

## 2018 4th Quarter Correspondence

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October 10, 2018

Judith Savard

Laona, WI 54541

Dear Ms. Savard:

The Wisconsin Department of Justice (DOJ) is in receipt of your February 15, 2018 correspondence to Assistant Attorney General Paul Ferguson regarding your public records requests to the Forest County clerk and county attorneys. You also provided a copy of the documents you received in response to your public records requests, which I have reviewed.

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 the district attorney or a private attorney regarding your concerns. However, we can address your correspondence to the extent it concerns the public records law.

In your correspondence you wrote, "I have been denied several open records request by our County Clerk and County attorneys." Specifically, you wrote that you requested "[a]ll Attorney billings for 2017"; "[a]ll Attorney correspondence for 2017"; and "financial information from 2017 like orig. Budget and end of year adjusted budget for 2017."

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). Specific policy reasons, rather than mere statements of legal conclusion or recitation of exemptions, must be given. *Law Offices of Pangman & Assocs. v. Zellmer*, 163 Wis. 2d 1070, 1084, 473 N.W.2d 538 (Ct. App. 1991); *Vill. of Butler v. Cohen*, 163 Wis. 2d 819, 824-25, 472 N.W.2d 579 (Ct. App. 1991).

The 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 if a requested record does not exist, DOJ advises that authorities should do so.

With respect to your request for “[a]ll Attorney billings for 2017”; “[a]ll Attorney correspondence for 2017,” attorney-client privileged communications are not subject to disclosure under the public records law. *George v. Record Custodian*, 169 Wis. 2d 573, 582, 485 N.W.2d 460 (Ct. App. 1992); *Wisconsin Newspress, Inc. v. School Dist. of Sheboygan Falls*, 199 Wis. 2d 768, 782-83, 546 N.W.2d 143 (1996). Moreover, the attorney-client privilege, Wis. Stat. § 905.03, does provide sufficient grounds to deny access without resorting to the public records balancing test. *Id.* Therefore, an authority may deny a records request if the records fall within the attorney-client privilege. Billing records are communications from the attorney to the client, and therefore revealing the records may violate the attorney-client privilege if the records would directly or indirectly reveal the substance of the client’s confidential communications to the lawyer. *Juneau Cty. Star-Times v. Juneau Cty.*, 2011 WI App 150, ¶ 37, 337 Wis. 2d 710, 807 N.W.2d 655.

Further, attorney work product is a statutory and common-law exception to disclosure. *See* Wis. Stat. § 19.35(1)(a); *see also Seifert v. Sch. Dist. of Sheboygan Falls*, 2007 WI App 207, ¶¶ 27-28, 305 Wis. 2d 582, 740 N.W.2d 177 (“The common law long has recognized the privileged status of attorney work product, including the material, information, mental impressions and strategies an attorney compiles in preparation for litigation.”); Wis. Stat. § 804.01(2)(c)1.

With respect to your request for “financial information from 2017 like orig. Budget and end of year adjusted budget for 2017,” I do not have sufficient information to evaluate that issue, as I do not have your original public records request asking about those records or the county’s response to that request. However, I note that some budget information, including budgets from 2017 and 2018, are available on Forest County’s website, at [www.co.forest.wi.gov](http://www.co.forest.wi.gov), under the “Information” tab, which may be helpful to you.

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

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

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

Lawyer Referral and Information Service  
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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.



Judith Savard  
October 10, 2018  
Page 4

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

Sincerely,

A handwritten signature in black ink, appearing to read "Sarah K. Larson", with a stylized flourish at the end.

Sarah K. Larson  
Assistant Attorney General  
Office of Open Government

SKL:lah



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October 10, 2018

William Mitchell

Janesville, WI 53546

Dear Mr. Mitchell:

The Wisconsin Department of Justice (DOJ) is in receipt of a copy of your March 23, 2018 Mandamus Request to the Jefferson County District Attorney's Office regarding your public records requests to the Jefferson County Sheriff's Office. You also included a copy of your January 22, 2018 public records request to the Jefferson County Sheriff's Office and their February 1, 2018 correspondence to you stating that your "request has been received and will be processed in the order it was received."

It does not appear from your correspondence that you are asking a question or requesting the help of the Attorney General at this time as the Mandamus Request was directed to the Jefferson County District Attorney's Office with a copy to DOJ. However, I would like to provide you with some general information about the public records law.

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

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

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

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.

As you are aware, the public records law provides several remedies for a requester dissatisfied with an authority’s response, or lack of response, to a public records request. 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. 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 also wish to contact a private attorney regarding this matter. The State Bar of Wisconsin operates an attorney referral service. The referral service is free; however, a private attorney may charge attorney’s fees. You may reach the service using the contact information below:

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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", with a stylized flourish at the end.

Sarah K. Larson  
Assistant Attorney General  
Office of Open Government

SKL:lah



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October 11, 2018

Micah M. Bahr

[REDACTED]  
Darlington, WI 53530

Dear Mr. Bahr:

The Wisconsin Department of Justice (DOJ) is in receipt of your March 16, 2018 correspondence regarding your Verified Open Meetings Law Complaint filed with Lafayette County District Attorney Jenna Gill regarding "the Town of Kendall Chairman, Mark Rehmstedt, not giving proper posting time for the Annual Budget hearing." You included a copy of your complaint, the District Attorney's response, and other documents which I have reviewed.

In your correspondence you wrote, "I am sending you this letter to inform you of activities that are happening in our county and township." It does not appear from your correspondence that you are asking a question or requesting the help of the Attorney General at this time. However, I would like to provide you with some general information about the open meetings law.

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

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

Public notice of every meeting of a governmental body must be provided at least 24 hours prior to the commencement of such a meeting. Wis. Stat. § 19.84(3). If, for good

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

Public notice of a meeting must provide the “time, date, place and subject matter of the meeting . . . in such form as is reasonably likely to apprise members of the public and the news media thereof.” Wis. Stat. § 19.84(2). For additional information on the notice requirements of the open meetings law, you may wish to read pages 13 through 19 of the Open Meetings Law Compliance Guide available through DOJ’s website (<https://www.doj.state.wi.us/office-open-government/office-open-government>).

As you are aware, 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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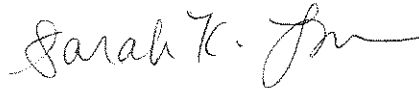
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Compliance Guide, and provides a recorded webinar and associated presentation documentation.

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 cursive script, appearing to read "Sarah K. Larson".

Sarah K. Larson  
Assistant Attorney General  
Office of Open Government

SKL:lah



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October 25, 2018

Mary Struck

Kohler, WI 53044

Dear Ms. Struck:

This Wisconsin Department of Justice's (DOJ) is in receipt of your electronic correspondence, dated April 2, 2018, in which you wrote, "I know of someone who used a fake name to make an open records request from a municipality. I'm wondering if that violates any FOIA laws."

Your correspondence references the federal Freedom of Information Act (FOIA), 5 U.S.C. § 552. FOIA applies to federal agencies and helps ensure public access to records of federal agencies. In Wisconsin, the state counterpart to FOIA is the Wisconsin Public Records Law, Wis. Stat. §§ 19.31 to 19.39. The purpose of the public records law is to shed light on the workings of government and the official acts of public officers and employees. *Bldg. & Constr. Trades Council v. Waunakee Cmty. Sch. Dist.*, 221 Wis. 2d 575, 582, 585 N.W.2d 726 (Ct. App. 1998).

The public records law authorizes requesters to inspect or obtain copies of "records" created or maintained by an "authority." Records are presumed to be open to public inspection and copying, but there are exceptions. *See* Wis. Stat. § 19.31. Statutes, case law, and the public records law balancing test, which weighs the public interest in disclosure of a record against the public interest in nondisclosure, provide such exceptions.

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

For example, under the public records law, there is no requirement that a request must be made or fulfilled in person, and generally, one may submit a request verbally or in writing. *See* Wis. Stat. § 19.35(1)(h) ("A request may be made orally, but a request must be in writing before an action to enforce the request is commenced" under Wis. Stat. § 19.37.) Additionally, an authority generally may not refuse a request because the request is received



by mail unless prepayment of a fee is required under Wis. Stat. § 19.35(3)(f). *See* Wis. Stat. § 19.35(1)(i).

Further, as is pertinent to your inquiry, the requester generally does not need to identify himself or herself. *See* Wis. Stat. § 19.35(1)(i) ("Except as authorized under this paragraph, no request . . . may be refused because the person making the request is unwilling to be identified or to state the purpose of the request"). Thus, the public policy expressed in Wis. Stat. § 19.35(1)(i) is that a requester generally may remain anonymous. *See State ex rel. Ledford v. Turcotte*, 195 Wis. 2d 244, 252, 536 N.W.2d 130 (Ct. App. 1995). Consequently, because requesters generally may remain anonymous, the requester also generally would not need to identify himself or herself using his or her true identity. *See* Wis. Stat. § 19.35(1)(i).

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

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

DOJ's Office of Open Government (OOG) works to increase government openness and transparency with a focus on the Wisconsin Open Meetings Law, Wis. Stat. §§ 19.81 to 19.98, and the Wisconsin Public Records Law, Wis. Stat. §§ 19.31 to 19.39. The OOG cannot provide legal advice or counsel on anything outside of this scope. There may be other substantive federal or state laws regarding the use of false identities, but the OOG is not authorized to advise you on those issues. If you have further concerns not addressed by this letter, you may wish to consult with a private attorney about those concerns.

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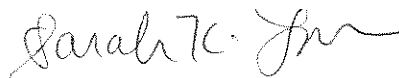
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If you would like to learn more about the Wisconsin Public Records Law, the OOG offers several open government resources through the Wisconsin DOJ website (<https://www.doj.state.wi.us/office-open-government/office-open-government>). DOJ provides the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

Thank you for your correspondence. The Attorney General and DOJ's Office of Open Government are committed to increasing government openness and transparency, and we are dedicated to the work necessary to preserve Wisconsin's proud tradition of open government.

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Sincerely,

A handwritten signature in cursive script, appearing to read "Sarah K. Larson".

Sarah K. Larson  
Assistant Attorney General  
Office of Open Government

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November 1, 2018

Gary Phelan  
[REDACTED]

Waupaca, WI 54981

Dear Mr. Phelan:

The Wisconsin Department of Justice (DOJ) is in receipt of your correspondence, dated February 23 and 27, 2018, in which you wrote, "I need your help to obtain [an] investigation report from the Wisconsin Resource Center [WRC]. I know it was sent to the Winnebago County Sheriffs [sic] office as upon my release. I immediately contacted that office. I've written open records requests & was denied each & every time." You have indicated that you seek any investigation reports as well as your own medical records.

DOJ is also in receipt of your correspondence, dated March 12, 2018, in which you wrote that you "have things filed with the [Department of Workforce Development (DWD)] [E]qual [R]ights [D]ivision (ERD Case #CR201604412) (EEOC Case #210700178C)." You also stated that you "still have not heard from the [Winnebago County] District Attorney[']s Office as far as the investigation report from 2015 at the Wisconsin Resource Center." In addition, you also discuss a different, unrelated public records request that you said you sent to "the city police department" related to jail records from March of 2018. However, I do not have sufficient information from your correspondence to evaluate the latter request.

In your correspondence from February 23 and 27, 2018, you provided copies of public records requests you submitted to various agencies, along with some of the responses you received. I have reviewed this documentation, along with the other enclosures in your correspondence, including but not limited to the following:

- 1) Your public records requests to the Wisconsin Department of Corrections (DOC), dated December 8 and December 15, 2017, seeking records from around March or April of 2015; and DOC's denial letter dated February 23, 2018;
- 2) Your public records requests to the Wisconsin Department of Health Services-Division of Care and Treatment Services (DHS-DCTS), dated December 15, 2017 and February 14, 2018; and DHS's denial letter dated February 22, 2018;
- 3) Your public records requests to the Winnebago County Sheriff's Office and Winnebago District Attorney's Office, seeking the same or similar investigatory records from around March or April of 2015.

The Attorney General and DOJ's Office of Open Government (OOG) work 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. However, DOJ cannot offer you legal advice or counsel concerning your public records requests to DOC or DHS, as DOJ may be called upon to represent DOC and DHS. DOJ also cannot offer you legal advice or counsel concerning any pending litigation with DWD or ERD, as DOJ may be called upon to represent DWD. Therefore, DOJ may only provide legal advice or counsel regarding your public records requests to the Winnebago County Sheriff's Office and Winnebago District Attorney's Office.

Moreover, based on the information you provided in your correspondence, it appears that some of the subject matter of your correspondence is outside the scope of the public records law and open meetings law. Therefore, we are unable to offer assistance regarding your concerns that are outside the scope of the OOG's responsibilities. Our records indicate that you have previously discussed these matters in various telephone conversations with Assistant Attorney General Paul Ferguson, and that he indicated to you on at least three occasions—February 20, 2018, April 16, 2018, and April 30, 2018—that some of your questions and concerns are outside the scope of the OOG's responsibilities.

In order to address your correspondence as it relates to your public records requests, I wanted to give you some information about 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. 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).

Under the public records law, a request "is deemed sufficient if it reasonably describes the requested record or the information requested." Wis. Stat. § 19.35(1)(h). A request "without a reasonable limitation as to subject matter or length of time represented by the record does not constitute a sufficient request." *Id.* It is helpful for public records requests to be as specific as possible. This helps avoid any confusion the authority may have regarding the request, thereby helping to ensure the requester receives the records they seek in a timely fashion.

The public records law "does not require 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.

Further, 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 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.

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

Turning now to the specific issues set forth in your correspondence, I first re-iterate that DOJ cannot offer you legal advice or counsel concerning your public records requests to DOC or DHS, as DOJ may be called upon to represent DOC and DHS. However, in an effort to assist you, I contacted DOC and DHS to discuss your public records requests with those agencies. I also contacted the Winnebago County District Attorney’s Office and the Winnebago County Sheriff’s Office, as it was unclear to me from your correspondence whether those offices had responded to you or whether your public records requests were still pending.

The following is a summary of what I found out, as well as some further information that you may find helpful to resolve any remaining concerns you have:

- 1) The Winnebago County District Attorney's Office informed me that they have no records responsive to your requests.
- 2) The Winnebago County Sheriff's Office informed me that they have no records responsive to your requests, but has indicated that records from the WRC would be maintained at DHS and DOC.
- 3) DHS informed me that they have no records responsive to your requests.
- 4) DOC informed me that they have no records responsive to your requests, but has indicated that if you had any personal medical records from your time at the WRC, those records would be maintained at DOC's central medical records office. Requests for personal medical records are handled through a process separate from DOC's public records request process.

You may use the following contact information to request medical records directly from DOC. Please be sure to indicate that you are requesting personal medical records from your time at WRC:

Dodge Correctional Institution  
Attn: Medical Records Department  
P.O. Box 661  
Waupun, WI 53963  
Phone: 920-324-6296

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 on the next page:

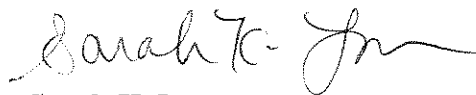
Lawyer Referral and Information Service  
State Bar of Wisconsin  
P.O. Box 7158  
Madison, WI 53707-7158  
(800) 362-9082 or (608) 257-4666  
<http://www.wisbar.org/forpublic/ineedalawyer/pages/lris.aspx>

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

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

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

Sincerely,

A handwritten signature in black ink, appearing to read "Sarah K. Larson", with a stylized flourish at the end.

Sarah K. Larson  
Assistant Attorney General  
Office of Open Government

SKL:lah



STATE OF WISCONSIN  
DEPARTMENT OF JUSTICE

BRAD D. SCHIMEL  
ATTORNEY GENERAL

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FAX 608/267-2779

November 7, 2018

Marty Curtiss

Superior, WI 43880

Dear Mr. Curtiss:

The Wisconsin Department of Justice (DOJ) is in receipt of your February 1, 2018 email correspondence regarding your "FOI requests to the City of Superior Clerk." You wrote, "I am not looking for enforcement action other than if these request[s] are deemed within reasonable limits by your office and Clerk Kalan still refuses to comply." You requested "assistance in getting the City of Superior compliance and suggest the clerk be required to attend a course offered by your office on both open records and open meeting compliance." You provided your public records requests to the City of Superior and the City Clerk's responses which I have reviewed.

The public records law authorizes requesters to inspect or obtain copies of "records" created or maintained by an "authority." Records are presumed to be open to public inspection and copying, but there are exceptions. Wis. Stat. § 19.31. Statutes, case law, and the public records law balancing test, which weighs the public interest in disclosure of a record against the public interest in nondisclosure, provide such exceptions.

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.* See also *Seifert v. School Dist. of Sheboygan Falls*, 2007 WI App 207, ¶ 42, 305 Wis. 2d 582, 740 N.W.2d 177 (custodian should not have to guess at what records a requester desires).

Additionally, 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.

Pursuant to Wis. Stat. § 19.35(4)(b), "If an authority denies a written request in whole or in part, the requester shall receive from the authority a written statement of the reasons



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

Based on the information in your correspondence, it appears that the authority denied your requests as insufficient, either because they were “not reasonably limited to subject matter,” or did not include a “sufficient ... length of time for the records requested,” or both. I do not have enough information to thoroughly evaluate whether the requests are insufficient. In all four instances, the authority invited you to “submit a public records request outlining a sufficient subject matter.” Additionally, in a related email, it appears that the clerk asked you to confirm the subject matter of one request, and indicated that she would process your request if you “amend your request to include sufficient subject matter.” The clerk provided an example of such an amended request. Your response email indicated, “That was not and is not my request, please address my requests as stated.”

The Office of Open Government encourages authorities and requesters to maintain an open line of communication. This helps to avoid misunderstandings between an authority and a requester. It appears that the clerk is willing to work with you in order to process your requests. Providing a subject matter or key words to search can help to an authority to more efficiently process searches such as yours. I encourage you to keep communicating with the authority about the records you seek, clarifying your request to “reasonably describe[] the requested record or the information requested.” Wis. Stat. § 19.35(1)(h).

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). In order to obtain a writ of mandamus, the requester must establish four things: “(1) the petitioner has a clear legal right to the records sought; (2) the government entity has a plain legal duty to disclose the records; (3) substantial damages would result if the petition for mandamus was denied; and (4) the petitioner has no other adequate remedy at law.” *Watton v. Hegerty*, 2008 WI 74, ¶ 8, 311 Wis. 2d 52, 751 N.W.2d 369.

Alternatively, the requester may submit a written request for the district attorney of the county where the record is found, or the Attorney General, to file an action for mandamus seeking release of the requested records. Wis. Stat. § 19.37(1)(b). The Attorney General is authorized to enforce the public records law; however, he generally exercises this authority only in cases presenting novel issues of law that coincide with matters of statewide concern. Your matter does not appear to present such issues. Therefore, although you have not asked the Attorney General to pursue a mandamus action on your behalf, the Attorney General respectfully declines to do so at this time.

Although the Attorney General is declining to pursue a mandamus action at this time, the public records law's other enforcement options may still be available to you. You may also wish to contact an 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:

Lawyer Referral and Information Service  
State Bar of Wisconsin  
P.O. Box 7158  
Madison, WI 53707-7158  
(800) 362-9082  
(608) 257-4666

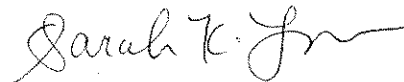
<http://www.wisbar.org/forpublic/ineedalawyer/pages/lris.aspx>

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

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

Sincerely,



Sarah K. Larson  
Assistant Attorney General  
Office of Open Government

SKL:lah

Cc: Terri Kalan, City of Superior Clerk



STATE OF WISCONSIN  
DEPARTMENT OF JUSTICE

BRAD D. SCHIMEL  
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608/266-1221  
TTY 1-800-947-3529  
FAX 608/267-2779

November 14, 2018

Pamela Schmidt  
Shawano County Clerk  
Shawano County Courthouse  
1st Floor, Room 104  
311 N. Main St.  
Shawano, WI 54166

Dear Ms. Schmidt:

The Wisconsin Department of Justice (DOJ) is in receipt of anonymous correspondence, received on February 26, 2018, alleging violations of the Wisconsin Public Records Law, Wis. Stat. §§ 19.31 to 19.39. The alleged violations primarily concern drafts or notes of minutes from meetings occurring in Shawano County. Enclosed, please find a copy the correspondence and related attachments, including a response letter from Shawano County Corporation Counsel to the requester. (Please note that the redactions in that letter had already been made by the requester prior to DOJ receiving the letter from the requester. To protect the anonymity of the requester, DOJ has also redacted the requester's phone number in the requester's letter to us.)

The Attorney General and DOJ's Office of Open Government (OOG) are committed to increasing government openness and transparency, and DOJ endeavors to offer guidance in these areas with a focus on the Wisconsin Public Records Law and the Wisconsin Open Meetings Law, Wis. Stat. §§ 19.81 to 19.98. I am writing to make you aware of the allegations of the anonymous requester, and to provide general information regarding the public records law. I am addressing this letter to you, because we do not have address information for the requester and our attempts to reach him or her on the telephone have been unsuccessful.

According to the information set forth in the anonymous correspondence to DOJ and the attachments thereto, the requester here made public records requests for "the original minutes ('notes') from 3 different Shawano County Departments." First, the requester made a "verbal record request" on November 20, 2017 for the "original minutes" taken at the Board of Health-Veterans Service committee held on November 20, 2017. According to the requester, "a copy of original minutes" was provided on November 21, 2017. I will consider that request fulfilled, based upon the information available to me.

Second, the requester made a “verbal record request” on November 30, 2017 for the “notes” from the Highway 29 Intergovernmental Planning meeting held on October 26, 2017. Based on my review of the correspondence, it appears that the authority provided meeting minutes to the requester for the meeting in question. However, it appears that the requester was unsatisfied with this response, and later sought “meeting notes.” The requester also indicates in the letter to DOJ that “meeting notes have 5 year retention,” according to the “Public Records Board General Records General Record Schedule page 11.”

Third, the requester made a “verbal record request” on March 6, 2017 to the Shawano County Highway Commissioner for the “original minutes” of the highway and parks committee meetings held on March 6, 2017. The requester also requested “access to the record listing the retention period of the original minutes and the record described under Wis Statute 19.33(4) that provides the name of the legal custodian of the original minutes to employees entrusted with the original minutes.” In a letter dated December 7, 2017, Shawano County Corporation Counsel, Tony Kordus, responded to the requester that the request was denied, because the definition of record under the public records law excludes “drafts” and “notes.” The requester now seeks DOJ’s “opinion” as to whether the March 6, 2017 meeting minutes, “label[ed] as ‘notes’” but “that are used to generate[] official meeting minutes” are a ‘record’ under [Wis. Stat. §] 19.32(2).

Before I address the specific concerns and questions set forth in the anonymous correspondence, I would first like to give you some general information about the public records law which I hope you will find helpful. 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. Any exceptions to the general rule of disclosure must be narrowly construed; the burden of proof is on the records custodian. *Fox v. Bock*, 149 Wis. 2d 403, 411, 417, 438 N.W.2d 589 (1989); *Voice of Wis. Rapids, LLC v. Wisconsin Rapids Public Sch. Dist.*, 2015 WI App 53, ¶ 10, 364 Wis. 2d 429, 867 N.W.2d 825.

The public records law authorizes requesters to inspect or obtain copies of “records” created or maintained by an “authority.” The 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). “Record” does *not* include “drafts, notes, preliminary documents, and similar materials prepared for the originator’s personal use or by the originator in the name of a person for whom the originator is working.” Wis. Stat. § 19.32(2).

Regarding “drafts,” a document is not a draft if it is used for the purposes for which it was commissioned. *Fox*, 149 Wis. 2d at 414. Preventing final corrections from being made does not indefinitely qualify a document as a draft. *Id.* at 417. Labeling each page of the document “draft” does not indefinitely qualify a document as a draft. *Id.* Additionally, this exception is generally limited to documents that are circulated to those persons over whom the person for whom the draft is prepared has authority. 77 Op. Att’y Gen. 100, 102–03 (1988).

Further, the word “notes” in Wis. Stat. § 19.32(2) is given standard dictionary definition and covers a broad range of frequently created informal writings. *Voice of Wis. Rapids*, 2015 WI App 53, ¶ 15. However, a document is not a “note[ ] . . . prepared for the originator’s personal use” if it is used to establish a formal position of action of an authority. *Id.* ¶¶ 21, 25 (emphasis added). Rather, the “personal use exception” applies when the notes are only used for the purpose of refreshing originator’s recollection at a later time, not when notes are used for the purpose of communicating information to any other person, or if notes are retained for the purpose of memorializing agency activity. *Id.* The “personal use exception” applies when the notes are a “voluntary piece of work” completed by the drafter for his or her “own convenience” and “to facilitate the performance of [his or her] own duties.” *Id.* ¶ 27 (internal quotations and citations omitted).

Turning now to the specific concerns set forth in the anonymous correspondence, I do not have sufficient information from the requester to thoroughly evaluate whether the documents in question constitute “records.” Some of the documents at issue could potentially fall into one of the exceptions set forth in Wis. Stat. § 19.32(2), such as the exceptions for “drafts,” “notes,” or “preliminary documents.” But such a determination would depend on a variety of factors, such as whether the documents in question were “prepared for the originator’s personal use or by the originator in the name of a person for whom the originator is working,” whether the documents were retained for the purpose of memorializing agency activity, and whether the documents were used for the purposes for which they were commissioned. Wis. Stat. § 19.32(2); *Voice of Wis. Rapids*, 2015 WI App 53, ¶¶ 21, 25. Based on the limited factual information presented in the correspondence, I cannot form any conclusions about those issues.

The requester also requested “access to the record listing the retention period of the original minutes,” and inquired in the anonymous correspondence to DOJ about whether “meeting notes have 5 year retention” according to the “Public Records Board General Records General Record Schedule page 11.” Records retention is a subject that is generally related to, but different from, the access requirements imposed by the public records law. Although the public records law addresses the duty to *disclose* records, it is not a means of enforcing the duty to *retain* records, except for the period after a request for particular records is submitted. *See State ex rel. Gehl v. Connors*, 2007 WI App 238, ¶ 15 n.4 (citing Wis. Stat. § 19.35(5)) (citation omitted).

Any person may request advice from the Attorney General as to the applicability of the public records law and the open meetings law. *See* Wis. Stat. §§ 19.98 and 19.39. The duty to retain records, however, is governed by the records retention statutes for state agencies and local units of government, Wis. Stat. §§ 16.61 and 19.21, respectively. Therefore, the OOG cannot provide advice on the record retention statutes, as those statutes are outside the scope of the OOG’s authority. Individuals interested in more information about record retention may wish to consult their legal counsel or visit the Wisconsin Public Records Board’s website ([publicrecordsboard.wi.gov](http://publicrecordsboard.wi.gov)) which contains further information about record retention.

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 the anonymous requester here 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.

The requester 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. The requester may reach the service using the contact information below:

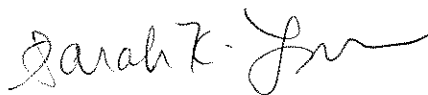
Lawyer Referral and Information Service  
State Bar of Wisconsin  
P.O. Box 7158  
Madison, WI 53707-7158  
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DOJ appreciates that the requester has brought these concerns and questions to our attention. If you have questions or concerns regarding this matter, or the public records law in general, please contact the Office of Open Government at (608) 267-2220. We are dedicated to the work necessary to preserve Wisconsin's proud tradition of open government. Thank you for your attention to this matter.

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

Enclosures

cc: Tony Kordus, Shawano County Corporation Counsel



STATE OF WISCONSIN  
DEPARTMENT OF JUSTICE

BRAD D. SCHIMEL  
ATTORNEY GENERAL

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FAX 608/267-2779

November 15, 2018

Frank Becvar

Grantsburg, WI 54840

Dear Mr. Becvar:

The Wisconsin Department of Justice (DOJ) is in receipt of your March 27, 2018 correspondence to Assistant Attorney General Paul Ferguson regarding your public records request to the Village of Grantsburg. You provided your email correspondence with the Village of Grantsburg discussing your public records request. You wrote, "I believe that the Village of Grantsburg has willfully delayed my Open Records Request." You requested DOJ "follow up on this, also file charges against them for doing so."

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

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

The public records law does not require a response to a public records request within a specific timeframe. In other words, after a request is received, there is no set deadline by which the authority must respond. However, the law states that upon receipt of a public records request, the authority "shall, as soon as practicable and without delay, either fill the

request or notify the requester of the authority's determination to deny the request in whole or in part and the reasons therefor." Wis. Stat. § 19.35(4)(a). A reasonable amount of time for a response "depends on the nature of the request, the staff and other resources available to the authority to process the request, the extent of the request, and other related considerations." *WIREDdata, Inc. v. Vill. of Sussex*, 2008 WI 69, ¶ 56, 310 Wis. 2d 397, 751 N.W.2d 736; see *Journal Times v. Police & Fire Comm'rs Bd.*, 2015 WI 56, ¶ 85, 362 Wis. 2d 577, 866 N.W.2d 563 (an authority "can be swamped with public records requests and may need a substantial period of time to respond to any given request").

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

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

The Office of Open Government (OOG) encourages authorities and requesters to maintain an open line of communication. This helps to avoid misunderstandings between an authority and a requester. As a best practice, authorities should send requesters an acknowledgment of the request after receiving it. If it becomes apparent to an authority that a public records request may require a longer response time, it may be prudent that the authority provide the requester with a letter providing an update on the status of the response and, if possible, indicating when a response might be anticipated. Similarly, if an authority receives an inquiry from a requester seeking an update on the status of the request, it is advisable for the authority to respond to the requester with an update. Based on the information you provided in your correspondence, it appears that you have already been communicating with the authority, and that they have indicated they are working on your request. I encourage you to keep communicating with the authority.

The public records law provides several remedies for a requester dissatisfied with an authority's response, or lack of response, to a public records request. A requester may file an action for mandamus, with or without an attorney, asking a court to order release of the records. Wis. Stat. § 19.37(1)(a). To obtain a writ of mandamus, the requester must establish four things: "(1) the petitioner has a clear legal right to the records sought; (2) the government



entity has a plain legal duty to disclose the records; (3) substantial damages would result if the petition for mandamus was denied; and (4) the petitioner has no other adequate remedy at law." *Watton v. Hegerty*, 2008 WI 74, ¶ 8, 311 Wis. 2d 52, 751 N.W.2d 369.

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

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

Lawyer Referral and Information Service  
State Bar of Wisconsin  
P.O. Box 7158  
Madison, WI 53707-7158  
(800) 362-9082  
(608) 257-4666

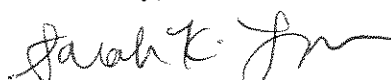
<http://www.wisbar.org/forpublic/ineedalawyer/pages/lris.aspx>

The Attorney General and the 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



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DEPARTMENT OF JUSTICE

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November 15, 2018

Stephen Styza

Waukesha, WI 53188

Dear Mr. Styza:

The Wisconsin Department of Justice (DOJ) Office of Open Government (OOG) is in receipt of your March 25, 2018 electronic correspondence in which you wrote, among other things, that you recently "sent a revision of my plat and a short memo" to "all Seven members of a towns [sic] Planning Commission." You ask if this was a violation of "any rules." You also asked whether you could "speak to up to only three in a group at a time" when "there are Seven members."

The Attorney General and the OOG are committed to increasing government openness and transparency, and DOJ endeavors to offer guidance in these areas with a focus on the Wisconsin Open Meetings Law, Wis. Stat. §§ 19.81 to 19.98, and the Wisconsin Public Records Law, Wis. Stat. §§ 19.31 to 19.39. Based on the information set forth in your correspondence, it appears that some of your questions and concerns may fall outside of this scope. The OOG cannot provide you with advice on matters falling outside the scope of the public records law and the open meetings law. I can, however, provide you with some general information regarding the open meetings law, which I hope you will 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).

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

[T]he convening of members of a governmental body for the purpose of exercising the responsibilities, authority, power or duties delegated to or vested in the body. If one-half or more of the members of a governmental body

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

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

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

Thus, the first requirement under the so-called *Showers* test is that there must be a purpose to engage in governmental business (the purpose requirement). Second, the number of members present must be sufficient to determine the governmental body’s course of action (the numbers requirement). However, a meeting does not exist where the members are gathered by chance or for social reasons. *See Badke*, 173 Wis. 2d at 576 (“meeting” does not include any social or chance gathering or conference that is not intended to avoid the requirements of the open meetings law).

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

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

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

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 also note, however, that a phone call, an email, or a letter from a constituent to an individual board member would generally not be considered a meeting under the open meetings law. 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. The rapid evolution of electronic media, however, has made the distinction between written and oral communication less sharp than it once appeared, so the facts and circumstances of each particular situation must be carefully considered when determining whether a “convening of members” has occurred under the open meetings law.

Based on the information in your correspondence, it appears that you are only requesting information about, and are not alleging any violations of, the open meetings law. Nevertheless, for your information, I am providing you with some general information regarding filing complaints under the open meetings law. Under the open meetings law, the Attorney General and the district attorneys have authority to enforce the law. Wis. Stat. § 19.97(1). Generally, the Attorney General may elect to prosecute complaints presenting novel issues of law that coincide with matters of statewide concern. 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.

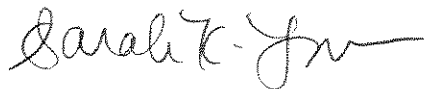
More frequently, the district attorney of the county where the alleged violation occurred may enforce the law. However, in order to have this authority, an individual must file a verified complaint with the district attorney. Wis. Stat. § 19.97(1). If the district attorney refuses or otherwise fails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

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,

A handwritten signature in dark ink, appearing to read "Sarah K. Larson", with a stylized flourish at the end.

Sarah K. Larson  
Assistant Attorney General  
Office of Open Government

SKL:skl



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November 20, 2018

Kelly Gallaher  
A Better Mount Pleasant  
[abettermtpleasant@gmail.com](mailto:abettermtpleasant@gmail.com)

Dear Ms. Gallaher:

The Wisconsin Department of Justice (DOJ) Office of Open Government (OOG) is in receipt of your May 14, 2018 correspondence in which you indicate that there was “a reoccur[r]ing circumstance in the Village of Mt. Pleasant in which village officials have acted to prohibit members of the public from speaking on items listed on the agenda during publicly noticed public comment periods.” You also indicate that “[i]t is highly unusual, and possibly improper, for a governmental body to prohibit public discussion on items noticed on the agenda and threaten to rule such speech as out of order.” According to our records, you spoke on the phone with Assistant Attorney General Paul Ferguson on May 2, 2018 about this same, or similar, issue.

In your May 14, 2018 correspondence, you specifically assert that, in two Mt. Pleasant Community Development Authority meetings—one on April 17, 2018 and one on May 9, 2018—community members were asked to fill out “required” public comment forms stating that members of the public could address “any item,” yet the public was then “prohibited by the presiding officer from speaking specifically about items listed on the agenda for those meetings,” even though community members wanted to speak on those particular noticed items which “directly impacted them.”

Regarding the April 17, 2018 meeting, you assert that the chair of the governmental body announced that public comments would only be on “items not on the agenda” and the public was not allowed to comment on “the project plan.” You also assert that the chair stated that “tonight’s agenda will not be part of public comment,” and that despite “objections from residents in the meeting, [he] maintained he had the authority to prevent the public from commenting on items listed on the meeting agenda.”

Regarding the May 9, 2018 meeting, you assert that “the same Redevelopment Plan discussed at the April 17th meeting” was on the listed on the agenda, yet the attorney for the governmental body “announced that any public comments regarding the redevelopment plan would be out of order.” You assert that the attorney then stated, “[B]ecause the deadline for

accepting testimony stemming from a hearing scheduled in March regarding the redevelopment plan had ended, the CDA could not hear any comments from the public during the public comments period." You also state that the chair of the governmental body "read off the names of people who had registered for public comment to determine if they were willing to only speak about items not on the meeting agenda."

Your correspondence also indicates that you believe "disallowing such content based comments violates the spirit of the open meetings law, serves no logical government interest, and is a violation of the First Amendment right to free speech." You are now asking DOJ to "investigate these events and render an opinion which determines if a governmental body may disallow certain and specific public speech regarding agenda items during a properly noticed public comment period."

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). Under the open meetings law, 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.

There are some other state statutes that require governmental bodies to hold public hearings on specified matters, and those statutes may also impact public comment periods. The OOG is only authorized to provide assistance to the public regarding matters pertaining to the Wisconsin Open Meetings Law and the Wisconsin Public Records Law, Wis. Stat. §§ 19.31 to 19.39. Other statutes that may require public hearings fall outside of this scope. The OOG cannot opine on any interaction between the Wisconsin Open Meetings Law and other statutes. If you have further questions about how other laws may interact with the Wisconsin Open Meetings Law, you may wish to consult with private counsel.

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. The OOG does not have the

resources to sort out disagreements between the parties, but if factual disputes exist, our conclusions concerning the legality of the meeting notice could be impacted.

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, the OOG 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 court system has not addressed that kind of restriction. As you may be aware, Representative Peter Barca sent DOJ a letter, dated May 30, 2018, on similar issues to which the OOG responded with an informal response letter in July. That response letter, however, did not constitute a formal or informal opinion of the Attorney General pursuant to Wis. Stat. § 165.015(1), nor did it render a determination as to whether the Village of Mount Pleasant violated Wisconsin’s Open Meetings Law. Rather, 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.

Based on the facts set forth in your correspondence, I conclude that restrictions prohibiting public comment on noticed agenda items would be inadvisable under the open meetings law, 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 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.”). 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. As already noted, the OOG is only authorized to provide assistance to citizens within the scope of the Wisconsin Public Records Law and the Wisconsin Open Meetings Law, 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, under the open meetings law, 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, they do not appear 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. Ultimately, it would be up to a court to rule on this issue based on all of the relevant facts.

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 restrictions, and that the public comment forms indicated that members of the public could address “any item.” At the meetings, however, the presiding officer or legal counsel then informed the public that they were not allowed to comment on agenda items, even though community members protested because they wanted to speak on those noticed items that were of particular importance to them.

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.

Again, there may be other statutes that impact notices for meetings, but as already noted, the OOG is only authorized to provide assistance to citizens within the scope of the Wisconsin Public Records Law and the Wisconsin Open Meetings Law. The OOG cannot opine on any interaction, if any, between the notice provisions of the open meetings law and any notice provisions that may exist in other statutes. If you have further questions about how other laws may interact with the Wisconsin Open Meetings Law, you may wish to consult with private legal counsel.

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).

Although the Attorney General is declining to pursue an enforcement action at this time, the open meeting law's other enforcement options may still be available to you. You may wish to contact an 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:

Lawyer Referral and Information Service  
State Bar of Wisconsin  
P.O. Box 7158  
Madison, WI 53707-7158  
(800) 362-9082  
(608) 257-4666

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

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

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

DOJ appreciates your concern. Enclosed please find several letters related to this issue including the May 30, 2018 letter from Representative Barca, our July 11, 2018 response letter to Representative Barca, an August 7, 2018 letter from Mount Pleasant Village Attorney Christopher R. Smith, and our September 5, 2018 letter in response to Attorney Smith. 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

Enclosures



May 30, 2018

Brad Schimel, Attorney General  
Wisconsin Department of Justice  
P.O. Box 7857  
Madison, WI 53703-7857

Attorney General Schimel,

This letter is to request that your office provide greater guidance and clarity related to how local government matters are noticed and addressed under the Wisconsin open meetings law.

While state law and guidance from the Wisconsin Department of Justice note that open meetings law does not require local governmental bodies to hold a public comment period, it is permitted under the law and there are noticing requirements for bodies that allow for public comment.

My office has 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.

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.

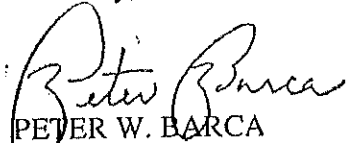
While not explicitly specified in the requirements of this portion of the law, it seems reasonable that the public comment period at a local government meeting be allowed to be on the business before the board or committee that day, especially when the decision to restrict testimony has not been clearly explained in the meeting notice.

I write to request your guidance 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.

Local officials, legislators, and members of the public rely on the guidance from your office to understand the extent, impact, and details of the law. While our community in particular could benefit from further guidance to ensure laws are being appropriately applied, presumably there is similar confusion about this area of the law in other parts of the state.

I look forward to your response on this matter.

Sincerely,

  
PETER W. BARCA  
State Representative  
64th Assembly District

CC: Paul Ferguson, Wisconsin Dept. of Justice, Office of Open Government



STATE OF WISCONSIN  
DEPARTMENT OF JUSTICE

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ATTORNEY GENERAL

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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.

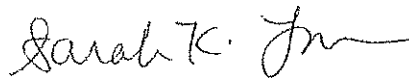
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DOJ appreciates your concern. We are dedicated to the work necessary to preserve Wisconsin's proud tradition of open government. Thank you for your correspondence.

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).

Rep. Peter Barca  
July 11, 2018  
Page 6

Sincerely,

A handwritten signature in cursive script, appearing to read "Sarah K. Larson".

Sarah K. Larson  
Assistant Attorney General  
Office of Open Government

SKL:skl:pmf

Cc: Attorney Christopher R. Smith

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11402 WEST CHURCH STREET  
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TELEPHONE (414) 529-8900  
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JANE C. KASSIS,  
LEGAL SECRETARY

August 7, 2018

Sarah K. Larson  
Assistant Attorney General  
17 W. Main Street  
Madison, WI 53707-7857

**RE: July 11, 2018 Letter to State Rep. Peter Barca**

Dear Ms. Larson:

I have received and reviewed your July 11, 2018 letter to State Representative Peter Barca. I appreciate and understand that you qualified all conclusions contained therein by cautioning that they were based only on what was contained in Mr. Barca's initial correspondence to you, and that no factual inquiry was conducted. Despite the notation that your opinion was not based on a review of the complete facts related to the April 17, 2018 and May 9, 2018 Community Development Authority ("CDA") meetings, you should be aware that your letter is being cited as "proof" by some persons in the community, that the Village of Mount Pleasant violated Wisconsin's Open Meetings Law at those meetings. That is in need of correction.

First, it is important to note that the public was not denied an opportunity to provide input on the agenda item regarding the Foxconn area redevelopment plan. On April 17, 2018, the only agenda item (other than approval of prior meeting minutes) was a staff report on the status of the matter. On May 9, 2018, the CDA took up the matter. However, these meetings were but the final steps of a very specific and exhaustive public input process that is identified in Wis. Stat. § 66.1333(6)(b)3.

Pursuant to that statute, a duly noticed and lengthy public hearing was held regarding the proposed redevelopment plan at a CDA meeting held on March 20, 2018. Following that public hearing, there was an additional fifteen days within which members of the public could (and did) file written materials with the CDA. see *Id.* The 15-day submission period expired April 4, 2018. Only after both the closing of the public hearing and the expiration of the 15-day submission period was the CDA legally able to take action on the matter. On May 9 and April 17 the CDA affirmatively acted so as to not re-open this public hearing/submission process. After this process was closed, if additional public commentary

were accepted, the CDA could have unintentionally opened an additional 15-day period for written submissions. Accepting more public comment on the item after the 15 days expired could have provided the basis for a claim that the statute was not followed and that the CDA's actions were void.

CDA's actions strictly followed the statutory requirements and are the basis for the ensuing CDA decision. The final CDA action on May 9, 2018 was properly based only on comments made at the public hearing and materials submitted within the 15-day submission window after the public hearing.

Considering this additional context, the CDA's actions were not only "reasonable" but in compliance with the statutory procedure, which validates its ultimate decision.

Finally, as to the opinion that the noticed CDA agendas were insufficient, I respectfully disagree with your conclusion. The CDA agendas noticed a "public comment" agenda item. All agree that a governing body may remove items from a noticed agenda at any time. It logically follows that a public comment agenda item which can be removed can also be limited in some way. I am unaware of any legal authority requiring notice of any limitations on a public comment, including time, topic or otherwise. As you stated in your letter, the notice requirement of the open meetings law "functions to assure that members of the public are reasonable apprised of what is discussed at such meetings." One of the purposes of the open meetings law is to ensure that *only* properly noticed items are taken up. The limitation in this instance respected this purpose.

Thank you for your time in reviewing this correspondence. I hope that, in light of this context, you will revise your prior conclusions and advise the Village accordingly.

Sincerely,

*Christopher R. Smith*

Christopher R. Smith  
Village Attorney  
Village of Mount Pleasant



STATE OF WISCONSIN  
DEPARTMENT OF JUSTICE

BRAD D. SCHIMEL  
ATTORNEY GENERAL

Paul W. Connell  
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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

BRAD D. SCHIMEL  
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TTY 1-800-947-8529  
FAX 608/266-2779

November 20, 2018

Dr. Sabina Burton

Platteville, WI 53818

Dear Dr. Burton:

The Wisconsin Department of Justice (DOJ) is in receipt of your verified open meetings law complaint that you filed with both DOJ and the Grant County District Attorney for review and possible enforcement action. I am responding to your complaint 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. Under the open meetings law, the Attorney General and the district attorneys have authority to enforce the law. Wis. Stat. § 19.97(1). The Attorney General also has authority to interpret the open meetings law. *See* Wis. Stat. §§ 19.97(1), 19.98.

The alleged open meetings law violations in your complaint, however, concern the University of Wisconsin (UW)-Platteville and its employees. The Attorney General and DOJ may be called upon to represent UW-System, including UW-Platteville. Therefore, DOJ must respectfully decline to pursue an enforcement action. Moreover, DOJ also cannot offer you legal advice or counsel concerning the alleged open meetings law violations, because DOJ currently represents UW-Platteville in litigation related to those alleged violations. However, I have copied the Grant County District Attorney on this letter.

Although the Attorney General is not pursuing an enforcement action in this matter, the district attorney of the county where the alleged violation occurred can also enforce the open meetings law after he or she receives a verified complaint. Wis. Stat. § 19.97(1). The law, however, does not require a district attorney to commence an enforcement action upon receipt of a written request to do so. *See* Wis. Stat. § 19.97(4). A district attorney has broad discretion to decide whether to bring an enforcement action. *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 under Wis. Stat. § 19.97(4).

Sabina Burton  
November 20, 2018  
Page 2

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

Lawyer Referral and Information Service  
State Bar of Wisconsin  
P.O. Box 7158  
Madison, WI 53707-7158  
(800) 362-9082  
(608) 257-4666

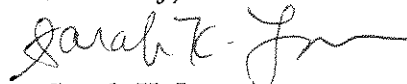
<http://www.wisbar.org/forpublic/ineedalawyer/pages/lris.aspx>

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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

cc: District Attorney, Grant County  
Legal Counsel, UW-System



STATE OF WISCONSIN  
DEPARTMENT OF JUSTICE

BRAD D. SCHIMEL  
ATTORNEY GENERAL

Paul W. Connell  
Deputy Attorney General

Delanie M. Breuer  
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608/266-1221  
TTY 1-800-947-3529  
FAX 608/267-2779

November 27, 2018

Jamie Gonzalez

Milwaukee, WI 53228

Dear Mr. Gonzalez:

This Wisconsin Department of Justice (DOJ) is in receipt of your correspondence, dated April 8, 2018 and April 10, 2018, regarding your public records request to the Milwaukee Police Department. You wrote, "I was denied an open records request from the city of Milwaukee police dept." You asked, "What legal rights do I have. Can the D.O.J. request these records for me."

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

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

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

824-25, 472 N.W.2d 579 (Ct. App. 1991). In every written denial, the authority must also inform the requester that “if the request for the record was made in writing, then the determination is subject to review by mandamus under s. 19.37(1) or upon application to the attorney general or a district attorney.” Wis. Stat. § 19.35(4)(b).

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

The Office of Open Government (OOG) encourages authorities and requesters to maintain an open line of communication. This helps to avoid misunderstandings between an authority and a requester. 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.

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

Alternatively, the requester may submit a written request for the district attorney of the county where the record is found,<sup>1</sup> or the Attorney General, to file an action for mandamus seeking release of the requested records. Wis. Stat. § 19.37(1)(b). The Attorney General is authorized to enforce the public records law; however, he generally exercises this authority in cases presenting novel issues of law that coincide with matters of statewide concern. The public records issue that you raised does not appear to raise novel issues of law that coincide with matters of statewide concern. Therefore, we respectfully decline to pursue an action for mandamus on your behalf at this time.

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

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

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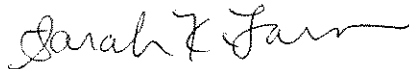
<http://www.wisbar.org/forpublic/inneedalawyer/pages/lris.aspx>

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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

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Assistant Attorney General  
larsonsk@doj.state.wi.us  
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FAX 608/266-2779

November 28, 2018

Vickie Galich

[REDACTED]  
Silver Lake, WI 53170

Dear Ms. Galich:

The Wisconsin Department of Justice (DOJ) is in receipt of your correspondence, dated April 5, 2018, in which you asked, "Can the Village Clerk legally give out personal information, more specifically residential information, about the Village Administrator without their knowledge?" You wrote, "The information was shared with select village board members and a select few members of the public. What is the repercussion from her providing this information[?]"

DOJ and the Office of Open Government (OOG) work to increase government openness and transparency with a focus on the Wisconsin Open Meetings Law, Wis. Stat. §§ 19.81 to 19.98, and the Wisconsin Public Records Law, Wis. Stat. §§ 19.31 to 19.39. The information you provided is insufficient to evaluate your concerns. Furthermore, it is unclear if your concerns are related to a public records request or an open meetings law related issue. Therefore, your correspondence may be outside the scope of the OOG's responsibilities, but without further information we are unable to make that determination. However, we can address your correspondence to the extent that it may concern the public records law.

The public records law authorizes requesters to inspect or obtain copies of "records" created or maintained by an "authority." Records are presumed to be open to public inspection and copying, but there are exceptions. Wis. Stat. § 19.31. Requested records fall into one of three categories: (1) absolute right of access; (2) absolute denial of access; and (3) right of access determined by the balancing test. *Hathaway v. Joint Sch. Dist. No. 1 of Green Bay*, 116 Wis. 2d 388, 397, 342 N.W.2d 682 (1984). If neither a statute nor the common law requires disclosure or creates a general exception to disclosure, the records custodian must decide whether the strong public policy favoring disclosure is overcome by some even stronger public policy favoring limited access or nondisclosure. This balancing test, determines whether the presumption of openness is overcome by another public policy concern. *Hempel v. City of Baraboo*, 2005 WI 120, ¶ 4, 284 Wis. 2d 162, 699 N.W.2d 551. If a records custodian

determines that a record or part of a record cannot be disclosed, the custodian must redact that record or part of that record. *See* Wis. Stat. § 19.36(6).

Records specifically exempt from disclosure are listed in Wis. Stat. § 19.36(2)-(11), (13). Information maintained, prepared, or provided by an employer concerning the home address, home email address, home telephone number, or social security number of an individual who holds a local public office or state public office is exempt from disclosure. Wis. Stat. § 19.36(11). An exception to this would be if the individual is required to live in a specific location as a condition of employment. *Id.*

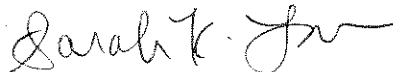
The public records law defines "local public office" as having the meaning provided in Wis. Stat. § 19.42(7w), including many elective or appointive offices of local government units, and "also includes any appointive office or position of a local governmental unit in which an individual serves as the head of a department, agency, or division of the local governmental unit, but does not include any office or position filled by a municipal employee." Wis. Stat. § 19.32(1dm). A "local governmental unit" is a political subdivision, a special purpose district, an instrumentality or corporation of a political subdivision or special purpose district, a combination or subunit of any of these, or an instrumentality of the state and any of these. Wis. Stat. § 19.42(7u).

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. 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:amh:lah



STATE OF WISCONSIN  
DEPARTMENT OF JUSTICE

BRAD D. SCHIMEL  
ATTORNEY GENERAL

Paul W. Connell  
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FAX 608/267-2779

November 29, 2018

Noah McVay

Spring Green, WI 53588

Dear Mr. McVay:

The Wisconsin Department of Justice (DOJ) is in receipt of your email correspondence to Attorney General Brad Schimel, dated April 3, 2018, in which you wrote, the "River Valley School District is not fully compliant with sections 19.83 and 19.84, as public notices are never issued for meetings of the board of directors governing said school district's endowment fund, and said meetings are never held in open session. (This 'endowment board' consists of several school board members and lay people appointed thereunto, and is subject to the jurisdiction of the Board of Education of River Valley School District.)" You requested DOJ to "please advise on this matter at your earliest convenience."

DOJ and the Office of Open Government work 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 concerns regarding the "school district's FY 2016-2017 external auditor's report" are outside this scope. However, we can address your correspondence to the extent it concerns the open meetings law.

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

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

[A] state or local agency, board, commission, council, department or public body corporate and politic created by constitution, statute, ordinance, rule or order; a governmental or quasi-governmental corporation except for the Bradley Center sports and entertainment corporation; a local exposition district under subch. II of ch. 229; a long-term care district under s. 46.2895; or a formally



constituted subunit of any of the foregoing, but excludes any such body or committee or subunit of such body which is formed for or meeting for the purpose of collective bargaining under subch. I, IV, V, or VI of ch. 111.

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

The definition of a governmental body includes a “quasi-governmental corporation” which is not defined in the statutes, but the Wisconsin Supreme Court discussed its definition in the court case of *State v. Beaver Dam Area Development Corp. (“BDADC”). State v. Beaver Dam Area Dev. Corp.*, 2008 WI 90, 312 Wis. 2d 84, 752 N.W.2d 295. In that decision, the Court held that a “quasi-governmental corporation” does not have to be *created* by the government or be *per se* governmental, but rather is a corporation that significantly resembles a governmental corporation in function, effect, or status. *Id.* ¶¶ 33-36. The Court further held that each case must be decided on its own particular facts, under the totality of the circumstances, and set forth a non-exhaustive list of factors to be examined in determining whether a particular corporation sufficiently resembles a governmental corporation to be deemed quasi-governmental, while emphasizing that no single factor is outcome determinative. *Id.* ¶¶ 7-8, 63 n.14, and 79.

The factors set out by the Court in *BDADC* fall into five basic categories: (1) the extent to which the private corporation is supported by public funds; (2) whether the private corporation serves a public function and, if so, whether it also has other, private functions; (3) whether the private corporation appears in its public presentations to be a governmental entity; (4) the extent to which the private corporation is subject to governmental control; and (5) the degree of access that government bodies have to the private corporation’s records. *Id.* ¶ 62.

In applying the *BDADC* analysis to any matter, a court would look at all relevant factors before making a determination of whether the entity is a “quasi-governmental corporation” under Wis. Stat. § 19.82(1), and it is important that all relevant information be available. Here, we do not have sufficient information to fully evaluate the situation at hand and make a determination of whether the River Valley School District Endowment Board is a “quasi-governmental corporation” subject to the requirements of the open meetings law.

Even if the endowment board is not a quasi-governmental corporation, however, its meetings may still be subject to the open meetings laws requirements, because it is possible that they constitute meetings of the school board. Under the open meetings 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.

You have indicated that the endowment board "consists of several school board members," so it is possible that the endowment board's meetings would be considered "meetings" of the school board under the open meetings law as defined by the *Showers* test requirements. Again, however, we do not have sufficient information to fully evaluate the situation at hand, but I hope that you find this information helpful.

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

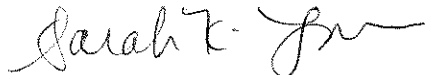
DOJ appreciates your concern. The Attorney General and DOJ's Office of Open Government are committed to increasing government openness and transparency, and we

Noah McVay  
November 29, 2018  
Page 4

are dedicated to the work necessary to preserve Wisconsin's proud tradition of open government. If you have additional questions, please contact the Office of Open Government's Public Records 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,

A handwritten signature in cursive script, appearing to read "Sarah K. Larson".

Sarah K. Larson  
Assistant Attorney General  
Office of Open Government

SKL:lah



STATE OF WISCONSIN  
DEPARTMENT OF JUSTICE

BRAD D. SCHIMEL  
ATTORNEY GENERAL

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

December 4, 2018

Tim Pollard



Greenfield, WI 53221

Dear Mr. Pollard:

The Wisconsin Department of Justice (DOJ) is in receipt of your correspondence, dated April 16, 2018, regarding your request for a "transcript of the hearing from Francine O'Claire at the Milwaukee County courthouse" in case number 2017SC6837. You wrote that "she charged me over \$3.00 per page" for the production of the transcript and you believe she "is profiting from public records."

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 public records law authorizes requesters to inspect or obtain copies of "records" created or maintained by an "authority." See Wis. Stat. §§ 19.31 to 19.39.

The public records law defines an "authority" as any of the following having custody of a record:

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

Wis. Stat. § 19.32(1).



The public records law, however, only applies to “records.” 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. *Id.* A “record” does not include . . . materials to which access is limited by copyright, patent, or bequest; and published materials in the possession of an authority other than a public library that are available for sale, or that are available for inspection at a public library.” *Id.*

Pursuant to Wis. Stat. § 19.35(3)(a), “An authority may impose a fee upon the requester of a copy of a record which may not exceed the actual, necessary and direct cost of reproduction and transcription of the record, unless a fee is otherwise specifically established or authorized to be established by law.”

Under the public records law, “[A]n authority may charge a fee [for records] 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. However, an authority may not profit from complying with public records requests. *WIREData, Inc. v. Vill. of Sussex*, 2008 WI 69, ¶¶ 103, 107, 310 Wis. 2d 397, 751 N.W.2d 736 (an authority may not profit from its response to a public records request, but may recoup all of its actual costs).

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 short, the copy fees charged by an authority must not exceed the “actual necessary and direct cost of reproduction and transcription” unless another law established such a fee or authorizes such a fee to be established by law. The information in your correspondence is insufficient to properly evaluate whether the fees assessed were permissible, but other fees outside of the public records law may apply. For example, see Wis. Stat. § 59.40(3), which directs the clerk of the circuit court to collect certain specified fees. See also Wis. Stat. §§ 757.57 and 814.69, which apply to the fees of court reporters.

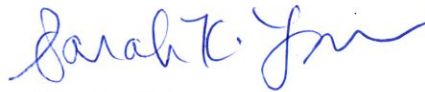
If you would like to learn more about the public records law, DOJ’s Office of Open Government offers several open government resources through the Wisconsin DOJ website

(<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. 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:amh:lah





STATE OF WISCONSIN  
DEPARTMENT OF JUSTICE

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ATTORNEY GENERAL

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FAX 608/267-2779

December 13, 2018

Andrea Olmanson

██████████  
Madison, WI 53704

Dear Ms. Olmanson:

This Wisconsin Department of Justice (DOJ) is in receipt of your correspondence, dated April 19, 2018, regarding your public records request to the Eau Claire Area School District and subsequent mandamus action. You wrote, "Since the statute does permit a victim of a wrongful public records denial to ask the AG to file a mandamus action, I don't see why the AG wouldn't also take over a pending mandamus action, upon request." You continued, "The Eau Claire Area School District violated my rights under the public records act . . . and [I] need someone with power to hold the perpetrators accountable."

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

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

The public records law does not require a response to a public records request within a specific timeframe. In other words, after a request is received, there is no set deadline by which the authority must respond. However, the law states that upon receipt of a public

records request, the authority “shall, as soon as practicable and without delay, either fill the request or notify the requester of the authority’s determination to deny the request in whole or in part and the reasons therefor.” Wis. Stat. § 19.35(4)(a). A reasonable amount of time for a response “depends on the nature of the request, the staff and other resources available to the authority to process the request, the extent of the request, and other related considerations.” *WIREData, Inc. v. Vill. of Sussex*, 2008 WI 69, ¶ 56, 310 Wis. 2d 397, 751 N.W.2d 736; see *Journal Times v. Police & Fire Comm’rs Bd.*, 2015 WI 56, ¶ 85, 362 Wis. 2d 577, 866 N.W.2d 563 (an authority “can be swamped with public records requests and may need a substantial period of time to respond to any given request”).

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

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

The Office of Open Government (OOG) encourages authorities and requesters to maintain an open line of communication. This helps to avoid misunderstandings between an authority and a requester. 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.

As you are aware, the public records law provides several remedies for a requester dissatisfied with an authority’s response, or lack of response, to a public records request. 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. The public records issue that you raised does not appear to raise novel issues of law that coincide with matters of statewide concern. Moreover, it appears that the mandamus action you filed has now been dismissed by order of the circuit court. Therefore, we respectfully decline to pursue an action for mandamus on your behalf at this time.

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

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

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

Sincerely,



Sarah K. Larson  
Assistant Attorney General  
Office of Open Government

SKL:lah



STATE OF WISCONSIN  
DEPARTMENT OF JUSTICE

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FAX 608/266-2779

December 13, 2018

Gail Peckler-Dziki  
The Westosha Report  
gailpd@frontier.com

Dear Ms. Peckler-Dziki:

The Wisconsin Department of Justice (DOJ) is in receipt of your correspondence, dated April 11, 2018, in which you requested "an opinion from the Office of the Attorney General for Wisconsin regarding a denial of a record from the Village of Salem Lakes regarding a letter obtained by Village Administrator Patrick Casey." You specify the document is "an opinion from the law firm of Michael Best regarding the legality" of the creation of "a new Police and Fire Commission for the new village of Salem Lakes" in 2016. You have also indicated that the village administrator "explained the gist of the opinion from Michael Best in open session at the March 12 meeting." You asked "is [the opinion] an open record and does it have to be given to me?"

The Attorney General and the Office of Open Government appreciate your concern and your request for an opinion. Wisconsin law provides that the Attorney General must, when asked, provide the legislature and designated Wisconsin state government officials with an opinion on legal questions. Wis. Stat. § 165.015. The Attorney General may also provide formal legal opinions to district attorneys and county corporation counsel under certain circumstances. Wis. Stat. §§ 165.25(3) and 59.42(1)(c). The Attorney General cannot provide you with the opinion you requested because you do not meet this criteria. Nonetheless, DOJ is committed to increasing government openness and transparency, and I can provide you with some guidance regarding the Wisconsin Public Records Law, Wis. Stat. §§ 19.31 to 19.39, pursuant to Wis. Stat. § 19.39.

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

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).

Attorney-client privileged communications are not subject to disclosure under the public records law. *George v. Record Custodian*, 169 Wis. 2d 573, 582, 485 N.W.2d 460 (Ct. App. 1992); *Wisconsin Newspress, Inc. v. School Dist. of Sheboygan Falls*, 199 Wis. 2d 768, 782-83, 546 N.W.2d 143 (1996); Wis. Stat. § 905.03(2). Moreover, the attorney-client privilege, Wis. Stat. § 905.03, does provide sufficient grounds to deny access without resorting to the public records balancing test. *Id.* Attorney work product is also a statutory and common-law exception to disclosure. See Wis. Stat. § 19.35(1)(a); see also *Seifert v. Sch. Dist. of Sheboygan Falls*, 2007 WI App 207, ¶¶ 27-28, 305 Wis. 2d 582, 740 N.W.2d 177 (“The common law long has recognized the privileged status of attorney work product, including the material, information, mental impressions and strategies an attorney compiles in preparation for litigation.”); Wis. Stat. § 804.01(2)(c)1.

Attorney-client privilege generally does not apply to communications from the lawyer to the client, but an exception exists where the disclosure of the communication would indirectly reveal the substance of the client’s confidential communication to his or her lawyer. *Juneau Cty. Star-Times v. Juneau Cty.*, 2011 WI App 150, ¶ 36, 337 Wis. 2d 710, 807 N.W.2d 655 (citing *Wisconsin Newspress, Inc.*, 199 Wis. 2d at 783). Wisconsin Stat. § 905.03(1)(d) provides that “a communication is ‘confidential’ if not intended to be disclosed to 3rd persons other than those to whom disclosure is in furtherance of the rendition of professional legal services to the client....”

Therefore, an authority may deny a records request if the records fall within the attorney-client privilege. However, the information you provided is insufficient to evaluate whether the requested records contain such attorney-client privileged communications.

Your correspondence also indicated that the “village board has yet to formally appoint a keeper of the records for the village.” You note that, although an individual “has been appointed ... village clerk, nothing has been done about the keeper of the records.” Although you have not asked a question about records custodians, I can provide you with some general information about records custodians which I hope you will find helpful.

Under the public records law, “legal custodian” includes “[a]n elective official,” the “chairperson of a committee of elective officials,” or “cochairpersons of a joint committee of elective officials.” See Wis. Stat. §§ 19.33(1), (2), and (3). Each of those individuals may also designate someone else on staff to act as the legal custodian of records in that office. *Id.*

Further, every authority not specified in Wis. Stat. §§ 19.33(1), (2), and (3) "shall designate in writing one or more positions not occupied by an officer or employee of the authority or the unit of government of which it is a part as a legal custodian to fulfill its duties" under the public records law. See Wis. Stat. §§ 19.33(4). The law also provides, however, that "[i]n the absence of a designation the authority's highest ranking officer and the chief administrative officer, if any, are the legal custodians for the authority." *Id.*

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

Lawyer Referral and Information Service  
State Bar of Wisconsin  
P.O. Box 7158  
Madison, WI 53707-7158  
(800) 362-9082  
(608) 257-4666

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

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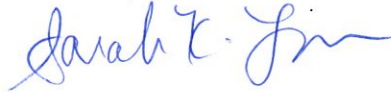
Thank you for your concern. DOJ is dedicated to the work necessary to preserve Wisconsin's proud tradition of open government. Thank you for your correspondence.



Gail Peckler-Dziki  
December 13, 2018  
Page 4

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

Sincerely,



Sarah K. Larson  
Assistant Attorney General  
Office of Open Government

SKL:amh:lah



STATE OF WISCONSIN  
DEPARTMENT OF JUSTICE

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FAX 608/267-2779

December 19, 2018

Scott Michalak

Marshall, WI 53559

Dear Mr. Michalak:

The Wisconsin Department of Justice (DOJ) is in receipt of your correspondence, dated April 17, 2018, in which you wrote, "I am a Marshall Trustee and back in February I made a motion to go to closed session. It was seconded and voted approved 6-0 to talk about the employment of a village attorney." You were "then told on March, 6 that this was an illegal [sic] act by the village President." You wrote, "I believe this is wrong and would like clarification in order to go to closed session in the future." I also note that you and I had two phone conversations on our Public Records/Open Meetings (PROM) helpline, on April 11, 2018 and on June 13, 2018, about similar questions and concerns.

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).

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

Every meeting must be initially convened in open session. At an open meeting, a motion to enter into closed session must be carried by a majority vote. No motion to convene in closed session may be adopted unless an announcement is made to those present the nature of the business to be considered at the proposed closed session and the specific



exemption or exemptions by which the closed session is claimed to be authorized. Wis. Stat. § 19.85(1).

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

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

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

Further, the language of the exemption applies to a "public employee over which the governmental body has jurisdiction or exercises responsibility." Wis. Stat. § 19.85(1)(c). The Attorney General has interpreted this exemption to extend to public officers, such as a police chief, whom the governmental body has jurisdiction to employ. See Caturia Correspondence (Sept. 20, 1982). An elected official, however, is not considered a "public employee over which the governmental body has jurisdiction or exercises responsibility." Therefore, the Attorney General has opined that the exemption does not authorize a county board to convene in closed session to consider appointments of county board members to a county board committee. See 76 Op. Att'y Gen. 276 (1987).

Based on the limited information you provided in your correspondence, I am unable to make a factual determination as to whether the closed sessions you discussed were proper.

However, please note that, if there is any doubt as to whether closure is permitted under a given exemption, the governmental body should hold the meeting in open session.

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

The Attorney General and DOJ's Office of Open Government are committed to increasing government openness and transparency, and we are dedicated to the work necessary to preserve Wisconsin's proud tradition of open government. If you have additional questions, please contact the Office of Open Government's Public Records 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:amh:lah





STATE OF WISCONSIN  
DEPARTMENT OF JUSTICE

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December 20, 2018

Lt. Daniel Koland

[REDACTED]  
Neenah, WI 54956

Dear Lt. Koland:

The Wisconsin Department of Justice (DOJ) is in receipt of your email correspondence, dated April 24, 2018, in which you wrote that you "are seeking clarification of whether a Municipal Fire Departments meeting should be held as open public meetings. This has been the practice for the Town of Neenah Fire Department for many years. As we did some looking, it appears that almost no other Fire Departments in the State of Wisconsin do business in the fashion." You also noted that "[t]here is an opinion paper that we found from years ago regarding this issue, but it is not applicable as it was specifically for Fire Departments that are Private 501(c)3 organizations." You stated that "[w]e do not fall under this category, as we are [a] tax payer funded, municipal Fire Department."

The Open Meetings Law, Wis. Stat. §§ 19.81 to 19.98, acknowledges that the public is entitled to the fullest and most complete information regarding government affairs as is compatible with the conduct of government business. Wis. Stat. § 19.81(1). All meetings of governmental bodies shall be held publicly and be open to all citizens at all times unless otherwise expressly provided by law. Wis. Stat. § 19.81(2). The provisions of the open meetings law are to be construed liberally to achieve that purpose. Wis. Stat. § 19.81(4). The open meetings law applies to every meeting of a governmental body. A "governmental body" is defined as:

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

Wis. Stat. § 19.82(1). The list of entities is broad enough to include essentially any governmental entity, regardless of what it is labeled. Purely advisory bodies are subject to the law, even though they do not possess final decision making power, as long as they are created by constitution, statute, ordinance, rule, or order. *See State v. Swanson*, 92 Wis. 2d

310, 317, 284 N.W.2d 655 (1979). An entity that fits within the definition of governmental body must comply with the requirements of the open meetings law.

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

Based on the limited information you provided in your correspondence, I cannot make a definitive determination, but it appears that the Town of Neenah Fire Department is likely a “governmental body” as defined in Wis. Stat. § 19.82(1), or a “quasi-governmental corporation” as defined in the *BDADC* case. Therefore, it would most likely be subject to the open meetings law, particularly because the provisions of the open meetings law are to be construed liberally to achieve openness and transparency.

The Attorney General opinion to which you alluded, 66 Op. Att’y Gen. 113 (1977), opined that a particular volunteer fire department, organized as a non-profit organization, was not a “quasi-governmental” corporation under the facts and circumstances of that fire department. But that 1977 Attorney General opinion should now be read in light of the Wisconsin Supreme Court’s 2008 decision in *BDADC*—a case which sets forth the current factors that a court would consider in determining whether an entity is a “quasi-governmental corporation” subject to the open meetings law.

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

The Attorney General and DOJ’s Office of Open Government are committed to increasing government openness and transparency, and we are dedicated to the work necessary to preserve Wisconsin’s proud tradition of open government. If you have additional



Daniel Koland  
December 20, 2018  
Page 3

questions, please contact the Office of Open Government's Public Records Open Meetings (PROM) Help Line at (608) 267-2220. Thank you for your correspondence.

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Sincerely,



Sarah K. Larson  
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Office of Open Government

SKL:amh:lah



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December 20, 2018

John Windolff

[REDACTED]  
Hudson, WI 54016

Dear Mr. Windolff:

The Wisconsin Department of Justice (DOJ) is in receipt of your correspondence, dated April 27, 2018 and May 28, 2018, regarding your public records requests "to the Town of Hudson with no results." You wrote the "Town Clerk charged me seventy dollars for 29 copies of material I had sent the Town" and Clerk Shaw "refuses to allow me access to legal fees the Town has paid." You asked, "What do I do next?"

The purpose of the Wisconsin Public Records Law, Wis. Stat. §§ 19.31 to 19.39, is to shed light on the workings of government and the official acts of public officers and employees. *Bldg. & Constr. Trades Council v. Waunakee Cmty. Sch. Dist.*, 221 Wis. 2d 575, 582, 585 N.W.2d 726 (Ct. App. 1998).

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. However, an authority may not profit from complying with public records requests. *WIREData, Inc. v. Vill. of Sussex*, 2008 WI 69, ¶¶ 103, 107, 310 Wis. 2d 397, 751 N.W.2d 736 (an authority may not profit from its response to a public records request, but may recoup all of its actual costs).

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. 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 short, the copy fees charged by an authority must not exceed the “actual necessary and direct cost of reproduction and transcription” unless another law established such a fee or authorizes such a fee to be established by law. The information in your correspondence is insufficient to properly evaluate whether the fees assessed were permissible, but I hope you find this information helpful.

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

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

In your correspondence you wrote, “The Town Clerk keeps stating that the legal fees the Town paid are covered by ‘attorney client privilege.’” Attorney-client privileged communications are not subject to disclosure under the public records law. *George v. Record Custodian*, 169 Wis. 2d 573, 582, 485 N.W.2d 460 (Ct. App. 1992); *Wisconsin Newspress, Inc. v. School Dist. of Sheboygan Falls*, 199 Wis. 2d 768, 782-83, 546 N.W.2d 143 (1996). Moreover, the attorney-client privilege, Wis. Stat. § 905.03, does provide sufficient grounds to deny access without resorting to the public records balancing test. *Id.*

Therefore, an authority may deny a records request if the records fall within the attorney-client privilege. Billing records are communications from the attorney to the client, and therefore revealing the records may violate the attorney-client privilege if the records would directly or indirectly reveal the substance of the client’s confidential communications to the lawyer. *Juneau Cty. Star-Times v. Juneau Cty.*, 2011 WI App 150, ¶ 37, 337 Wis. 2d 710, 807 N.W.2d 655. The information you provided is insufficient to evaluate whether the

requested records contain such attorney-client privileged communications. Nevertheless, I hope you find this information helpful.

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

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

Lawyer Referral and Information Service  
State Bar of Wisconsin  
P.O. Box 7158  
Madison, WI 53707-7158  
(800) 362-9082  
(608) 257-4666

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

The Attorney General and the 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.



John Windolff  
December 20, 2018  
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The information provided in this letter does not constitute an informal or formal opinion of the Attorney General pursuant to Wis. Stat. § 165.015(1).

Sincerely,



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