

## 2018 3rd Quarter Correspondence

### Index

	<b>Page</b>
Public Records – fees	2
Public Records – fees	5
Open Meetings – public comment restrictions, notice	8
Open Meetings – facts presented, other statute, outside scope of OOG	14
Public Records – sufficient request, timeframe for response	16
Open Meetings – notice requirements	19
Public Records – personal cell phone for government use, definition of record	26
Public Records – exceptions to release of records, student educational records	28
Open Meetings – notice, meeting minutes, consent agendas	31
Open Meetings – governmental body, subunit, definition of meeting, meeting requirements (purpose and numbers), walking quorum	36
Open Meetings – definition of meeting, meeting requirements (purpose and numbers), walking quorum, blogs and social media posts	40
Open Meetings – no requirement for public comment period, meeting minutes and agenda	46
Open Meetings – meeting minutes	50
Public Records – balancing test, ongoing investigation or litigation	52
Public Records – balancing test, denial reasons, no records exist	55
Public Records and Open Meetings – balancing test, denial reasons, ongoing litigation, attorney-client communications, definition of meeting, closed session, fees, right to record open session meetings, exclusion of members	58
Public Records – outside scope of OOG	63
Open Meetings – notice requirements, public comment period	65



STATE OF WISCONSIN  
DEPARTMENT OF JUSTICE

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July 9, 2018

Ginny Maziarka

[REDACTED]  
Baraboo, WI 53913

Dear Ms. Maziarka:

The Wisconsin Department of Justice (DOJ) is in receipt of your correspondence, dated December 4, 2017, regarding your "request [for] an investigation into a violation of open records law in Wisconsin." You wrote that you believe you were "significantly overcharged" for the records you received from Nicolet High School in response to your public records request initially placed on September 7, 2017 and updated on November 1, 2017.

I reached out to Nicolet High School Superintendent Robert Kobylski, and we discussed your matter and fees permitted under the public records law in general. He informed me that he intends to reach out to you regarding your concerns. I anticipate that once this occurs, this matter will be resolved.

Under the public records law, "[A]n authority may charge a fee not exceeding the actual, necessary, and direct costs of *four specific tasks*: (1) 'reproduction and transcription'; (2) 'photographing and photographic processing'; (3) 'locating'; and (4) 'mailing or shipping.'" *Milwaukee Journal Sentinel v. City of Milwaukee*, 2012 WI 65, ¶ 54 (citation omitted) (emphasis in original). The amount of such fees may vary depending on the authority. The law permits an authority to impose a fee for locating records if the cost is \$50.00 or more. Wis. Stat. § 19.35(3)(c). An authority may require a requester prepay any such fees if the total amount exceeds \$5.00. Wis. Stat. § 19.35(3)(f). 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.

In your correspondence, you indicated that the records you received included 14 pages dated outside the timeframe of your request. While, an authority may provide additional records outside the parameters of a request, it should not charge fees for any such records that were not requested.

It appears there was communication between you and the high school regarding your initial request, which led to you updating your request. DOJ's 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. It is also helpful in resolving issues such as those related to fees. If a requester is concerned about potential fees, it may be helpful that he or she express such concerns in the request. For example, a requester may ask an authority to contact them if they anticipate fees will exceed a certain dollar amount. As a best practice, an authority should implement a policy in which they notify requesters if they anticipate fees will exceed a certain amount.

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

Alternatively, the requester may submit a written request for the district attorney of the county where the record is found, or the Attorney General, to file an action for mandamus seeking release of the requested records. Wis. Stat. § 19.37(1)(b). The Attorney General is authorized to enforce the public records law; however, he generally exercises this authority in cases presenting novel issues of law that coincide with matters of statewide concern. Based on the information you provided, your matter does not appear to raise novel issues of law that coincide with matters of statewide concern. Furthermore, I anticipate that this matter will be resolved soon. Although you did not specifically request the Attorney General to file an action for mandamus, nonetheless, we respectfully decline to pursue an action for mandamus on your behalf at this time.

In the event you 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/inedalawyer/pages/lris.aspx>

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

Ginny Maziarka  
July 9, 2018  
Page 3

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

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

Sincerely,

A handwritten signature in black ink, appearing to read "Paul M. Ferguson", written over a horizontal line.

Paul M. Ferguson  
Assistant Attorney General  
Office of Open Government

PMF:lah

cc: Superintendent Robert Kobylski, Nicolet High School



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July 9, 2018

Mary Weigand

West Bend, WI 53095

Dear Ms. Weigand:

This Wisconsin Department of Justice (DOJ) is in receipt of your correspondence, dated November 24, 2017, regarding your "request [for] an investigation into a violation of open records law in Wisconsin." You wrote that your "friend Ginny Mariarka placed an ORR to Nicolet High School" and that the fee for the records was paid by you and Dave Weigand. You wrote that "[w]e believe we were significantly overcharged for the ORR."

We received correspondence from Ms. Mariarka raising similar concerns regarding the same matter, and we are responding to Ms. Mariarka separately. I reached out to Nicolet High School Superintendent Robert Kobylski, and we discussed this matter and fees permitted under the public records law in general. He informed me that he intends to reach out to you regarding your concerns. I anticipate that once this occurs, this matter will be resolved.

Under the public records law, "[A]n authority may charge a fee not exceeding the actual, necessary, and direct costs of *four specific tasks*: (1) 'reproduction and transcription'; (2) 'photographing and photographic processing'; (3) 'locating'; and (4) 'mailing or shipping.'" *Milwaukee Journal Sentinel v. City of Milwaukee*, 2012 WI 65, ¶ 54 (citation omitted) (emphasis in original). The amount of such fees may vary depending on the authority. The law permits an authority to impose a fee for locating records if the cost is \$50.00 or more. Wis. Stat. § 19.35(3)(c). An authority may require a requester prepay any such fees if the total amount exceeds \$5.00. Wis. Stat. § 19.35(3)(f). 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.

Your correspondence indicates that the records provided by the high school included 14 pages dated outside the timeframe of the request. While, an authority may provide additional records outside the parameters of a request, it should not charge fees for any such records that were not requested.

It appears there was communication between Ms. Mariarka and the high school regarding her initial request, which led to Ms. Mariarka updating her request. DOJ's 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. It is also helpful in resolving issues such as those related to fees. If a requester is concerned about potential fees, it may be helpful that he or she express such concerns in the request. For example, a requester may ask an authority to contact them if they anticipate fees will exceed a certain dollar amount. As a best practice, an authority should implement a policy in which they notify requesters if they anticipate fees will exceed a certain amount.

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

Alternatively, the requester may submit a written request for the district attorney of the county where the record is found, or the Attorney General, to file an action for mandamus seeking release of the requested records. Wis. Stat. § 19.37(1)(b). The Attorney General is authorized to enforce the public records law; however, he generally exercises this authority in cases presenting novel issues of law that coincide with matters of statewide concern. Based on the information you provided, this matter does not appear to raise novel issues of law that coincide with matters of statewide concern. Furthermore, I anticipate that this matter will be resolved soon. Although you did not specifically request the Attorney General to file an action for mandamus, nonetheless, we respectfully decline to pursue an action for mandamus at this time.

A requester may also wish to contact a private attorney regarding his or her 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. The service may be reached using the contact information below:

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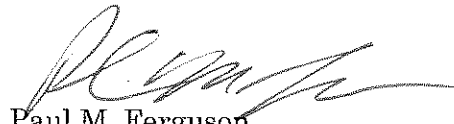
Mary Weigand  
July 9, 2018  
Page 3

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

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

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

Sincerely,



Paul M. Ferguson  
Assistant Attorney General  
Office of Open Government

PMF:lah

cc: Superintendent Robert Kobylski, Nicolet High School



STATE OF WISCONSIN  
DEPARTMENT OF JUSTICE

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July 11, 2018

Peter W. Barca  
Wisconsin State Representative  
64th Assembly District, State Capitol  
P.O. Box 8952  
Madison, WI 53708

Dear Representative Barca:

The Wisconsin Department of Justice (DOJ) Office of Open Government is in receipt of your May 30, 2018 correspondence in which you asked our office to “provide greater guidance and clarity related to how local government matters are noticed and addressed under the Wisconsin open meetings law”—specifically, on “the proper administration of the state’s open meetings law related to these issues of notice and handling of public comment periods at a local government meeting.”

In your correspondence, you wrote that your office had “become aware of concerns about how the Village of Mount Pleasant Community Development Authority has noticed and conducted recent meetings, particularly related to the allowable subject matter of the public comment section, including prohibiting comments based on the agenda items of the meeting.” Specifically, you wrote that “Mount Pleasant citizens note that despite noticing a public comment period as a part of the April 17, 2018 and May 9, 2018 meetings of the Community Development Authority without any restrictions, immediately prior to the comment period either the presiding officer or legal counsel informed members of the public that they were not able to speak about the reports or actions before the body for that meeting during the public comment period.” You further wrote that “it seems reasonable that the public comment period at a local government meeting be allowed to be on the business before the board or committee that day, especially when the decision to restrict testimony has not been clearly explained in the meeting notice.”

Before I address the specific concerns set forth in your correspondence, I would first like to provide you with some general information about 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).

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. Other restrictions on citizen participation will be discussed further below.

Turning now to the specific concerns set forth in your correspondence, I construe your concerns to pertain to two separate but interrelated areas of the open meetings law: 1) the restrictions on the public comment period; and 2) the notice about the public comment period. I will address each of these areas separately below, but I first caution that my conclusions herein are based only on the facts known to me as set forth in your correspondence, not on any independent factual investigation that I have conducted.

First, regarding the restrictions on the public comment period, I wanted to emphasize again that the open meetings law allows, but does not require, a governmental body to designate a portion of an open meeting as a public comment period. Wis. Stat. §§ 19.83(2), 19.84(2). As the Attorney General has previously advised, however, the statutes are silent regarding any specific procedures to be followed *if* such a public comment period is allowed. *See, e.g.*, Lundquist Correspondence (Oct. 25, 2005); Zweig Correspondence (July 13, 2006); Chiaverotti Correspondence (Sept. 19, 2006). Faced with such statutory silence, Wisconsin law generally gives local governmental bodies broad discretion to govern their own procedures about whether, and to what extent, to allow public input at a meeting. *Id.*

Because of this broad discretion afforded to local governmental bodies, DOJ's Office of Open Government often receives inquiries about various restrictions on public comment periods that a governmental body may impose. In the past, the Attorney General has advised about restrictions that would generally be considered permissible under the open meetings laws. For example, the Attorney General has deemed permissible various meeting procedures that restrict the length of public comment periods. *See, e.g.*, Zweig Correspondence (July 13, 2006). Similarly, the Attorney General has upheld restrictions on "the timing of such periods, the subjects that may be addressed, and who will be allowed to speak." *See* Chiaverotti Correspondence (Sept. 19, 2006). Further, the Attorney General has previously opined that the open meetings law does not preclude governmental bodies from having a policy that "confines public comment to the beginning of meetings, *restricts the subject of comments to agenda items*, and allows participation only by individuals who reside or pay taxes in the community." *See* Chiaverotti Correspondence (Sept. 19, 2006) (emphasis added).

Here, however, your correspondence raises the issue of whether a governmental body can impose the opposite kind of restriction—namely, whether the governmental body can

prohibit the public from discussing any *noticed* agenda items during the public comment period. To my knowledge, the Attorney General has not before addressed that kind of restriction in an informal or formal opinion, or in any informal correspondence. Nor has the court system directly addressed this question. Nevertheless, I conclude that restrictions prohibiting public comment on noticed agenda items would be inadvisable, for three reasons.

First, restrictions prohibiting public comment on agenda items would, as a practical matter, limit public comment to only subjects that are *not* noticed on the agenda, which in turn could open the door to a potential discussion about subjects that do not appear on the agenda or meeting notice. The Office of Open Government generally advises governmental bodies that, if citizens happen to raise subjects during a public comment period that are *not* properly noticed on an agenda or elsewhere, the governmental body should: 1) limit the discussion of that subject; and 2) defer any extensive deliberation to a later meeting for which more specific notice can be given. *See, e.g.*, Sayles Correspondence (Aug. 4, 2017); *see also State ex rel. Buswell v. Tomah Area Sch. Dist.*, 2007 WI 71, ¶ 34, 301 Wis. 2d 178, 732 N.W.2d 804 (a meeting generally “cannot address topics unrelated to the information in the notice.”). We also generally advise that governmental bodies may not take formal action on any subject raised in the public comment period, unless that subject is also identified in the meeting notice. *See Sayles Correspondence* (Aug. 4, 2017).

Second, and more importantly here, restrictions prohibiting public comment on subjects that *are* specifically included on an agenda do not seem to comport with the policies underlying the open meetings law. As Wis. Stat. § 19.81(1) states, the open meetings law is based on the premise that “representative government [depends] upon an informed electorate.” The Wisconsin Supreme Court has similarly found that government functions best when it is open and when people have information about its operations. *Buswell*, 301 Wis. 2d 178, ¶ 26. And the legislature has made clear that the provisions of the open meetings law are to be construed liberally to achieve the purpose of fostering openness in government. Wis. Stat. § 19.81(4).

As discussed above, governmental bodies are generally free to impose reasonable limits on discussions or public comments at open meetings, such as imposing a time limit for public comment. When governmental bodies do not use *reasonable* procedures to limit discussions at open meetings, however, public trust and confidence in the workings of government can become eroded. Thus, for example, the Wisconsin Supreme Court has found that, under a reasonableness standard, “meeting participants” should generally be “free to discuss *any* aspect of the noticed subject matter, as well as issues that are reasonably related to it.” *Buswell*, 301 Wis. 2d 178, ¶ 34 (emphasis added). The Attorney General has similarly concluded that, if a governmental body decides to set aside a portion of an open meeting as a public comment period and properly notices that public comment period, the body may receive information from the public and may discuss *any* matter raised by the public. *See, e.g.*, Sayles Correspondence (Aug. 4, 2017) (emphasis added).

Third and finally, restrictions limiting the topics during a public comment period of an open meeting are inadvisable because once a public meeting is opened to public participation, the federal and/or state constitutions may also limit the degree to which the government can restrict the speech of individual attendees. *See Chiaverotti Correspondence* (Sept. 19, 2006). As a recent Supreme Court case has determined, municipalities may encounter complicated

First Amendment issues when attempting to limit an individual's statements or topics at an otherwise open meeting, and may, ultimately, face liability for damages. *Lozman v. City of Riviera Beach, Florida*, \_\_ U.S. \_\_, 138 S. Ct. 1945, 1954–55 (June 18, 2018). The best practice would be to avoid such complicated issues. DOJ's Office of Open Government is only authorized to provide assistance to citizens within the scope of 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, and interpretations of constitutional law are outside of this scope. You may wish to consult with private legal counsel concerning such questions of constitutional interpretation.

In summary, I conclude that it is inadvisable for a governmental body to impose restrictions on a public comment period that would prevent the public from discussing noticed agenda items during a public comment period, and/or to impose restrictions that would limit discussion to only subjects that are *not* noticed on the agenda. Although restrictions of this type have not, thus far, been deemed illegal *per se* under Wisconsin open meetings law, I do not consider them to be the kind of *reasonable* restrictions that have heretofore been sanctioned by the courts and the Attorney General, because such restrictions do not seem to comport with the purpose of the law. If a court were to rule on this issue, I believe it would likely find that the only reasonable way for a governmental body to impose subject restrictions during a public comment period would be for the governmental body to limit public comment only to subjects that *are* noticed on the agenda.

Turning now to your second, interrelated concern about the notices of the meetings in question, you indicated in your correspondence that the public comment periods for the April 17, 2017 and May 9, 2019 meetings were noticed "without any restrictions," but yet "immediately prior to the comment period either the presiding officer or legal counsel informed members of the public that they were not able to speak about the reports or actions before the body for that meeting during the public comment period." You also wrote that "it seems reasonable" to allow public comment on noticed agenda items, "especially when the decision to restrict testimony has not been clearly explained in the meeting notice."

Under the open meetings law, 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.*

Whether the notice is specific enough is determined on a case-specific basis, based on a reasonableness standard. *Buswell*, 2007 WI 71, ¶¶ 27–29. This includes analyzing such factors as the burden of providing more detailed notice, whether the subject is of particular public interest, and whether it involves non-routine action that the public would be unlikely to anticipate. *Id.* ¶ 28. Particular public interest in the subject matter of a meeting may require greater specificity in the hearing notice, and the degree of specificity of notice may also depend on whether the subject of the meeting is routine or novel. *Id.* ¶¶ 30–31. The determination of whether notice is sufficient should be based upon what information is available to the officer noticing the meeting at the time notice is provided, and based upon what it would be reasonable for the officer to know. *Id.* ¶ 32.

Moreover, the notice requirement in the open meetings law also functions to assure that members of the public are reasonably apprised of what is discussed at such meetings.

*Buswell*, 301 Wis. 2d 178, ¶ 34. The Wisconsin Supreme Court has reasoned that the notice requirement gives the public information about the business to be conducted that will alert them to the importance of the meeting, so that they can make an informed decision whether to attend. *State ex rel. Badke v. Vill. Bd. of Vill. of Greendale*, 173 Wis. 2d 553, 573–74, 577–78, 494 N.W.2d 408 (1993).

Based on the information available to me, it appears that the notices themselves contained no restrictions on the public comment periods, other than a time restriction. It also likely would not have been a burden for the governmental body to provide more specificity in the notice regarding any substantive restrictions they wished to impose on the public comment period. Thus, a specific notice of the restrictions was probably warranted here, particularly because the agenda items may have been of particular interest to the public, and/or might have involved non-routine actions of the governmental body.

Therefore, I conclude that a court could reasonably find that a violation of the notice provisions of the open meetings law may have occurred. A court could reasonably find the notice insufficient because the notice did not reasonably apprise the public of the subject matter of the public comment periods. Specifically, the notice did not reasonably apprise the public that the public comment period was limited to subjects *not* on the meeting agenda. Such information in the notices would have alerted the members of the public about the restrictions, so that they could make an informed decision about whether to attend and/or about what they could say during the public comment periods. *Badke*, 173 Wis. 2d at 573–74, 577–78.

By copy of this letter to the Village of Mount Pleasant attorney, I am making the Village of Mount Pleasant Community Development Authority aware of DOJ's recommendation that, if they intend to have a public comment period at their meetings, they should modify their open meetings practices to allow public comment on *any* aspect of noticed subject matter, as well as issues that are reasonably related to that subject matter. DOJ also anticipates that any restrictions on public comment periods, should they exist, will be clearly explained to the public ahead of time in a proper notice.

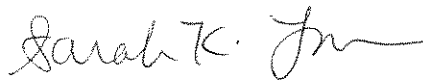
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DOJ appreciates your concern. We are dedicated to the work necessary to preserve Wisconsin's proud tradition of open government. Thank you for your correspondence.

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Rep. Peter Barca  
July 11, 2018  
Page 6

Sincerely,

A handwritten signature in cursive script that reads "Sarah K. Larson". The signature is written in black ink and is positioned above the typed name.

Sarah K. Larson  
Assistant Attorney General  
Office of Open Government

SKL:skl:pmf

Cc: Attorney Christopher R. Smith



**STATE OF WISCONSIN  
DEPARTMENT OF JUSTICE**

**BRAD D. SCHIMEL  
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**Sarah K. Larson  
Assistant Attorney General  
larsonsk@doj.state.wi.us  
608/266-1221  
TTY 1-800-947-3529  
FAX 608/267-2779**

September 5, 2018

Attorney Christopher R. Smith  
Wesolowski, Reidenbach & Sajdak, S.C.  
11402 West Church Street  
Franklin, WI 53132

Sent via email to [chris@wrslegal.net](mailto:chris@wrslegal.net)

Dear Attorney Smith:

The Wisconsin Department of Justice (DOJ) Office of Open Government (OOG) is in receipt of your August 7, 2018 correspondence, which was in response to our July 11, 2018 letter to Representative Peter Barca. In your August 7, 2018 letter, you stated that our July 11, 2018 letter “is in need of correction,” and you cite various provisions in Wis. Stat. § 66.1333. You also noted that, “in light of this context,” you “respectfully disagree with [our] conclusion [in the July 11, 2018 letter],” and asked to “revise [our] prior conclusions and advise the Village [of Mount Pleasant] accordingly.”

As you are aware, our July 11, 2018 letter to Representative Barca was written based on the facts presented and under the presumption that all the facts he asserted therein were true. The OOG did not conduct an independent review or investigation to determine whether those facts were true. Obviously, if the facts were different than those alleged in Representative Barca’s letter to us, our conclusions concerning the legality of the meeting notice could be impacted. The OOG does not have the resources to sort out disagreements between the parties, but we hope that the general discussion in our July 11, 2018 letter related to the open meetings law was helpful.

You also state that our letter “is being cited as ‘proof’ by some persons in the community, that the Village of Mount Pleasant violated Wisconsin’s Open Meetings Law.” The letter does not constitute such “proof” and should not be used in that manner. The purpose of the letter was simply to provide a general overview of the law, and the possible legal outcomes under the Open Meeting Law, assuming all facts in Representative Barca’s letter to be true.

I understand from your communications to DOJ that your legal theory is based upon Wis. Stat. § 66.1333, which contains various statutory processes regarding public comment periods. I also understand from those communications that the Village's desire to remove a topic from the public comment period was an effort "so as to not re-open the public hearing/submission process." The OOG is only authorized to provide assistance to the public regarding matters pertaining to 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. Other statutes, such as Wis. Stat. § 66.1333, fall outside of this scope. It may very well be true that Wis. Stat. § 66.1333 impacts public comment periods. However, in the July 11, 2018 letter, we were not opining on any interaction between the Wisconsin Open Meetings Law and Wis. Stat. § 66.1333.

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,

//s// Sarah K. Larson

Sarah K. Larson  
Assistant Attorney General  
Office of Open Government

SKL:skl:pmf



STATE OF WISCONSIN  
DEPARTMENT OF JUSTICE

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ATTORNEY GENERAL

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TTY 1-800-947-3529  
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August 7, 2018

Attorney John Rearden, Jr.  
Oliver Close LLC  
Suite 300 Waterside Center  
124 North Water Street  
Rockford, IL 61107-3974

Dear Attorney Rearden:

The Wisconsin Department of Justice (DOJ) is in receipt of your correspondence to Attorney General Brad Schimel, dated December 1, 2017, in which you requested DOJ "bring an action for mandamus against the City of Beloit, Wisconsin asking a court to order the release of records that IPMF, LLC requested [on March 3, 2017] from the City of Beloit under Wisconsin's Open Records Act."

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. 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.

In Exhibit B of your correspondence, City Attorney Elizabeth Krueger responds, on July 18, 2017, to Ann Dempsey's follow up regarding the status of the March 3, 2017 public records request stating, "You have asked for searching of 5 years' worth of emails. The City has one staff person that can do so. Each email . . . has to be reviewed." On October 16, 2017, City Attorney Krueger responds to Ann Dempsey's follow up status request stating, "If you would like to limit the breadth of your request, that may expedite the release." 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.

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 an effort to determine the status of your request, I contacted City Attorney Elizabeth Krueger. She indicated that the City fulfilled your request on March 27, 2018, sending you a CD containing all of the documents that the City believed were responsive to your request, totaling 8,075 pages. She also indicated that, given the breadth of the request, it required the review of thousands of emails, and the City made every effort to respond as soon as it could. Finally, she indicated that the City had not received any further questions or communications from you after the response letter was sent to you in March.

Therefore, I believe that the matter has now been resolved 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. Because it appears that you have now received the documents in response to your request, and because your matter does not appear to present novel issues of law that coincide with

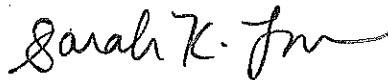
matters of statewide concern, we respectfully decline your request to pursue an action for mandamus on your behalf at this time.

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

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

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: City Attorney Elizabeth Krueger



STATE OF WISCONSIN  
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August 8, 2018

Todd Krysiak  
Editor, Baraboo News Republic  
714 Matt's Ferry Road  
Baraboo, WI 53913

Dear Mr. Krysiak:

The Wisconsin Department of Justice (DOJ) is in receipt of your verified open meetings law complaint that you filed with the Sauk County District Attorney's Office. Sauk County District Attorney Kevin Calkins forwarded your complaint to DOJ's Office of Open Government for review and possible enforcement action, 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 complaint, I wanted to provide you with some general information regarding verified 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 after he or she receives 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

Todd Krysiak  
August 8, 2018  
Page 2

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).

Here, because District Attorney Calkins referred your complaint to the Office of Open Government for a possible enforcement action, I am responding to your complaint under the Attorney General's authority to enforce and interpret the open meetings law. *See* Wis. Stat. §§ 19.97(1), 19.98.

In your complaint, you allege that the Sauk County Board's Personnel Committee committed an open meetings notice violation for a meeting occurring December 1, 2017, because the posted agenda for the meeting was not sufficiently specific to provide adequate notice to the public about one of the subjects to be discussed at the meeting. Specifically, you allege that the committee failed to provide adequate notice that the committee would be "considering and voting on important policy changes concerning the reporting and resolution of workplace complaints and fraud."

You further allege that the committee "buried this important discussion in a generic agenda item," where the subject was simply noticed as "Policies/Ordinance Updates." Moreover, you allege that the public had no reason to expect that the committee would actually be taking up the issue of a new employee complaint and fraud reporting policy at the meeting in question, because all of the previous monthly meeting agendas had included the subject "Policies/Ordinance Updates," yet the committee had never taken up significant changes in policy at any previous meetings where that subject had been noticed. You now seek to void the committee's actions and impose penalties through an enforcement action.

Again, 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 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). 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 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.

As is pertinent here, every public notice of a meeting must give the time, date, place and subject matter of the meeting, and the notice must be in such a form so as to reasonably apprise the public of this information. Wis. Stat. § 19.84(2). The notice requirement gives the public information about the business to be conducted that will alert them to the importance of the meeting, so that they can make an informed decision whether to attend. *State ex rel. Badke v. Vill. Bd. of Vill. of Greendale*, 173 Wis. 2d 553, 573–78, 494 N.W.2d 408 (1993).

Whether the notice is specific enough is determined on a case-specific basis, based on a reasonableness standard. *State ex rel. Buswell v. Tomah Area Sch. Dist.*, 2007 WI 71, ¶¶ 27–29, 301 Wis. 2d 178, 732 N.W.2d 804. This includes analyzing such factors as the burden of providing more detailed notice, whether the subject is of particular public interest, and whether it involves non-routine action that the public would be unlikely to anticipate. *Id.* ¶ 28. There may be less need for specificity where a meeting subject occurs frequently, because members of the public are more likely to anticipate that the meeting subject will be addressed, but novel issues may require more specific notice. *Id.* ¶ 31.

Further, the Attorney General has also advised in informal correspondence that purely generic subject matter designations such as “old business,” “new business,” “miscellaneous business,” “agenda revisions,” or “such other matters as are authorized by law” are insufficient because, standing alone, they identify no particular subjects at all. *See, e.g.,* Heupel Correspondence (Aug. 29, 2006). 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>).

In order to investigate the allegations in your complaint, I reviewed the documents attached to your complaint, including the agenda and minutes from the December 1, 2017 meeting. As discussed further below, I also reviewed other relevant agendas and minutes, and contacted Sauk County’s Corporation Counsel to discuss the notice in question. My conclusions throughout this letter are based on the facts as presented in your complaint, and on the facts available to me as the result of my limited investigation.

Based on my review of pertinent documents, it appears that, during the several months leading up to the December 1, 2017 meeting, the committee had taken no substantive action under the “Policies/Ordinance Updates” items on those agendas. The committee had apparently been reviewing the county’s personnel policies for several months, noting in various minutes that “a comprehensive review [of personnel policies] will be required.” Nothing specific to any particular new policies, however, had ever been formally noticed or included in agendas or minutes leading up to the meeting in question. I also note that, before the new policy was added, the personnel manual contained hundreds of policies.

Regarding the December 1, 2017 meeting itself, the agenda provided notice of the subject only as "Policies/Ordinance Updates." The minutes from that meeting show that Sauk County's Personnel Director, Michelle Posewitz, "presented updates to the internal HR Policies and Procedures Manual. Specific areas that required updates were reviewed in detail with the group including compliant [sic]/fraud reporting and other editing updates." Thereafter, the committee members voted on the new policy, and it was approved. The minutes from a later February 6, 2018 meeting indicate that the committee considered the newly adopted personnel policy to be an "internal employee complaint policy" that "had minimal impact on the public."

Based on the information set forth in the agendas and minutes, I had concerns about the lack of specificity regarding the subject to be discussed at the December 1, 2017 meeting. I also had concerns about the committee's apparent belief that more specific notice was not required, because the new policy was merely an "internal employee complaint policy" that "had minimal impact on the public."

Given these concerns, I contacted Sauk County Corporation Counsel, Attorney Debra O'Rourke, to discuss the notice in question. Attorney O'Rourke told me that the committee had apparently relied on the advice of the county's previous corporation counsel in drafting the notice using the more general terms, "Policy/Ordinance Updates." Shortly after the December 1, 2017 meeting, however, Attorney O'Rourke recognized that a more specific notice was likely warranted, given the public's interest in the subject. Accordingly, she advised the committee to re-notice the meeting using more specific language. I also note that the agenda for the February 6, 2018 committee meeting contained that more specific language, "Consideration and discussion of Ethics Hotline Policy and Complaint Policy."

Moreover, Attorney O'Rourke indicated to me that she believed there was no intent to mislead the public with the more general notice. Instead, the committee had relied on the advice of previous counsel in using the verbiage "Policies/Ordinance Update." Nevertheless, Attorney O'Rourke takes full responsibility for what occurred, and has assured me that, going forward, the committee will utilize more specific language for agenda items wherever such specificity is required under the open meetings law.

Based on my limited investigation and the facts alleged in your complaint, I conclude that the notice for the December 1, 2017 committee meeting should have been more specific, for three reasons. First, I believe a court could reasonably find that the public was not likely to anticipate that the non-routine action of adopting those new policies would take place or be addressed at the meeting. Although the generic subject designation "Policies/Ordinances Update" appeared on all agendas in the several months leading up to the meeting in question, the Attorney General has previously stated that such generic subject matter designations will generally be insufficient to provide notice. Standing alone, "Policies/Ordinances Update" identified no particular policies that were going to be updated out of the hundreds of potential personnel policies that might have been subject to change at

that meeting. Further, the previous meetings' minutes only revealed that the committee believed "a comprehensive review [of personnel policies] will be required," but did not indicate that they were actually going to change or add specific policies at that particular meeting. Thus, without a more specific description of the intended updates or changes that the committee was considering at the December 1, 2017 meeting, it would not necessarily have been evident to the public as to which policies were going to be revised or added.

Second, I believe that a court could reasonably find that it would not have been burdensome for the committee to provide more specific information to the public. The committee apparently knew in advance that they would be considering those specific policy changes. Presumably, it would have been easy for the committee to provide a more specific designation in the agenda as to which policies were being added or being considered for updating at the December 1, 2017 meeting. Indeed, the committee did, in fact, create a more specific agenda for the February 6, 2018 meeting indicating the new policies.

Third, I believe that a court could reasonably find that the public had a particular interest in hearing about these new policies at an open meeting. Although the committee was apparently operating under the assumption that these were merely "internal" employee policies that did not affect the public, the new personnel policies were intended to address how the county would investigate fraud and respond to workplace complaints—subjects in which the public has a particular interest. More generally, however, county employee personnel policies are a matter of public concern that should be noticed appropriately under the open meetings law. A court could reasonably find the public would be interested in policies about how county employees conduct themselves in the workplace, and about how complaints about county employees are handled.

Like all other provisions of the open meetings law, the notice provisions 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, while I cannot conclude with certainty that a notice violation occurred under the open meetings law, the facts available to me show that a court could reasonably find that a notice violation may have occurred, given the lack of specificity in the December 1, 2017 agenda.

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 Sauk County Personnel Committee, for three reasons.

First, I do not believe that the committee was intentionally trying to circumvent the law. Instead, it appears that the committee was relying on the advice of the county's previous counsel in using the more general language for agendas regarding policy updates. By way of this letter and by way of my discussion with Attorney O'Rourke, the committee is

Todd Krysiak  
August 8, 2018  
Page 6

now on notice as to their obligations under the open meetings law, and I expect that no future violations will occur.

Second, I believe that a court could reasonably conclude that the committee properly noticed the subject in the later February 6, 2018 agenda. Although the more specific February 6, 2018 notice does not serve to rectify any deficiencies in the earlier December 1, 2017 notice, the court would still likely uphold the actions of the committee taken at the later February 6, 2018 meeting. In other words, even if a court would void the committee's earlier December 1, 2017 actions during an enforcement action, the committee's later February 6, 2018 action of adopting the new personnel policies would likely still stand, because the committee had already taken action to correct itself.

Third and finally, 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:

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 the Office of Open Government are committed to increasing government openness and transparency, and DOJ endeavors to offer guidance in these areas. DOJ offers several open government resources through its website (<https://www.doj.state.wi.us/office-open-government/office-open-government>). DOJ provides the full Wisconsin Open Meetings Law, maintains an Open Meetings Law Compliance Guide and provides a recorded webinar and associated presentation documentation.

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



Todd Krysiak  
August 8, 2018  
Page 7

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

Sincerely,

A handwritten signature in black ink, appearing to read "Sarah K. Larson". The signature is fluid and cursive, with a large initial "S" and "L".

Sarah K. Larson  
Assistant Attorney General  
Office of Open Government

SKL:skl:pmf

cc: Kevin Calkins, Sauk County District Attorney  
Debra O'Rourke, Sauk County Corporation Counsel



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August 14, 2018

Susan Hitchler

[REDACTED]  
Oconomowoc, WI 53066

Dear Ms. Hitchler:

The Wisconsin Department of Justice (DOJ) is in receipt of your January 9, 2018 correspondence in which you asked whether “there is any legal reason why a government employee subject to the open records law could not use a personal cell phone to do official business, thereby hiding calls from the eyes of the public.”

DOJ’s Office of Open Government (OOG) works to increase government openness and transparency with a focus on the Wisconsin Open Meetings Law, Wis. Stat. §§ 19.81 to 19.98, and the Wisconsin Public Records Law, Wis. Stat. §§ 19.31 to 19.39.

The 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.” Nothing in the public records law prohibits a government employee from using a personal cell phone to conduct official government business, but doing so may result in the creation of a “record” that is subject to disclosure under the public records law.

The public records law defines a “record” as any material on which written, drawn, printed, spoken, visual, or electromagnetic information or electronically generated or stored data is recorded or preserved, regardless of physical form or characteristics, which has been created or is being kept by an authority. Wis. Stat. § 19.32(2). A record includes handwritten, typed, or printed documents; maps and charts; photographs, films, and tape recordings; tapes, optical disks, and any other medium on which electronically generated or stored data is recorded or preserved; and electronic records and communications.

Whether material is a “record” subject to disclosure under the public records law depends on whether the record is created or kept in connection with the official purpose or function of the agency. *See* OAG I-06-09, at 2 (Dec. 23, 2009). Not everything a public official or employee creates is a public record. The substance or content, not the medium, format or location, controls whether something is a record. *State ex rel. Youmans v. Owens*, 28 Wis. 2d 672, 679, 137 N.W.2d 470 (1965).

Susan Hitchler  
August 14, 2018  
Page 2

The fact that a record is subject to disclosure, however, does not necessarily mean an authority must disclose the record. While records are presumed to be open to public inspection and copying, there are exceptions. Wis. Stat. § 19.31. Statutes, case law, and the public records law balancing test provide such exceptions. If neither a statute nor the common law creates a general exception to disclosure, the records custodian must apply the balancing test, which weighs the public interest in disclosure versus the public interest in nondisclosure, on a case-by-case basis.

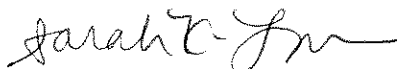
Government employees who use personal telephones, or other personal accounts such as email, for government business should conduct a careful search of all relevant devices and accounts for responsive records when the authority for which they work receive public records requests. Additionally, government business-related records found on personal telephones or other personal accounts, are also subject to record retention requirements. Government employees should contact their agency's legal counsel with any questions regarding such requirements.

If you would like to learn more about the Wisconsin Public Records Law, DOJ's Office of Open Government offers several open government resources through the Wisconsin DOJ website (<https://www.doj.state.wi.us/office-open-government/office-open-government>). DOJ provides the full Wisconsin Public Records Law, Wis. Stat. §§ 19.31 to 19.39, maintains a Public Records 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. If you have additional questions or concerns, DOJ maintains a Public Records Open Meetings (PROM) help line to respond to individuals' open government questions. The PROM telephone number is (608) 267-2220.

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

Sincerely,



Sarah K. Larson  
Assistant Attorney General  
Office of Open Government

SKL:skl:pmf



STATE OF WISCONSIN  
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August 21, 2018

Garry Sherwood

[REDACTED]  
Eau Claire, WI 54701

Dear Mr. Sherwood:

This letter is in response to your electronic correspondence to Attorney General Brad Schimel, dated January 9, 2018, in which you stated, "I have been in contact with the Eau Claire Area School District and have asked and been refused what I think is a public records request. I asked for the names and addresses of parents in the school district here and was refused saying it was part of the student records. I cited the Wisconsin Supreme Court case that I believe gives me a right to this information and they have stonewalled me." You have asked for our assistance.

The Attorney General and the Department of Justice (DOJ) are committed to increasing government openness and transparency. DOJ's Office of Open Government 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. Without seeing your public records request and the subsequent response from the school district, I have insufficient information to fully evaluate your questions and concerns. However, I can provide you with some general information regarding the public records law, which I hope you will find helpful.

The public records law authorizes requesters to inspect or obtain copies of "records" created or maintained by an "authority." Records are presumed to be open to public inspection and copying, but there are exceptions. Wis. Stat. § 19.31. A statute may provide such an exception. If a federal or state statute prohibits the release of a record in response to a public records request, an authority's records custodian cannot release the record. (The common law and the public records law balancing test, which weighs the public interest in disclosure of a record against the public interest in nondisclosure, provide other exceptions.)

One such federal statute, the Federal Educational Records Privacy Act (FERPA), generally prohibits a federally funded educational institution, such as the Eau Claire Area School District, from disclosing a student's educational records or a student's personally identifiable information contained in such records without the written consent of the student's parents. See 20 U.S.C. § 1232g(b)(1). A state statute, the Wisconsin pupil records

statute, also generally prohibits the disclosure of confidential student information. *See* Wis. Stat. § 118.125.

Moreover, the public records balancing test would also likely weigh in favor of non-disclosure, because a request about information about the parents would reveal confidential information about the students that cannot be disclosed. The federal and state student records statutes create a statutory confidentiality interest reflecting a public interest in non-disclosure. Well-established public policy recognizing the confidentiality and privacy of children and juveniles is also expressed in other statutes such as Wis. Stat. §§ 48.396 and 938.396.

In short, well-established public policy recognizing the confidentiality and privacy of student educational records and personally identifiable information contained in such records is expressed in FERPA, Wis. Stat. § 118.125, and other statutes related to juvenile records. Therefore, under the public records balancing test, the same public policy protecting the confidentiality of pupil records mandated by the Wisconsin Legislature in Wis. Stat. § 118.125 and by Congress in FERPA would also apply to confidentiality of information obtained from those records, including names and addresses of parents of those students, and would generally outweigh any general public interest in disclosure of that information.

Without seeing your public records request and the district's response to you, I have insufficient information to be able to assist you further. However, the public records law provides several remedies for a requester dissatisfied with an authority's response, or lack of response, to a public records request. A requester may file an action for mandamus, with or without an attorney, asking a court to order release of the records. Wis. Stat. § 19.37(1)(a). Alternatively, the requester may submit a written request for the district attorney of the county where the record is found, or the Attorney General, to file an action for mandamus seeking release of the requested records. Wis. Stat. § 19.37(1)(b).

The Attorney General is authorized to enforce the public records law; however, he generally exercises this authority in cases presenting novel issues of law that coincide with matters of statewide concern. Although you did not specifically request the Attorney General to file an action for mandamus, nonetheless, we respectfully decline to pursue an action for mandamus on your behalf.

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

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(800) 362-9082  
(608) 257-4666

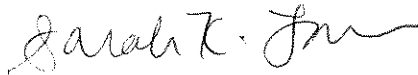
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The Attorney General and the Office of Open Government are committed to increasing government openness and transparency, and DOJ endeavors to offer guidance in these areas. DOJ offers several open government resources through its website (<https://www.doj.state.wi.us/office-open-government/office-open-government>). DOJ provides the full Wisconsin Public Records Law, maintains a Wisconsin Public Records Law Compliance Guide, which was updated earlier this month, 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  
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August 22, 2018

Joan Beem

[REDACTED]  
Omro, WI 54963

Dear Ms. Beem:

This letter is in response to your electronic correspondence to Attorney General Brad Schimel, dated January 15, 2018, in which you stated, "I am a new school board member and would like to self report our board for blatant violation of 120.11(4), class 1 notice, under ch. 985, and 19.81(1)." You then described a series of events about your attempted efforts to place various items on the agenda at various meetings.

In your correspondence, you also described your efforts to obtain an agenda of the building and grounds committee meeting from November 8, 2017. Based on the information you provided, it appears that you were eventually provided a copy of those meeting minutes, but that you still had concerns about the specificity of the agenda and/or notice of the meeting, stating that it was "void of public announcement of actions taken by the Committee." Finally, although it is somewhat unclear from your correspondence, it also appears you had concerns about your board's use of a consent agenda item at the December 13, 2017 regular meeting.

The Attorney General and the Department of Justice (DOJ) are committed to increasing government openness and transparency. DOJ's Office of Open Government (OOG) endeavors to offer guidance in these areas with a focus on the Wisconsin Open Meetings Law, Wis. Stat. §§ 19.81 to 19.98, and the Wisconsin Public Records Law, Wis. Stat. §§ 19.31 to 19.39. The OOG is only authorized to provide assistance within this scope. Based on the limited 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 such subject matter. However, I can provide you with some general information about the open meetings law that you may find helpful.

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

While the open meetings law governs public access to meetings of governmental bodies, it does not dictate all procedural aspects of how bodies run meetings. The law provides for the level of specificity required in agenda items for open meetings as well as the timing for releasing agendas in order to provide proper notice. Wis. Stat. § 19.84(2). However, the law does not specify requirements for the process that governmental bodies use to adopt meeting agendas. So long as governmental bodies follow the requirements for adequate and timely notice to the public, the notice complies with the open meetings law.

With respect to notice, 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.

Every public notice of a meeting must give the time, date, place and subject matter of the meeting, and the notice must be in such a form so as to reasonably apprise the public of this information. Wis. Stat. § 19.84(2). The notice requirement gives the public information about the business to be conducted that will alert them to the importance of the meeting, so that they can make an informed decision whether to attend. *State ex rel. Badke v. Vill. Bd. of Vill. of Greendale*, 173 Wis. 2d 553, 573–78, 494 N.W.2d 408 (1993).

Whether the notice is specific enough is determined on a case-specific basis, based on a reasonableness standard. *State ex rel. Buswell v. Tomah Area Sch. Dist.*, 2007 WI 71, ¶¶ 27–29, 301 Wis. 2d 178, 732 N.W.2d 804. This includes analyzing such factors as the burden of providing more detailed notice, whether the subject is of particular public interest, and whether it involves non-routine action that the public would be unlikely to anticipate. *Id.* ¶ 28. There may be less need for specificity where a meeting subject occurs frequently, because members of the public are more likely to anticipate that the meeting subject will be addressed, but novel issues may require more specific notice. *Id.* ¶ 31.

The open meetings law does not expressly require that the notice indicate whether a meeting will be purely deliberative or if action will be taken. *State ex rel. Olson v. City of Baraboo Joint Review Bd.*, 2002 WI App 64, ¶ 15, 252 Wis. 2d 628, 643 N.W.2d 796. But the information in the notice must be sufficient to alert the public to the importance of the meeting, so that they can make an informed decision whether to attend. *Id.* Thus, in some circumstances, a failure to expressly state whether action will be taken at a meeting could be a violation of the open meetings law. *Id.* See also Herbst Correspondence (July 16, 2008). 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>).

With respect to recordkeeping, the open meetings law requires a governmental body to create and preserve a record of all motions and roll-call votes at its meetings. Wis. Stat.



§ 19.88(3). This requirement applies to both open and closed sessions. *See De Moya Correspondence* (June 17, 2009). Written minutes are the most common method used to comply with the requirement, but they are not the only permissible method. It can also be satisfied if the motions and roll-call votes are recorded and preserved in some other way, such as on a tape recording. *See I-95-89* (Nov. 13, 1989).

Thus, as long as the body creates and preserves a record of all motions and roll-call votes, the Wis. Stat. § 19.88(3) requirement is satisfied, and the open meetings law does not require the body to take more formal or detailed minutes of other aspects of the meeting. Other statutes outside the open meetings law, however, may prescribe particular minute-taking requirements for certain governmental bodies and officials that go beyond what is required by the open meetings law. I-20-89 (Mar. 8, 1989). *See, e.g.*, Wis. Stat. §§ 59.23(2)(a) (county clerk); 60.33(2)(a) (town clerk); 61.25(3) (village clerk); 62.09(11)(b) (city clerk); 62.13(5)(i) (police and fire commission); 66.1001(4)(b) (plan commission); 70.47(7)(bb) (board of review).

Although Wis. Stat. § 19.88(3) does not indicate how detailed the record of motions and roll-call votes should be, the general legislative policy of the open meetings law is that “the public is entitled to the fullest and most complete information regarding the affairs of government as is compatible with the conduct of governmental business.” *See Wis. Stat. § 19.81(1)*. In light of that policy, it seems clear that a governmental body’s records should provide the public with a reasonably intelligible description of the essential substantive elements of every motion made, who initiated and seconded the motion, the outcome of any vote on the motion, and, if a roll-call vote, how each member voted. *See De Moya Correspondence* (June 17, 2009).

Moreover, although there is no requirement under the open meetings law for a governmental body to keep minutes, DOJ recommends that governmental bodies keep minutes of all meetings in an effort to increase transparency. A governmental body may choose to go beyond the requirements in Wis. Stat. § 19.88(3). Easily accessible agendas and minutes—such as through links on the body’s website—and more detailed minutes are ways in which the body can increase government transparency.

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

Under the open meetings law, the Attorney General and the district attorneys have authority to enforce the law. Wis. Stat. § 19.97(1). Generally, the Attorney General may elect to prosecute complaints presenting novel issues of law that coincide with matters of statewide concern. While 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.

Although your matter is important, it does not appear that it presents novel issues of law that coincide with matters of statewide concern.

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

Under the open meetings law, the district attorney cannot act to enforce the law unless he or she receives a verified complaint. Therefore, to ensure the district attorney has the authority to enforce the law, you must file a verified complaint. This also ensures that you have the option to file suit should the district attorney refuse or otherwise fail to commence an enforcement action, as explained in the previous paragraph. For further information, please see pages 29-30 of the Open Meetings Law Compliance Guide and Wis. Stat. § 19.97. Appendix B of the Open Meetings Law Compliance Guide provides a template for a verified open meetings law complaint.

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

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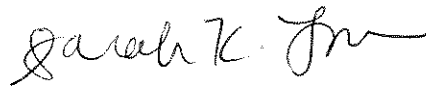
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DOJ appreciates your concern. We are dedicated to the work necessary to preserve Wisconsin's proud tradition of open government. Thank you for your correspondence.

Joan Beem  
August 22, 2018  
Page 5

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Sincerely,

A handwritten signature in black ink, appearing to read "Sarah K. Larson". The signature is fluid and cursive, with a prominent initial "S" and a long, sweeping tail.

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  
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August 22, 2018

James Faller

[REDACTED]  
Plymouth, WI 53073

Dear Mr. Faller:

This letter is in response to your electronic correspondence to Attorney General Brad Schimel, dated January 14, 2018, in which you stated, "We have 8 members on City Council. If a committee has 4 council members and the mayor on the Personnel/Finance committee that discussed an item that was approved in committee that was on the council agenda, is this considered a walking quorum and thus the council vote is then just a formality?"

The Attorney General and the Department of Justice (DOJ) are committed to increasing government openness and transparency. DOJ's Office of Open Government 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. Based on the information you provided in your correspondence, I have insufficient information to give you a definitive answer as to whether a walking quorum exists. However, I can provide you with some general information about the open meetings law that you may 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 open meetings law applies to every "meeting" of a "governmental body." Wis. Stat. § 19.83. An entity that fits within the definition of governmental body must comply with the requirements of the open meetings law. The definition of a "governmental body" includes a "state or local agency, board, commission, council, department or public body corporate and politic created by constitution, statute, ordinance, rule or order[.]" Wis. Stat. § 19.82(1). The list of entities is broad enough to include essentially any governmental entity, regardless of what it is labeled. Purely advisory bodies are subject to the law, even though they do not

possess final decision making power, as long as they are created by constitution, statute, ordinance, rule, or order. *See State v. Swanson*, 92 Wis. 2d 310, 317, 284 N.W.2d 655 (1979).

If a committee is a “formally constituted subunit” of the governmental body, then it is also subject to the open meetings law. A “formally constituted subunit” of a governmental body is itself a “governmental body” within the definition in Wis. Stat. § 19.82(1). A subunit is a separate, smaller body created by a parent body and composed exclusively of members of the parent body. *See* 74 Op. Att’y Gen. 38, 40 (1985). If, for example, a fifteen member county board appoints a committee consisting of five members of the county board, that committee would be considered a “subunit” subject to the open meetings law. This is true despite the fact that the five-person committee would be smaller than a quorum of the county board. Even a committee with only two members is considered a “subunit,” as is a committee that is only advisory and that has no power to make binding decisions. *See* Dziki Correspondence (Dec. 12, 2006).

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

As already noted, the open meetings law applies to every “meeting” of a “governmental body.” Wis. Stat. § 19.83. The open meetings law defines a “meeting” 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 meeting occurs when a convening of members of a governmental body satisfies two requirements. *See State ex rel. Newspapers, Inc. v. Showers*, 135 Wis. 2d 77, 398 N.W.2d 154 (1987). The first requirement under the so-called *Showers* test is that there must be a purpose to engage in governmental business (the purpose requirement). Second, the number of members present must be sufficient to determine the governmental body’s course of action (the numbers requirement).

Regarding the purpose requirement, a body is engaged in governmental business when its members gather to simply hear information on a matter within the body’s realm of authority. *See State ex rel. Badke v. Vill. Bd. of Vill. of Greendale*, 173 Wis. 2d 553, 573–74, 494 N.W.2d 408 (1993). Thus, mere attendance at an informational meeting on a matter within a body’s realm of authority satisfies the purpose requirement. The members of the body need not discuss the matter or even interact. *Id.* at 574-76. This applies to a body that

is only advisory and that has no power to make binding decisions. *See State v. Swanson*, 92 Wis. 2d 310, 317, 284 N.W.2d 655 (1979).

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

The 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. *See Showers*, 135 Wis. 2d at 92. The danger is that a walking quorum may produce a predetermined outcome and thus render the publicly-held meeting a mere formality. *See 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.

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

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

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

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

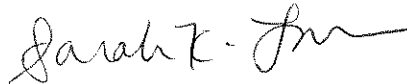
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DOJ appreciates your concern. We are dedicated to the work necessary to preserve Wisconsin's proud tradition of open government. Thank you for your correspondence.

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,



Sarah K. Larson  
Assistant Attorney General  
Office of Open Government

SKL:skl



STATE OF WISCONSIN  
DEPARTMENT OF JUSTICE

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ATTORNEY GENERAL

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FAX 608/267-2779

August 22, 2018

Monte Schmiede

West Bend, WI 53095

Dear Mr. Schmiede:

This letter is in response to your correspondence to Attorney General Brad Schimel, dated January 9, 2018, in which you stated you are a member of the West Bend Joint School District #1 school board serving on the policy committee, and wanted advice “as to the applicability of Wisconsin Open Meetings Law to blogs, social media posts, and other forms of electronic communication beyond email and instant messaging addressed in the Open Meetings Law Compliance Guide.”

Specifically, you wanted advice about the applicability of the open meetings law “under any of these circumstances”: 1) “Communicating information and/or personal opinion to the public in a posting that may or may not be viewed by other board members, with or without the intent of influencing other board members”; and 2) “Responding to a reporter’s request for a personal opinion on a matter of public interest with the consequence of it being reported in printed an electronic form.”

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

The open meetings law applies to every meeting of a governmental body. Wis. Stat. § 19.83. Under the law, 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 meeting occurs when a convening of members of a governmental body satisfies two requirements. *See State ex rel. Newspapers, Inc. v. Showers*, 135 Wis. 2d 77, 398 N.W.2d 154 (1987). The first requirement under the so-called *Showers* test is that there must be a purpose to engage in governmental business (the purpose requirement). Second, the number of members present must be sufficient to determine the governmental body's course of action (the numbers requirement).

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

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

The 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. *See Showers*, 135 Wis. 2d at 92. The danger is that a walking quorum may produce a predetermined outcome and thus render the publicly-held meeting a mere formality. *See 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.

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 and electronic communications, including email.

I will now turn to the hypothetical questions you posed in your correspondence, but caution that any conclusions I have reached in this letter are based solely on the hypothetical questions you sent us, not on any specific facts that might exist in your situation. Regarding the first situation, “[c]ommunicating information and/or personal opinion to the public in a posting that may or may not be viewed by other board members, with or without the intent of influencing other board members,” such as in blogs, social media posts, and other forms of electronic communication beyond email and instant messaging, I have insufficient information to draw any definitive conclusions about those situations in the abstract. Those kinds of electronic postings can possess many different kinds of characteristics, depending on how the communication medium is used.

Although no Wisconsin court has applied the open meetings law to these kinds of electronic communications, it is likely that the courts will try to determine whether the communications in question are more like an in-person discussion—*e.g.*, a rapid back-and-forth exchange of viewpoints among multiple members—or more like non-electronic written correspondence, which generally does not raise open meetings law concerns. In addressing these questions, courts are likely to consider such factors as the following: (1) the number of participants involved in the communications; (2) the number of communications regarding the subject; (3) the time frame within which the electronic communications occurred; and (4) the extent of the conversation-like interactions reflected in the communications.

It also bears repeating that 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. A walking quorum, however, 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.

For those reasons, the Attorney General has cautioned that members of governmental bodies should reduce any possible appearance of impropriety by minimizing inter-member communications. *See Kay Correspondence* (Apr. 25, 2007). With respect to email specifically, the Attorney General has strongly discouraged the members of every governmental body from using email to communicate about issues within the body’s realm of authority. *See Krischan Correspondence* (Oct. 3, 2000); *Benson Correspondence* (Mar. 12, 2004) Exchanges

on other electronic media can be seen as closely analogous to email exchanges—such as interactive comments on a blog or social media exchanges, especially those exchanges that occur almost in real time.

Because the applicability of the open meetings law to such electronic communications depends on the particular way in which a specific message technology is used, these technologies create special dangers for governmental officials trying to comply with the law. Features like “forward” and “reply to all” common in electronic communication or social media programs deprive a sender of control over the number and identity of the recipients who eventually may have access to the sender’s message. It is quite possible that, through the use of those types of electronic communications, a quorum of a governmental body may receive information on a subject within the body’s jurisdiction in an almost real-time basis, just as they would receive it in a physical gathering of the members. Because of the absence of judicial guidance on the subject, and because electronic media communications create the risk that they will be used to carry on private debate and discussion on matters that belong at open meetings subject to public scrutiny, the members of governmental bodies should refrain from using electronic media to communicate about issues within the body’s realm of authority.

Therefore, a court could find that the kinds of electronic communications you describe in your hypothetical situations constitute improper walking quorums if: 1) a sufficient number of body members have engaged in a collective discussion or information gathering related to governmental business; and 2) then agree, tacitly or explicitly, to act in some uniform fashion. At the very least, the use of electronic media to conduct serial individual contacts or back-and-forth exchanges is strongly discouraged. As with email exchanges, a court could construe such back and forth communication on electronic media 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 is a “close proximity” of time of the exchanges over electronic media if a single official uses electronic media to communicate with others in succession, asking—explicitly or tacitly—for their support of a particular position. *See Benson Correspondence* (Mar. 12, 2004). Regardless of how a court would view such communications, however, in the interest of government openness and transparency such discussions and decisions should occur in the light of a properly noticed open meeting.

Turning now to the second situation you posited, “[r]esponding to a reporter’s request for a personal opinion on a matter of public interest with the consequence of it being reported in printed an electronic form,” I first note that a phone call or an email to an individual board member is generally not a meeting under the open meetings law. Further, the Attorney General has previously concluded that there is no meeting within the meaning of the open meetings law when the members of a governmental body conduct official business while acting separately, without communicating with each other or engaging in other collective action. *See Katayama Correspondence* (Jan. 20, 2006).

Moreover, the Attorney General has long taken the position that written communications generally do not constitute a “convening of members” for purposes of the open meetings law. *See Merkel Correspondence* (Mar. 11, 1993). This is particularly true of

written communications that involve a largely one-way flow of information, with any exchanges spread out over a considerable period of time and little or no conversation-like interaction among members. Although the rapid evolution of electronic media has made the distinction between written and oral communication less sharp than it once appeared, it appears unlikely that a Wisconsin court would conclude that the circulation of an online article, written by a reporter who has requested a personal opinion of an individual member, could be deemed a “convening” or “gathering” of the members of a governmental body for purposes of the open meetings law.

In your correspondence, you also stated that you are “interested in this matter from the standpoint of running for re-election,” and that “[a]s a sitting board member, it seems my options for communication may be more limited than those for someone who is running for the office and not a sitting member.” You further stated that, “[t]o some extent, it seems freedom of speech is curtailed by Open Meetings Law,” and “[t]here are implication[s] for record keeping as well.”

DOJ’s Office of Open Government is only authorized to provide assistance to citizens within the scope of 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, and interpretations of constitutional law are outside of this scope. You may wish to consult with private legal counsel concerning such questions. 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 this contact information:

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

Regarding the “implication[s] for record keeping,” it is unclear whether you are referring to recordkeeping requirements under the open meetings law or record retention requirements for public records. As to requirements under the open meetings law, you may wish to consult DOJ’s Open Meetings Law Compliance Guide, pp. 18–23, available on our website at <https://www.doj.state.wi.us/office-open-government/office-open-government>. The duty to retain records is governed by the record retention statutes and record retention schedules created pursuant to those statutes. For more information on record retention, you may wish to visit the Wisconsin Public Records Board website at <http://publicrecordsboard.wi.gov/>.

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

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

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

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

Sincerely,



Sarah K. Larson  
Assistant Attorney General  
Office of Open Government

SKL:skl:pmf

cc: Mary Hubacher, Buelow Vetter



STATE OF WISCONSIN  
DEPARTMENT OF JUSTICE

BRAD D. SCHIMMEL  
ATTORNEY GENERAL

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September 6, 2018

David Frahm

[REDACTED]  
Dodge, WI 54625

Dear Mr. Frahm:

The Wisconsin Department of Justice (DOJ) is in receipt of your electronic correspondence from both January 30, 2018 and April 6, 2018. In your January 30, 2018 correspondence, you discuss Arcadia School District School Board meetings that occurred on September 18, 2017 and November 20, 2017, alleging that the school board and other school officials engaged in "complicity," "moral public school bankruptcy," "corruption," "bias," "stealing of Public Funding," "building public safety concern and potential violation," and "Open Meeting Law Non Compliance." In your April 6, 2018 correspondence, you allege that the school board engaged in "blatant tax dollar abuse," and that the school board president had an "absolute and unequivocally corrupt track record."

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 limited information you provided, it appears some of the subject matter of your correspondence is outside the scope of the OOG's responsibilities. Therefore, the OOG cannot provide assistance regarding such subject matter. If you believe a crime has been committed, you should contact your local law enforcement agency.

However, we can address your correspondence to the extent it concerns the open meetings law. Although it is unclear to me from your allegations, it appears that you believe the following open meetings law violations occurred at the September 18, 2017 school board meeting: 1) the board "rejected correction of the August Meeting Minutes" 2) the board "discriminat[ed] against [you] on the 4-minutes for Citizens Concerns while others talked longer"; 3) the board took "unilateral action" by signing an agreement "right before the meeting"; 4) the board "took action on a discussion agenda item" after you stated "the law was being broken"; and 5) the board "illegally granted constituents to speak during agenda item N: Coop Update" when the board's "protocol does not grant cherry-picking opportunities." You further stated that, at the November 20, 2017 school board meeting,

you “challenged” the school superintendent to “go to his office and retrieve” a “DNR Bus Program Grant” application, at which time the school board president then “stated I was ‘out of control.’”

In your correspondence, you did not provide sufficient details for us to properly evaluate the issues you raised. However, I can provide you with some general information about the open meetings law that you may find helpful. The Wisconsin 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).

Although 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. Thus, while the open meetings law permits 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. *See, e.g.*, Nix Correspondence (October 29, 2002); Lundquist Correspondence (Oct. 25, 2005); Zweig Correspondence (July 13, 2006); Chiaverotti Correspondence (Sept. 19, 2006).

Further, the OOG generally advises governmental bodies that, if citizens happen to raise subjects during a public comment period that are not properly noticed on an agenda or elsewhere, the governmental body should: 1) limit the discussion of that subject; and 2) defer any extensive deliberation to a later meeting for which more specific notice can be given. *See, e.g.*, Sayles Correspondence (Aug. 4, 2017); *see also State ex rel. Buswell v. Tomah Area Sch. Dist.*, 2007 WI 71, ¶ 34, 301 Wis. 2d 178, 732 N.W.2d 804 (a meeting generally “cannot address topics unrelated to the information in the notice.”). Governmental bodies may not take formal action on any subject raised in the public comment period, unless that subject is also identified in the meeting notice. *See* Sayles Correspondence (Aug. 4, 2017).

The open meetings law requires a governmental body to create and preserve a record of all motions and roll-call votes at its meetings. Wis. Stat. § 19.88(3). Written minutes are the most common method used to comply with the requirement, but they are not the only permissible method. The law can also be satisfied if the motions and roll-call votes are recorded and preserved in some other way, such as on a tape recording. *See* I-95-89 (Nov. 13, 1989).

Thus, as long as the body creates and preserves a record of all motions and roll-call votes, the open meetings law does not require the body to take more formal or detailed minutes of other aspects of the meeting. Other statutes outside the open meetings law, however, may prescribe particular minute-taking requirements for certain governmental bodies and officials that go beyond what is required by the open meetings law. I-20-89 (Mar. 8, 1989). *See, e.g.*, Wis. Stat. §§ 59.23(2)(a) (county clerk); 60.33(2)(a) (town clerk); 61.25(3) (village clerk); 62.09(11)(b) (city clerk); 62.13(5)(i) (police and fire commission); 66.1001(4)(b) (plan commission); 70.47(7)(bb) (board of review).

Although Wis. Stat. § 19.88(3) does not indicate how detailed the record of motions and roll-call votes should be, the general legislative policy of the open meetings law is that “the public is entitled to the fullest and most complete information regarding the affairs of government as is compatible with the conduct of governmental business.” *See* Wis. Stat. § 19.81(1). In light of that policy, it seems clear that a governmental body’s records should provide the public with a reasonably intelligible description of the essential substantive elements of every motion made, who initiated and seconded the motion, the outcome of any vote on the motion, and, if a roll-call vote, how each member voted. *See* De Moya Correspondence (June 17, 2009).

Moreover, although there is no requirement under the open meetings law for a governmental body to keep minutes, DOJ recommends that governmental bodies keep minutes of all meetings in an effort to increase transparency. A governmental body may choose to go beyond the requirements in Wis. Stat. § 19.88(3). Easily accessible agendas and minutes—such as through links on the body’s website—and more detailed minutes are ways in which the body can increase government transparency.

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

Under the open meetings law, the Attorney General and the district attorneys have authority to enforce the law. Wis. Stat. § 19.97(1). Generally, the Attorney General may elect to prosecute complaints presenting novel issues of law that coincide with matters of statewide concern. While 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. Based on the limited facts presented, it does not appear that your matter presents novel issues of law that coincide with matters of statewide concern.

More frequently, the district attorney of the county where the alleged violation occurred may enforce the law. However, in order to have this authority, an individual must



David Frahm  
September 6, 2018  
Page 4

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

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

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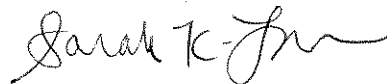
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DOJ appreciates your concern. We are dedicated to the work necessary to preserve Wisconsin's proud tradition of open government. Thank you for your correspondence.

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

Sincerely,



Sarah K. Larson  
Assistant Attorney General  
Office of Open Government

SKL:skl



STATE OF WISCONSIN  
DEPARTMENT OF JUSTICE

BRAD D. SCHIMEL  
ATTORNEY GENERAL

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FAX 608/267-2779

September 18, 2018

Tobi Machak

[REDACTED]  
Larsen, WI 54947

Dear Mr. Machak:

This Wisconsin Department of Justice (DOJ) is in receipt of your correspondence, dated February 14, 2018, in which you wrote, "I have a couple of questions regarding the Town of Winchester Town Board in Larsen Wisconsin. Mainly the town clerk roll. What is the proper state statute of posting the meeting minutes? 5 days?" You requested "the state to step in and look at the Winchester town board."

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. In your correspondence, you did not provide details regarding your concerns that the "[town] board has been extremely bad and the town clerk has not been following her duties." As a result, the information provided is insufficient to properly evaluate the issues you raised. Additionally, based on the information you provided, it appears some of the subject matter of your correspondence is outside the OOG's scope. Therefore, the OOG cannot provide assistance regarding such subject matter. You may wish to contact your local district attorney or private legal counsel regarding your concerns. However, we can address your correspondence to the extent it concerns the open meetings law.

In your correspondence you wrote, "What is the proper state statute of posting the meeting minutes? 5 days?" In an effort to increase transparency, DOJ recommends that governmental bodies keep minutes of all meetings. However, there is no requirement under the open meetings law for a governmental body to do so. The open meetings law only requires a governmental body to create and preserve a record of all motions and roll-call votes at its meetings. Wis. Stat. § 19.88(3). Meeting minutes are a common method that governmental bodies use to do so. However, as long as the governmental body is maintaining some type of record of all motions and roll-call votes, the Wis. Stat. § 19.88(3) requirement is satisfied.

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

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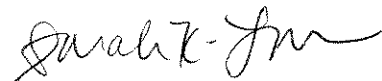
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DOJ appreciates your concern. We are dedicated to the work necessary to preserve Wisconsin's proud tradition of open government. Thank you for your correspondence.

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

Sincerely,



Sarah K. Larson  
Assistant Attorney General  
Office of Open Government

SKL:lah



STATE OF WISCONSIN  
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September 19, 2018

Joy Hammer

[REDACTED]  
Verona, WI 53593

Dear Ms. Hammer:

This Wisconsin Department of Justice (DOJ) is in receipt of your correspondence, dated February 6, 2018, in which you wrote, "I contacted the Madison Police [sic] department on a couple of occasions regarding some information on some missing person cases and they refuse to give it to me. They say it's active but one case in particular is from 1989." You asked, "What can I do?"

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

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

If the records you requested were regarding an ongoing investigation or litigation, an authority may withhold records material to the ongoing investigation or litigation. Whether an investigation or litigation is ongoing and whether the confidentiality of the requested records is material to that ongoing investigation or litigation are factors that an authority may consider in applying the balancing test. Cf. *Linzmeier 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); *Democratic Party of Wisconsin v. Wisconsin Dep't of Justice*, 2016 WI 100, ¶ 12, 372 Wis. 2d 460, 888 N.W.2d 584. An authority could determine that release of records while an investigation or litigation is in progress could compromise the investigation or litigation. Therefore, when performing the public records balancing test, an authority could conclude that the public interest in effectively investigating and litigating a case and in protecting the integrity of the current investigation or litigation outweighs the public interest in disclosing the requested records at that time. *Id.*; Wis. Stat. § 19.35(1)(a).

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

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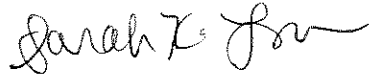
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DOJ appreciates your concern. We are dedicated to the work necessary to preserve Wisconsin's proud tradition of open government. Thank you for your correspondence.

Joy Hammer  
September 19, 2018  
Page 3

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Sincerely,

A handwritten signature in black ink, appearing to read "Sarah K. Larson". The signature is fluid and cursive, with a long horizontal flourish at the end.

Sarah K. Larson  
Assistant Attorney General  
Office of Open Government

SKL:lah



STATE OF WISCONSIN  
DEPARTMENT OF JUSTICE

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FAX 608/267-2779

September 20, 2018

Tracy McCarthy

[REDACTED]

Oconomowoc, WI 53066

Dear Mr. McCarthy:

This Wisconsin Department of Justice (DOJ) is in receipt of your correspondence, dated February 20, 2018, regarding your public records request to the Village of Lannon for reports filed by "Kezeske and Chief Kevin Porter." You wrote, "the Village has stated that they are not the custodial records keepers for their own department, I have written several times to ask who keeps these records however, they do not respond." You asked, "please do what you can to force compliance with the freedom of information acts spirit and requirements from the village of Lannon."

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

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

DOJ's 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. 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.

It is also worth noting that the public records law only applies to records in the custody of an authority. Wis. Stat. § 19.32(1). The public records law “does not require an authority to provide requested information if no record exists, or to simply answer questions about a topic of interest to the requester.” *Journal Times v. City of Racine Board of Police and Fire Commissioners*, 2015 WI 56, 55 (citation omitted); see also *State ex rel. Zinngrabe v. Sch. Dist. of Sevastopol*, 146 Wis. 2d 629, 431 N.W.2d 734 (Ct. App. 1988). An authority cannot fulfill a request for a record if the authority has no such record. While the public records law does not require an authority to notify a requester that the requested record does not exist, it is advisable that an authority do so.

It is unclear from your correspondence if you have requested the police reports filed by “Kezeske and Chief Kevin Porter” from anyone other than the Village of Lannon. If you have not already done so, I would recommend contacting the police department and making a public records request for these reports, as the police department may be the custodian of the records you seek.

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

Alternatively, the requester may submit a written request for the district attorney of the county where the record is found, or the Attorney General, to file an action for mandamus seeking release of the requested records. Wis. Stat. § 19.37(1)(b). The Attorney General is authorized to enforce the public records law; however, he generally exercises this authority only in cases presenting novel issues of law that coincide with matters of statewide concern. Although you did not specifically request the Attorney General to file an action for mandamus, nonetheless, we respectfully decline to pursue a mandamus action 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:

Lawyer Referral and Information Service  
State Bar of Wisconsin  
P.O. Box 7158  
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<http://www.wisbar.org/forpublic/ineedalawyer/pages/lris.aspx>

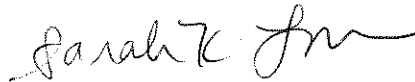


The Attorney General and DOJ's Office of Open Government are committed to increasing government openness and transparency, and DOJ endeavors to offer guidance in these areas. DOJ offers several open government resources through its website (<https://www.doj.state.wi.us/office-open-government/office-open-government>).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

A handwritten signature in black ink, appearing to read "Sarah K. Larson". The signature is fluid and cursive, with a long horizontal flourish extending to the right.

Sarah K. Larson  
Assistant Attorney General  
Office of Open Government

SKL:lah



STATE OF WISCONSIN  
DEPARTMENT OF JUSTICE

BRAD D. SCHIMEL  
ATTORNEY GENERAL

Paul W. Connell  
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FAX 608/267-2779

September 26, 2018

Shirley Conrad

[REDACTED]  
Mondovi, WI 54755

Dear Ms. Conrad:

This Wisconsin Department of Justice (DOJ) is in receipt of your correspondence, received on December 20, 2017, regarding "issues that [you] have been made aware [of] in [your] town of Mondovi." You wrote, "Being a new council member, and I'm unsure where to turn. I hope you can offer assistance or direction for myself, and my community."

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 some of the subject matter of your correspondence is outside this scope. Therefore, we are unable to offer you assistance regarding your concerns that are outside the scope of the OOG's responsibilities. You may wish to contact your local district attorney or private legal counsel regarding your concerns. However, we can address your correspondence to the extent it concerns the open meetings law and public records law.

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

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

In your correspondence you reference a "lawsuit the City of Mondovi filed against North Creek Development and its members: David Holden, Darrin Ede and Steve Larson." If the records requests you reference in your correspondence were for records regarding an ongoing lawsuit, an authority may withhold records material to the ongoing litigation. Whether an investigation or litigation is ongoing and whether the confidentiality of the requested records is material to that ongoing investigation or litigation are factors that an authority may consider in applying the 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. Agerup*, 145 Wis. 2d 818, 824-27, 429 N.W.2d 772 (Ct. App. 1988); *Democratic Party of Wisconsin v. Wisconsin Dep't of Justice*, 2016 WI 100, ¶ 12, 372 Wis. 2d 460, 888 N.W.2d 584. An authority could determine that release of records while an investigation or litigation is in progress could compromise the investigation or litigation. Therefore, when performing the public records balancing test, an authority could conclude that the public interest in effectively investigating and litigating a case and in protecting the integrity of the current investigation or litigation outweighs the public interest in disclosing the requested records at that time. *Id.*; Wis. Stat. § 19.35(1)(a).

Further, attorney-client privileged communications are not subject to disclosure under the public records law. *George v. Record Custodian*, 169 Wis. 2d 573, 582, 485 N.W.2d 460 (Ct. App. 1992); *Wisconsin Newspaper, Inc. v. School Dist. of Sheboygan Falls*, 199 Wis. 2d 768, 782-83, 546 N.W.2d 143 (1996). It is unclear from the information provided in your correspondence whether the records regarding the lawsuit you reference contain such communications, but if they did, it might constitute a reason to withhold or redact such records.

*In part two of your correspondence* regarding the October 24, 2017 council meeting you wrote, "At the recess of the meeting before closed session a conversation was captured on audio of them planning on firing the Street Supervisor and the Mayor referencing the lawsuit." I do not have sufficient information from your correspondence to fully evaluate this issue, but 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). The provisions of the open meetings law are to be construed liberally to achieve that purpose. Wis. Stat. § 19.81(4).

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 exemptions for convening in closed session 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).

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). Under the so-called *Showers* test, a meeting of a governmental body exists 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).

Under the open meetings law, 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). As noted above, if one-half or more of the members of a governmental body are present, 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). Therefore, whenever one-half or more of the members of a governmental body are present, governmental officials should not discuss government business unless the gathering complies with all of the requirements of the open meetings law, either as an open meeting or a closed meeting.

In part three of your correspondence you wrote, “Many have been charged \$52.00 an hour for open records.” Under the public records law, “[A]n authority may charge a fee not exceeding the actual, necessary, and direct costs of four specific tasks: (1) ‘reproduction and transcription’; (2) ‘photographing and photographic processing’; (3) ‘locating’; and (4) ‘mailing or shipping.’” *Milwaukee Journal Sentinel v. City of Milwaukee*, 2012 WI 65, ¶ 54 (citation omitted) (emphasis in original). The amount of such fees may vary depending on the authority. The law permits an authority to impose a fee for locating records if the cost is \$50.00 or more. Wis. Stat. § 19.35(3)(c). An authority may require a requester prepay any such fees if the total amount exceeds \$5.00. Wis. Stat. § 19.35(3)(f). Generally, the rate for an actual, necessary, and direct charge for staff time should be based on the pay rate (including fringe benefits) of the lowest paid employee capable of performing the task. For more information on permissible fees, please see the Office of Open Government Advisory: Charging Fees under the Wisconsin Public Records Law, which was issued on August 8, 2018 and can be found on DOJ’s website (<https://www.doj.state.wi.us/news-releases/office-open-government-advisory-charging-fees-under-wisconsin-public-records-law>).

In part four of your correspondence you wrote that you were “out of town for 2 weeks” and the “Mayor and Administrator set up 2 extra meetings.” Regarding the first meeting, you wrote that “the notice to council on the 10-24-17 audio was that I [h]ad been eavesdropping with what my audio caught.” The open meetings law grants citizens the right to tape record

or videotape meetings held in open session so long as doing so does not disrupt the meeting. The law explicitly states that a governmental body must make a reasonable effort to accommodate anyone who wants to record, film, or photograph an open session meeting so long as the activity does not interfere with the conduct of the meeting or the rights of the participants. Wis. Stat. § 19.90. The open meetings law, however, does not require a governmental body to permit recording of an authorized closed session. 66 Op. Att’y Gen. 318, 325 (1977); Maroney Correspondence (Oct. 31, 2006).

Regarding the second meeting, you wrote that “I had asked to be able to participate in the 11-14-17 meeting via the phone. I was denied.” Pursuant to Wis. Stat. § 19.89, “No duly elected or appointed member of a governmental body may be excluded from any meeting of such body. Unless the rules of a governmental body provide to the contrary, no members of the body may be excluded from any meeting of a subunit of that governmental body.” This statute does not specifically address whether members must be allowed to participate by phone in a meeting. The Attorney General has previously stated that telephone conference calls are a permissible method of convening a meeting, although they are probably not the most desirable method of doing so, especially at the local level. *See* 69 Op. Att’y Gen. 143, 145 (1980). Conference calls that meet the *Showers* test requirements for a meeting are also subject to all of the open meetings law’s requirements, *see id.*, and governmental bodies should construe the open meetings law’s provisions liberally to achieve the law’s intended purpose of openness and transparency. Wis. Stat. § 19.81(4).

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).

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

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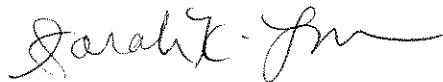
<http://www.wisbar.org/forpublic/ineedalawyer/pages/lris.aspx>

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

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

Sincerely,



Sarah K. Larson  
Assistant Attorney General  
Office of Open Government

SKL:lah



STATE OF WISCONSIN  
DEPARTMENT OF JUSTICE

BRAD D. SCHIMMEL  
ATTORNEY GENERAL

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Sarah K. Larson  
Assistant Attorney General  
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FAX 608/267-2779

September 26, 2018

Courtland Martens

[REDACTED]  
Sun Prairie, WI 53590

Dear Mr. Martens:

This Wisconsin Department of Justice (DOJ) is in receipt of your correspondence, dated February 23, 2018, in which you wrote, "I write you with concern about the upcoming records changes that will occur on Wisconsin Circuit Court Access website. I am concerned that the Director of State Courts, Hon. Randy Koschnick, is unlawfully attempting to block legal open records, specifically those that are dismissed due to plea agreements, etc." You said, "it concerns me this unlawful act is a violation of my open records access under current law." You asked, "Can you please explain to me how the director of the courts can unilaterally decide which records will be available online and which records are only viewed by going into a courthouse? If my mind serves me correctly, the Wisconsin Supreme Court stated changes such as these are left to the legislature?"

The Department of Justice (DOJ) 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. Your request for an explanation of the decision-making authority of the Director of State Courts is outside this scope. However, we can address your correspondence to the extent it concerned the public records law.

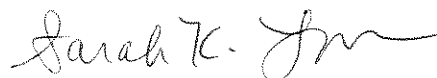
The Wisconsin Public Records Law authorizes requesters to inspect or obtain copies of records maintained by government authorities. However, generally, under the public records law, there is no requirement that authorities make records available online. While it may be more convenient to have the information available online, the law does not require this. Additionally, an authority is not required to create a new record by extracting and compiling information from existing records in a new format. *See* Wis. Stat. § 19.35(1)(L). *See also George v. Record Custodian*, 169 Wis. 2d 573, 579, 485 N.W.2d 460 (Ct. App. 1992).

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

DOJ appreciates your concern. If you have additional questions, please contact the Office of Open Government's Public Record Open Meetings (PROM) Help Line at (608) 267-2220. Thank you for your correspondence.

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

Sincerely,



Sarah K. Larson  
Assistant Attorney General  
Office of Open Government

SKL:lah





STATE OF WISCONSIN  
DEPARTMENT OF JUSTICE

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FAX 608/267-2779

September 27, 2018

Carolyn Toms-Neary

[REDACTED]  
Cudahy, WI 53110

Dear Ms. Toms-Neary:

This Wisconsin Department of Justice (DOJ) is in receipt of your correspondence, dated February 14, 2018, in which you wrote, "During a meeting of our Finance Committee, one of our alderpersons is being passed notes from the public in attendance." You asked, "Can she act and discuss on these notes and questions?"

The Wisconsin Open Meetings Law, Wis. Stat. §§ 19.81 to 19.98, law acknowledges that the public is entitled to the fullest and most complete information regarding government affairs as is compatible with conducting government business. Wis. Stat. § 19.81(1). All meetings of government bodies shall be held publically and be open to all citizens at all times unless otherwise expressly provided by law. Wis. Stat. § 19.81(2). The provisions of the Open Meetings Law are to be construed liberally to achieve that purpose. Wis. Stat. § 19.81(4).

The open meetings law 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. 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.* For additional information on the notice requirements of the open meetings law, please see pages 13 through 18 of the Open Meetings Law Compliance Guide available through DOJ's website (<https://www.doj.state.wi.us/office-open-government/office-open-government>).

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.

A governmental body, when conducting a meeting, is free to discuss any aspect of any subject identified in the public notice of that meeting, as well as issues reasonably related to that subject, but may not address any topics that are not reasonably related to the information in the notice. *State ex rel. Buswell v. Tomah Area Sch. Dist.*, 2007 WI 71 ¶ 34, 301 Wis. 2d 178, 732 N.W.2d 804. There is no requirement, however, that a governmental body must follow the agenda in the order listed on the meeting notice, unless a particular agenda item has been noticed for a specific time. Stencil Correspondence (Mar. 6, 2008). Nor is a governmental body required to actually discuss every item contained in the public notice. It is reasonable in appropriate circumstances, for a body to cancel a previously planned discussion or postpone it to a later date. Black Correspondence (Apr. 22, 2009).

Under the open meetings law, the Attorney General and the district attorneys have authority to enforce the law. Wis. Stat. § 19.97(1). Generally, the Attorney General may elect to prosecute complaints presenting novel issues of law that coincide with matters of statewide concern. 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.

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Sincerely,



Sarah K. Larson  
Assistant Attorney General  
Office of Open Government

SKL:lah