2018 2nd Quarter Correspondence

Index

STATE OF WISCONSIN
DEPARTMENT OF JUSTICE

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April 4, 2018

Gary Kohlenberg
garykohlenberg@gmail.com

Dear Mr. Kohlenberg:

The Wisconsin Department of Justice (DOJ) is in receipt of your October 5, 2017 email correspondence regarding the LaCrosse Police Department's (LPD) website. In your email correspondence, you stated that LPD's website's request form "asks for identifying information" when citizens request public records, "which is a violation." You also stated that the request form asks "if the request is for media use, also a violation." You had previously spoken with Assistant Attorney General Paul Ferguson on the phone about this matter, but this letter will provide you with some information regarding your concerns.

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. *See* Wis. Stat. § 19.31. Statutes, case law, and the public records law balancing test, which weighs the public interest in disclosure of a record against the public interest in nondisclosure, provide such exceptions.

A request for records is sufficient if it is directed to an authority and reasonably describes the records or information requested. *See* Wis. Stat. § 19.35(1)(h). Generally, there are no "magic words" that are required, and no specific form is permitted to be required in order to submit a public records request.

For example, under the public records law, there is no requirement that a request must be made or fulfilled in person. *See* Wis. Stat. § 19.35(1)(h) ("A request may be made orally, but a request must be in writing before an action to enforce the request is commenced" under Wis. Stat. § 19.37.) Additionally, an authority generally may not refuse a request because the request is received by mail unless prepayment of a fee is required under Wis. Stat. § 19.35(3)(f). *See* Wis. Stat. § 19.35(1)(i).

Further, as is pertinent to your inquiry, the requester generally does not need to identify himself or herself. *See* Wis. Stat. § 19.35(1)(i) ("Except as authorized under this paragraph, no request . . . may be refused because the person making the request is unwilling to be identified or to state the purpose of the request"). Thus, the public policy expressed in Wis. Stat. § 19.35(1)(i) is that a requester generally may remain anonymous. *See State ex rel.*

Ledford v. Turcotte, 195 Wis. 2d 244, 252, 536 N.W.2d 130 (Ct. App. 1995). Consequently, because requesters generally may remain anonymous, the requester also generally would not need to identify himself or herself as a member of the media. *See* Wis. Stat. § 19.35(1)(i).

However, exceptions to these general rules exist. For example, under Wis. Stat. § 19.35(1)(i), "[a] requester may be required to show acceptable identification whenever the requested record is kept at a private residence or whenever security reasons or federal law or regulations so require." Additionally, "[a] legal custodian may impose reasonable restrictions on the manner of access to an original record if the record is irreplaceable or easily damaged." *See* Wis. Stat. § 19.35(1)(k).

Further, certain substantive statutes, such as those concerning pupil records and patient health care records, may also restrict record access to specified persons. *See, e.g.,* Wis. Stat. § 118.125(1)(b) (pupil records); § 146.82 (patient health care records). Moreover, under certain circumstances, members of the media may be entitled to more information than other requesters. *See, e.g.,* Wis. Stat. §§ 48.396(1); 938.396(1)(b)1. Thus, when records of that nature are the subject of a public records request, the records custodian is permitted to confirm, before releasing the records, that the requester is someone statutorily authorized to obtain the requested records.

Based on your correspondence, it does not appear that you have attempted to request any records from the authority, anonymously or otherwise, through LPD's website or otherwise. If you have requested records, 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 have not asked the Attorney General to pursue a mandamus action on your behalf, the Attorney General respectfully declines to take any action in this matter at this time, including filing an action for mandamus on your behalf. The other remedies outlined above, however, may still be available to you.

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

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DOJ is committed to increasing government openness and transparency, and DOJ endeavors to offer guidance in these areas. DOJ offers several open government resources through its website (https://www.doj.state.wi.us/office-open-government/office-open-government). DOJ provides the full Wisconsin public records law, maintains a Public Records Law Compliance Guide, and provides a recorded webinar and associated presentation documentation.

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,

Sarah K. Larson
Assistant Attorney General
Office of Open Government

SKL:skl

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April 12, 2018

Christopher Welcenbach
[redacted]
Eagle River, WI 54521

Dear Mr. Welcenbach:

The Wisconsin Department of Justice (DOJ) is in receipt of your correspondence, dated August 22, 2017, in which you requested DOJ "commence a mandamus action to challenge the determination of [your] open records request to the Oneida County Sheriff's Department dated 8-3-17 and 8-9-17."

I reviewed your public records requests and the Oneida County Sheriff's Office's response. In his response, Chief Deputy Daniel Hess wrote, "Should you be able to narrow your request by providing a more limited subject matter, or length of time, we can reconsider this request." It appears that you submitted a narrowed request on August 22, 2017, which you included and I also reviewed.

The Wisconsin Public Records Law, Wis. Stat. §§ 19.31 to 19.39, authorizes requesters to inspect or obtain copies of "records" created or maintained by an "authority." The purpose of the public records law is to shed light on the workings of government and the official acts of public officers and employees. *Bldg. & Constr. Trades Council v. Waunakee Cmty. Sch. Dist.*, 221 Wis. 2d 575, 582, 585 N.W.2d 726 (Ct. App. 1998).

Under the public records law, a request "is deemed sufficient if it reasonably describes the requested record or the information requested." Wis. Stat. § 19.35(1)(h). A request "without a reasonable limitation as to subject matter or length of time represented by the record does not constitute a sufficient request." *Id.* The public records law does not impose such heavy burdens on a record custodian that normal functioning of the office would be severely impaired, and does not require expenditure of excessive amounts of time and resources to respond to a public records request. *Schopper v. Gehring*, 210 Wis. 2d 208, 213, 565 N.W.2d 187 (Ct. App. 1997); *State ex rel. Gehl v. Connors*, 2007 WI App 238, ¶ 17, 306 Wis. 2d 247, 742 N.W.2d 530. From the documents you provided with your correspondence, it appears that you submitted a narrowed public records request to the Oneida County Sheriff's Office after receiving a denial letter because your original request was overly burdensome.

In your correspondence to us you wrote, "They also claim in their denial letter that it would 'take in excess of 340 hours to fulfill this request.' This is an absurd amount of time to search for the things that I requested." The public records law does not require a response to a public records request within a specific timeframe. In other words, after a request is received, there is no set deadline by which the authority must respond. However, the law states that upon receipt of a public records request, the authority "shall, as soon as practicable and without delay, either fill the request or notify the requester of the authority's determination to deny the request in whole or in part and the reasons therefor." Wis. Stat. § 19.35(4)(a). A reasonable amount of time for a response "depends on the nature of the request, the staff and 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 Office of Open Government encourages authorities and requesters to maintain an open line of communication. This helps to avoid misunderstandings between an authority and a requester. If it becomes apparent to an authority that a public records request may require a longer response time, it may be prudent for the authority to send the requester a letter providing an update on the status of the response and, if possible, indicating when a response might be anticipated. Similarly, if an authority receives an inquiry from a requester seeking an update on the status of the request, it is advisable for the authority to respond to the requester with an update.

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

Alternatively, the requester may submit a written request for the district attorney of the county where the record is found, or the Attorney General, to file an action for mandamus seeking release of the requested records. Wis. Stat. § 19.37(1)(b). The Attorney General is authorized to enforce the public records law; however, he generally exercises this authority in cases presenting novel issues of law that coincide with matters of statewide concern. As your matter does not present an issue of statewide concern, we respectfully decline to pursue an action for mandamus on your behalf at this time. If, however, you are dissatisfied with the authority's response, or lack of response, to your revised, narrowed public records request, please feel free to contact the Office of Open Government again.

You may also wish to contact a private attorney regarding this matter. The State Bar of Wisconsin operates an attorney referral service. The referral service is free; however, a

private attorney may charge attorney's fees. You may reach the service using the contact information below:

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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,

Sarah K. Larson
Assistant Attorney General
Office of Open Government

SKL:lah

cc: Chief Deputy Daniel Hess, Oneida County Sheriff's Office

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April 18, 2018

Michael A. Schmidt
[redacted]
Hartford, WI 53027

Dear Mr. Schmidt:

The Wisconsin Department of Justice (DOJ) is in receipt of your correspondence, dated September 12, 2017, in which you requested that Mark Bensen, Washington County District Attorney, "investigate and prosecute" alleged open meetings violations from July 18, 2017 involving the West Bend School Board. Mr. Bensen referred your letter to DOJ's Office of Open Government, and I am responding by way of this letter.

The Attorney General and DOJ's Office of Open Government are committed to increasing government openness and transparency, and DOJ endeavors to offer guidance in these areas 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.

Before I respond to the specific concerns outlined in your correspondence, I wanted to provide you with some general information regarding filing complaints under 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. 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. 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).

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

As explained above, filing a verified complaint ensures that you have the option to file suit, should the district attorney refuse or otherwise fail to commence an enforcement action. For further information, please see pages 30-31 of the Open Meetings Law Compliance Guide available through DOJ's website (https://www.doj.state.wi.us/office-open-government/office-open-government) 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 can be used to submit a verified complaint to the district attorney.

You sent your September 12, 2017 correspondence to the Washington County District Attorney. However, if you intended your correspondence to be a verified complaint under Wis. Stat. § 19.97, it should be noted that your correspondence to the Washington County District Attorney does not comply with the requirements of a "verified complaint" under Wis. Stat. § 19.97. However, because Mr. Bensen referred your letter to the Office of Open Government for a possible enforcement action, I am responding to your letter under the Attorney General's authority to enforce and interpret the open meetings law. Wis. Stat. §§ 19.97(1), 19.98.

As I understand your correspondence, you are alleging that the West Bend School Board violated the open meetings law in two interrelated ways: 1) by allegedly discussing the topic of the reorganization of the high school administration at the July 18, 2017 meeting in closed session; and 2) by allegedly failing to provide proper notice of the July 18, 2017 closed session because the notice did not adequately describe the subject of the closed session meeting. The notice for the July 18, 2017 meeting stated that the board would enter into closed session under "Wis. Stat. § 19.85(1)(c) to consider employment, promotion, compensation or performance evaluation data" of "administrative personnel."

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).

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.*

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

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

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

Furthermore, some specificity is required since many exemptions contain more than one reason for authorizing a closed session. For example, Wis. Stat. § 19.85(1)(c) provides an exemption for the following: "Considering employment, promotion, compensation or performance evaluation data of any public employee over which the governmental body has jurisdiction or exercises responsibility." Merely quoting the entire exemption, without specifying the portion of the exemption under which the body intends to enter into closed session, may not be sufficient.

The Attorney General has previously concluded that the Wis. Stat. § 19.85(1)(c) exemption is sufficiently broad to authorize convening in closed session to interview and consider applicants for positions of employment. *See* Caturia Correspondence (Sept. 20, 1982). Both the Attorney General and the Wisconsin Supreme Court have also concluded that the Wis. Stat. § 19.85(1)(c) exemption authorizes a closed session to discuss the qualifications of and salary to offer a specific applicant for a position of employment, but does not authorize a closed session to discuss the qualifications and salary range for the position in general. *See* 80 Op. Att'y Gen. 176, 177–78 (1992); *State ex rel. Buswell v. Tomah Area Sch. Dist.*, 2007 WI 71, ¶ 37, 301 Wis. 2d 178, 732 N.W.2d 804 (noting that Wis. Stat.

§ 19.85(1)(c) "provides for closed sessions for considering matters related to *individual* employees" (emphasis added)).

In order to investigate the allegations in your complaint, I contacted the West Bend School Board's legal counsel, and my conclusions throughout this letter are based on the facts as presented in your correspondence and as available to me as the result of my investigation.

I obtained the following information about what transpired at the July 18, 2017 closed meeting. The closed session involved a discussion about hiring a possible candidate for employment at the school district in an administrative position. Therefore, as to that subject, based on the facts available to me, I conclude that the discussion that took place at that closed meeting was proper under Wis. Stat. § 19.85(1)(c), because the discussion involved an individual prospective candidate for employment. *See* 80 Op. Att'y Gen. 176, 177–78 (1992); *Buswell*, 2007 WI 71, ¶ 37. I also conclude that the notice as to that subject was proper, because the notice was sufficiently specific. *See Buswell*, 2007 WI 71, ¶ 29 (whether notice is specific enough is determined on a case-specific basis, based on a reasonableness standard).

As you indicated in your letter, however, any more general discussion about the high school administrative reorganization would be inappropriate for closed session, so I also obtained the following information from the board's legal counsel. After the discussion about the individual prospective candidate for employment, someone at the closed meeting asked a rhetorical question about whether the one-principal format was an appropriate administrative structure for the district, or whether they should go back to the old two-principal format. Immediately thereafter, someone else stated that the board could not discuss that matter in closed session. The board members all agreed to table the issue without further discussion, and agreed to schedule a special (open) board meeting solely for the purpose of that discussion. (That was the meeting that occurred on July 20, 2017.)

Based on the facts available to me from my investigation, I conclude that nothing about the high school administrative reorganization subject was actually discussed at the closed July 18, 2017 meeting. Rather, the subject was merely mentioned, was immediately tabled, and was not discussed any further. Thereafter, the board scheduled the July 20, 2017 special meeting to occur in open session for the sole purpose of discussing that subject in open session with members of the public present.

For these reasons, and based on the facts available to me, I conclude that no violations of the open meetings law occurred at the July 18, 2017 closed meeting, either with respect to the actual meeting itself or with respect to the notice. Because the high school reorganization subject was not intended to be discussed in closed session, nor was the subject actually discussed in closed session, the closed meeting was proper, and the notice of the closed meeting was not required to contain any information about the subject.

During the course of my investigation, however, I independently discovered an additional potential open meetings violation that you had not previously identified in your September 12, 2017 correspondence. I learned that, at 12:05 p.m. on July 20, 2017, the school board had posted a revised online notice of the 5:00 p.m. meeting that same day. In other words, the board posted a revised public notice of the open meeting less than 24 hours before the meeting. I will discuss that potential notice violation below, but I first wanted to provide you with some general information about the notice requirements under open meetings law.

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. *See* 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." Wis. Stat. § 19.84(2). The notice must be in such a form so as to reasonably apprise the public of this information. *Id.* Whether the notice is specific enough is determined on a case-specific basis, based on a reasonableness standard. *Buswell*, 2007 WI 71, ¶ 29. For additional information on the notice requirements of the open meetings law, please see pages 13 through 19 of the Open Meetings Law Compliance Guide available through DOJ's website (https://www.doj.state.wi.us/office-open-government/office-open-government).

Here, as already noted, the school board posted a revised public notice of the open meeting at 12:05 p.m. on the same day of the 5:00 p.m. meeting (*i.e.*, less than 24 hours before the meeting), but the original notice was not contained online. Therefore, I conducted an investigation to find out: 1) whether the original notice was posted more than 24 hours before the meeting; 2) whether the original notice was sufficiently specific; and 3) if not, whether the board had "good cause" for not posting the revised notice with the required 24-hours' notice under Wis. Stat. § 19.84(3).

I obtained the following information from the school board's legal counsel about the original notice for the July 20, 2017 meeting. The original notice could not be located, but it was apparently posted more than 24 hours before the meeting. The original notice apparently contained an agenda item with some kind of description pertaining to "high school principal." It was decided, however, that the original notice needed to be revised because the original agenda item was not specific enough to apprise the public of the subject matter of the meeting. Therefore, the board posted the revised notice at 12:05 p.m. on July 20, 2017 with the agenda item, "High School Administrative Reorganization."

Under the open meetings law, both the revised notice as well as the original notice should have been posted over 24 hours before the meeting in order to comply with the notice requirements, unless the board had "good cause" for not providing the revised notice with the required 24-hours' notice. *See* Wis. Stat. § 19.84(3). However, no Wisconsin court decision or Attorney General Opinion discusses what constitutes "good cause" to provide less than 24 hours' notice of a meeting, so it is difficult to determine what might constitute "good cause" under the law for the board's failure to provide adequate notice.

Nevertheless, the "good cause" provision, like all other provisions of the open meetings law, must be construed in favor of providing the public with the fullest and most complete information about governmental affairs as is compatible with the conduct of governmental business. Thus, if there is any doubt whether "good cause" exists, the governmental body should provide the full twenty-four-hour notice.

Here, the board may have believed that they had "good cause" as to why they could not or did not provide 24-hours' notice of the July 20, 2017 meeting. However, I have insufficient information to make a determination of whether "good cause" existed, because no explanation was provided to me as to why the board failed to provide the required 24-hours' notice for the revised notice. Thus, although I cannot conclude with certainty that a notice violation occurred under the open meetings law, it appears that a notice violation may have occurred.

As noted earlier, the Attorney General has authority to enforce the open meetings law. Wis. Stat. § 19.97(1). At this time, however, the Attorney General is declining to pursue an enforcement action against the West Bend School Board, for several reasons.

First, I do not believe that the board was trying to circumvent the law. Instead, it appears that the board was trying to comply with the open meetings law by correcting any defects in the original notice and re-posting the revised notice with more specificity as to the meeting subject. Thus, even though the revised notice was rendered untimely under Wis. Stat. § 19.84(3), the board did take measures to try to correct the lack of specificity in the original notice under Wis. Stat. § 19.84(2). By way of this letter and by way of my

discussion with the board's counsel, the board is now aware of their notice obligations under the open meetings law, and I expect that no future violations will occur.

Second, the board has taken steps since the July 2017 meetings to improve upon their operations—most notably, by revising their board policies pertaining to public participation at meetings and creating new board policies pertaining to notice and closed sessions. The board's legal counsel has also provided training to the board about open meetings law. Therefore, it is unlikely that future violations will occur.

Third, as noted above, the Attorney General may elect to prosecute complaints involving cases presenting novel issues of law that coincide with matters of statewide concern. While your matter is important, it does not appear to present novel issues of law that coincide with matters of statewide concern. As a result, we respectfully decline to pursue an enforcement action at this time.

However, the other remedies outlined above may still be available to you, and 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.

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Sincerely,

Sarah K. Larson
Assistant Attorney General
Office of Open Government

SKL:skl

cc: Mark Bensen, Washington County District Attorney
Mary Hubacher, Buelow Vetter

STATE OF WISCONSIN
DEPARTMENT OF JUSTICE

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May 22, 2018

Jason Dobbs
[redacted]
Greendale, WI 53129

Dear Mr. Dobbs:

The Wisconsin Department of Justice (DOJ) Office of Open Government is in receipt of your November 27, 2017 correspondence attaching "a verified complaint of the State of Wisconsin Open Meetings Law." In your complaint, you allege that five members of the Greendale Village Board and the Village President violated the open meetings law on November 18, 2017 when they "knowingly attended a gathering of a political fundraiser for James Birmingham," who is the Greendale Village President. You allege that this is a violation because "[t]here was a quorum of Greendale elected trustees present and the meeting was not officially posted as required." You also included "documentary evidence of said acts or omissions" in the form of Facebook posts and photos.

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 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. Before I respond to the specific concerns outlined in your complaint, I wanted to provide you with some general information regarding the open meetings law, which I hope you will find helpful.

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 publicly and be open to all citizens at all times unless otherwise expressly provided by law. Wis. Stat. § 19.81(2). The provisions of the open meetings law are to be construed liberally to achieve that purpose. Wis. Stat. § 19.81(4).

The open meetings law applies to every meeting of a governmental body. Wis. Stat. § 19.83. A "meeting" is defined as:

> [T]he convening of members of a governmental body for the purpose of exercising the responsibilities, authority, power or duties delegated to or

> vested in the body. If one-half or more of the members of a governmental body are present, the meeting is rebuttably presumed to be for the purpose of exercising the responsibilities, authority, power or duties delegated to or vested in the body. The term does not include any social or chance gathering or conference which is not intended to avoid this subchapter . . . .

Wis. Stat. § 19.82(2). A "convening of members" occurs when a group of members gather to engage in formal or informal government business, including discussion, decision, and information gathering. *State ex rel. Badke v. Vill. Bd. of Greendale*, 173 Wis. 2d 553, 572, 494 N.W.2d 408 (1993).

The presence of members of a governmental body does not, in itself, establish the existence of a "meeting" subject to the open meetings law. A meeting of a governmental body exists, such that prior notice is required by law, when (1) there is a purpose to engage in government business and (2) the number of members present is sufficient to determine the governmental body's course of action. *State ex rel. Newspapers v. Showers*, 135 Wis. 2d 77, 102, 398 N.W.2d 154 (1987).

Thus, 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). However, a meeting does not exist where the members are gathered by chance or for social reasons. *See Badke*, 173 Wis. 2d at 576 ("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 Badke*, 173 Wis. 2d at 573–74. 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. Moreover, 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 law provides, however, that if one-half or more of the members of a body are present at a gathering, the gathering is "rebuttably" presumed to be a "meeting" for the purpose of "exercising the responsibilities, authority, power or duties delegated to or vested in the body." *See* Wis. Stat. § 19.82(2). Thus, when one-half or more members convene, the burden of proof rests with the governmental body to establish that a "meeting" was *not*

held. *See* OAG 17–82 (Feb. 12, 1982). For example, the members of the governmental body may overcome the presumption that a meeting occurred by proving that they did not discuss any subject that was within the realm of the body's authority. *See* Dieck Correspondence (Sept. 12, 2007).

If a "meeting" takes place, the open meetings law requires that public notice must be given. For additional information on the notice requirements of the open meetings law, you may wish to read pages 13 through 19 of the Open Meetings Law Compliance Guide available through DOJ's website (https://www.doj.state.wi.us/office-open-government/office-open-government).

Before I address your specific complaint, I also wanted to provide you with some general information regarding filing complaints under the open meetings law. Under the open meetings law, the Attorney General and the district attorneys have authority to enforce the law. Wis. Stat. § 19.97(1). Generally, the Attorney General may elect to prosecute complaints presenting novel issues of law that coincide with matters of statewide concern.

More frequently, the district attorney of the county where the alleged violation occurred may enforce the law. 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. 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).

Please note that, in Milwaukee County, the Milwaukee County Office of Corporation Counsel—*not* the district attorney—serves as legal counsel for the purposes of enforcement of the open meetings law. *See* Wis. Stat. § 59.42(2)(b). As I will explain further below, the verified complaint that you filed with the Milwaukee County District Attorney's office was forwarded to the Milwaukee County Office of Corporation Counsel for investigation and possible enforcement action.

The law does not require a district attorney—or, as in this instance, the corporation counsel—to commence an enforcement action upon receipt of a written request to do so. *See* Wis. Stat. § 19.97(4). A district attorney has broad discretion to decide whether to bring an action for enforcement. *See State v. Karpinski*, 92 Wis. 2d 599, 607, 285 N.W.2d 729 (1979). The open meetings law takes into account the fact that district attorneys may not always commence actions for enforcement and provides individuals with the option of commencing their own action pursuant to Wis. Stat. § 19.97(4).

Turning now to the specific allegations in your complaint, you alleged that five members of the Greendale Village Board and the Village President violated the open

meetings law on November 18, 2017 when they "knowingly attended a gathering of a political fundraiser for James Birmingham," because "[t]here was a quorum of Greendale elected trustees present" and the "meeting was not officially posted as required." As described below, I have come to my conclusions about these allegations based upon the information you provided to me in the complaint, as well as information available to me from my limited investigation.

First, as to the Village President himself, it is unclear whether he is part of the village board, based on the information available to me. If he is not a member of the village board, then he is not subject to the open meetings law in this particular situation because he alone occupies the office of Village President. *See State ex rel. Plourde v. Habhegger*, 2006 WI App 147, ¶¶ 12–13, 294 Wis. 2d 746, 720 N.W.2d 130 (open meetings law does not apply to single-member governmental bodies; Wis. Stat. § 19.82(2) contemplates that there must be at least two members in a governmental body for the open meetings law to apply).

Second, as to the rest of the Village of Greendale Board of Trustees, it appears that the board is comprised of six trustees, and thus, a quorum of the board was present at the November 18, 2017 gathering because five members were in attendance. Therefore, the gathering was "rebuttably" presumed to be a "meeting," unless the meeting was by chance or for social reasons. *See* Wis. Stat. § 19.82(2); *Badke*, 173 Wis. 2d at 576.

In other words, the November 18, 2017 gathering was presumed to be a "meeting," and subject to open meetings law requirements, unless the members of the board of trustees can prove that a "meeting" was not held—for example, by showing that the gathering was by chance or for social reasons, or by showing that the members did not discuss any subject that was within the realm of the board's authority. *See* Wis. Stat. § 19.82(2); *Badke*, 173 Wis. 2d at 576; OAG 17–82 (Feb. 12, 1982); Dieck Correspondence (Sept. 12, 2007). If any kind of formal or informal government business was conducted, however, such as discussion or information gathering, the gathering would be considered a "convening" of the board, subject to open meetings law requirements. *Badke*, 173 Wis. 2d at 572.

The information you provided in your verified complaint was insufficient to evaluate these factual issues. However, pursuant to the Attorney General's authority to enforce and interpret the open meetings law, *see* Wis. Stat. §§ 19.97(1), 19.98, I contacted the Village of Greendale village attorney in order to investigate the allegations in your complaint. As noted above, my conclusions throughout this letter are based on the facts available to me as the result of my limited investigation and the allegations in your complaint.

First, as noted above, I learned that the Milwaukee County District Attorney did, in fact, forward your verified complaint to the Milwaukee County Office of Corporation Counsel for investigation and possible enforcement action. The latter office then investigated the matter, and made the determination not to commence an enforcement action. The assistant corporation counsel in charge of the investigation provided you with her determination letter dated December 21, 2017. I have also seen the December 21, 2017 letter, described further below and included with this correspondence as an enclosure.

In her December 21, 2017 determination letter, the assistant corporation counsel concluded that there was "no dispute that five of the six current [t]rustees were present at the fundraiser" on November 18, 2017. According to her investigation, which consisted of interviews of and written statements from the village trustees, the village trustees were "invited to the fundraiser" and "encouraged to preregister for the event," but the trustees "did not respond formally regarding their anticipated attendance." The Village of Greendale attorney also told me that the village trustees did not sit with each other at the event, instead sitting with their spouses or doing other activities at the fundraiser such as staffing the door.

In her determination letter, the assistant corporation counsel concluded that, even if the gathering was not a social or chance gathering, the "sworn testimony" of the trustees "would be sufficient to overcome the presumption [that a meeting occurred] and defeat any enforcement action commenced by [the Milwaukee County Office of Corporation Counsel]." Specifically, she found that the trustees "deny having discussed any subject within the realm of the Village Board's authority." Moreover, she found that, "to the extent they conversed with one another, their topics were limited to those of a social nature, such as the food being served at the event." The determination letter also noted that your complaint failed to allege "any more specific facts regarding the specific conduct of any [t]rustees or the topic of any conversations at the November 18th event."

The Milwaukee County Office of Corporation Counsel therefore declined to pursue enforcement action, but strongly recommended that the Village of Greendale provide open meetings training to its elected officials, including the Village Board of Trustees. The determination letter further explained that "[v]oluntary completion of Open Meetings training will be regarded favorably by [the Milwaukee County Office of Corporation Counsel] in the event of similar complaints to yours arising out of the same event."

The Attorney General has independent enforcement authority over open meetings law matters. *See* Wis. Stat. § 19.97(1). However, the Milwaukee County Office of Corporation Counsel conducted a seemingly thorough investigation, and the village board trustees denied discussing government business at the fundraiser. If the Attorney General were to initiate an enforcement action, the same factual problems of proof would likely exist. As already mentioned, if the trustees would deny under oath that they discussed any government business or gathered any information at the fundraiser, then a court could likely find that the trustees overcame the rebuttable presumption that a "meeting" occurred.

Moreover, under Wisconsin law, the mere fact that individual members of a public body have been invited to a gathering by a third party does not determine whether a meeting within the scope of the open meetings law has occurred. *See Paulton v. Volkmann*, 141 Wis. 2d 370, 372–73, 415 N.W.2d 528 (Ct. App. 1987). Rather, the relevant inquiry is whether the presumption that a "meeting" occurred can be *rebutted* by evidence that a quorum of members present did not discuss or consider government business. *See Badke*, 173 Wis. 2d at 572.

Thus, for example, the Attorney General has opined that the presumption of a school board "meeting" was rebutted when a quorum of school board members attended a school PTA meeting but merely had individual discussions with various parents in attendance. *See* OAG 72-77 (August 24, 1977). In that situation, the board members were acting as individual members of the board and there appeared to be no convening of a meeting of the school board. *Id.*

Similarly, in *Paulton*, the presumption of a "meeting" was rebutted when a series of individual invitations were extended to individual members of a government body, even though a quorum ended up being present when they all attended. *Paulton*, 141 Wis. 2d 370, 372–73. In that case, the court reasoned that the presumption of a meeting was rebutted because there was no evidence that the school board members discussed anything related to their official powers or duties. *Id.* at 374–75. Rather, the evidence instead showed that the individual board members only answered a few personal questions pertaining to their own children. *Id.* at 373.

Under relevant Wisconsin open meetings law, and given the facts available to me, I find the Milwaukee County Office of Corporation Counsel's conclusion—that the presumption of a "meeting" on November 18, 2017 would likely be overcome here by the factual denials of the trustees who were present at the fundraiser—to be reasonable. Given the facts available to me, I conclude that it would be difficult for an enforcement action to succeed. Moreover, while your matter is important, your complaint does not appear to present novel issues of law that coincide with matters of statewide concern. As a result, the Attorney General respectfully declines to pursue an enforcement action at this time.

It should be noted, however, that I agree with the Milwaukee County Office of Corporation Counsel's recommendation that the Village of Greendale public officials, including the Village Board of Trustees, should undergo additional training on complying with open meetings law. As the assistant corporation counsel noted in her December 21, 2017 determination letter, the Milwaukee County Office of Corporation Counsel may be able to coordinate no-cost training for the Village.

By way of this letter copied to both the village board's attorney and the Village Manager, the village and its board should now be aware of their obligations under the open meetings law. DOJ's Office of Open Government also recommends that the board provide the required open meetings notices of any gatherings where a quorum of the board may be present. Such notices could indicate, for example, that although a quorum may be present at an event, no government business will be considered, discussed, or acted upon.

By way of this letter, the village and its board should also now be aware of the training obligations that DOJ's Office of Open Government expects the village and its board to undergo. We strongly recommend that the village and its board avail itself of the training that the Milwaukee County Office of Corporation Counsel has offered to coordinate. DOJ's Office of Open Government also offers various open meetings law resources through its

website (https://www.doj.state.wi.us/office-open-government/office-open-government), and the village may also contact our office with any questions.

DOJ's Office of Open Government views this anticipated further training as a sufficient resolution of your complaint. However, should you choose to pursue the matter further on your own, the other remedies outlined above may still be available to you, and you may wish to contact a private attorney regarding this matter. The State Bar of Wisconsin operates an attorney referral service. The referral service is free; however, a private attorney may charge attorney's fees. You may reach the service using the contact information below:

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

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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,

Sarah K. Larson
Assistant Attorney General
Office of Open Government

SKL:skl

Enclosure

cc: Attorney Margaret C. Daun, Milwaukee County Corporate Counsel (w/enc.)
Attorney John Macy, Municipal Law and Litigation Group, S.C. (w/enc.)
Mr. Todd Michaels, Greendale Village Manager (w/enc.)

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May 29, 2018

Cynthia Swanson
[redacted]
Oshkosh, WI 54902

Dear Ms. Swanson:

The Wisconsin Department of Justice (DOJ) is in receipt of your November 7, 2017 correspondence in which you "inquir[ed] about the legality of what's going on with the Lakeshore Golf Course in the City of Oshkosh, WI." You wrote that the "land was a gift to the people of Oshkosh, for the sole purpose of building a golf course . . . city counsel [*sic*] members have decided to take this away from the people, without a vote, or even a voice." You also wrote, "Yesterday's meeting was not publicized, and I hear on the news this morning that not one opposing voice was heard . . . only those for it were allowed to speak their thoughts." You asked, "Is this legal?"

The Attorney General and DOJ's Office of Open Government (OOG) are committed to increasing government openness and transparency. The OOG works in furtherance of this with a focus on the Wisconsin Open Meetings Law, Wis. Stat. §§ 19.81 to 19.98, and the Wisconsin Public Records Law, Wis. Stat. §§ 19.31 to 19.39. The OOG is only authorized to provide assistance within this scope. Based on the information you provided, it appears that some of the subject matter of your correspondence is outside the OOG's scope. Therefore, the OOG cannot provide assistance regarding the "legality of what's going on with the Lakeshore Golf Course in the City of Oshkosh, WI." However, we can address your correspondence to the extent it concerns the open meetings law.

The open meetings law acknowledges that the public is entitled to the fullest and most complete information regarding government affairs as is compatible with the conduct of governmental 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).

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 19 of the Open Meetings Law Compliance Guide available through DOJ's website (https://www.doj.state.wi.us/office-open-government/office-open-government).

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. You did not specifically request the Attorney General to file an enforcement action; nonetheless, we respectfully decline to pursue an enforcement action at this time.

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

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

You may 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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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,

Sarah K. Larson
Assistant Attorney General
Office of Open Government

SKL:lah

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May 25, 2018

Shawn Ackerman #386102
Stanley Correctional Institution
100 Corrections Drive
Stanley, WI 54768

Dear Mr. Ackerman (Evy):

This is in response to your correspondence, received on March 6, 2018, in which you requested that the Attorney General demand that the Milwaukee Police Department release records you requested regarding case #10 CF 3472.

The Wisconsin Department of Justice (DOJ) Office of Open Government (OOG) interpreted your correspondence, in part, as a public records request directed to DOJ to which we responded in our letter, dated March 12, 2018. That letter also informed you that we would respond to your request for DOJ's assistance with the public records request you submitted to the Milwaukee Police Department in a separate letter, which we are doing now.

DOJ's OOG works to increase government openness and transparency with a focus on the Wisconsin Open Meetings Law, Wis. Stat. §§ 19.81 to 19.98, and the Wisconsin Public Records Law, Wis. Stat. §§ 19.31 to 19.39. The information provided in your correspondence is insufficient to evaluate your matter. However, we can provide you with information regarding the public records law that you may find useful.

The public records law authorizes requesters to inspect or obtain copies of "records" created or maintained by an "authority." Under the law, an incarcerated individual is not considered a "requester" unless the records the individual seeks contains specific references to the individual or the individual's minor children. *See* Wis. Stat. § 19.32(3). 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.

Under the public records law, a request "is deemed sufficient if it reasonably describes the requested record or the information requested." Wis. Stat. § 19.35(1)(h). A request "without a reasonable limitation as to subject matter or length of time represented by the record does not constitute a sufficient request." *Id.* It is helpful for public records requests to

be as specific as possible. This helps avoid any confusion the authority may have regarding the request, thereby helping to ensure the requester receives the records they seek in a timely fashion.

The public records law does not require a response to a public records request within a specific timeframe. In other words, after a request is received, there is no set deadline by which the authority must respond. However, the law states that upon receipt of a public records request, the authority "shall, as soon as practicable and without delay, either fill the request or notify the requester of the authority's determination to deny the request in whole or in part and the reasons therefor." Wis. Stat. § 19.35(4)(a). A reasonable amount of time for a response "depends on the nature of the request, the staff and other resources available to the authority to process the request, the extent of the request, and other related considerations." *WIREdata, Inc. v. Vill. of Sussex*, 2008 WI 69, ¶ 56, 310 Wis. 2d 397, 751 N.W.2d 736; *see Journal Times v. Police & Fire Comm'rs Bd.*, 2015 WI 56, ¶ 85, 362 Wis. 2d 577, 866 N.W.2d 563 (an authority "can be swamped with public records requests and may need a substantial period of time to respond to any given request").

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

While the law requires an authority to fill a request or notify the requester of a determination to deny a request, the law does not require an authority to respond to a requester if the authority has no records responsive to a request. However, DOJ advises that an authority notify a requester if they have no responsive records. *See Journal Times*, 362 Wis. 2d 577, ¶ 102.

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

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

Committed or incarcerated individuals may not commence an action for mandamus under the public records law later than 90 days after the date the request is denied by the authority having custody of the record. Wis. Stat. § 19.37(1m).

Alternatively, the requester may submit a written request for the district attorney of the county where the record is found, or the Attorney General, to file an action for mandamus seeking release of the requested records. Wis. Stat. § 19.37(1)(b). (In Milwaukee County, the Milwaukee County Office of Corporation Counsel—not the district attorney—serves as legal counsel for the purposes of enforcement of the Open Meetings Law and Public Records Law.) 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 public records issue raises novel issues of law that coincide with matters of statewide concern. Therefore, we respectfully decline to pursue an action for mandamus on your behalf at this time.

The other remedies outlined above may still be available to you. Additionally, you may wish to contact a private attorney regarding this matter. The State Bar of Wisconsin operates an attorney referral service. The referral service is free; however, a private attorney may charge attorney's fees. You may reach the service using the contact information below:

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(608) 257-4666
http://www.wisbar.org/forpublic/ineedalawyer/pages/lris.aspx

Although we are declining to pursue an enforcement action at this time, I contacted the Milwaukee City Attorney's Office, which represents the city of Milwaukee including the Milwaukee Police Department. I spoke with Assistant City Attorney Peter Block and brought your matter to his attention.

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

Cc: Assistant City Attorney Peter J. Block

STATE OF WISCONSIN
DEPARTMENT OF JUSTICE

BRAD D. SCHIMEL
ATTORNEY GENERAL

Paul W. Connell
Deputy Attorney General

Delanie M. Breuer
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June 6, 2018

Talis Shelbourne
[redacted]
Milwaukee, WI 53233

Dear Ms. Shelbourne:

The Wisconsin Department of Justice (DOJ) Office of Open Government is in receipt of your January 11, 2018 email correspondence regarding your November 28, 2017 public records request to the Milwaukee Police Department (MPD). Between January 30, 2018 and February 15, 2018, you also provided us with a number of documents, including your November 28, 2017 public records request to MPD, and MPD's December 13, 2017 letter responding to your public records request.

In your November 28, 2017 public record request to MPD, you stated that you were requesting "the police reports for any investigation into" a professor at UW-M "for any sexual assault or related investigations." That letter also indicated that you would be "willing to accept redacted records."

In response, MPD sent you a letter on December 13, 2017 stating, in relevant part, that "the public disclosure of the responsive sexual assault records would constitute an invasion of privacy of the victim or the victim's family members," and that MPD was denying your request for the sexual assault records. The December 13, 2017 denial letter went on to state that MPD "may be able to release a copy of these sensitive records if you are able to inform the MPD Open Records Section that the victims involved in this incident consent to the release of the responsive record."

In your January 11, 2018 email to us, you stated that were "filing an official complaint" with DOJ, based on MPD's failure to provide you with the requested documents, even in redacted form. You noted in your email that "the police department's legal reasoning for withholding the request was inapplicable to the open records request we made on November 28, 2017." You further explained that, although you were "still willing to accept a document with victim redaction," you were "applying to [DOJ] for an official review to challenge MPD's refusal to provide the police records in this closed sexual assault investigation."

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 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. Before we respond to the specific concerns outlined in your correspondence, we wanted to provide you with some general information regarding the public records law, which we 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 public records balancing test determines whether the presumption of openness is overcome by another public policy concern. *Hempel v. City of Baraboo*, 2005 WI 120, ¶ 4, 284 Wis. 2d 162, 699 N.W.2d 551. If a records custodian determines that a record or part of a record cannot be disclosed, the custodian must redact that record or part of that record. *See* Wis. Stat. § 19.36(6).

The public records law also 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). Specific policy reasons, rather than mere statements of legal conclusion or recitation of exemptions, must be given. *Pangman & Assocs. v. Zellmer*, 163 Wis. 2d 1070, 1084, 473 N.W.2d 538 (Ct. App. 1991); *Vill. of Butler v. Cohen*, 163 Wis. 2d 819, 824-25, 472 N.W.2d 579 (Ct. App. 1991). The reason must be specific and sufficient to provide the requester with adequate notice of the reasons for denial. In every written denial, the authority must also inform the requester that 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 concerns you have outlined in your correspondence potentially relate to a number of complex public records issues. Although we have not seen the records in question here, we have identified a number of potential legal issues that might be relevant to your concerns. Therefore, we wanted to provide you with some additional general information related to release of police records, and privacy rights of crime victims.

With respect to police records, an ongoing investigation, prosecution, or other litigation—and whether the confidentiality of the records sought is material to that ongoing investigation, prosecution, or other litigation—are factors that an authority may consider in applying the public records balancing test. *Cf. Linzmeyer v. Forcey*, 2002 WI 84, ¶¶ 30, 32, 39, 41, 254 Wis. 2d 306, 646 N.W.2d 811; *Journal/Sentinel, Inc. v. Aagerup*, 145 Wis. 2d 818, 824-27, 429 N.W.2d 772 (Ct. App. 1988). Moreover, as to police records of closed investigations, there is no blanket rule. After the investigation is closed, the authority must

perform the balancing test on a case-by-case basis in determining whether to disclose records. *Linzmeyer*, 2002 WI 84, ¶ 42.

With respect to crime victims, 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.

Three statutory provisions in the crime victims "bill of rights"—Wis. Stat. §§ 950.04(1v)(ag), (1v)(dr), and (2w)(dm)—also specifically relate to the disclosure of personally identifying information of victims and witnesses by public officials, employees or agencies. Those provisions are intended to protect victims and witnesses from inappropriate and unauthorized use of their personal information. Those statutes are not intended to, and do not, prohibit law enforcement agencies or other public entities from disclosing the personal identities of crime victims and witnesses in response to public records requests, although those public records duties should continue to be performed with due regard for the privacy, confidentiality, and safety of crime victims and witnesses. *See* Memorandum from J.B. Van Hollen, Wisconsin Attorney General, to Interested Parties (Apr. 27, 2012), available at https://www.doj.state.wi.us/sites/default/files/dls/act-283-advisory.pdf. Those important concerns generally are addressed in case-by-case application of the public records balancing test which, under appropriate circumstances, allows sensitive information to be redacted or withheld. *Id.* Under the balancing test, public policies supporting protection of the privacy, confidentiality, and safety of crime victims and witnesses must be balanced against the general public interest in disclosure. *Id.*

Turning to your specific concerns outlined in your January 11, 2018 email correspondence to us, we had a series of phone conversations with Milwaukee Assistant City Attorney Peter Block, whose office represents MPD. In so doing, we wanted to accomplish various objectives.

First, we wanted to ascertain why MPD was withholding the records instead of releasing them in redacted form under Wis. Stat. § 19.36(6). Redacting records would potentially provide adequate privacy protections to the victims while at the same time fulfilling MPD's obligations under the public records law. Moreover, we are concerned that MPD was placing the burden on you, the requester, to "inform the MPD Open Records Section that the victims involved in this incident consent to the release of the responsive record."

Finally, we wanted to make MPD aware that, absent a strong public policy favoring nondisclosure in this specific case, the balancing test would likely mandate disclosure of the

records in redacted form under Wis. Stat. § 19.36(6), because the records likely pertain to a closed police investigation, not an open investigation. MPD's December 13, 2017 denial letter does not indicate whether the police records in question were part of an open investigation, but MPD's response to you does not assert an open investigation as part of its rationale. You have also asserted that the investigation was closed. Therefore, even though we have not seen the records in question, we concluded the investigation was closed, based on the facts available to us.

We expressed our concerns to Mr. Block, and provided him an opportunity to relay our concerns to MPD and for MPD to reconsider their position in the denial letter. We also notified Mr. Block that, should MPD decline to reconsider their denial without an adequate reason under the public records balancing test, DOJ would explore a potential enforcement action against MPD if they failed to provide the records to you in redacted form.

After taking these concerns to MPD, Mr. Block informed us that MPD was now willing to provide the records to you in redacted form. It is our understanding that the redacted records have now been released to you.

We hope that this resolves the matter to your satisfaction. If not, 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. These remedies are also available if you are dissatisfied with an authority's redactions and/or their reasons for redactions.

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.

We construed your January 11, 2018 correspondence as a request for the Attorney General to pursue mandamus litigation against MPD. Following our office's involvement, we believe the matter is now resolved, as explained above. Therefore, we believe an action for mandamus is unnecessary at this time, and the Attorney General respectfully declines to take any further action in this matter.

Although we are declining to take further action at this time, the remedies outlined above may still be available to you. You may also wish to contact a private attorney regarding your public records matter. The State Bar of Wisconsin operates an attorney referral service.

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

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

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

Sincerely,

Sarah K. Larson
Assistant Attorney General
Office of Open Government

SKL:skl:pmf

cc: Assistant City Attorney Peter Block

STATE OF WISCONSIN
DEPARTMENT OF JUSTICE

BRAD D. SCHIMEL
ATTORNEY GENERAL

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June 6, 2018

Rosemarie Annonson
spit_fires@hotmail.com

Dear Ms. Annonson:

This letter is in response to your correspondence to Assistant Attorney General Paul Ferguson on November 16, 2017, regarding your "difficulty in following issues as related to the clerk not having copy in the timeline adopted by ordinance and the quality of the minutes." You wrote, "I started complaining in August in regard to a personnel meeting regarding closed session and labor negotiations. Per 'my' reading . . . personnel is using closed without cause." You also asked that the "agenda and minutes to the Oct 11th meeting copied and pasted" in your correspondence be reviewed.

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

Wisconsin Stat. § 19.85 lists exemptions in which meetings may be convened in closed session. Any exemptions to open meetings are to be viewed with the presumption of openness in mind. Such exemptions should be strictly construed. *State ex rel. Hodge v. Turtle Lake,* 180 Wis. 2d 62, 71, 508 N.W.2d 603 (1993). The exemptions should be invoked sparingly and only where necessary to protect the public interest and when holding an open session would be incompatible with the conduct of governmental affairs.

In your correspondence, you provided the October 11th Personnel Committee Agenda and Minutes. The minutes and agenda cited the Wis. Stat. § 19.85(1)(e) exemption as their reasoning for going into closed session to "[c]onsider City negotiating position with Oak Creek Professional Firefighters (International Association of Firefighters, Local No. 1848)." Under the open meetings law, a closed session is authorized for "[d]eliberating or negotiating the purchasing of public properties, the investing of public funds, or conducting other specified public business, whenever competitive or bargaining reasons require a closed session." Wis. Stat. § 19.85(1)(e). The Wis. Stat. § 19.85(1)(e) exemption is not limited to deliberating or negotiating the purchase of public property or the investing of public funds. For example, the Attorney General has determined that the exemption authorized a school board to convene

in closed session to develop negotiating strategies for collective bargaining. 66 Op. Att'y Gen. 93, 96-97 (1977). Therefore, going into closed session to "[c]onsider [the] City['s] negotiating position" may fall under the Wis. Stat. § 19.85(1)(e) exemption.

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

Based on the facts presented, I am unable to make a factual determination as to whether the closed session you discussed was proper. However, please note that when a governmental body seeks to convene in closed session under Wis. Stat. § 19.85(1)(e), the burden is on the body to show that competitive or bargaining interests require closure. *State ex rel. Citizens for Responsible Dev. v. City of Milton*, 2007 WI App 114, ¶¶ 6-8, 300 Wis. 2d 649, 731 N.W.2d 640. "Mere government inconvenience is . . . no bar to the requirements of the law." *State ex rel. Lynch v. Conta*, 71 Wis. 2d 662, 678, 239 N.W.2d 313 (1976).

In your correspondence, you also wrote that you are "again experiencing some difficulty" with "the quality of the minutes." In an effort to increase transparency, it is recommended to keep minutes of all meetings held by a governmental body; however, there is no requirement under the open meetings law for a governmental body to do so. The open meetings law only requires a governmental body to create and preserve a record of all motions and roll-call votes at its meetings. Wis. Stat. § 19.88(3). Meeting minutes are a common method that governmental bodies use to do so. However, so long as the governmental body is maintaining some type of record of all motions and roll-call votes, the Wis. Stat. § 19.88(3) requirement is satisfied.

Under the open meetings law, the Attorney General and the district attorneys have authority to enforce the law. Wis. Stat. § 19.97(1). Generally, the Attorney General may elect to prosecute complaints presenting novel issues of law that coincide with matters of statewide concern. While you did not specifically request the Attorney General to file an enforcement action, nonetheless, we respectfully decline to pursue an enforcement action at this time.

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

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

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

Sarah K. Larson
Assistant Attorney General
Office of Open Government

SKL:lah

STATE OF WISCONSIN
DEPARTMENT OF JUSTICE

BRAD D. SCHIMEL
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June 12, 2018

Linda May
[redacted]
West Allis, WI 53214-4808

Dear Ms. May:

The Wisconsin Department of Justice (DOJ) is in receipt of your correspondence to Attorney General Brad Schimel, dated April 10, 2018, regarding a public records request you made to the "West Allis Police Department over a year ago and to date have had no response." You wrote that your request "was for: Fredrick J. Guske" and that you requested "copies of any/all reports, citations, dispatch notes, narratives –both sides of all documents." You also requested "a booking photo" if on file.

On April 24, 2018, DOJ received a letter from Marisa Szymuszkiewicz, Records Supervisor for the West Allis Police Department, regarding your public records request. She wrote that the West Allis Police Department received your initial public records request in April of 2017 and that you were notified that it was ready for you to pick up on April 17, 2017. She wrote that you never responded to pay for the records or pick them up and that they "discard any requests after one month." She also wrote that your "second request was fulfilled again on [April 24, 2018] and [you were] notified that it was ready for payment and pickup." Our hope is that you now have the records that you requested. If that is not the case or if you have additional questions or concerns, DOJ maintains a Public Records Open Meetings (PROM) hotline to respond to individuals' open government questions. The PROM telephone number is (608) 267-2220.

The 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.

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,

Sarah K. Larson
Assistant Attorney General
Office of Open Government

SKL:lah

cc: Marisa Szymuszkiewicz, Records Supervisor, West Allis Police Department

STATE OF WISCONSIN
DEPARTMENT OF JUSTICE

BRAD D. SCHIMEL
ATTORNEY GENERAL

Paul W. Connell
Deputy Attorney General

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June 12, 2018

Daryise L. Earl #413453
Kettle Moraine Correctional Institution
Post Office Box #282
Plymouth, WI 53073

Dear Mr. Earl:

The Wisconsin Department of Justice (DOJ) is in receipt of your correspondence dated December 11, 2017 in which you stated that you filed two separate open records requests seeking "information relevant to the Michael Bizzle homicide." One public records request from August 4, 2017 was to the Racine County District Attorney's Office in which you sought "the chart that A.D.A. Sharon Riek displayed to jurors, on February 9, 2007, in [C]ase [N]o. 05-CF-210, State of Wisconsin v. Daryise L. Earl." The other public records request from October 30, 2017 was to the Racine County Police Department in which you sought "any and all reports/notes, regarding the time that the Racine County 911 Emergency Operator Center was initially contacted about the Michael Bizzle homicide on August 2, 2000."

In your correspondence, you further stated that, as of December 11, 2017, "I have yet to receive any acknowledgement/response to my requests." You also stated that "upon properly submitting my requests I am entitled to these records, or an explanation as to why the state agency will not disclose the information." You further noted that under Wis. Stat. § 19.37(1)(b), requesters may request that the Attorney General bring an action for mandamus, and requested that DOJ "take the appropriate steps so that Wisconsin State Law is not ignored, and to ensure the requested information is provided to me."

The Attorney General and DOJ's Office of Open Government (OOG) are committed to increasing government openness and transparency. The OOG works in furtherance of this with a focus on the Wisconsin Public Records Law, Wis. Stat. §§ 19.31 to 19.39 and the Wisconsin Open Meetings Law, Wis. Stat. §§ 19.81 to 19.98. To that end, I am providing you with the following information regarding Wisconsin's public records law which I hope you will find helpful.

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, some of the records you requested may pertain to you; therefore, you may request those records pursuant to the public records law. However, under the public records law, certain information may still be redacted from the records.

The public records law authorizes requesters to inspect or obtain copies of "records" created or maintained by an "authority." Records are presumed to be open to public inspection and copying, but there are exceptions. *See* 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).

It should also be noted that, pursuant to Wis. Stat. § 19.32(2), "record" does not include "materials to which access is limited by copyright, patent, or bequest; and published materials in the possession of an authority other than a public library that are available for sale, or that are available for inspection at a public library." It appears that you were represented by an attorney in your criminal case, so you may wish to contact your counsel to obtain copies of information from your court file.

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. *See* Wis. Stat. § 19.35(4)(b).

Based on the facts you have stated in your correspondence, it appears that your public records requests have not been denied, but had not yet been fulfilled as of December 11, 2017. The public records law does not require a response to a public records request within a specific timeframe. In other words, after a request is received, there is no set deadline by which the authority must respond. However, the law states that upon receipt of a public records request, the authority "shall, as soon as practicable and without delay, either fill the request or notify the requester of the authority's determination to deny the request in whole or in part and the reasons therefor." Wis. Stat. § 19.35(4)(a). A reasonable amount of time for a response "depends on the nature of the request, the staff and other resources available to the authority to process the request, the extent of the request, and other related considerations." *WIREdata, Inc. v. Vill. of Sussex*, 2008 WI 69, ¶ 56, 310 Wis. 2d 397, 751 N.W.2d 736; *see Journal Times v. Police & Fire Comm'rs Bd.*, 2015 WI 56, ¶ 85, 362 Wis. 2d 577, 866 N.W.2d 563 (an authority "can be swamped with public records requests and may need a substantial period of time to respond to any given request").

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

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. *See* 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.

It is important to note that the public records law states that no action for mandamus may be commenced by an incarcerated person later than 90 days after the date the request was denied. *See* Wis. Stat. § 19.37(1m). Inmates who seek mandamus must also exhaust their administrative remedies first before filing an action under Wis. Stat. § 19.37. *See* Wis. Stat. § 801.07(7); *Moore v. Stahowiak*, 212 Wis. 2d 744, 749-50, 569 N.W.2d 70 (Ct. App. 1997). For requesters who are not committed or incarcerated, an action for mandamus arising under the public records law must be commenced within three years after the cause of action accrues. *See* Wis. Stat. § 893.90(2).

Alternatively, the requester may submit a written request for the district attorney of the county where the record is found, or the Attorney General, to file an action for mandamus seeking release of the requested records. *See* 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. Nevertheless, we respectfully decline to file an action for mandamus on your behalf. Although your matter is important to you, it does not appear to present a novel issue of law coinciding with matters of statewide concern.

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

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

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

Sincerely,

Sarah K. Larson
Assistant Attorney General
Office of Open Government

SKL:skl

STATE OF WISCONSIN
DEPARTMENT OF JUSTICE

BRAD D. SCHIMEL
ATTORNEY GENERAL

Paul W. Connell
Deputy Attorney General

Delanie M. Breuer
Chief of Staff

17 W. Main Street
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Sarah K. Larson
Assistant Attorney General
larsonsk@doj.state.wi.us
608/266-1221
TTY 1-800-947-3529
FAX 608/266-2779

June 12, 2018

Mr. Douglas Bauman
Marathon County Courthouse
500 Forest Street
Wausau, Wisconsin 54403

Dear Mr. Bauman:

The Wisconsin Department of Justice (DOJ) is in receipt of your February 22, 2018 email correspondence to Attorney General Brad Schimel in which you wrote "I've been trying to find an AG opinion about marriage officiants who are ordained online. The official instructions from the Vital Records Office dating from 2012-2014 referred to (and quoted from) what was described as an October 2005 AG opinion, but I have never been able to find it." You then wrote, "If you can shed any light on this mystery, I would appreciate it."

DOJ's Office of Open Government (OOG) works to increase government openness and transparency with a focus on the Wisconsin Open Meetings Law, Wis. Stat. §§ 19.81 to 19.98, and the Wisconsin Public Records Law, Wis. Stat. §§ 19.31 to 19.39. Based on the information you provided in your correspondence, it appears that the subject matter of your correspondence is outside this scope.

We are unable to offer you assistance regarding your concerns that are outside the scope of the OOG's responsibilities. As a courtesy to you, I searched the archives of the Attorney General's Opinions (https://www.doj.state.wi.us/dls/ag-opinion-archive) in an attempt to locate the AG opinion that you seek, but I was unable to locate anything. You may wish to contact the Wisconsin State Law Library regarding your concerns.

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

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

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Sincerely,

Sarah K. Larson
Assistant Attorney General
Office of Open Government

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STATE OF WISCONSIN
DEPARTMENT OF JUSTICE

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June 13, 2018

Paul Skidmore
9th District Alder
City of Madison, Wisconsin
[redacted]
Madison, WI 53717

Dear Mr. Skidmore:

This letter is in response to your correspondence to Assistant Attorney General Paul Ferguson, dated July 16, 2017, in which you requested the Wisconsin Department of Justice (DOJ) Office of Open Government "review the results of [your] open records request to see if there was an open meetings law violation, or some other violation that was committed by any or all City of Madison alder[s]." You also forwarded us three emails sent to Madison City Attorney Mike May for our review regarding your public records request to the City of Madison Common Council.

I will first address your concerns regarding your public records request. In your email correspondence to City Attorney May on January 17, 2017, you wrote that you made your public records request to the City of Madison in June 2016 but "did not receive any meaningful records until December 27, 2016," and "finally received the last of my requested letters from the Records Custodian on January 11, 2016 [*sic*], which is more than six months after my initial open records request." You also wrote to City Attorney May that "I am very concerned regarding the unusually long delay," and "requesting that you investigate the reasons for the delay, and if there are any consequences to this unusual delay."

Regarding these concerns, I first note that 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. The law also states, however, 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").

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

Based on the information you provided, it appears that you ultimately received all of the public records you requested. Nonetheless, by copy of this letter to City Attorney May, I am making him aware of your concerns. Like all authorities, the City of Madison Common Council should endeavor to provide timely responses to public records requests and maintain communication with requesters. I hope that this resolves your public records matter to your satisfaction. If not, the public records law provides several remedies for a requester dissatisfied with an authority's response, or lack of response, to a public records request.

A requester may file an action for mandamus, with or without an attorney, asking a court to order release of the records. Wis. Stat. § 19.37(1)(a). Alternatively, the requester may submit a written request for the district attorney of the county where the record is found, or the Attorney General, to file an action for mandamus seeking release of the requested records. Wis. Stat. § 19.37(1)(b). The Attorney General is authorized to enforce the public records law; however, he generally exercises this authority in cases presenting novel issues of law that coincide with matters of statewide concern. Although you did not specifically ask our office to pursue a mandamus action to enforce your public records request, we respectfully decline to do so at this time.

I will now address the open meetings law questions and concerns set forth in your correspondence. Before I address your specific concerns, however, I wanted to give you some general information regarding the open meetings law which I hope you will find helpful.

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 requirements of the open meetings law also extend to walking quorums. A "walking quorum" is a series of gatherings among separate groups of members of a governmental body, each less than quorum size, who agree, tacitly or explicitly, to act uniformly in sufficient number to reach a quorum. *State ex rel. Newspapers, Inc. v. Showers*, 135 Wis. 2d 77, 92, 398 N.W.2d 154 (1987). The danger is that a walking quorum may produce a predetermined outcome and thus render the publicly-held meeting a mere formality. *State*

ex rel. Lynch v. Conta, 71 Wis. 2d 662, 685–88, 239 N.W.2d 313 (1976). Thus, any attempt to avoid the appearance of a "meeting" through use of a walking quorum or other "elaborate arrangements" is subject to prosecution under the open meetings law. *Id.* at 687.

The essential feature of a walking quorum is the element of agreement among members of a body to act uniformly in sufficient numbers to reach a quorum. Where there is no such express or tacit agreement, exchanges among separate groups of members may take place without violating the open meetings law.

For example, the requirements of the open meetings law cannot be circumvented by using an agent or surrogate to poll the members of governmental bodies through a series of individual contacts. *See* Clifford Correspondence (Apr. 28, 1986); Herbst Correspondence (Jul. 16, 2008). Similarly, the use of email voting to decide matters fits the definition of a "walking quorum" in violation of the open meetings law, even if the result of the vote is later ratified at a properly noticed meeting. *See* I-01-10 (Jan. 25, 2010).

Furthermore, where a majority of members of a body sign a document that expressly commits them to a future course of action, a court could find a walking quorum violation. *See* Huff Correspondence (Jan. 15, 2008). A walking quorum may be found when the members: 1) have effectively engaged in collective discussion or information gathering outside of the context of a properly noticed meeting; and 2) have agreed with each other to act in some uniform fashion. *Id.* Thus, for example, a walking quorum might be found where a quorum of members sign on to a document that "not only discussed policy matters pending" before the governmental body, but also "expressly committed the signatories not to vote for any additional funding" for a particular project. *Id.*

In contrast, the mere presence of signatories co-sponsoring a resolution would not necessarily imply a decision to later vote in a particular manner. *See* Huff Correspondence (Jan. 15, 2008). Similarly, the signing of a document by members of a body merely asking that a subject be placed on the agenda of an upcoming meeting does not constitute a "walking quorum" where the signers have not engaged in substantive discussion or agreed on a uniform course of action regarding the proposed subject. *See* Kay Correspondence (Apr. 25, 2007). An agreement that a subject should be considered is not the same as an agreement about what course of action is to be taken. *See* Kittleson Correspondence (June 13, 2007).

The Attorney General has advised that members of governmental bodies should reduce any possible appearance of impropriety by minimizing inter-member communications. *See* Kay Correspondence (Apr. 25, 2007). Members subject themselves to close scrutiny and possible prosecution whenever a majority of a body's membership is involved in interactions connected to government business that take place outside the context of a duly noticed meeting. *Id.*

Particularly pertinent here, the use of written communications transmitted by electronic means, such as via email or instant messaging, to discuss or debate a matter also creates the risk that the members of the governmental body have "convened" within the meeting of the open meetings law, depending on how the communication medium is used. *See*

Krischan Correspondence (Oct. 3, 2000).[1] On the one hand, if the emails are used a one-way conduit of information from one member of a governmental body to another, they might have the characteristics of a letter or memorandum rather than a meeting. *Id.*

On the other hand, if the emails closely resemble in-person discussion—such as email replies sent to many members of the governmental body or forwarded to others with attachments—then they may constitute a meeting if they involve enough members to control an action by the body. *Id.* For that reason, the Attorney General "strongly discourages the members of every governmental body from using email to communicate about issues within the body's realm of authority." *Id.*

Similarly, the Attorney General has advised that email "should not be used to carry on private debate and discussion which belongs at a public meeting subject to public scrutiny." *See* Benson Correspondence (Mar. 12, 2004). Emails exchanged "in close proximity in time to each other" could constitute a convening if those emails are akin to a face-to-face meeting. *Id.* For example, if a single official were to email other officials in succession, asking for their support of a particular matter or position, or if the sender (or others forwarding the sender's email) were to reach enough members to constitute a quorum necessary to take or block the action contemplated in the email, then a prohibited walking quorum may occur. *Id.* Email voting is also prohibited, if members vote with the understanding that the body's action would later be determined by the number of email votes in favor of or in opposition to the matter that was the subject of the vote. *See* I-01-10 (Jan. 12, 2010).

I will now turn to the questions that you have alleged in your correspondence, but caution that any conclusions I have reached in this letter are based solely on the information you sent us, not on any factual investigation that I have conducted. I view your concerns as relating to two sets of facts: 1) the Tony Robinson statement that was discussed and drafted via email, and later released to the public, on or around March 11 and 12, 2015; and 2) the Wisconsin State Journal op-ed piece that was discussed and drafted via email, and later published in the press, on or around June 13 and 14, 2016.

Regarding the Tony Robinson statement, the original email was sent by one alder to all of the members of the Common Council, and contained a statement "drafted by a small group of Alders and County Supervisors regarding the shooting of Tony [Robinson]." The email asked the alders to "[p]lease take a look at it and if you would like to add your name as a signer please let me know." The email also requested, "Please do not reply all (which is why I bcc'd this message)." Individual alders then replied to the original email sender with their intent to sign or not sign the letter. It appears that a quorum of at least 9 or 10 alders

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[1] It is important to note that the phrase "convening of members" in Wis. Stat. § 19.82(2) is not limited to situations in which members of a body are simultaneously gathered in the same location, but may also include other situations in which members are able to effectively communicate with each other and to exercise the authority vested in the body, even if they are not physically present together. Whether such a situation qualifies as a "convening of members" under the open meetings law depends on the extent to which the communications in question resemble a face-to-face exchange. A convening of members may occur through written correspondence, telephone conference calls, and electronic communications including email.

expressed their agreement to sign, although other signatories to the statement included former alders who were not on the Common Council at the time, as well as some Dane County Supervisors.

A court could possibly conclude that no walking quorum existed, because the emails could be construed as merely soliciting signatories to co-sponsor a resolution, rather than any decision to vote or decide as a collective body to act in a certain way. *See* Huff Correspondence (Jan. 15, 2008). There may also have been an attempt to comply with the open meetings law, or at least an attempt to minimize inter-member communications, by having the members email directly to the original sender, rather than "reply all." *See* Kay Correspondence (Apr. 25, 2007). Thus, a court could conclude that the emails were intended to be used as a one-way conduit of information. *See* Krischan Correspondence (Oct. 3, 2000).

As the Attorney General has cautioned, however, a risk of a walking quorum exists whenever the members of a governmental body use serial individual emails to communicate about issues within the body's realm of authority. *See* Krischan Correspondence (Oct. 3, 2000). Here, one member was engaged in polling the other members, through a series of individual contacts, about their intent to sign the letter—possibly leading to a prohibited walking quorum through the use of email polling or voting. *See* Clifford Correspondence (Apr. 28, 1986); Herbst Correspondence (Jul. 16, 2008); I-01-10 (Jan. 25, 2010).

Moreover, after the initial email was sent, a series of later emails among members discussed substantive changes and edits to the letter that resembled a discussion. A court could reasonably find that a walking quorum may have occurred because the members: 1) effectively engaged in a collective discussion or information gathering outside of the context of a properly noticed meeting; and 2) agreed with each other to act in some uniform fashion—that is, to sign the statement. *See* Huff Correspondence (Jan. 15, 2008). A court could reasonably find that this was not a mere agreement to consider and vote on later, but that it was an agreement by a quorum of members to act uniformly to issue the statement.

I cannot conclude with certainty that a walking quorum occurred, based on the facts available to me. But I believe that a court could reasonably conclude that a walking quorum occurred here. At the very least, this kind of serial individual contacts is strongly discouraged, because the open meetings law exists in order to ensure that discussion and debate influencing a governmental body's decision is open to public scrutiny.

I turn now to the second set facts related to the Wisconsin State Journal op-ed piece. The original email was sent by one alder to all of the members of the Common Council, and contained an attachment with the draft op-ed piece asking the alders to sign on. The email indicated that the "letter [] provides facts about the study and our expectations for city dep[artmen]t heads," including the Chief of Police. Based on the facts available to me, I believe that the "study" referenced in the email was to take place using the $400,000 already allocated from city funds, and its purpose was to conduct an "independent review of [police] department policies and practices" following Tony Robinson's death.

Based on the information available to me, it appears that a quorum of at least 10 alders in the Common Council agreed, over email, to sign on to the op-ed piece, presenting

the same polling issues described above, and potentially signifying a potential walking quorum violation. I am more concerned, however, about the extent to which the alders engaged in considerable drafting and editing of the op-ed statement over email, including multiple drafts and attachments forwarded back and forth among alders. A court could construe such back and forth emailing as a convening of members under the open meetings law, because it resembles an in-person discussion. *See* Krischan Correspondence (Oct. 3, 2000). A court could also find that there was a "close proximity" of time of the email exchanges, because a single official was emailing others in succession, asking for their support of the particular position that the alders should take in the op-ed piece. *See* Benson Correspondence (Mar. 12, 2004). The Attorney General strongly discourages the use of email for this kind of purpose, because such debate and discussion "belongs at a public meeting subject to public scrutiny." *Id.*

Moreover, although the alders had apparently already voted in open session to allocate the funds, the content of the op-ed piece could reasonably be construed as voicing the alders' philosophy about how $400,000 of city funding should be spent. Thus, a court could reasonably find that a walking quorum of members agreed to sign on to a document about policy matters pending before the governmental body. *See* Huff Correspondence (Jan. 15, 2008). These kind of interactions connected to government business should not take place outside the context of a duly noticed meeting. *See* Kay Correspondence (Apr. 25, 2007). Indeed, one alder who did *not* sign on was apparently concerned about the possibility of a prohibited walking quorum, and even suggested that the alders consult the City Attorney.

In the facts presented, members of the Common Council used email communications to discuss the substantive content of, and whether to sign onto, a statement and an op-ed piece regarding a significant matter of importance to the city. Regardless of how a court would view such communications, in the interest of government openness and transparency, such discussions and decisions should occur in the light of a properly noticed open meeting.

Despite the possibility that a court could find a violation or violations of the open meetings law here, DOJ's Office of Open Government has determined that it will not institute an enforcement action under Wis. Stat. § 19.97(1) at this time, for four reasons. First, DOJ's Office of Open Government fully anticipates that these kinds of email exchanges will not recur or continue among alders of the Common Council. As this letter makes clear, the Attorney General strongly discourages the use of email for these kinds of discussions. By a copy of this letter to the City Attorney, DOJ's Office of Open Government also sets forth its clear expectation that the alders receive additional training in the requirements of the open meetings laws, including the kinds of walking quorums that are prohibited.

Second, I have based these conclusions on the documents you sent us, rather than any independent investigation. If an enforcement action alleging violations of the open meetings law were to be commenced, the parties would have an opportunity to develop a more complete factual record related to the issues, which may or may not support my conclusions herein.

Third, initiating an enforcement action here would not necessarily accomplish or further the objectives of the open meetings laws. Even if DOJ were to initiate an enforcement action and prevail in court, the remedies available under the open meetings law would not

be very meaningful in this situation. For example, the enforcement provisions provide that a prevailing party may be entitled to legal or equitable relief, such as an injunction or declaratory judgment. *See* Wis. Stat. § 19.97(2). Although such a remedy might deter future violations, I have also determined that this letter will serve that purpose.

Another possible remedy in an enforcement action might be that a court could void the action taken in violation of the open meetings law. *See* Wis. Stat. § 19.97(3). But such a judgment would not be entered unless the court would find, under the facts of the case, that the public interest in voiding the action outweighs the public interest in sustaining the validity of the action. *See* Wis. Stat. § 19.97(2).

Here, I am not confident that a court would void the actions taken by the Common Council, because it has been over two years since the op-ed piece was published and over three years since the Tony Robinson statement was issued. It seems unlikely that a court would void those actions, especially considering that the public has already seen both the Tony Robinson statement and the op-ed piece.

Fourth and finally, both the Attorney General and the district attorneys have authority to enforce the law under the open meetings law. Wis. Stat. § 19.97(1). Generally, however, the Attorney General may elect to prosecute complaints presenting novel issues of law that coincide with matters of statewide concern. Here, although your concerns are important, they do not appear to present novel issues of law that coincide with matters of statewide concern. Therefore, the Attorney General has decided not 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. This option may still be available to you, but 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. 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).

Filing a verified complaint ensures that you have the option to file suit, should the district attorney refuse or otherwise fail to commence an enforcement action. For further information, please see pages 30-31 of the Open Meetings Law Compliance Guide available through DOJ's website (https://www.doj.state.wi.us/office-open-government/office-open-government) 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 can be used to submit a verified complaint to the district attorney.

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.

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,

Sarah K. Larson
Assistant Attorney General
Office of Open Government

SKL:lah:skl:pmf

cc: Michael May, City Attorney

STATE OF WISCONSIN
DEPARTMENT OF JUSTICE

BRAD D. SCHIMEL
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June 21, 2018

Ester Riva
esterriva@gmail.com

Dear Ms. Riva:

This Wisconsin Department of Justice (DOJ) Office of Open Government is in receipt of your correspondence, dated November 9, 2017, regarding your public records request to the Milwaukee County Department of Health and Human Services, Delinquency and Court Services Division (DCSD). You wrote, "[i]t took them essentially several months to just provide the case notes" and you "had requested email conversations and the case file as well." You also wrote "[t]hey only sent me the emails which I had sent to them instead of all the emails about the case" and that all of the emails about the case and a copy of the case file "has not been provided."

The public records law authorizes requesters to inspect or obtain copies of "records" created or maintained by an "authority." Records are presumed to be open to public inspection and copying, but there are exceptions. Wis. Stat. § 19.31. Requested records fall into one of three categories: (1) absolute right of access; (2) absolute denial of access; and (3) right of access determined by the balancing test. *Hathaway v. Joint Sch. Dist. No. 1 of Green Bay*, 116 Wis. 2d 388, 397, 342 N.W.2d 682 (1984). If neither a statute nor the common law requires disclosure or creates a general exception to disclosure, the records custodian must decide whether the strong public policy favoring disclosure is overcome by some even stronger public policy favoring limited access or nondisclosure. This balancing test, determines whether the presumption of openness is overcome by another public policy concern. *Hempel v. City of Baraboo*, 2005 WI 120, ¶ 4, 284 Wis. 2d 162, 699 N.W.2d 551. If a records custodian determines that a record or part of a record cannot be disclosed, the custodian must redact that record or part of that record. *See* Wis. Stat. § 19.36(6).

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

determination is subject to review by mandamus under s. 19.37(1) or upon application to the attorney general or a district attorney." Wis. Stat. § 19.35(4)(b).

The public records law does not require a response to a public records request within a specific timeframe. In other words, after a request is received, there is no set deadline by which the authority must respond. However, the law states that upon receipt of a public records request, the authority "shall, as soon as practicable and without delay, either fill the request or notify the requester of the authority's determination to deny the request in whole or in part and the reasons therefor." Wis. Stat. § 19.35(4)(a). A reasonable amount of time for a response "depends on the nature of the request, the staff and other resources available to the authority to process the request, the extent of the request, and other related considerations." *WIREdata, Inc. v. Vill. of Sussex*, 2008 WI 69, ¶ 56, 310 Wis. 2d 397, 751 N.W.2d 736; *see Journal Times v. Police & Fire Comm'rs Bd.*, 2015 WI 56, ¶ 85, 362 Wis. 2d 577, 866 N.W.2d 563 (an authority "can be swamped with public records requests and may need a substantial period of time to respond to any given request").

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

In your correspondence you also wrote that you received "an estimate cost of over $1000 for searching their server or email inboxes at a rate of $85.49 per hour to do this research. I have asked for public records through state agencies . . . and I was never charged such a rate." Under the public records law, "[A]n authority may charge a fee not exceeding the actual, necessary, and direct costs *of four specific tasks:* (1) 'reproduction and transcription'; (2) 'photographing and photographic processing'; (3) 'locating'; and (4) 'mailing or shipping.'" *Milwaukee Journal Sentinel v. City of Milwaukee*, 2012 WI 65, ¶ 54 (citation omitted) (emphasis in original). The amount of such fees may vary depending on the authority. The law permits an authority to impose a fee for locating records if the cost is $50.00 or more. Wis. Stat. § 19.35(3)(c).

Additionally, an authority may require prepayment for the costs associated with responding to a public records request if the total amount exceeds $5.00. Wis. Stat. § 19.35(3)(f). Generally, the rate for an actual, necessary, and direct charge for staff time should be based on the pay rate of the lowest paid employee capable of performing the task. An authority may not charge for the time it takes to redact records. *Milwaukee Journal Sentinel*, 2012 WI 65, ¶¶ 1 & n.4, 6, 58 (Abrahamson, C.J., lead opinion); *Id.* ¶ 76 (Roggensack, J., concurring).

In your correspondence you also wrote, "I had asked as well for a waiver of the costs in this case and had been denied it by the Deputy Administrator of the DCSD although I know that cost waivers are allowed by statute." Under the public records law, "an authority may provide copies of a record without charge or at a reduced charge where the authority

determines that waiver or reduction of the fee is in the public interest." Wis. Stat. § 19.35(3)(e); *George v. Record Custodian*, 169 Wis. 2d 573, 580, 485 N.W.2d 460 (Ct. App. 1992). However, it is up to each authority to determine whether or not to waive its fees.

In order to obtain more information about the status of your public records request and the requirement of prepayment of the costs of the request, I contacted the Milwaukee County Corporation Counsel's Office and spoke with Assistant Corporation Counsel Tedia Gamino there. She informed me that your public records request is still pending, and that they are still trying to fulfill the request. She also provided me with some information regarding the estimated cost of fulfilling your request, including the fact that your 12-part request required 9 search terms to search 31 email addresses over a 2.5 month period of time. Eleven of the 12 parts required an estimated 1.5 hours of time to locate the records, and one part required an estimated 1.4 hours of time for locating records. I was also informed that all email searches for Milwaukee County agencies are assigned to their specialized information technology personnel, and at that specialized rate of $56.99 per hour, the total location fees resulted in the total prepayment amount of $1020.18.

Based on the information available to me, I believe that the amount of fees charged here could be deemed justifiable as actual, necessary, and direct costs of your public records request under the public records law. *See Milwaukee Journal Sentinel*, 2012 WI 65, ¶ 54. I also believe that the prepayment requirement is permitted under Wis. Stat. § 19.35(3)(c), because the total amount of costs associated with responding exceeds $5.00.

However, I did caution the authority that it may be prudent to limit the specialized personnel hours to only the specialized part of the searches, and then use a lower paid employee to perform the review of the search results in order to locate or identify responsive records. By copy of this letter to the Milwaukee County Corporation Counsel's Office, I am also now requesting that the authority evaluate again whether they can provide copies of your public records request without charge or at a reduced charge if they determine that a waiver or reduction of the fee is in the public interest. *See* Wis. Stat. § 19.35(3)(e); *George*, 169 Wis. 2d at 580.

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,[1] or the Attorney General, to file an action for mandamus seeking release of the requested records. Wis. Stat. § 19.37(1)(b). The Attorney General is

[1] In Milwaukee County, the Milwaukee County Office of Corporation Counsel—not the district attorney—serves as legal counsel for the purposes of enforcement of the public records law. *See* Wis. Stat. § 59.42(2)(b).

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.

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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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,

Sarah K. Larson
Assistant Attorney General
Office of Open Government

SKL:lah

Cc: Milwaukee County Assistant Corporation Counsel Tedia Gamino

STATE OF WISCONSIN
DEPARTMENT OF JUSTICE

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ATTORNEY GENERAL

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June 29, 2018

David Lukoski
[redacted]
Ripon, WI 54971

Dear Mr. Lukoski:

The Wisconsin Department of Justice (DOJ) is in receipt of your January 25, 2018 correspondence regarding your public records request to the Marquette County Coroner's Office. You wrote that on December 7, 2017, you sent an email to the Coroner's Office requesting an autopsy report and on January 2, 2018, you sent a follow-up letter again requesting the autopsy report. You wrote, "To date I have received no response from the Marquette County Coroner." You requested "an action for mandamus be brought asking the court to order release of the record to [you] per State Statute."

The Wisconsin Public Records Law, Wis. Stat. §§ 19.31 to 19.39, authorizes requesters to inspect or obtain copies of "records" created or maintained by an "authority." The purpose of the public records law is to shed light on the workings of government and the official acts of public officers and employees. *Bldg. & Constr. Trades Council v. Waunakee Cmty. Sch. Dist.*, 221 Wis. 2d 575, 582, 585 N.W.2d 726 (Ct. App. 1998).

Records are presumed to be open to public inspection and copying, but there are exceptions. Wis. Stat. § 19.31. Requested records fall into one of three categories: (1) absolute right of access; (2) absolute denial of access; and (3) right of access determined by the balancing test. *Hathaway v. Joint Sch. Dist. No. 1 of Green Bay*, 116 Wis. 2d 388, 397, 342 N.W.2d 682 (1984). If neither a statute nor the common law requires disclosure or creates a general exception to disclosure, the records custodian must decide whether the strong public policy favoring disclosure is overcome by some even stronger public policy favoring limited access or nondisclosure. This balancing test determines whether the presumption of openness is overcome by another public policy concern. *Hempel v. City of Baraboo,* 2005 WI 120, ¶ 4, 284 Wis. 2d 162, 699 N.W.2d 551. If a records custodian determines that a record or part of a record cannot be disclosed, the custodian must redact that record or part of that record. *See* Wis. Stat. § 19.36(6).

The public records law does not require a response to a public records request within a specific timeframe. In other words, after a request is received, there is no set deadline by which the authority must respond. However, the law states that upon receipt of a public records request, the authority "shall, as soon as practicable and without delay, either fill the request or notify the requester of the authority's determination to deny the request in whole or in part and the reasons therefor." Wis. Stat. § 19.35(4)(a). A reasonable amount of time for a response "depends on the nature of the request, the staff and other resources available to the authority to process the request, the extent of the request, and other related considerations." *WIREdata, Inc. v. Vill. of Sussex*, 2008 WI 69, ¶ 56, 310 Wis. 2d 397, 751 N.W.2d 736; *see Journal Times v. Police & Fire Comm'rs Bd.*, 2015 WI 56, ¶ 85, 362 Wis. 2d 577, 866 N.W.2d 563 (an authority "can be swamped with public records requests and may need a substantial period of time to respond to any given request").

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

The public records law "does not require an authority to provide requested information if no record exists, or to simply answer questions about a topic of interest to the requester." *Journal Times v. City of Racine Board of Police and Fire Commissioners*, 2015 WI 56, ¶ 55 (citation omitted) ("While a record will always contain information, information may not always be in the form of a record."); *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 Office of Open Government (OOG) encourages authorities and requesters to maintain an open line of communication. This helps to avoid misunderstandings between an authority and a requester. As a best practice, authorities should send requesters an acknowledgment of the request after receiving it. If it becomes apparent to an authority that a public records request may require a longer response time, it may be prudent that the authority provide the requester with a letter providing an update on the status of the response and, if possible, indicating when a response might be anticipated. Similarly, if an authority receives an inquiry from a requester seeking an update on the status of the request, it is advisable for the authority to respond to the requester with an update.

We are sending a copy of this letter to Marquette County Coroner Tom Wastart so that he is aware of your concerns and to provide him an opportunity to address them. If the coroner's office has any questions, they are invited to contact our office at (608) 267-2220.

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. The public records issue that you raised does not appear to raise novel issues of law that coincide with matters of statewide concern. Therefore, we respectfully decline to pursue an action for mandamus on your behalf at this time.

While we are declining to pursue an action for mandamus at this time, the other enforcement options may still be available to you. You may also wish to contact a private attorney regarding this matter. The State Bar of Wisconsin operates an attorney referral service. The referral service is free; however, a private attorney may charge attorney's fees. You may reach the service using the contact information below:

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

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

Sincerely,

Paul M. Ferguson
Assistant Attorney General
Office of Open Government

PMF:lah

Cc: Tom Wastart, Marquette County Coroner

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DEPARTMENT OF JUSTICE

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June 29, 2018

Louis Keys, #587473
Columbia Correctional Institution
P.O. Box 900
Portage, WI 53901

Dear Mr. Keys:

The Wisconsin Department of Justice (DOJ) is in receipt of your January 19, 2018 correspondence to Attorney General Brad Schimel regarding your public records request. You wrote that you "requested incident and medical reports in support of the situation, as well as video footage" and that you "received everything but the video footage and investigation report." You also wrote, "The reports clearly state that there were no cameras in the transport vehicle that day on 6-21-17, and that's a lie!" (Emphasis in original.) You requested the Attorney General "file a writ of mandamus on [your] behalf."

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). If 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.

Your correspondence did not include a copy of your request, the authority's response, or any additional documentation. As a result, we are unable to properly evaluate your matter based on the limited information that you provided. However, we are able to provide you with some information regarding the public records law that you may find useful.

The public records law authorizes requesters to inspect or obtain copies of "records" created or maintained by an "authority." The purpose of the public records law is to shed light on the workings of government and the official acts of public officers and employees. *Bldg. & Constr. Trades Council v. Waunakee Cmty. Sch. Dist.*, 221 Wis. 2d 575, 582, 585 N.W.2d 726 (Ct. App. 1998).

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

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

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The public records law provides several remedies for a requester dissatisfied with an authority's response, or lack of response, to a written 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. Based on the limited information provided, the public records issue that you raised does not appear to raise novel issues of law that coincide with matters of statewide concern. Therefore, we respectfully decline to pursue an action for mandamus on your behalf at this time.

While we are declining to pursue an action for mandamus at this time, the other enforcement options described above may still be available to you. You may also wish to contact a private attorney regarding this matter. The State Bar of Wisconsin operates an attorney referral service. The referral service is free; however, a private attorney may charge attorney's fees. You may reach the service using the contact information below:

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Sincerely,

Paul M. Ferguson
Assistant Attorney General
Office of Open Government

PMF:lah