please note, in an August 26, 2016 email, the district's attorney expressed a desire to provide the district's input regarding this matter. In my response email to him the same day, I invited him to do so, but to date, I have not received any such input. Therefore, this correspondence is based solely on the facts as presented in your August 26, 2016 correspondence.

First, whether a position is a local public office is not determined by the discretion of an authority. "Local public office" is defined by statute. Whether a position falls within the statute's definition depends on the factual circumstances of that position.

Next, you noted that, by its plain language, the Wis. Stat. § 19.36(10) exceptions only apply to employees and that an individual holding public office cannot be an employee for the purposes of the public records law. This is correct based on a plain reading of the public records law's definition of "employee." Wis. Stat. § 19.32(1bg). However, determining what is meant by "an individual holding local public office" requires reviewing several layers of statutory definitions.

The public records law defines "local public office" as having the meaning provided in Wis. Stat. § 19.42(7w) and "also includes any appointive office or position of a local governmental unit in which an individual serves as the head of a department, agency, or division of the local governmental unit, but does not include any office or position filled by a municipal employee." Wis. Stat. § 19.32(1dm). A "local governmental unit" is a political subdivision, a special purpose district, an instrumentality or corporation of a political subdivision or special purpose district, a combination or subunit of any of these, or an instrumentality of the state and any of these. Wis. Stat. § 19.42(7u). A "municipal employee" includes those employed by a school district other than a "supervisor, or confidential, managerial or executive employee." See Wis. Stat. §§ 111.70(1)(i) and (j). A supervisor is further defined, in part, as follows:

[A]ny individual who has authority, in the interest of the municipal employer, to hire, transfer, suspend, lay off, recall, promote, discharge, assign, reward or discipline other employees, or to adjust their grievances or effectively to recommend such action, if in connection with the foregoing the exercise of such authority is not of a merely routine or clerical nature, but requires the use of independent judgment.

Wis. Stat. § 111.70(1)(o)1.

The next step is to apply these definitions to the facts presented in your correspondence. The district is a local governmental unit, and as a subunit of a school district, the middle school is also a local governmental unit. Thus, the principal is employed by a local government unit and a municipal employer. However, that principal may not necessarily be a municipal employee. If the principal's responsibilities mirror those found in Wis. Stat. § 111.70(1)(o)1, a court could reasonably find that the principal is a supervisor, and therefore not a municipal employee.

Attorney Dustin Brown

July 28, 2017

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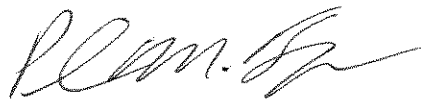
If a court determines the principal is a supervisor and not a municipal employee, then the question is whether the middle school is a department or division and whether the principal is the head of that department or division. Based on the facts presented, a court could reasonably find that the middle school is a department or division of the district, and the principal is the head of that department or division. As a result, a court could reasonably find that the principal is not an employee and the Wis. Stat. § 19.36(10) exemptions to disclosure do not apply.

It also bears mentioning that it is important that authorities and requesters remember the public records law's purpose and its "presumption of complete public access, consistent with the conduct of governmental business." Wis. Stat. § 19.31. Exceptions to disclosure should be narrowly construed to effectuate the law's purpose of ensuring government openness and transparency.

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:acg

cc: Attorney John Thiel



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DEPARTMENT OF JUSTICE

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August 1, 2017

William Gruber
[REDACTED]

Friendship, WI 53934

Dear Mr. Gruber:

The Department of Justice (DOJ) is in receipt of your correspondence, which included a verified open meetings law complaint directed to the Adams County District Attorney, dated November 1, 2016. Accompanying a copy of the complaint was a short note in which you wrote about two concerns. First, you summarized your complaint alleging that the Preston Town Board and Board Chairperson Matt Morrow violated the open meetings law when it adjourned its meetings, and once the public departed, discussed "bills." According to your correspondence, such discussions were not on the agendas or referenced in meeting minutes. Second, you stated that Adams County District Attorney's Office staff told you that their office does not accept open meetings law complaints. Instead, they directed you to go to the Adams County Sheriff's Office.

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 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, 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).

The law requires that 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.

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).

Public notice of a meeting must provide 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>).

Your correspondence includes a few copies of meeting notices and meeting minutes. However, there is no information regarding the alleged post-meeting discussions regarding "bills." As such, there is insufficient information to properly evaluate the circumstances of your matter. However, if a governmental body adjourns a meeting and reconvenes without proper notice after the public has left, a court would likely find there to be a violation of the open meetings law if the *Showers* test requirements are met. If a governmental body wishes to discuss bills or other financial matters within the body's realm of authority, it should do so at a properly noticed meeting. Again, based on the facts presented in your correspondence, there is insufficient information to evaluate if this occurred in the present case.

Under the open meetings law, the Attorney General and the district attorneys have authority to enforce the law. Wis. Stat. § 19.97(1). In your correspondence, you did not specifically request the Attorney General to pursue an enforcement action. In the event you are seeking the Attorney General to pursue an enforcement action, under the facts alleged, questions remain that preclude a determination as to whether any open meetings law

violations occurred. In addition, generally, the Attorney General may elect to prosecute complaints presenting novel issues of law that coincide with matters of statewide concern. In this case, based on the facts presented, this matter does not appear to raise such issues. As such, 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).

It appears you attempted to file a verified complaint with the Adams County District Attorney's Office, as is outlined in the open meetings law. You wrote that office staff instructed you to contact the Adams County Sheriff's Office regarding your complaint. I contacted District Attorney Tania M. Bonnett and discussed your matter. It appears that this interaction with staff was a misunderstanding or a miscommunication. DA Bonnett stated that she would speak to her staff regarding this. Regarding the substance of your complaint, DA Bonnett said that it is under review.

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

cc: District Attorney Tania M. Bonnett
Preston Town Board Chairperson Matt Morrow



STATE OF WISCONSIN
DEPARTMENT OF JUSTICE

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August 4, 2017

Dean Y. Sayles
[REDACTED]

New Auburn, WI 54757

Dear Mr. Sayles:

This letter is in response to your correspondence, received November 7, 2016, in which you wrote that “[o]ur freedom of speech gets cut short” by the three-minute limit on comments during New Auburn town board meetings.

The Attorney General and Department of Justice (DOJ) 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. I hope that you find the following information regarding the open meetings law to be 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 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).

While Wisconsin law requires that meetings of governmental bodies be open to the public so that citizens may attend and observe open session meetings, the law does not require a governmental body to allow members of the public to speak or actively participate in the body’s meetings. While the open meetings law does allow a governmental body to set aside a portion of a meeting for public comment, it does not require a body to do so. Wis. Stat. §§ 19.83(2), 19.84(2). There are some other state statutes that require governmental bodies to hold public hearings on specified matters. Unless such a statute specifically applies, however, a governmental body is free to determine for itself whether and to what extent it will allow citizen participation at its meetings. For example, a body may choose to limit the time each citizen has to speak.

If a governmental body decides to set aside a portion of an open meeting as a public comment period, this must be included in the meeting notice. During such a period, the body may receive information from the public and may discuss any matter raised by the public. If a member of the public raises a subject that does not appear on the meeting notice, however, it is advisable to limit the discussion of that subject and to defer any extensive deliberation to a later meeting for which more specific notice can be given. In addition, the body may not take formal action on a subject raised in the public comment period, unless that subject is also identified in the meeting notice.

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. Based on the facts presented in your correspondence, your matter 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.

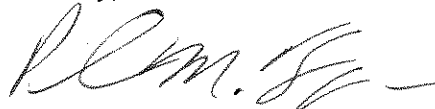
More frequently, the district attorney of the county where the alleged violation occurred may enforce the law. However, in order to have this authority, an individual must file a verified complaint with the district attorney. Wis. Stat. § 19.97(1). If the district attorney refuses or otherwise fails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

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 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



STATE OF WISCONSIN
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August 17, 2017

Cindy Cutrano

████████████████████
Cambridge, WI 53523

Dear Ms. Cutrano:

The Department of Justice (DOJ) is in receipt of your September 13, 2016 email correspondence in which you stated that your township holds its "regular monthly meetings on the 2nd Tuesday of each month" and that this month they "held it on Monday." You requested a resource on the relevant law to see if this was allowed.

In general, a date change for a meeting, such as the one you described, is not a violation of the Wisconsin Open Meetings Law, Wis. Stat. §§ 19.81 to 19.98, so long as the open meetings law's notice requirements have been met. However, the information you provided is insufficient to evaluate whether the town board complied with the notice requirements for the meeting in question. I would like to provide you with some general information regarding the notice requirements, which you may find helpful.

The open meetings law requires that 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.

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). When calculating the 24-hour notice period, Wis. Stat. § 990.001(4)(a) requires that Sundays and legal holidays shall be excluded. 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. Wis. Stat. § 19.84(3). 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).

Public notice of a meeting must provide the "time, date, place and subject matter of the meeting, including that intended for consideration at any contemplated closed session."

Cindy Cutrano
August 17, 2017
Page 2

Wis. Stat. § 19.84(2). The notice must be in such a form so as to reasonably apprise the public of this information. *Id.* For additional information on the notice requirements of the open meetings law, please see 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 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.

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:acg:lah



STATE OF WISCONSIN
DEPARTMENT OF JUSTICE

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August 18, 2017

Ben Rodgers
Chilton Times Journal
19 E. Main Street
Post Office Box 227
Chilton, WI 53014

Dear Mr. Rodgers:

The Department of Justice (DOJ) is in receipt of your November 2, 2016 correspondence requesting an opinion as to whether the Calumet County Agricultural Association is a quasi-governmental body for the purposes of the open meetings law.

The Attorney General and the Office of Open Government appreciate your concern and your request for an opinion. 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 provide 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. Nonetheless, DOJ is committed to increasing government openness and transparency, and I can provide you with some guidance regarding the Wisconsin Open Meetings Law, Wis. Stat. §§ 19.81 to 19.98, pursuant to Wis. Stat. § 19.98.

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, but 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.

A court, in applying the *BDADC* analysis to the present circumstances, may find some of the details you provided helpful. However, a court may require additional information in order to perform a thorough analysis. Based on the details you provided, I am unable to make a determination as to whether the Calumet County Agricultural Association is a quasi-governmental body as defined in the open meetings law and thus subject to the provisions of that law. Nonetheless, I hope that you find the information provided helpful.

Under the open meetings law, the Attorney General and the district attorneys have authority to enforce the law. Wis. Stat. § 19.97(1). Generally, the Attorney General may elect to prosecute complaints 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 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>

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.

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Sincerely,



Paul M. Ferguson
Assistant Attorney General
Office of Open Government

PMF:acg:lah



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September 26, 2017

Riley Kuntz

[REDACTED]
Dickinson, ND 58601

Dear Mr. Kuntz:

The Wisconsin Department of Justice (DOJ) is in receipt of your November 29, 2016 correspondence to Attorney General Brad Schimel in which you requested "an investigation and report on the possible non-compliance of a state agency to fulfill the duties imposed upon them under § 19.35." You stated that you mailed a request to the Secretary of State requesting records and "have not received any response." I also reviewed a copy of your request that you provided.

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 Wisconsin Secretary of State. However, I reached out to the Office of the Secretary of State regarding your request.

I was informed that the Office of the Secretary of State mailed a response to your public records request on or about November 21, 2016; however, the response came back as undeliverable. The copy of the request you provided lists your street address as "1119 14th Ave N; Apt 310." This is the address to which the Secretary of State office's response was mailed. However, your correspondence to DOJ lists the slightly different street address of "1119 14th St W; Apt. 310." After discussing this with the Secretary of State's office, it is my understanding that they intended to resend their original response to the address listed on your correspondence to DOJ.

Although DOJ cannot offer you legal advice or counsel regarding this matter, I am providing you with the following information regarding Wisconsin's public records law that you may find helpful.

Wisconsin's 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”).

If an authority denies a written request, in whole or in part, the authority must provide a written statement of the reasons for such a denial and inform the requester that the determination is subject to review by mandamus under Wis. Stat. § 19.37(1) or upon application to the attorney general or a district attorney. 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.

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, as stated, DOJ may be called upon to represent the Office of the Secretary of State. Therefore, the Attorney General respectfully declines to file an action for mandamus on your behalf.

Riley Kuntz
September 26, 2017
Page 3

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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State Bar of Wisconsin
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<http://www.wisbar.org/forpublic/inedalawyer/pages/lris.aspx>

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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

Cc: The Office of the Secretary of State of Wisconsin



STATE OF WISCONSIN
DEPARTMENT OF JUSTICE

BRAD D. SCHIMEL
ATTORNEY GENERAL

Paul W. Connell
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September 28, 2017

Jeneen Henry

[REDACTED]
Livingston, WI 53554

Dear Ms. Henry:

The Wisconsin Department of Justice (DOJ) is in receipt of your November 7, 2016 email correspondence to Attorney General Brad Schimel in which you stated that “[I]owa county and [G]rant county law enforcement office[s] are pulling a few things as to which I know is illegal. One is I requested a open records request and I still do not have it.” You also stated they have “referred it to there [sic] corporation council.” You asked for help with “these counties and dectective [sic] Lana Bowers.”

Your correspondence did not provide details of the alleged illegal activity. 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. To the extent your issues of concern are outside this scope, I am unable to offer you assistance. If you have concerns regarding potential illegal activity, you may wish to contact your local district attorney. Your correspondence mentioned a public records issue, however, you did not provide details regarding your request, the circumstances of the matter, or the specific law enforcement agencies involved. Therefore, I cannot properly evaluate this issue. However, I can provide you general information regarding the public records law that you may find helpful.

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”).

If an authority denies a written request, in whole or in part, the authority must provide a written statement of the reasons for such a denial and inform the requester that the determination is subject to review by mandamus under Wis. Stat. § 19.37(1) or upon application to the attorney general or a district attorney. 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.

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. Based on the information provided, it is unclear whether your public records issue raises 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’s fees. You may reach the service using the contact information below:

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Jeneen Henry
September 28, 2017
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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,

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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September 29, 2017

Anne Caylor

[REDACTED]
Kaukauna, WI 54130

Dear Ms. Caylor:

The Wisconsin Department of Justice (DOJ) is in receipt of your January 16, 2017 email correspondence to me in which you stated your concerns regarding the “practices of the Merrill City Council and their abuse of Open Meetings laws.” You also provided a copy of your email to former Lincoln County District Attorney Don Dunphy raising your concerns. You stated that you never received a response from former DA Dunphy and that you are contacting DOJ for “advice as to how to proceed.”

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 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).

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

In your correspondence you raised several concerns about quorums by the council members. You provided that council members “routinely show up for meetings of committees they are not a part of and contribute to the discussions taking place. These meetings are not

posted in such a way as to indicate to anyone that there may be a quorum of the council present.” You also stated your concerns regarding the voting members of the “newly formed Festival Grounds Committee.” You stated that the “current appointed members include 2 people who are also on the 3 person standing committee Personnel & Finance” and that “at each meeting there is a quorum of that standing committee present.” You are concerned that “financing and approval of projects are taking place . . . before any taxpayers even knew it was happening” because council members are present at committee meetings and are contributing to discussions.

Under 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. 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.

You also stated your concerns with an “Ad Hoc committee ‘appointed by the mayor’” that “met several times but only one meeting was ever posted on the city’s website and there are no longer any links to minutes or agendas from that committee.” You provided that there was a “quorum of the City Council present.”

While the law’s definition of “governmental body” is broad, not all gatherings may fit the definition. Some gatherings are too loosely constituted to fit the definition. For example, the definition is rarely satisfied when groups of a governmental unit’s employees gather on a subject within the unit’s jurisdiction. The directive creating the body must also confer collective power and define when that power exists. As explained, *Showers* requires that a meeting of a governmental body occurs only if there are a sufficient number of members present to determine the body’s course of action. In order to determine whether a sufficient number of members are present to determine a body’s course of action, the membership of

the body must be numerically definable. For example, the Attorney General's Office concluded that a loosely constituted group of citizens and local officials instituted by a mayor to discuss various issues related to a dam closure was not a governmental body, because no rule or order defined the group's membership, and no provision existed for the group to exercise collective power. Godlewski Correspondence (Sept. 24, 1998).

In your correspondence, you indicated that the mayor said that the ad hoc committee consisted of "anyone who wanted to show up." Therefore, it appears, based on the limited information provided, that the group may not have a numerically definable membership. However, the information you provided is insufficient, and DOJ cannot make such a factual determination.

You also provided that "there are no longer any links to minutes or agendas from [the Ad Hoc] committee." As stated, there is insufficient information to evaluate whether this committee is a governmental body subject to the open meetings law's requirements. However, if it were, 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. Nevertheless, a governmental body may choose to go beyond these requirements. Easily accessible agendas and minutes—such as through links on the body's website—and more detailed minutes are ways in which the body can increase government transparency.

In your correspondence, you stated that "posted agendas are ignored." 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).

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. Your correspondence asked for advice as to how to proceed, and 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 stated that you sent an email to former Lincoln County District Attorney Don Dunphy with your concerns, however, you did not state whether you filed a verified complaint with the DA. By filing a verified complaint with the DA, the above options would be available to you.

By way of copying, I am notifying current Lincoln County District Attorney Galen Bayne-Allison of your concerns. However, in order for the district attorney to enforce the law, you need to file a verified complaint as explained above. I am also enclosing a copy of the July 26, 2016 letter to Winnebago County that you referenced in your letter as it addresses some of the issues that you raise. I invite DA Bayne-Allison to contact me to discuss if he deems it necessary.

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

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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.

Anne Caylor
September 29, 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,



Paul M. Ferguson
Assistant Attorney General
Office of Open Government

PMF:lah

Enclosure

cc: Lincoln District Attorney Galen Bayne-Allison



STATE OF WISCONSIN
DEPARTMENT OF JUSTICE

BRAD D. SCHIMEL
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Andrew C. Cook
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July 26, 2016

Scott A. Ceman
Deputy District Attorney
Winnebago County District Attorney's Office
Orrin King Bldg, 448 Algoma Blvd.
Oshkosh, WI 54901

John A. Bodnar
Winnebago County Corporation Counsel
448 Algoma Blvd
P.O. Box 2808
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

Scott A. Ceman
John A. Bodnar
July 26, 2016
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FPMC.¹ 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

¹ 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).

Scott A. Ceman
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Page 3

reasons: (1) The JSCS expanded its membership beyond the Supreme Court mandated members to include members of other governmental bodies that could advance the JSCS'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

Scott A. Ceman
John A. Bodnar
July 26, 2016
Page 5

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.

Scott A. Ceman
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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
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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,



Paul M. Ferguson
Assistant Attorney General
Office of Open Government

Cc: The Honorable Karen L. Seifert



STATE OF WISCONSIN
DEPARTMENT OF JUSTICE

BRAD D. SCHIMEL
ATTORNEY GENERAL

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September 29, 2017

Robert Champion
Door County Jail
1203 S. Duluth Avenue
Sturgeon Bay, WI 54235

Dear Mr. Champion:

The Department of Justice (DOJ) is in receipt of your December 15, 2016 correspondence to Attorney General Brad Schimel requesting assistance in obtaining unredacted copies of an Incident Report from the Door County Sheriff's Department. You indicated that the copy you received from the Door County Sheriff's Department had the names of witnesses redacted. You requested that our "office aid [you] in bringing an action for asking the Court to order release of these records to [you]."

First, 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). Based on the information you provided, since the records you requested pertain to you, you may request them pursuant to the public records law. However, certain information may still be redacted from the records as provided for under 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. 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).

Wisconsin Const. art. I, § 9m requires that crime victims be treated with “fairness, dignity and respect for their privacy.” Related Wisconsin statutes recognize that this state constitutional right must be vigorously honored by law enforcement agencies, and that crime victims include both persons against whom crimes have been committed and the family members of those persons. Wis. Stat. §§ 950.01 and 950.02(4)(a). Chapter 950 of the Wisconsin Statutes also protects the rights of witnesses to crimes, including protecting them from harm and threats of harm arising out of their cooperation with law enforcement and prosecution efforts. Wis. Stat. §§ 950.02(5) and 950.04(2w). The Wisconsin Supreme Court, speaking about both Wis. Const. art. I, § 9m, and related victim rights statutes, has instructed that “justice requires that all who are engaged in the prosecution of crimes make every effort to minimize further suffering by crime victims.” *Schilling v. Crime Victim Rights Bd.*, 2005 WI 17, ¶ 26, 278 Wis. 2d 216, 692 N.W.2d 623.

The public records law states, “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.” Wis. Stat. § 19.35(4)(b). Therefore, if your request was in writing, you should have received a written explanation for any redactions. Your correspondence did not include the sheriff’s department’s response, and it is unclear from your correspondence why certain information was redacted from the records you requested. In your correspondence, you stated that the record you seek was provided to the Public Defender’s Office in case number 16-CF-91. You may wish to contact your attorney in that case for a copy of the report.

The public records law provides several remedies for a requester dissatisfied with an authority’s response, or lack of response, to a public records request. A requester may file an action for mandamus, with or without an attorney, asking a court to order release of the records. Wis. Stat. § 19.37(1)(a). To obtain a writ of mandamus, the requester must establish four things: “(1) the petitioner has a clear legal right to the records sought; (2) the government entity has a plain legal duty to disclose the records; (3) substantial damages would result if the petition for mandamus was denied; and (4) the petitioner has no other adequate remedy at law.” *Watton v. Hegerty*, 2008 WI 74, ¶ 8, 311 Wis. 2d 52, 751 N.W.2d 369.

Alternatively, the requester may submit a written request for the district attorney of the county where the record is found, or the Attorney General, to file an action for mandamus seeking release of the requested records. Wis. Stat. § 19.37(1)(b). The Attorney General is authorized to enforce the public records law; however, he generally exercises this authority in cases presenting novel issues of law that coincide with matters of statewide concern. I interpret your correspondence as a request for the Attorney General to file an action for mandamus. However, as your matter does not appear to present novel issues of law that coincide with matters of statewide concern, 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 at this time, the other remedies outlined above may still be available to you. You may wish to contact a private

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

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Madison, WI 53707-7158
(800) 362-9082
(608) 257-4666

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

The Attorney General and the 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 Public Records Law, maintains a Public Records Law Compliance Guide, and provides a recorded webinar and associated presentation documentation.

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

As requested, a copy of your original correspondence and attachments are being returned to you along with this response.

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:acg:lah

Enclosure

Inquire Within, INC.

Response Requested

Dou County Sheriff's Dept.
Incident Report # 16-004994

ATTN: Attorney General

My name is Robert Champion. I seek resolution to this matter.

I have filled out a request for records information while in the Dou County Jail. This request was filled and I received the document as Dou County Sheriff's Incident Report # 16-004994. It was given to the Public Defender's Office in a previous case file 16-CF-91.

It involves a supplemental report written by officer Medley. Officer LaVieille was also on the scene. It was provided by Jail Lt. Tommy Stewart.

I have enclosed a black copy of the form I filled out and the original. The report I was given had crucial data blacked out and I was unable to obtain the information needed in order for me to press criminal charges against the person who made the false allegation.

This form was filled out on 11-17-16 please return the original forms in your response.

Because I am a party to this action, I am requesting your office aid me in bringing an action for asking the Court to order release of these records to me in order for me to answer the charges and to bring some action against the unknown names in this incident report.

This act of S. 9429 retribution against my party is unjust.

This request in writing is also being sent to the District Attorney for a response.

I ask that the full incident report be allowed to me for review and that a copy be produced and delivered to me with the names of parties who filed this allegation with the Dou County Sheriff's Dept. I have already paid once for a document without the needed information.

A requester may bring an action for Mandamus or request in writing that the District Attorney or Attorney General bring an action for asking the Court to order release of any records.

I would prefer to not initiate a civil action against the State for not producing this copy to me and it is the basis for this request. It is in my best interest to defend myself from false allegations of S. 939.30 Substitution and Violations of the Children's Code. My intent is to file a claim against the abuser in this report and move you to act accordingly in this incident. Please respond within a reasonable amount of time and return this letter with your response. Sincerely,
12/13/16 Robert Champion



STATE OF WISCONSIN
DEPARTMENT OF JUSTICE

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September 29, 2017

Robett De Groot

[REDACTED]
Deforest, WI 53532

Dear Mr. De Groot:

This letter is in response to your email correspondence, dated February 7, 2017, in which you stated that a school district refuses "to release information from an investigation following a complaint of staff misconduct . . . based on 'attorney/client privilege' and privacy."

The information you provided is insufficient to evaluate your concerns. Furthermore, it is unclear if you are asking a specific question or requesting the assistance of the Attorney General at this time. However, I would like to provide you with some general information about the public records law that I hope you will find helpful.

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).

If an authority denies a written request, in whole or in part, the authority must provide a written statement of the reasons for such a denial and inform the requester that the determination is subject to review by mandamus under Wis. Stat. § 19.37(1) or upon application to the attorney general or a district attorney. Wis. Stat. § 19.35(4)(b).

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). It is unclear from the information provided in your correspondence whether the requested records contain such communication.

It is also unclear whether the investigation about which you requested records is closed or is ongoing. The public records law provides that an authority shall not provide access to records "relating to the current investigation of a possible criminal offense or possible misconduct connected with employment by an employee prior to disposition of the investigation." Wis. Stat. § 19.36(10)(b). Upon disposition of the investigation, the misconduct investigation and disciplinary records are no longer exempt from disclosure under Wis. Stat. § 19.36(10)(b). However, as discussed above, other exceptions to disclosure may apply.

The public records law provides several remedies for a requester dissatisfied with an authority's response, or lack of response, to a public records request. A requester may file an action for mandamus, with or without an attorney, asking a court to order release of the records. Wis. Stat. § 19.37(1)(a). To obtain a writ of mandamus, the requester must establish four things: "(1) the petitioner has a clear legal right to the records sought; (2) the government entity has a plain legal duty to disclose the records; (3) substantial damages would result if the petition for mandamus was denied; and (4) the petitioner has no other adequate remedy at law." *Watton v. Hegerty*, 2008 WI 74, ¶ 8, 311 Wis. 2d 52, 751 N.W.2d 369.

Alternatively, the requester may submit a written request for the district attorney of the county where the record is found, or the Attorney General, to file an action for mandamus seeking release of the requested records. Wis. Stat. § 19.37(1)(b). The Attorney General is authorized to enforce the public records law; however, he generally exercises this authority in cases presenting novel issues of law that coincide with matters of statewide concern. There is insufficient information to determine whether your matter presents 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's fees. You may reach the service using the contact information below:

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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,

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:acg:lah



STATE OF WISCONSIN
DEPARTMENT OF JUSTICE

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September 29, 2017

Emmett Reilly

[REDACTED]
Shullsburg, WI 53586

Dear Mr. Reilly:

The Department of Justice (DOJ) is in receipt of your April 10, 2017 email correspondence requesting "help to file a complaint of public officials corruption. Conflict of interest, doing business for gain, open meeting, etc."

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 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 assistance you seek regarding "help to file a complaint of public officials corruption. Conflict of interest, doing business for gain" is outside the scope of the OOG's responsibilities. Therefore, we are unable to offer you assistance in those areas. You may wish to contact the local district attorney's office, law enforcement, or your legal counsel regarding your concerns.

However, I can provide you with some information regarding the open meetings law, which you mentioned in your correspondence. 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 district attorney cannot act to enforce the law unless he or she receives a verified complaint. Therefore, to ensure the district attorney has the authority to enforce the law, you must file a verified complaint. This also ensures that you have the option to file suit, as explained in the previous paragraph, should the district attorney refuse or otherwise fail to commence an enforcement action. For further information, please see pages 29-30 of the Open Meetings Law Compliance Guide located on DOJ's website (<https://www.doj.state.wi.us/sites/default/files/dls/2015-OML-Guide.pdf>) and Wis. Stat. § 19.97. Appendix B of the Open Meetings Law Compliance Guide provides a template for a verified open meetings law complaint which you can use to submit a verified complaint to the district attorney.

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 the service using the contact information below:

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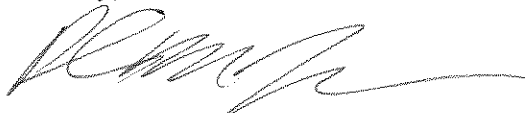
<http://www.wisbar.org/forpublic/ineedalawyer/pages/lris.aspx>

In addition to the Open Meetings Law Compliance Guide referenced above, DOJ offers several open government resources through its website (<https://www.doj.state.wi.us/office-open-government/office-open-government-resources>), including the full Wisconsin Open Meetings Law and a recorded webinar 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.

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