

2019 1st Quarter Correspondence

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STATE OF WISCONSIN
DEPARTMENT OF JUSTICE

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January 22, 2019

Kari Jozwiak

[REDACTED]
Stevens Point, WI 54481

Dear Ms. Jozwiak:

The Wisconsin Department of Justice (DOJ) is in receipt of your correspondence, dated April 25, 2018, in which you wrote, "I work at a municipal court and am writing about the large mass record requests made by businesses such as TransUnion. I understand the statute requiring the release of records when made by individuals . . . It is when the courts entire records are requested on a monthly basis by these big businesses . . . I believe the statute is misrepresented." You also wrote, "For a one-clerk court processing over 5,000 citations annually, these requests are overly burdensome and are an abuse of the statute for which it was intended."

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

Under the public records law, a request "is deemed sufficient if it reasonably describes the requested record or the information requested." Wis. Stat. § 19.35(1)(h). A request "without a reasonable limitation as to subject matter or length of time represented by the record does not constitute a sufficient request." *Id.* In addition, the public records law does not impose such heavy burdens on a record custodian that normal functioning of the office would be severely impaired, and does not require expenditure of excessive amounts of time and resources to respond to a public records request. *Schopper v. Gehring*, 210 Wis. 2d 208, 213, 565 N.W.2d 187 (Ct. App. 1997); *State ex rel. Gehl v. Connors*, 2007 WI App 238, ¶ 17, 306 Wis. 2d 247, 742 N.W.2d 530. The identity of the requester and the purpose of the request, however, are generally irrelevant to whether a request should be granted. *See* Wis. Stat. §§ 19.35(1)(h) and 19.35(1)(i); *see also Democratic Party of Wis. v. Wis. Dep't of Justice*, 2016 WI 100, ¶ 23, 372 Wis. 2d 460, 888 N.W.2d 584.

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'r's Bd.*, 2015 WI 56, ¶ 85, 362 Wis. 2d 577, 866 N.W.2d 563 (an authority "can be swamped with public records requests and may need a substantial period of time to respond to any given request").

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

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). 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 law also 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>).

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 hope you find the information provided helpful. 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, Wis. Stat. §§ 19.31 to 19.39, and maintains a Public Records Law Compliance Guide.

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

Kari Jozwiak
January 22, 2019
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.

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



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DEPARTMENT OF JUSTICE

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January 23, 2019

Heather Lisser

Monroe, WI 53566

Dear Ms. Lisser:

The Wisconsin Department of Justice (DOJ) is in receipt of your correspondence, dated May 8, 2018, in which you ask if "humane societies fall under [the] definition" of quasi-governmental corporations. You also ask, "are humane societies governed by open meetings laws?"

The Attorney General and DOJ's Office of Open Government (OOG) are committed to increasing government openness and transparency. The OOG works in furtherance of this with a focus on the Wisconsin Open Meetings Law, Wis. Stat. §§ 19.81 to 19.98, and the Wisconsin Public Records Law, Wis. Stat. §§ 19.31 to 19.39. The information you provided is insufficient to properly address your questions under the open meetings law. Moreover, given the complexity and fact-specific nature of the law governing quasi-governmental corporations, I cannot come to a conclusion about humane societies in general. However, I can provide you with some general information about the open meetings law that you may find helpful.

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

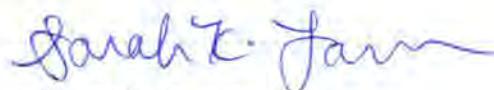
The definition of a governmental body includes a "quasi-governmental corporation" which is not defined in the statutes. The Wisconsin Supreme Court discussed the definition of "quasi-governmental corporation" in *State v. Beaver Dam Area Development Corp.* ("BDADC"). *State v. Beaver Dam Area Dev. Corp.*,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

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. If you have additional questions, you may 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



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January 23, 2019

Joseph Prosser

Green Bay, WI 54311

Dear Mr. Prosser:

The Wisconsin Department of Justice (DOJ) is in receipt of your correspondence, dated May 16, 2018, regarding closed sessions of the Green Bay Area Public School District Board of Education. You wrote, "when they do use closed sessions, they do not give a description of what they will be discussing and why they are allowed to go into closed session. The only information they offer on the agenda is the relevant state statute."

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.

Under the open meetings law, the Attorney General and the district attorneys have authority to enforce the law. Wis. Stat. § 19.97(1). 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).

Generally, the Attorney General may elect to prosecute complaints presenting novel issues of law that coincide with matters of statewide concern. While you did not specifically request the Attorney General to file an enforcement action, nonetheless, we respectfully decline to pursue an enforcement action at this time. I have, however, sent a copy of this correspondence to the Board President to make the board aware of your concerns.

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

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

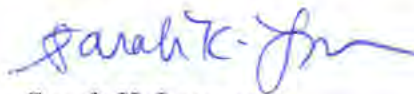
<http://www.wisbar.org/forpublic/incedalawyer/pages/lris.aspx>

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, Wis. Stat. §§ 19.81 to 19.98, maintains an Open Meetings Law Compliance Guide, and provides a recorded webinar and associated presentation documentation.

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

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

Sincerely,



Sarah K. Larson
Assistant Attorney General
Office of Open Government

SKL:amh:lah

cc: Brenda Warren, Board President, Green Bay Area School District Board of Education



STATE OF WISCONSIN
DEPARTMENT OF JUSTICE

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January 23, 2019

Timothy Lee Stewart, Sr. #273450
Kettle Moraine Correctional Institution
Post Office Box 282
Plymouth, WI 53073

Dear Mr. Stewart:

The Wisconsin Department of Justice (DOJ) is in receipt of your May 4, 2018 correspondence to in which you requested the Attorney General provide assistance regarding your public records request to the Department of Corrections (DOC). You requested "the release of e-mails pertinent to" Dane County Case Nos. "[REDACTED]", 2014CF310, 2017SC7377, and "[REDACTED]". You asked the Attorney General to "[p]lease order the Department of Corrections to release the e-mails requested."

The Attorney General and DOJ's Office of Open Government appreciate your concerns regarding the Wisconsin Public Records Law, Wis. Stat. §§ 19.31 to 19.39. However, DOJ cannot offer you legal advice or counsel concerning your public records request as DOJ may be called upon to represent DOC. Although DOJ cannot offer you legal advice or counsel regarding this matter, I am providing you with the following information regarding Wisconsin's public records law that you may find helpful.

First, it should be noted that, as an incarcerated person, your right to request records under the Wisconsin Public Records Law is limited to records that contain specific references to yourself or your minor children for whom you have not been denied physical placement under Wisconsin Statutes Chapter 767, and the records are otherwise accessible to you by law. See Wis. Stat. § 19.32(1c) and (3). As a courtesy to you, I reviewed the information you provided in your correspondence, as well as other information contained in DOJ records. Based on that limited information, it appears that, under the public records law, you may not be entitled to request some of the records you seek.

Second, even if you are entitled to request the records you seek, certain information may still be redacted or withheld from the records under the public records law. The public records law authorizes requesters to inspect or obtain copies of "records" created or maintained by an "authority." Records are presumed to be open to public inspection and copying, but there are exceptions. Wis. Stat. § 19.31. Requested records fall into one of three categories: (1) absolute right of access; (2) absolute denial of access; and (3) right of access

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

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

The public records law 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.

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

Alternatively, the requester may submit a written request for the district attorney of the county where the record is found, or the Attorney General, to file an action for mandamus seeking release of the requested records. 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. Moreover, as already noted above, DOJ may be called upon to represent DOC. Therefore, we respectfully decline to pursue an action for mandamus on your behalf.

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

Lawyer Referral and Information Service

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.

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Sincerely,



Sarah K. Larson
Assistant Attorney General
Office of Open Government

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STATE OF WISCONSIN
DEPARTMENT OF JUSTICE

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January 24, 2019

Jeffrey Kussow
[REDACTED]

Waukesha, WI 53189

Dear Mr. Kussow:

The Wisconsin Department of Justice (DOJ) is in receipt of your correspondence, dated April 23, 2018, in which you wrote, "I have been seeking specific public records from Waukesha STEM Academy (WSTEM), a charter school in Waukesha, WI, and a quasi-governmental organization required to comply with Wisconsin Open Government laws." You continued, "I've requested some or all of these records multiple times since July 27, 2016. My requests have been ignored, excuses have been made, and promises to provide the records at some later date have gone unfulfilled."

In your correspondence, you wrote that the specific records you requested were "Minutes of the Regular Board Meeting of the Waukesha Stem Academy Governing Board held on, or about," February 9, 2016, October 11, 2016, and March 22, 2017. You also noted that "[t]here is a great deal of evidence suggesting the records don't actually exist," and asked for DOJ's "assistance in resolving the matter," expressing concern that "the organization may have violated Wisconsin Open Government laws, multiple times."

The Attorney General and the Department of Justice (DOJ) are committed to increasing government openness and transparency. DOJ's Office of Open Government (OOG) endeavors to offer guidance in these areas with a focus on the Wisconsin Open Meetings Law, Wis. Stat. §§ 19.81 to 19.98, and the Wisconsin Public Records Law, Wis. Stat. §§ 19.31 to 19.39. Before addressing the specific concerns outlined in your correspondence, I first wanted to give you some general information about those laws 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. 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 statute, but the Wisconsin Supreme Court discussed the definition of “quasi-governmental corporation” in *State v. Beaver Dam Area Development Corp.* (“BDADC”). *State v. Beaver Dam Area Dev. Corp.*, 2008 WI 90, 312 Wis. 2d 84, 752 N.W.2d 295. In that decision, the Court held that a “quasi-governmental corporation” does not have to be *created* by the government or be *per se* governmental, but rather is a corporation that significantly resembles a governmental corporation in function, effect, or status. *Id.* ¶¶ 33-36. The Court further held that each case must be decided on its own particular facts, under the totality of the circumstances. The Court set forth a non-exhaustive list of factors to be examined in determining whether a particular corporation sufficiently resembles a governmental corporation to be deemed quasi-governmental, while emphasizing that no single factor is outcome determinative. *Id.* ¶¶ 7-8, 63 n.14, and 79. The factors set out by the Court in *BDADC* fall into five basic categories: (1) the extent to which the private corporation is supported by public funds; (2) whether the private corporation serves a public function and, if so, whether it also has other, private functions; (3) whether the private corporation appears in its public presentations to be a governmental entity; (4) the extent to which the private corporation is subject to governmental control; and (5) the degree of access that government bodies have to the private corporation’s records. *Id.* ¶ 62.

Turning now to the specific concerns in your correspondence, I cannot conclude with certainty that the Waukesha STEM Academy (WSA) is a quasi-governmental corporation as defined in Wis. Stat. § 19.82(1), based on the limited information provided in your correspondence. If WSA does qualify as a quasi-governmental corporation, it would be subject to the provisions of the Wisconsin open meetings law.

With respect to record keeping, the open meetings law requires a governmental body to create and preserve a record of all motions and roll-call votes at its meetings. Wis. Stat. § 19.88(3). This requirement applies to both open and closed sessions. *See De Moya*

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

In an effort to increase transparency, DOJ recommends that governmental bodies keep minutes of all meetings. However, there is no requirement under the open meetings law for a governmental body to do so. Other statutes outside the open meetings law may prescribe particular minute-taking requirements for certain governmental bodies and officials that go beyond what is required by the open meetings law, but any such statutes fall outside of the scope of OOG's responsibilities and authority. Therefore, the OOG cannot provide assistance regarding such subject matter.

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

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

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.").

Even when miscommunications about a record's existence occur, misunderstandings and confusion do not equate to a public records law violation if no records existed at the time the request was made. *See Journal Times*, 2015 WI 56, ¶¶ 77, 92 (before the minutes were drafted, no record containing the requested information existed). An authority cannot avoid a public records request by failing to timely create a record, but if a governmental body is not required to create the record under the open meetings law in the first instance, the requester generally will not be entitled to relief under the public records law. *Id.* ¶¶ 8, 44, 54, 93, 102 (whether a record should have been in existence at the time of a request is a matter of the

open meetings law, not the public records law, but the court declined to decide whether open meetings law was violated). Even if communications from the authority could have been better or clearer that no record existed, an authority should not be held liable for public records violations when the authority responds to a requester with reasonable diligence. *Id.*

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

Here, based on the information provided in your correspondence, it appears that you did receive a packet of documents on October 17, 2017 containing 59 pages of records that you requested. You then followed up with WSA regarding some of the minutes that you said had not been provided to you. Thereafter, the WSA had communicated to you, on more than one occasion, that some of the minutes you sought may not have been in existence, but that they would be provided to you once they were. Indeed, on one occasion, the WSA even specifically noted that it was *not* denying your request, but was still attempting to resolve the issue. Further, with respect to the February 9, 2016 meeting minutes in particular, the WSA told you that those minutes were not in existence, but that it was attempting to recover any notes or documents that may have existed in the personal files of the board members present at the meeting so that minutes could be drafted and approved.

Based on the information that was provided to me, it does not appear that the WSA has denied your request. I encourage you to keep the lines of communication open, because it appears that the WSA is still attempting to provide you with the records you seek. Although the length of time that has elapsed since your original request is concerning, the minutes you seek likely fall outside the scope of the open meetings law. So long as a record of any motions and roll calls for the meetings in question were created, either at the time of the meetings or as soon thereafter as practicable, the record keeping requirements of the open meetings law likely will have been satisfied, and minutes may not have been required to be created. *See Journal Times*, 2015 WI 56, ¶¶ 8, 44, 54.

By way of a copy of this letter, I have made the WSA aware of your continuing concerns, and I expect that your concerns can be resolved through informal means. If not, however, the public records law provides several remedies for a requester dissatisfied with an authority's response, or lack of response, to a public records request. A requester may file an action for mandamus, with or without an attorney, asking a court to order release of the records. Wis. Stat. § 19.37(1)(a).

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

in cases presenting novel issues of law that coincide with matters of statewide concern. While the public records issue that you raised is important, it does not appear to present 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 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

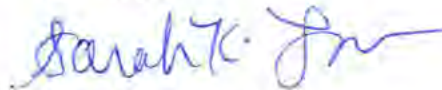
<http://www.wisbar.org/forpublic/ineedalawyer/pages/lris.aspx>

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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:amh:lah

cc: Randy Thomas, WSA Governing Board President



STATE OF WISCONSIN
DEPARTMENT OF JUSTICE

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FAX 608/267-2779

February 12, 2019

Sean Fuerstenberg

Jackson, WI 53037

Dear Mr. Fuerstenberg:

The Wisconsin Department of Justice (DOJ) is in receipt of your email correspondence dated May 14, 2018, regarding your public records request to the Milwaukee Area Technical College for "emails that were sent/received from MATC Vice President Janice Falkenberg (who is an attorney) regarding [yourself] (Sean Fuerstenberg)." You wrote, "I was denied with the reason being attorney-client privilege" and "I do not know how to proceed from here."

The Attorney General and DOJ's Office of Open Government appreciate your concerns regarding the Wisconsin Public Records Law, Wis. Stat. §§ 19.31 to 19.39. However, DOJ cannot offer you legal advice or counsel concerning your public records request as DOJ may be called upon to represent the Milwaukee Area Technical College which is part of the Wisconsin Technical College System. I did contact their legal counsel and made them aware of your concerns.

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

Wisconsin's public records law authorizes requesters to inspect or obtain copies of "records" created or maintained by an "authority." 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). 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.

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

The public records law 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 only in cases presenting novel issues of law that coincide with matters of statewide concern. Although you did not specifically request the Attorney General to file an action for mandamus, as stated, DOJ may be called upon to represent the Milwaukee Area Technical College. Therefore, the Attorney General respectfully declines to file an action for mandamus on your behalf.

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

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

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

Sincerely,



Sarah K. Larson
Assistant Attorney General
Office of Open Government

SKL:amh:lah

cc: Attorney Kristen Decato, Milwaukee Area Technical College



STATE OF WISCONSIN
DEPARTMENT OF JUSTICE

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FAX 608/267-2779

February 12, 2019

John Kline

[REDACTED]
Barnes, WI 54873

Dear Mr. Kline:

The Wisconsin Department of Justice (DOJ) is in receipt of your correspondence, dated May 31, 2018, regarding the Town of Gordon. You wrote, "The town board has been known to lock the doors so the towns folks cannot attend the meeting and several times they advertise of 'Private Meetings.'"

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. While the OOG works to increase government openness and transparency, we do so with a focus on the Wisconsin Open Meetings Law, Wis. Stat. §§ 19.81 to 19.98, and the Wisconsin Public Records Law, Wis. Stat. §§ 19.31 to 19.39. The OOG is only authorized to provide assistance within this scope. Some of the subject matter of your correspondence is outside the OOG's scope. Therefore, we are unable to offer you assistance or insight regarding these aspects of your matter. However, to the extent your correspondence concerns the open meetings law, we can provide you with some information that you may find helpful.

The open meetings law acknowledges that the public is entitled to the fullest and most complete information regarding government affairs as is compatible with the conduct of governmental business. Wis. Stat. § 19.81(1). All meetings of governmental bodies shall be held 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 requires that public notice of all meetings of a governmental body must be given by communication from the governmental body's chief presiding officer or his or her designee to the following: (1) the public; (2) to news media who have filed a written request for such notice; and (3) to the official newspaper (designated under Wis. Stat. §§ 985.04, 985.05, and 985.06) or, if there is no such paper, to a news medium likely to give notice in the area. Wis. Stat. § 19.84(1). In addition to these requirements, other statutes may also set forth the type of notice required for a meeting of a governmental body.

Public notice of every meeting of a governmental body must be provided at least 24 hours prior to the commencement of such a meeting. Wis. Stat. § 19.84(3). If, for good cause, such notice is impossible or impractical, shorter notice may be given, but in no case may the notice be less than two hours in advance of the meeting. Wis. Stat. § 19.84(3). Furthermore, the law requires separate public notice for each meeting of a governmental body at a time and date "reasonably proximate to the time and date of the meeting." Wis. Stat. § 19.84(4).

Public notice of a meeting must provide the "time, date, place and subject matter of the meeting, including that intended for consideration at any contemplated closed session." Wis. Stat. § 19.84(2). The notice must be in such a form so as to reasonably apprise the public of this information. *Id.* For additional information on the notice requirements of the open meetings law, please see pages 13 through 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>).

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.

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

More frequently, the district attorney of the county where the alleged violation occurred may enforce the law. However, in order to have this authority, an individual must file a verified complaint with the district attorney. Wis. Stat. § 19.97(1). For further information, please see pages 30-31 of the Open Meetings Law Compliance Guide and Wis. Stat. § 19.97. Appendix B of the Open Meetings Law Compliance Guide provides a template for a verified open meetings law complaint. If the district attorney refuses or otherwise fails to commence an action to enforce the open meetings law within 20 days after receiving the verified complaint, the individual may bring an action in the name of the state. Wis. Stat. § 19.97(4). (Please note a district attorney may still commence an enforcement action even after 20 days have passed.) Such actions by an individual must be commenced within two years after the cause of action accrues. Wis. Stat. § 893.93(2)(a).

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

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

John Kline
February 12, 2019
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 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:amh:lah



STATE OF WISCONSIN
DEPARTMENT OF JUSTICE

Josh Kaul
Attorney General

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FAX 608/267-2779

February 12, 2019

Lee Weis

La Crosse, WI 54603

Dear Mr. Weis:

The Wisconsin Department of Justice (DOJ) is in receipt of your correspondence, dated May 21, 2018, regarding your April 2017 public records request to the Town of Campbell for "communications between the Fire Chief of the Town of Campbell, Mr. Nate Melby, and his fire officers as well as the Campbell Fire Board of Trustees and his fire officers pertaining to the actions of the town board." You wrote, "I received most of what I requested except for item 4 of the original request." You received some updates regarding the remaining item 4 you requested. However, according to your correspondence, as of May 21, 2018 you "have not received any communication from [the authority's attorney] fulfilling my request or acknowledging my follow-up email."

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).

Under the public records law, a request “is deemed sufficient if it reasonably describes the requested record or the information requested.” Wis. Stat. § 19.35(1)(h). A request “without a reasonable limitation as to subject matter or length of time represented by the record does not constitute a sufficient request.” *Id.* The public records law does not impose such heavy burdens on a record custodian that normal functioning of the office would be severely impaired, and does not require expenditure of excessive amounts of time and resources to respond to a public records request. *Schopper v. Gehring*, 210 Wis. 2d 208, 213, 565 N.W.2d 187 (Ct. App. 1997); *State ex rel. Gehl v. Connors*, 2007 WI App 238, ¶ 17, 306 Wis. 2d 247, 742 N.W.2d 530.

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

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.

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. 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 available to me from your correspondence, it appears that you have been in frequent contact with the authority's attorney regarding records that you believe are still outstanding from your original public records request. I encourage you to keep the lines of communication open, because it appears that, at least as of January 2018, the authority was still communicating with you regarding the remaining records, and had not denied your request.

However, the length of time that has elapsed since your original request is concerning, and based on the information you sent us, it appears that the authority has not communicated with you since your May 2, 2018 follow up letter to the authority. By way of a copy of this letter, I have made the authority aware of your continuing concerns, and I expect that your concerns can be resolved through informal means.

If not, however, the public records law provides several remedies for a requester dissatisfied with an authority's response, or lack of response, to a public records request. A requester may file an action for mandamus, with or without an attorney, asking a court to order release of the records. Wis. Stat. § 19.37(1)(a). 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. While the public records issue that you raised is important, it does not appear to present novel issues of law that coincide with matters of statewide concern.

In your correspondence, you also indicated that you submitted a "formal complaint" to the La Crosse County District Attorney. You wrote that you "have not received any communications from Mr. Gruenke (DA) as of my first discussion with him on January 25, 2018." It also appears that you sent Mr. Gruenke an email on March 9, 2018 regarding your concerns. I encourage you to keep an open line of communication with the district attorney's office, and I am also copying the district attorney on this letter.

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

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

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

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

Sincerely,



Sarah K. Larson
Assistant Attorney General
Office of Open Government

SKL:amh:lah

cc: Attorney Brent Smith, Johns Flaherty
LaCrosse County District Attorney Timothy Gruenke



STATE OF WISCONSIN
DEPARTMENT OF JUSTICE

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February 13, 2019

Dennis Krueger

Clintonville, WI 54929

Dear Mr. Krueger:

The Wisconsin Department of Justice (DOJ) is in receipt of your correspondence, dated May 18, 2018, in which you asked, "Does a lake district have to go into closed session if it is posted and on the agenda? and not addressed at the beginning during agenda approval?" You wrote, "I am the president of our district and need clarification."

Before addressing the specific concerns outlined in your correspondence, I would first like to give you some general information regarding the Wisconsin Open Meetings Law, Wis. Stat. §§ 19.81 to 19.98, that I hope you will find helpful. The open meetings law acknowledges that the public is entitled to the fullest and most complete information regarding government affairs as is compatible with the conduct of 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).

With respect to notice, the open meetings law provides for the level of specificity required in agenda items for open and closed meetings, as well as the timing for releasing agendas in order to provide proper notice. Wis. Stat. § 19.84(2). Public notice of a meeting must provide the "time, date, place and subject matter of the meeting, including that intended for consideration at any contemplated closed session." *Id.* 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. *State ex rel. Buswell v. Tomah Area Sch. Dist.*, 2007 WI 71, ¶¶ 27–29, 301 Wis. 2d 178, 732 N.W.2d 804. The notice requirement in the open meetings law functions to assure that members of the public are reasonably apprised of what is discussed at such meetings. *Id.* ¶ 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). Therefore, a governmental body, when conducting a meeting, is free to discuss any aspect of any subject identified in the public notice of that meeting, as well as issues reasonably related to that subject, but may not address any topics that are not reasonably related to the information in the notice. *Buswell*, 301 Wis. 2d 178, ¶ 34 (a meeting generally “cannot address topics unrelated to the information in the notice.”).

There is no requirement, however, that a governmental body must follow the agenda in the order listed on the meeting notice, unless a particular agenda item has been noticed for a specific time. *See Stencil Correspondence* (Mar. 6, 2008). If an agenda item has been noticed for a specific time, the governmental body should make certain that the agenda item is discussed at that time, because citizens might have relied on the fact that a specific time was given. *Id.* But if an agenda item does not have a specific time listed, it is within the discretion of the governmental body to reorganize its agenda at the meeting. *Id.*

Nor is a governmental body required to actually discuss every item contained in the public notice. *See Black Correspondence* (Apr. 22, 2009). It is reasonable, in appropriate circumstances, for a body to cancel a previously planned discussion or postpone it to a later date. *Id.*

With respect to closed sessions, the open meetings law lists exemptions in which meetings may be convened in closed session. Wis. Stat. § 19.85. 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).

Under Wis. Stat. § 19.84(2), notice of any “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.

Turning now to the specific questions in your correspondence, I first note that, although the open meetings law governs public access to meetings of governmental bodies, it does not dictate all procedural aspects of how bodies run meetings. Thus, although Wisconsin law has provisions allowing closed sessions in limited circumstances, the law does not require that the governmental body go into closed session when such a "contemplated" closed session is noticed on the agenda. So long as governmental bodies follow the requirements for adequate and timely notice to the public, the notice complies with the open meetings law.

In other words, there is no requirement within the open meetings law that a meeting must go into closed session if a "contemplated" closed session was posted or on the agenda. Moreover, before going into closed session, a governmental body must still move to go into closed session, even if the closed session was noticed on the agenda. Wis. Stat. § 19.85(2). Accordingly, even if a subject was previously noticed for a closed session, it is permissible to discuss that subject in open session, so long as the previous notice for the closed session fulfills the notice requirements of the open meetings law. *See* Wis. Stat. § 19.84(2). Indeed, DOJ's Office of Open Government encourages transparency and openness to the greatest extent possible, because the law is designed with the presumption of openness in mind. *Hodge*, 180 Wis. 2d at 71.

You also asked a question as to whether it was permissible to discuss the subject in open session when the decision not to go into closed session was "not addressed at the beginning [of the meeting] during agenda approval." As noted earlier, there is no requirement that the governmental body must follow the agenda in the order listed on the meeting notice, unless a particular agenda item has been noticed for a specific time. *See* Stencil Correspondence (Mar. 6, 2008). Nor is a governmental body required to actually discuss every item contained in the public notice. *See* Black Correspondence (Apr. 22, 2009). Further, there is no requirement under the open meetings law that the governmental body approve the agenda at the beginning of each meeting, although such an action would be permissible under the open meetings law. I do not have sufficient information from your correspondence to fully analyze your question, but I hope you find this information helpful.

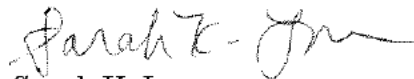
If you would like to learn more about the open meetings law, DOJ's Office of Open Government offers several open government resources through the Wisconsin DOJ website (<https://www.doj.state.wi.us/office-open-government/office-open-government>). DOJ provides the full Wisconsin Open Meetings Law, Wis.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

Dennis Krueger
February 13, 2019
Page 4

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,

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

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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February 13, 2019

Ruth Lark

Madison, WI 53704

Dear Ms. Lark:

The Wisconsin Department of Justice (DOJ) is in receipt of your correspondence, dated July 8, 2018, in which you wrote, "Please send me a record my 50 or more years at above address." You ask, "Where can I get a copy? Do I need a defender to search records of state? Medical included state?"

It is unclear from your correspondence whether are seeking information regarding public records or if you intended to request records from DOJ or another governmental entity. As a result, we are providing you with some general information that you may find helpful. If you intended your correspondence to serve as a public records request, please contact our office. DOJ maintains a Public Records Open Meetings (PROM) hotline to respond to individuals' open government questions. The PROM telephone number is (608) 267-2220.

The 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." Records are presumed to be open to public inspection and copying, but there are exceptions. Wis. Stat. § 19.31. Statutes, case law, and the public records law balancing test, which weighs the public interest in disclosure of a record against the public interest in nondisclosure, provide such exceptions.

The public records law "does not require 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.

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. If you intended your correspondence to serve as a public records request, it would be denied as insufficient because we are unable to understand from your correspondence what records you are seeking. If a determination denies a written request, it is subject to review by mandamus under Wis. Stat. § 19.37(1) or upon application to a district attorney or the Attorney General.

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.

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

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

Sincerely,



Sarah K. Larson
Assistant Attorney General
Office of Open Government

SKL:amh:lah



STATE OF WISCONSIN
DEPARTMENT OF JUSTICE

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February 19, 2019

Scott Thomas
scottkthomas@bellsouth.net

Dear Mr. Thomas:

The Wisconsin Department of Justice (DOJ) is in receipt of your email correspondence, dated June 6, 2018, to Assistant Attorney General (AAG) Paul Ferguson, in which you summarized your June 1, 2018 phone conversation with AAG Ferguson regarding your September 15, 2017 "FOIA request to UW President Cross and to UW-SP Chancellor Patterson." You wrote, I have not received any contact from President Cross or his office on my FOIA request." You received a response to your UW-SP request, however, "several key emails are heavily redacted by the University." You wrote, "I would like them not redacted." You also requested "UWSP Foundation Executive Board Minutes and regular UW-SP Foundation Board minutes" and have not received them. You asked DOJ to "have them sent."

On June 6, 2018, AAG Ferguson responded to your email to inform you, as he did during your June 1, 2018 telephone conversation, that DOJ may be called upon to represent the University of Wisconsin System and UW-SP and, therefore, could not provide you legal counsel regarding this matter. On June 7, 2018, you wrote, "I contacted you per the (Wis AG) website on open meetings which gives the allusion that your office would help in Informational request? Is this not true?" On January 25, 2019, in a follow-up email about the same public records request, you also wrote that you have not received "any Executive Board Minutes or any answer to the heavily redacted documents from UWSP," or "any documents I requested from President Cross."

The Attorney General and DOJ's Office of Open Government (OOG) appreciate your concerns regarding the Wisconsin public records law, Wis. Stat. §§ 19.31 to 19.39. However, as explained to you in your June 1, 2018 telephone conversation with AAG Ferguson and his June 6, 2018 email to you, DOJ cannot offer you legal advice or counsel concerning your public records requests as DOJ may be called upon to represent the University of Wisconsin System or the University of Wisconsin-Stevens Point. However, AAG Ferguson contacted the University of Wisconsin System Office of Legal Counsel and informed them of your concerns. While we cannot offer you legal advice or counsel, we can provide you with some general information regarding the Wisconsin public records law, Wis. Stat. §§ 19.31 to 19.39, that you may 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).

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.”).

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.

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

for the district attorney of the county where the record is found, or the Attorney General, to file an action for mandamus seeking release of the requested records. Wis. Stat. § 19.37(1)(b). The Attorney General is authorized to enforce the public records law; however, he generally exercises this authority in cases presenting novel issues of law that coincide with matters of statewide concern. As explained above, DOJ may be called upon to represent the University of Wisconsin System or the University of Wisconsin-Stevens Point. Therefore, the Attorney General respectfully declines to take any action in this matter, including filing an action for mandamus on your behalf, at this time.

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

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DOJ 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

cc: University of Wisconsin System Office of Legal Counsel



STATE OF WISCONSIN
DEPARTMENT OF JUSTICE

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February 21, 2019

Monica Weitkuhn
meweitkuhn@yahoo.com

Dear Ms. Weitkuhn:

The Wisconsin Department of Justice (DOJ) is in receipt of your email correspondence to Assistant Attorney General Paul Ferguson, dated June 12, 2018, regarding your public records request to the City of West Allis that was forwarded to the West Allis Police Department. You wrote, "I was told by one of the Chief Deputies at the West Allis Police Department, after they completed my request, that they were charging me \$50 an hour and it took 15 hours to fill the request. I was told the IT Director makes \$50 an hour, so, therefore I would be charged that amount for the records." You wrote, "I believe the fee the West Allis Police Department is charging me is unfair and unreasonable, and goes against the intent of the Wisconsin open records law."

In your correspondence, you asked two questions. First you asked, "I would like to know if I am legally obligated to pay for the records even though I was never told how much they were charging me until after they completed the search?" Second, you wrote that you would like "guidance on how I, a member of the public, can obtain public records from the West Allis Police Department without paying hundreds of dollars for the records."

Under the Wisconsin Public Records Law, Wis. Stat. §§ 19.31 to 19.39, "[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). An authority may not charge for the time it takes to redact records. *Milwaukee Journal Sentinel*, 2012 WI 65, ¶¶ 1 & n.4, 6, 58 (Abrahamson, C.J., lead opinion); *Id.* ¶ 76 (Roggensack, J., concurring).

The law also permits an authority to impose a fee for locating records if the cost is \$50.00 or more. Wis. Stat. § 19.35(3)(c). Additionally, an authority may require prepayment

for the costs associated with responding to a public records request if the total amount exceeds \$5.00. Wis. Stat. § 19.35(3)(f). Generally, the rate for an actual, necessary, and direct charge for staff time (such as for locating a record) 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>).

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. For example, if it becomes apparent to an authority that a public records request may require a longer response time, it may be prudent for the authority to send the requester a letter providing an update on the status of the response and, if possible, indicating when a response might be anticipated. Similarly, if an authority receives an inquiry from a requester seeking an update on the status of the request, it is advisable for the authority to respond to the requester with an update.

An open line of communication is also helpful in resolving issues related to fees. If a requester is concerned about potential fees, it may be helpful that he or she express such concerns in the request. For example, a requester may ask an authority to contact them if they anticipate fees will exceed a certain dollar amount. If the fees are anticipated to exceed a certain dollar amount that the requester sets forth, the authority could then contact the requester to inquire as to whether the requester desires to limit the scope or timeframe of the request in order to reduce the cost.

Similarly, as a best practice, an authority should implement a policy in which they notify requesters if they anticipate fees will exceed a certain amount. The authority's anticipated fees can be expressed in a letter requesting prepayment under Wis. Stat. § 19.35(3)(f), or can be communicated to the requester directly in some other way before the request is fulfilled. This communication between an authority and a requester regarding the fees associated with a request, prior to the request being fulfilled, may prevent a requester from no longer wanting the records because the fees are more than were expected.

There is no requirement within the public records law that requires a requester to pay for records once they have been prepared if the requester no longer wants them due to the costs associated with receiving the records. However, as noted above, an authority is allowed to require prepayment for the costs associated with responding to a public records request if the total amount exceeds \$5.00. Wis. Stat. § 19.35(3)(f). Therefore, it would be permissible for an authority not to release records if prepayment for costs exceeding \$5.00 has been requested by the authority and not received from the requester. Again, for these reasons, it is advisable that the authority and the requester maintain an open line of communication before the request is fulfilled, particularly if an authority anticipates there will be a large cost associated with responding to a public records request.

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. A sufficient request, limited by subject matter or length of time, may also help to limit the fees associated with a request.

The information in your correspondence is insufficient to properly evaluate whether the fees assessed were permissible, but I hope you find this information helpful. I have also copied the West Allis Police Department on this letter, to make them aware of your concerns.

In a follow-up email to AAG Ferguson, dated September 18, 2018, you wrote about another public records request to the City of West Allis saying that “it took over 40 days to get the City Clerk to fulfill a different open records request, and, then, he gave me a jump drive where the files are not accessible.” You wrote, “there are three files in a ‘pdf’ form which we are able to access. I don’t know why he did not put all the files on the jump drive in that same format (pdf).” In another follow-up email, dated September 21, 2018, you wrote that you were finally able to access the records after your son-in-law converted them into a format that you could read on your computer. You wrote, “I know, by law, agencies are not required to change the form of the records, but the records should be given in a form where the records can be read.”

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 public records law authorizes requesters to inspect or obtain copies of records maintained by government authorities. An authority is not required to create a new record by extracting and compiling information from existing records in a new format. See Wis. Stat. § 19.35(1)(L). See also *George v. Record Custodian*, 169 Wis. 2d 573, 579, 485 N.W.2d 460 (Ct. App. 1992). However, we recommend communicating with an authority if you are unable to access the records as provided, and we would encourage an authority to accommodate a requester’s request for a different format if possible.

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

Alternatively, the requester may submit a written request for the district attorney of the county where the record is found, or the Attorney General, to file an action for mandamus seeking release of the requested records. Wis. Stat. § 19.37(1)(b). The Attorney General is authorized to enforce the public records law; however, he generally exercises this authority in cases presenting novel issues of law that coincide with matters of statewide concern. 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 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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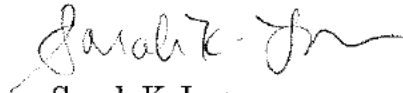
The Attorney General and the OOG are committed to increasing government openness and transparency, and DOJ endeavors to offer guidance in these areas. DOJ offers several open government resources through its website (<https://www.doj.state.wi.us/office-open-government/office-open-government>). DOJ provides the full Wisconsin Public Records Law, Wis. Stat. §§ 19.31 to 19.39, 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.

Monica Weitkuhn
February 21, 2019
Page 5

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:amh:lah

cc: Records Unit, West Allis Police Department



STATE OF WISCONSIN
DEPARTMENT OF JUSTICE

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Sarah K. Larson
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March 5, 2019

Alderman Chris Wery
[REDACTED]
Green Bay, WI 54304
chriswery@att.net

Dear Alderman Wery:

The Wisconsin Department of Justice (DOJ) is in receipt of your correspondence dated June 16, 2018 and August 28, 2019, and your correspondence to Assistant Attorney General (AAG) Paul Ferguson dated September 11, 2018, regarding walking quorums. You wrote, "Can a mayor hold separate meetings with each of the 12 members of a city council to tout an upcoming agenda of his/answer questions/whatever else may happen in a closed door meeting?" You further indicated that "the mayor is a member of our council. He can legally vote to break ties." I also note that you discussed similar issues with AAG Ferguson in two telephone calls, July 2, 2018 and September 11, 2018, but that you requested that our office provide you with an answer in writing.

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

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

The open meetings law does not apply to single-member governmental bodies, because the law contemplates that there must be at least two members in a governmental body for the open meetings law to apply. See Wis. Stat. § 19.82(2); *State ex rel. Plourde v. Habegger*, 2006 WI App 147, ¶¶ 12–13, 294 Wis. 2d 746, 720 N.W.2d 130 (one person occupying the office of village president was not subject to the open meetings law). Based on the information provided in your correspondence, it appears that the mayor would be subject to the open meetings law if he is a member of your council.

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). A meeting does not include any social or chance gathering or conference that is not intended to avoid the requirements of the open meetings law.

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

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

The 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.

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

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

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

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

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.

Based on the limited information provided in your correspondence, I cannot conclude that a walking quorum has occurred. But I caution that if the mayor meets with council members in one-on-one situations for the purpose of exercising the responsibilities, authority, power or duties delegated to or vested in the body, a court may find a prohibited walking quorum if the members: 1) have effectively engaged in collective discussion or information gathering outside of the context of a properly noticed meeting; and 2) have agreed with each other to act in some uniform fashion.

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

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

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

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

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

Sincerely,



Sarah K. Larson
Assistant Attorney General
Office of Open Government

SKL:amh:lah

cc: Rebecca Sande, Legislative Aid, Office of State Rep. André Jacque



STATE OF WISCONSIN
DEPARTMENT OF JUSTICE

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March 6, 2019

Asher Heimermann
Sheboygan Public Media
news@mysheboygan.com

Dear Mr. Heimermann:

The Wisconsin Department of Justice (DOJ) is in receipt of your correspondence, dated July 19, 2018, in which you wrote, "I am seeking an opinion from Attorney General Schimel or the DOJ regarding access to real estate land records." You write, "[s]ome law enforcement officers have requested to have their name removed from the Land Records Web Portal, blocking members of the media from researching land, buildings and homes owned by a law enforcement officer." You ask if the public is "allowed to view and research property owned by a law enforcement officer via the County Treasurer's Office or Register of Deeds" if those records are not available online.

The Attorney General and DOJ's Office of Open Government (OOG) 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 these criteria.

DOJ is committed to increasing government openness and transparency, and the OOG endeavors to offer guidance in these areas with a focus on the Wisconsin Open Meetings Law, Wis. Stat. §§ 19.81 to 19.98, and the Wisconsin Public Records Law, Wis. Stat. §§ 19.31 to 19.39. The OOG is only authorized to provide assistance within this scope. Other laws outside of the public records law may or may not require that these kinds of records be maintained online or be accessible through a web portal, but I cannot give you legal advice regarding such subject matter, because it falls outside of the OOG's scope.

I can, however, provide you with some general information about the public records law that I hope you will find helpful. With respect to records posted on the internet, the Attorney General has previously advised that agencies may not use online record posting as a substitute for their public records responsibilities; and that publication of documents on an agency website does not qualify for the exceptions for published materials set forth in

Wis. Stat. §§ 19.32(2) or 19.35(1)(g). See Muench Correspondence (July 24, 1998). However, providing public access to records via the internet can greatly assist agencies in complying with the statute by making posted materials available for inspection and copying, since that form of access may satisfy many requesters. Essentially, while nothing in the public records law requires that records be maintained online or accessible through a web portal, easily accessible online records can help increase government transparency.

The public records law authorizes requesters to inspect or obtain copies of "records" created or maintained by an "authority." Therefore, records maintained by an authority can still be requested by making a public records request, regardless of whether those records are readily available online. Under the public records law, the public can either ask to inspect a record at the authority's facilities, or ask to obtain a copy of the record. Wis. Stat. §§ 19.35(1) and 19.35(2).

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

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

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

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

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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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March 12, 2019

Kevin Mathewson
[REDACTED]
Kenosha, WI 53144

Dear Mr. Mathewson:

The Wisconsin Department of Justice (DOJ) is in receipt of your correspondence, dated June 4, 2018, in which you requested DOJ "to take action against District Attorney Patricia Hanson of Racine County" because you "believe she has violated the public records statute." Your April 20, 2018 public records request was denied and "[t]here was no disclaimer attached notifying [you] of [your] options under the law." You wrote that the District Attorney's response stated "the investigation could be closed at anytime [sic] and [you] would not be notified and would need to submit subsequent records requests." You then submitted "one records request per week for the next six weeks with no response."

The Attorney General and DOJ's Office of Open Government (OOG) appreciate your concern about your public records request to the Racine County District Attorney (DA). However, DOJ cannot offer you legal advice or counsel concerning your public records request, as DOJ may be called upon to represent the DA. However, as a courtesy to you, I contacted the DA and made her aware of your concerns.

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

Whether an investigation or litigation is ongoing and whether the confidentiality of the requested records is material to that ongoing investigation or litigation are factors that an authority may consider in applying the balancing test. *Cf. Linzmeyer v. Forcey*, 2002 WI 84, ¶¶ 30, 32, 39, 41, 254 Wis. 2d 306, 646 N.W.2d 811; *Journal/Sentinel, Inc. v. Aagerup*, 145 Wis. 2d 818, 824-27, 429 N.W.2d 772 (Ct. App. 1988); *Democratic Party of Wisconsin v. Wisconsin Dep't of Justice*, 2016 WI 100, ¶ 12, 372 Wis. 2d 460, 888 N.W.2d 584. An authority could determine that release of records while an investigation or litigation is in progress could compromise the investigation or litigation. Therefore, when performing the public records balancing test, an authority could conclude that the public interest in effectively investigating and litigating a case and in protecting the integrity of the current investigation or litigation outweighs the public interest in disclosing the requested records at that time. *Id.*; Wis. Stat. § 19.35(1)(a).

Additionally, prosecutors' case files, whether open or closed, are not subject to disclosure under the public records law. *State ex rel. Richards v. Foust*, 165 Wis. 2d 429, 436, 477 N.W.2d 608 (1991); see also *Democratic Party of Wisconsin v. Wisconsin Dep't of Justice*, 2016 WI 100, ¶ 12, 372 Wis. 2d 460, 888 N.W.2d 584.

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. For example, 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 does not envision forward looking requests. "The right of access applies only to records that exist at the time the request is made, and the law contemplates custodial decisions being made with respect to a specific request at the time the request is made." 73 Op. Att'y Gen. 37, 44 (1984). The public records law does not require a records custodian to notify a requester when records are available. However, such situations present an opportunity for the kind of communication between authorities and requesters that the OOG encourages.

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

The public records law 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. I construe your letter as a request for the Attorney General to pursue an action for mandamus on your behalf. As explained above, however, DOJ may be called upon to represent the DA. Therefore, we respectfully decline your request.

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

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

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

The Attorney General and the 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,

Kevin Mathewson

March 12, 2019

Page 4

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

Sarah K. Larson
Assistant Attorney General
Office of Open Government

SKL:amh:lah

cc: Patricia Hanson, Racine County District Attorney



STATE OF WISCONSIN
DEPARTMENT OF JUSTICE

Josh Kaul
Attorney General

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FAX 608/267-2779

March 14, 2019

Kimberly Bacik

Milwaukee, WI 53204

Dear Ms. Bacik:

The Wisconsin Department of Justice (DOJ) is in receipt of your correspondence, dated July 23, 2019, in which you wrote "I am looking to see if there was ever an opinion written on whether a chief legal counsel is considered a 'local public official' or what defines a public official." You wrote, "I have searched the online database and could not locate any 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 give formal legal opinions to district attorneys and county corporation counsel under certain circumstances. Wis. Stat. §§ 165.25(3) and 59.42(1)(c). Although you did not specifically request an opinion, the Attorney General cannot provide you with a formal opinion because you do not meet these criteria.

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 my research, it does not appear that the public records law itself addresses your question, and the OOG is not authorized to give you legal advice on matters that fall outside the scope of the public records law and open meetings law. However, pursuant to Wis. Stat. § 19.39, I can provide you with some general information regarding the public records law that you may find helpful.

The public records law defines "local public official" as "an individual holding a local public office." Wis. Stat. § 19.42(7x). "Local public office," in turn, has the meaning provided in Wis. Stat. § 19.42(7w), which includes 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.

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

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

Sincerely,

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

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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March 14, 2019

Linda May

West Allis, WI 53214-4808

Dear Ms. May:

The Wisconsin Department of Justice (DOJ) is in receipt of your correspondence, dated February 19, 2019, regarding a public records request you made to the West Allis Police Department on December 26, 2018. We have now received your correspondence dated March 11, 2019 indicating that you have received the records you requested, but that you were concerned that it took approximately two months to fulfill the request. Thus, although your original request has been fulfilled, I would still like to give you some general information about the public records law which you may find helpful. I am also copying the West Allis Police Department to make them aware of your concerns.

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

The Office of Open Government encourages authorities and requesters to maintain an open line of communication. This helps to avoid misunderstandings between an authority and a requester. If it becomes apparent to an authority that a public records request may require a longer response time, it may be prudent 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.

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

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

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. If you have additional questions or concerns, DOJ maintains a Public Records Open Meetings (PROM) hotline to respond to individuals' open government questions. The PROM telephone number is (608) 267-2220.

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: Marisa Szymuszkiewicz, Records Supervisor, West Allis Police Department



STATE OF WISCONSIN
DEPARTMENT OF JUSTICE

Josh Kaul
Attorney General

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Sarah K. Larson
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TTY 1-800-947-3529
FAX 608/267-2779

March 14, 2019

Frank Nowak
[REDACTED]
Sobieski, WI 54171

Dear Mr. Nowak:

The Wisconsin Department of Justice (DOJ) is in receipt of your correspondence, dated July 17, 2018, in which you wrote, "I recently E-mailed an Open Records request for the Un-Approved minutes of our July 9, Town Board Meeting to our Town Clerk." The Town Clerk responded to your request stating, "Further research as [sic] determined the Attorney General has stated that minutes do not become subject to the public records law until they are distributed to the town board for approval. Therefore your request will not be fulfilled for this reason." You asked, "Is that true? . . . If so, are the proceedings meaningless until approved by the Board at a later date?" In a follow-up correspondence dated August 19, 2018, you provided more details about the Town Board meeting, and asked, "When does the unapproved minutes of a Town meeting become Valid?"

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).

In an effort to increase transparency, DOJ recommends that governmental bodies keep minutes of all meetings. However, there is no requirement under the open meetings law for a governmental body to do so. The open meetings law only requires a governmental body to create and preserve a record of all motions and roll-call votes at its meetings. Wis. Stat. § 19.88(3). Meeting minutes are a common method that governmental bodies use to do so.

Thus, as long as a governmental body creates and preserves a record of all motions and roll-call votes, the Wis. Stat. § 19.88(3) requirement is satisfied, and the open meetings law does not require the body to take more formal or detailed minutes of other aspects of the meeting. Other statutes outside the open meetings law, however, may prescribe particular minute-taking requirements for certain governmental bodies and officials that go beyond what is required by the open meetings law. I-20-89 (Mar. 8, 1989). *See, e.g.*, Wis. Stat.

§§ 59.23(2)(a) (county clerk); 60.33(2)(a) (town clerk); 61.25(3) (village clerk); 62.09(11)(b) (city clerk); 62.13(5)(i) (police and fire commission); 66.1001(4)(b) (plan commission); 70.47(7)(bb) (board of review).

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

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

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 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 v. Bock*, 149 Wis. 2d 403, 414, 438 N.W.2d 589 (1989). 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).

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 v. Wis. Rapids Pub. Sch. Dist.*, 2015 WI App 53, ¶ 15, 364 Wis. 2d 429, 867 N.W.2d 825. 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).

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

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:amh:lah



STATE OF WISCONSIN
DEPARTMENT OF JUSTICE

Josh Kaul
Attorney General

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P.O. Box 7857
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TTY 1-800-947-3529
FAX 608/266-2779

March 19, 2019

Harry Wait

Union Grove, WI 53182
harrytrex@gmail.com

Dear Mr. Wait:

The Wisconsin Department of Justice (DOJ) is in receipt of your correspondence to former Attorney General Brad Schimel, dated July 11, 2018 and July 12, 2018, in which you wrote that you have concerns about the Wisconsin Supreme Court "considering exempting itself from the state open record laws out of concerns of possible ex parte conversations." You ask, "Is this reminiscent of the 2015 fiasco when the Wisconsin State legislature attempted to do the same and exempt themselves?" You also requested DOJ "take immediate action to thwart any such plans from the Wisconsin Supreme Court."

The Attorney General and DOJ's Office of Open Government appreciate your concerns regarding the Wisconsin Public Records Law, Wis. Stat. §§ 19.31 to 19.39. However, DOJ cannot offer you legal advice or counsel about your specific concerns, as DOJ may be called upon to represent members of the judiciary. Moreover, based on the limited information you provided to us, it does not appear that you have a pending public records request before the Wisconsin Supreme Court.

Although we cannot offer you legal advice or counsel, we can provide you with some general information regarding the public records law. The public records law authorizes requesters to inspect or obtain copies of "records" created or maintained by an "authority." Records are presumed to be open to public inspection and copying, but there are exceptions. Wis. Stat. § 19.31. Statutes, case law, and the public records law balancing test, which weighs the public interest in disclosure of a record against the public interest in nondisclosure, provide such exceptions. Exceptions to disclosure should be narrowly construed to effectuate the law's purpose of ensuring government openness and transparency.

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. As explained above, DOJ may be called upon to represent members of the judiciary. Therefore, 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 action on your behalf.

If you have further concerns, you may wish to contact a private attorney. 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>

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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:amh:lah



STATE OF WISCONSIN
DEPARTMENT OF JUSTICE

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March 28, 2019

Joseph Cardamone III
Corporation Counsel
County of Kenosha
Courthouse
912 56th Street, LL13
Kenosha, WI 53140-3747

Dear Mr. Cardamone:

This letter is in response to your correspondence to Attorney General Josh Kaul, dated January 14, 2109, regarding the Department of Justice (DOJ) advisory memorandum on public records fees. That advisory, "Office of Open Government Advisory: Charging Fees under the Wisconsin Public Records Law," was issued by DOJ on August 8, 2018 in response to an increasing number of public inquiries pertaining to high fees that some authorities were charging for records in response to public records requests.

In your correspondence, you wrote that you were aware that the advisory has caused some confusion among those who provide legal support and advice to authorities that are subject to the public records law. You asked whether Attorney General Kaul concurs with the recommendations made in the advisory or if it is a matter that might be subject to further review.

The advisory summarized the fees permitted under the public records law, particularly copying and location fees. By way of example, the advisory highlighted DOJ's then-recent update to its public records fee schedule and recommended that other authorities similarly re-evaluate their copying fees. The advisory made clear that each authority's actual, necessary and direct costs of reproduction may vary. It is stated in the advisory that authorities could use DOJ's published fee schedule as guidance and offered the Office of Open Government's assistance to any authority in developing a methodology for determining reproduction fees.

Additionally, the advisory discussed the formulation of fees associated with locating records. The advisory also focused on the fee calculation for specialized personnel who may be necessary to conduct certain record location tasks. A waiver or reduction of fees is also discussed in the advisory.

Joseph Cardamone III
March 28, 2019
Page 2

The purpose of the advisory was not to mandate the fee amounts that authorities must charge. Neither DOJ nor the attorney general has statutory authority to do so. The advisory did not establish a new interpretation of the law as it relates to permissible fees. It simply summarized the law and the advice DOJ provided in response to fee-related inquiries from the public.

The public records law helps ensure that everyone has "the greatest possible information regarding the affairs of government and the official acts of those officers and employees who represent them" by establishing the "presumption of complete public access, consistent with the conduct of government business." Wis. Stat. § 19.31. Exceptions to such access should be narrowly construed. Conditioning access on the payment of excessive or otherwise impermissible fees constitutes a denial of access. The purpose of the advisory was to help ensure that authorities avoided such situations, and Attorney General Kaul concurs with the advisory's recommendations. DOJ has no plans to review the matter at this time.

I appreciate your correspondence. If you have questions regarding open government, I encourage you to contact DOJ's Office of Open Government Public Records-Open Meetings (PROM) help line at (608) 267-2220.

The information in this letter is provided pursuant to Wis. Stat. § 19.39 and 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 "P.M.F.", with a stylized flourish extending to the right.

Paul M. Ferguson
Assistant Attorney General
Office of Open Government



STATE OF WISCONSIN
DEPARTMENT OF JUSTICE

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FAX (608) 266-2779

March 28, 2019

Gary L. Franz

Marshfield, WI 54449

Dear Mr. Franz:

The Wisconsin Department of Justice (DOJ) is in receipt of your correspondence dated June 22, 2018, in which you write that you hope DOJ "can help me and other concerned citizens in our quest to get the Town of McMillan to operate correctly." You indicate that you were hoping that DOJ can "help to stop the illegal practices," because there were "various ordinances and statutes being violated then and now."

I have reviewed the various documents you have enclosed with your letter, including but not limited to your letter to the Marathon County District Attorney's Office dated January 24, 2018, and two Marathon County Sheriff's Department reports from May 9, 2018 and May 12, 2018. I also note that you and I discussed your concerns in a telephone conversation on October 17, 2018.

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. It appears that you have already been in contact with the Marathon County District Attorney, as well as the Marathon County Sheriff's Department, but you may wish to follow up with the district attorney or law enforcement regarding your concerns.

I can, however, address your correspondence to the extent it concerns the public records law and open meetings law. Based on the limited information I have obtained from you, it appears that your primary concern under the public records law is the town's "continued refusal to honor open records requests." You also allege that, "[i]n certain instances the town chairperson instructed the clerk *not* to respond to these requests, and instead turn them over to the town's attorney." However, your letter and enclosed materials

did not provide any further specifics about your concerns, such as specific dates of public records requests that have allegedly gone unfulfilled. I also note that the May 12, 2018 report from the Marathon County Sheriff's Department concluded that they had "no evidence from the complainants of any specific open records request that were not honored," nor any "dates or times to reference any open records requests that were filed to follow up on."

Therefore, I have insufficient information from your correspondence to conclude that any public records law violations have occurred. I can, however, provide you with some general information about the public records law that I hope you will find helpful.

Regarding your concerns about response times, 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.").

In addition, you have provided us with an undated letter that you wrote to Detective Greg Bean in which you indicate that "I could not get an unredacted copy" of a certain report "unless I filled out a form and lied to get it."

Regarding your concerns about redactions, the public records law authorizes requesters to inspect or obtain copies of "records" created or maintained by an "authority." Records are presumed to be open to public inspection and copying, but there are exceptions. See Wis. Stat. § 19.31. Requested records fall into one of three categories: (1) absolute right of access; (2) absolute denial of access; and (3) right of access determined by the balancing test. *Hathaway v. Joint Sch. Dist. No. 1 of Green Bay*, 116 Wis. 2d 388, 397, 342 N.W.2d 682 (1984). If neither a statute nor the common law requires disclosure or creates a general exception to disclosure, the records custodian must decide whether the strong public policy

favoring disclosure is overcome by some even stronger public policy favoring limited access or nondisclosure. This balancing test determines whether the presumption of openness is overcome by another public policy concern. *Hempel v. City of Baraboo*, 2005 WI 120, ¶ 4, 284 Wis. 2d 162, 699 N.W.2d 551. If a records custodian determines that a record or part of a record cannot be disclosed, the custodian must redact that record or part of that record. See Wis. Stat. § 19.36(6).

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). The reason must be specific and sufficient to provide the requester with adequate notice of the reasons for denial. In every written denial, the authority must also inform the requester that "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).

Regarding your concerns about forms, 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, 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.

There may be other substantive federal or state laws regarding the use of false identities, but as already noted, the OOG is not authorized to provide you with legal advice or counsel on issues that fall outside the scope of the public records law and open meetings law. If you have further concerns not addressed by this letter, you may wish to consult with a private attorney about those concerns.

I will now turn to your concerns regarding the open meetings law. Your letter to Detective Greg Bean alleges that, at the June 11, 2018 town board meeting, "no person in the audience, was allowed to participate." You further note that "we will only be allowed to when comment from the audience part of the agenda takes place." Again, I do not have sufficient information from your correspondence to conclude that any open meetings law violations have occurred, but I can provide you with some general information about the open meetings law that I hope you will find helpful.

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

There are some other state statutes that may require governmental bodies to hold public hearings on specified matters, and those statutes may also impact public comment

periods, but the OOG is not authorized to give legal advice or counsel on matters outside the scope of the open meetings law and public records law. If you have further questions about how other laws may interact with the open meetings law, you may wish to consult with private 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 and Public Records Law, maintains an Open Meetings Law Compliance Guide and a Public Records Law Compliance Guide, and provides a recorded webinar and associated presentation documentation.

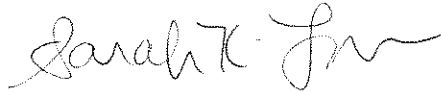
Gary L. Franz
March 28, 2019
Page 6

Finally, I also note that I have received correspondence from another resident of the Town of McMillan, Clarence Oertel, setting forth more specific concerns about public records requests. I believe that some of those concerns may be related to the concerns you have raised. Enclosed please find a copy of my response letter that I sent to those citizens, which I hope you will find helpful.

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.

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:skl

Enclosure (Oertel letter)



STATE OF WISCONSIN
DEPARTMENT OF JUSTICE

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March 28, 2019

Brian M. Gehn
Iowa County Jail
1205 N. Bequette Street
Dodgeville, WI 53533

Dear Mr. Gehn:

The Wisconsin Department of Justice (DOJ) is in receipt of your correspondence, dated August 16, 2018, in which you wrote, "I would like to bring an action for mandamus to receive a court order for the release of records. I am trying to obtain records to be used in my defense against criminal charges." In response to your requests to the Iowa County Sheriff's Department, the Arena Police Department, and the judge in your case, you were referred to the District Attorney's Office. You wrote, "I submitted a request to the District Attorney and have not yet received a response." You asked the Attorney General to "[p]lease send me as much information as possible on how to take action to obtain these records and help me as much as allowed by law."

DOJ's Office of Open Government (OOG) works to increase government openness and transparency with a focus on the Wisconsin Open Meetings Law, Wis. Stat. §§ 19.81 to 19.98, and the Wisconsin Public Records Law, Wis. Stat. §§ 19.31 to 19.39. The OOG is not authorized to give you legal advice on matters that fall outside the scope of those statutes. As part of your criminal case(s), you may have other avenues by which you can request documents, such as the criminal discovery statutes. However, the OOG is unable to provide you with assistance regarding those matters, as they fall outside the scope of the OOG's responsibilities and authority under Wis. Stat. § 19.39. You may wish to consult a private attorney or a state public defender, if you qualify for one, about such matters.

In addition, DOJ cannot offer you legal advice or counsel about matters related to the district attorney (DA), as DOJ may be called upon to represent the DA. As a courtesy to you, however, I am making the DA aware of your concerns by way of a copy of this letter.

I can also give you some general information about the public records law which you may find helpful. First, it should be noted that, as an incarcerated person, your right to request records under the Wisconsin Public Records Law, Wis. Stat. §§ 19.31 to 19.39, is limited to records that contain specific references to yourself or your minor children and are otherwise accessible to you by law. See Wis. Stat. § 19.32(1c) and (3). Based on the

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

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).

There is a general presumption that "public records shall be open to the public unless there is a clear statutory exception, unless there exists a limitation under the common law, or unless there is an overriding public interest in keeping the public record confidential." *Hathaway*, 116 Wis. 2d 388, 397. However, access to prosecutors' case files, whether open or closed, are exempt from disclosure. The Wisconsin Supreme Court has determined that "the common law provides an exception which protects the district attorney's files from being open to public inspection." *State ex rel. Richards v. Foust*, 165 Wis. 2d 429, 433-34, 477 N.W.2d 608 (1991). Therefore, if the records you seek are part of the prosecutor's file, such records are exempt from disclosure under the public records law. As already noted, however, you may have other avenues by which you can request documents related to your criminal case, such as criminal discovery statutes.

Under the public records law, if the records you requested were regarding an ongoing investigation or litigation, an authority may withhold records material to the ongoing investigation or litigation. Whether an investigation or litigation is ongoing and whether the confidentiality of the requested records is material to that ongoing investigation or litigation are factors that an authority may consider in applying the balancing test. Cf. *Linzmeier v. Forcey*, 2002 WI 84, ¶¶ 30, 32, 39, 41, 254 Wis. 2d 306, 646 N.W.2d 811; *Journal/Sentinel, Inc. v. Agerup*, 145 Wis. 2d 818, 824-27, 429 N.W.2d 772 (Ct. App. 1988); *Democratic Party of Wisconsin v. Wisconsin Dep't of Justice*, 2016 WI 100, ¶ 12, 372 Wis. 2d 460, 888 N.W.2d 584. An authority could determine that release of records while an investigation or litigation is in progress could compromise the investigation or litigation. Therefore, when performing the public records balancing test, an authority could conclude that the public interest in effectively investigating and litigating a case and in protecting the integrity of the current

investigation or litigation outweighs the public interest in disclosing the requested records at that time. *Id.*; Wis. Stat. § 19.35(1)(a).

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 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.

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

Alternatively, the requester may submit a written request for the district attorney of the county where the record is found, or the Attorney General, to file an action for mandamus seeking release of the requested records. Wis. Stat. § 19.37(1)(b). The Attorney General is authorized to enforce the public records law; however, he generally exercises this authority in cases presenting novel issues of law that coincide with matters of statewide concern. As noted above, DOJ may be called upon to represent the DA. Therefore, we respectfully decline to pursue an action for mandamus on your behalf.

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

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

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

Sincerely,



Sarah K. Larson
Assistant Attorney General
Office of Open Government

SKL:amh:lah

Cc: Iowa County District Attorney
Attorney Kyle Robert Reimann



STATE OF WISCONSIN
DEPARTMENT OF JUSTICE

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March 28, 2019

Clarence Oertel
[REDACTED]

Marshfield, WI 54449

Dear Mr. Oertel:

The Wisconsin Department of Justice (DOJ) is in receipt of a copy of your correspondence, dated October 29, 2018, in which you raise concerns about alleged misconduct and corruption of various Town of McMillan officials, as well as their alleged non-compliance with the public records law. I have reviewed your letter and all the associated documentation you sent us. Further, I note that you have contacted DOJ's Office of Open Government (OOG) and spoken to me, as well as Assistant Attorney General Paul Ferguson, about these concerns on February 26, 2018, September 18, 2018, and January 17, 2019.

The 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 law enforcement regarding your concerns about alleged misconduct and corruption. However, I can address your correspondence to the extent it concerns the public records law.

Before I address your specific concerns, I would like to give you some general 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." However, the 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).

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.* The public records law does not impose such heavy burdens on a record custodian that normal functioning of the office would be severely impaired, and does not require expenditure of excessive amounts of time and resources to respond to a public records request. *Schopper v. Gehring*, 210 Wis. 2d 208, 213, 565 N.W.2d 187 (Ct. App. 1997); *State ex rel. Gehl v. Connors*, 2007 WI App 238, ¶ 17, 306 Wis. 2d 247, 742 N.W.2d 530.

The public records law does not require a response to a public records request within a specific timeframe. In other words, after a request is received, there is no set deadline by which the authority must respond. However, the law states that upon receipt of a public records request, the authority “shall, as soon as practicable and without delay, either fill the request or notify the requester of the authority’s determination to deny the request in whole or in part and the reasons therefor.” Wis. Stat. § 19.35(4)(a). A reasonable amount of time for a response “depends on the nature of the request, the staff and other resources available to the authority to process the request, the extent of the request, and other related considerations.” *WIREdata, Inc. v. Vill. of Sussex*, 2008 WI 69, ¶ 56, 310 Wis. 2d 397, 751 N.W.2d 736; see *Journal Times v. Police & Fire Comm’rs Bd.*, 2015 WI 56, ¶ 85, 362 Wis. 2d 577, 866 N.W.2d 563 (an authority “can be swamped with public records requests and may need a substantial period of time to respond to any given request”). Additionally, statutorily required notice to certain record subjects may also increase the time it takes an authority to respond to a request. See Wis. Stat. § 19.356.

I will now turn to your specific concerns as set forth in your correspondence and associated documentation. 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. Based on my review of the information available to me, it appears that your concerns are related to several related public records requests (“PRR”) that you and Dorothy Olson submitted to the town on the following dates: 1) June 3, 2016 (“PRR #1”); 2) August 23, 2016 (“PRR #2”); 3) September 12, 2016 (“PRR #3”); and 4) October 7, 2016 (“PRR #4”). Based on the information available to me, it appears that the town has fulfilled PRR #2 and PRR #3. Therefore, I will only be addressing PRR #1 and PRR #4 below.

Regarding PRR #1 from June 3, 2016, Ms. Olson requested “monthly Reconciliation Records [from the town’s bank account] dating from 1999 through 2011 including money

orders and receipts." The town's attorney, Attorney Lee Turonie, responded that the town was attempting to comply with your PRR, but that he needed clarification on some items and wanted Ms. Olson to call him. Attorney Turonie also requested prepayment for the records in question. I note that, under Wis. Stat. § 19.35(3)(f), an authority is permitted to require that a requester prepay for the actual, direct, and necessary costs of fulfilling a public records request that exceeds \$5.00. It appears that no prepayment was made to the town. On June 23, 2016, however, Ms. Olson re-submitted the request with a narrowed timeframe from 1999 to 2005 ("Modified PRR #1").

It appears that Modified PRR #1 went unfulfilled between June 23, 2016 and October 7, 2016, when you and Ms. Olson submitted PRR #4. For the remainder of this letter, I will only be addressing PRR #4 from October 7, 2016, because it appears that Modified PRR #1 and PRR #4 requested the same basic information—that is, the town's monthly bank reconciliation records, including money orders and receipts—but that PRR #4 further limited the request in Modified PRR #1 only to the timeframe July 17, 2009 through January 5, 2011.

Regarding PRR #4 from October 7, 2016, the former Town of McMillan Clerk, Patti Rahn, had a telephone conversation with Ms. Olson on October 21, 2016, and acknowledged that the request had been made. During that conversation, Ms. Rahn stated that that she believed she had located some of the records but needed further clarification from Ms. Olson about the request, because Ms. Rahn was not the town clerk during the timeframe in question. Ms. Olson then asked Ms. Rahn to meet at your house to discuss the request. Ms. Rahn indicated that she would not meet you and Ms. Olson at a private residence, but she agreed to schedule an appointment at the town clerk's office so you and Ms. Olson could inspect the records there. Ms. Olson then indicated to Ms. Rahn that she needed to discuss the matter with you before making an appointment to inspect the records.

According to the information available to me, it does not appear that any appointment was made, nor does it appear that any inspection of the records took place. I first note that the public records law does not prohibit an authority from working with a requester to schedule a time for an in-person inspection of records that is convenient to both. For example, under Wis. Stat. § 19.34(2)(a), "[e]ach authority which maintains regular office hours at the location where records in the custody of the authority are kept shall permit access to the records of the authority at all times during those office hours, unless otherwise specifically authorized by law."

Under the public records law, however, a requester generally may choose to inspect a record and/or to obtain a copy of the record. As stated in Wis. Stat. § 19.35(1)(b), "Except as otherwise provided by law, any requester has a right to inspect a record and to make or receive a copy of a record. If a requester appears personally to request a copy of a record that permits copying, the authority having custody of the record may, at its option, permit the requester to copy the record or provide the requester with a copy substantially as readable as the original." Wis. Stat. § 19.35(1)(b). A requester must be provided facilities for inspection and copying of requested records comparable to those used by the authority's employees. Wis. Stat. § 19.35(2). A records custodian may impose reasonable restrictions on the manner of

access to an original record if the record is irreplaceable or easily damaged. Wis. Stat. § 19.35(1)(k).

According to the information available to me, no communication took place between you and the town between October 21, 2016 when the town sought to schedule a time for you and Ms. Olson to inspect the records, and September 5, 2017 when you and Ms. Olson jointly wrote a letter to Marathon County District Attorney (DA) Theresa Wetzsteon asking that the DA file a writ of mandamus under Wis. Stat. § 19.37 to order the records released.

The OOG encourages authorities and requesters to maintain an open line of communication. This helps to avoid misunderstandings between an authority and a requester. It is often mutually beneficial for a requester and an authority to work with each other regarding a request. This can provide for a more efficient processing of a request by the authority while ensuring that the requester receives the records that he or she seeks. For example, if a request is broad or lacks a timeframe, it may be beneficial for the requester to clarify the request. Certainly, a requester may always submit another request if he or she desires additional records.

If it becomes apparent to an authority that a public records request may require a longer response time, it may be prudent for the authority to send the requester a letter providing an update on the status of the response and, if possible, indicating when a response might be anticipated. Similarly, if an authority receives an inquiry from a requester seeking an update on the status of the request, it is advisable for the authority to respond to the requester with an update.

Communicating regarding scheduling a time to inspect records can also be beneficial for all involved. From an authority's perspective, it insures they will have staffing resources available to greet and provide the requested records to the requester, make any requested copies, and assist with any issues that may arise. From the requester's perspective, such an arrangement alleviates potential waiting times and inconvenience that may arise if an authority's staff is assisting others when the requester arrives to inspect requested records.

After the DA received your September 5, 2017 letter asking for a writ of mandamus, the DA wrote a letter to the town on November 16, 2017, requesting that the town forward a copy of the town's response to PRR #4 to her by December 15, 2017. The DA indicated that, if she did not receive the records by then, she would assume that the town had not responded to the request. On December 12, 2017, a meeting took place about the matter, with the town clerk, town chair, the DA, and Marathon County Corporation Counsel Scott Corbett all in attendance. I note that Attorney Corbett does not represent the Town of McMillan, but he was present at the town's request, due to his familiarity with the public records law.

At the December 12, 2017 meeting, the town clerk indicated that she believed she had already legally responded to PRR #4 by verbally responding to the requesters that they could inspect the records at the town clerk's office. Attorney Corbett indicated that the verbal response may not have been sufficient under the public records law. Per the documentation that I have, the town clerk then apologized for her "apparent misunderstanding of the open

records law, specifically to respond to written requests in writing." In a follow-up letter dated January 18, 2018, Attorney Corbett wrote to DA Wetzsteon that the town had still not fulfilled the request or turned over the records.

The public records law requires a written response if an authority denies a written request in whole or in part. Wis. Stat. § 19.35(4)(b). Here, the October 2016 request for PRR #4 was in writing, but it does not appear that the request was ever denied. Rather, it appears that the request has gone unfulfilled for an extended period of time. Although a written response may not have been required under the public records law, a better practice would have been for the town to respond in writing in October 2016, thereby potentially avoiding the apparent communication breakdown that occurred.

Several months later, on August 27, 2018, Ms. Olson wrote another letter to the DA indicating that the town had still not provided the requested records. On September 26, 2018, the DA wrote to Ms. Olson that she had again spoken with Attorney Turonie, the town's attorney, asking for the town's position regarding compliance with the public records law. I also note that I spoke with Attorney Turonie about the matter on August 2, 2018.

In the DA's September 26, 2018 letter to Ms. Olson, the DA indicated that she told Attorney Turonie that, although the request was "never denied," she requested that "the Town facilitate inspection of the records, provide copies of the records, or formally deny the request." According to the DA's September 26, 2018 letter, Attorney Turonie responded to the DA as follows:

[T]he public records request [PRR #4] did not make a simple request for a limited number of easily identifiable records. Rather [Ms. Olson's] request was for a large number of records constituting a long period of time. Further, [Ms. Olson] declined to inspect the records in accordance with state statutes and Town ordinances. [Attorney Turonie] indicated that the Town's position is that [Ms. Olson is] not entitled to unfettered access to source material in uncontrolled conditions.

Attorney Turonie further told the DA that, after Ms. Olson was informed that she could not take the original records offsite, she declined to inspect the records. In any event, Attorney Turonie said that the town "remains willing to facilitate the appropriate inspection of the records and provide an appropriate response to [Ms. Olson's] records request." Attorney Turonie then asked Ms. Olson to contact the town clerk to arrange for the inspection of the requested records.

As noted at the outset of this letter, you wrote to the OOG on October 29, 2018, and also spoke with me on the telephone on January 17, 2019. Since then, I have also been in contact with the DA to make her aware of your continuing concerns. However, I am unaware of any communication that may have occurred between you and the town since your October 29, 2018 letter to the OOG. Again, I encourage you to keep the line of communication open with the town, because it appears that the town is still attempting to provide you with the records you seek. Although the length of time that elapsed since your original request is

concerning, any misunderstandings that occurred potentially could have been avoided with an open line of communication between the authority and the requester. *See Journal Times*, 2015 WI 56, ¶¶ 77, 92 (even when miscommunications occur, misunderstandings and confusion do not necessarily equate to a public records law violation).

By way of a copy of this letter, I have made all interested parties aware of your continuing concerns, and going forward, I expect continuing communication between you and the town to take place. I also agree with the DA that the town should either: 1) facilitate inspection of the records; 2) provide copies of the records; or 3) formally deny the request. Finally, I note that, if the request is ultimately denied, the town should abide by Wis. Stat. § 19.35(4)(b) which states, "If an authority denies a written request in whole or in part, the requester shall receive from the authority a written statement of the reasons for denying the written request." 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).

I expect that your concerns can be resolved through these informal means. If not, the public records law provides several remedies for a requester dissatisfied with an authority's response, or lack of response, to a public records request. A requester may file an action for mandamus, with or without an attorney, asking a court to order release of the records. Wis. Stat. § 19.37(1)(a). 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. While the public records issue that you raised is important, it does not appear to present novel issues of law that coincide with matters of statewide concern, and as noted, I expect that your concerns can be resolved through informal means. Therefore, 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 fees. You may reach the service using the contact information below:

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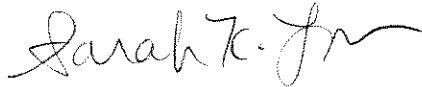
<http://www.wisbar.org/forpublic/ineedalawyer/pages/lris.aspx>

I would also like you to be aware of several open government resources available to you through DOJ's 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. Finally, I note that I have already sent a letter to another town resident, Gary Franz, regarding similar concerns. Enclosed please find a copy of my response letter to Mr. Franz which I hope you will find helpful.

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: Marathon County District Attorney Theresa Wetzsteon
Marathon County Corporation Counsel Scott Corbett
Town of McMillan Attorney Lee Turonie
Town of McMillan Clerk Tanya Holcomb
Ms. Dorothy Olson
Mr. Gary Franz

Enclosure (Franz letter)



STATE OF WISCONSIN
DEPARTMENT OF JUSTICE

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608/266-1221
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FAX 608/267-2779

March 28, 2019

Dorothy Olson
[REDACTED]
Marshfield, WI 54449

Clarence Oertel
[REDACTED]
Marshfield, WI 54449

Dear Ms. Olson and Mr. Oertel:

The Wisconsin Department of Justice (DOJ) is in receipt of a copy of your correspondence to Marathon County District Attorney (DA) Theresa Wetzsteon, dated August 27, 2018, concerning your "complaint about an open records request to the town of McMillan." You wrote to the DA, "It has been almost 1 year now and we still have not received a written response," and that "[t]here have been several attempts by several different individuals to try to get this financial information." We have also received your follow-up email correspondence, dated March 21, 2019, regarding "three criminal investigations."

The Attorney General and DOJ's Office of Open Government (OOG) are committed to increasing government openness and transparency, and DOJ endeavors to offer guidance in these areas with a focus on the Wisconsin Open Meetings Law and the Wisconsin Public Records Law. To the extent that your concerns may relate to the DA's handling of the complaint, DOJ cannot offer you legal advice or counsel, as DOJ may be called upon to represent the DA. As a courtesy to you, I contacted the DA and made her aware of your concerns.

Further, to the extent that your correspondence relates to criminal investigations, I note that the OOG is unable to offer you assistance in that subject matter, as it falls outside of the scope of the OOG's responsibilities and authority. I note, however, that I have received separate correspondence from Mr. Oertel setting forth the concerns about the town's handling of your public records requests, which in turn precipitated your complaint to the DA. Enclosed please find a copy of my response letter to Mr. Oertel, which I hope you will find helpful.

I also wanted to provide you with the following information regarding the enforcement of the public records law that you may find 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). 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. Moreover, as already noted, DOJ may be called upon to represent the DA. Therefore, although you have not specifically asked the Attorney General to pursue an action for mandamus on your behalf, we respectfully decline to do so.

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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I would like you to be aware of several open government resources available to you through DOJ's 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

Enclosure (Oertel letter)

Cc: Marathon County District Attorney Theresa Wetzsteon



STATE OF WISCONSIN
DEPARTMENT OF JUSTICE

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March 28, 2019

Judy Steffes

[REDACTED]
West Bend, WI 53095

Dear Ms. Steffes:

The Wisconsin Department of Justice (DOJ) is in receipt of your correspondence, dated August 6, 2018, in which you wrote, "I'm looking to report the uncooperative nature of Mayville School District Superintendent Scott Sabol, school board president John Westphal and Mayville Middle School Principal Bob Clark. I've submitted three Open Records Requests since June 14, 2018 and I've not heard back." You stated that you "did receive a note July 24" from Superintendent Sabol, and you provided the contents of this note. It appears that Superintendent Sabol's July 24th response was a denial of your first request "because it fails to reasonably describe the requested record" and it "does not contain a reasonable limitation as to the length of time." He asked you to provide "clarification as to specifically what you are seeking." Superintendent Sabol also denied your second request "because it seeks communications protected by the Attorney-Client Privilege." You stated you "revamped" and resubmitted your request on July 26, and as of August 6, you have not received a response or a confirmation that this request was received. You asked "how to move forward."

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).

Under the public records law, a request “is deemed sufficient if it reasonably describes the requested record or the information requested.” Wis Stat. § 19.35(1)(h). A request “without a reasonable limitation as to subject matter or length of time represented by the record does not constitute a sufficient request.” *Id.* The public records law does not impose such heavy burdens on a record custodian that normal functioning of the office would be severely impaired, and does not require expenditure of excessive amounts of time and resources to respond to a public records request. *Schopper v. Gehring*, 210 Wis. 2d 208, 213, 565 N.W.2d 187 (Ct. App. 1997); *State ex rel. Gehl v. Connors*, 2007 WI App 238, ¶ 17, 306 Wis. 2d 247, 742 N.W.2d 530.

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

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. It is often mutually beneficial for a requester and an authority to work with each other regarding a request. This can provide for a more efficient processing of a request by the authority while ensuring that the requester receives the records that he or she seeks. If a request is broad or lacks a timeframe, it may be beneficial for the requester to clarify the request. Certainly, a requester may always submit another request if he or she desires additional records.

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). Attorney work product is another 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.

The attorney-client privilege, Wis. Stat. § 905.03, does provide sufficient grounds to deny access without resorting to the public records balancing test. *George*, 169 Wis. 2d at 582; *Wisconsin Newspress*, 199 Wis. 2d at 782-83. Therefore, an authority may deny a records request if the records fall within the attorney-client privilege. The information you provided, however, 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).

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

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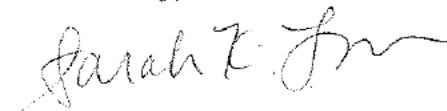
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DOJ appreciates your concern. We are dedicated to the work necessary to preserve Wisconsin's proud tradition of open government. Thank you for your correspondence.

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

Sincerely,



Sarah K. Larson
Assistant Attorney General
Office of Open Government

SKL:amh:lah

cc: Mayville School District Superintendent Scott Sabol



STATE OF WISCONSIN
DEPARTMENT OF JUSTICE

Josh Kaul
Attorney General

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Sarah K. Larson
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March 28, 2019

Donta Willis #491653
Milwaukee Secure Detention Facility
Post Office Box 05911
Milwaukee, WI 53205

Dear Mr. Willis:

The Wisconsin Department of Justice (DOJ) is in receipt of your correspondence, dated July 20, 2018, regarding your public records request to the Department of Corrections (DOC). You wrote, "I've appealed Assistant Chief, Peter Marik's decision to deny me access to public records to Division Administrator Lance Wiersma, and the Office of Management Director both located in Madison, WI." You asked, "what specific open government law grants me the right to actual and factual public record(s) . . . and what administrative penalty one (a state government official) faces if they were to disregard a citizen of Wisconsin's rights . . . and not conduct business with transparency in a state government?"

DOJ is also in receipt of your correspondence, dated August 14, 2018, to former Attorney General Brad Schimel in which you wrote you were "appealing a Record Request Appeal Decision" from the DOC. You also wrote that you made a public records request to DOJ's Crime Information Bureau for "warrant information" and that the records provided to you by Assistant Attorney General Paul Ferguson "were found to be fraudulent."

The Attorney General and DOJ's Office of Open Government appreciate your concern about your public records request to the DOC. However, DOJ cannot offer you legal advice or counsel concerning your request to the DOC as DOJ may be called upon to represent the DOC. While we cannot offer you legal advice or counsel regarding this matter, we can provide you with some general information regarding the Wisconsin Public Records Law, Wis. Stat. §§ 19.31 to 19.39, that you may find helpful.

First, it should be noted that, as an incarcerated person, your right to request records under the public records law is limited to records that contain specific references to yourself or your minor children and are otherwise accessible to you by law. *See* Wis. Stat. § 19.32(1c) and (3). If the records you requested pertain to you, you may request them pursuant to the public records law. However, under the public records law, certain information may still be redacted from the records.

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

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

committed or incarcerated, an action for mandamus arising under the public records law must be commenced within three years after the cause of action accrues. *See* Wis. Stat. § 893.90(2).

Alternatively, the requester may submit a written request for the district attorney of the county where the record is found, or the Attorney General, to file an action for mandamus seeking release of the requested records. 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. As explained, DOJ may be called upon to represent the DOC. Therefore, although you did not specifically request the Attorney General to file an action for mandamus, we respectfully decline to pursue an action for mandamus on your behalf.

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

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

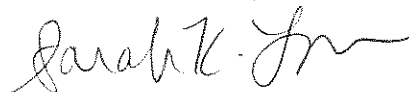
<http://www.wisbar.org/forpublic/ineedalawyer/pages/lris.aspx>

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

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

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

Sincerely,



Sarah K. Larson
Assistant Attorney General
Office of Open Government

SKL:amh:lah

Cc: Chief Legal Counsel, Department of Corrections