

2019 2nd Quarter Correspondence

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April 9, 2019

Bryan Stutzki
[REDACTED]
New Berlin, WI 53151

Dear Mr. Stutzki:

The Wisconsin Department of Justice (DOJ) is in receipt of your correspondence, dated August 27, 2018, in which you wrote, "I filed an open records request with the city of Cudahy on May 24, 2018 requesting specific information on two invoices they sent to me. I did not get all of the information I requested."

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).

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 he or she seeks in a timely fashion.

The public records law "does not require an authority to provide requested information if no record exists, or to simply answer questions about a topic of interest to the requester." *Journal Times v. City of Racine Board of Police and Fire Commissioners*, 2015 WI 56, ¶ 55 (citation omitted). 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.

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. Although you did not specifically request the Attorney General to file an action for mandamus, nonetheless, we respectfully decline to pursue an action for mandamus on your behalf at this time.

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

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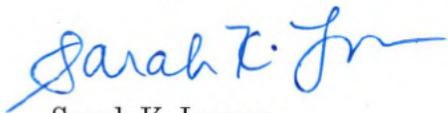
The Attorney General and DOJ's Office of Open Government are committed to increasing government openness and transparency, and DOJ endeavors to offer guidance in these areas. DOJ offers several open government resources through its website (<https://www.doj.state.wi.us/office-open-government/office-open-government>).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

Bryan Stutzki
April 9, 2019
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The information provided in this letter does not constitute an informal or formal opinion of the Attorney General pursuant to Wis. Stat. § 165.015(1).

Sincerely,



Sarah K. Larson
Assistant Attorney General
Office of Open Government

SKL:amh:lah



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April 9, 2019

Melissa Smiley
melissa.smiley@wisc.edu

Dear Ms. Smiley:

The Wisconsin Department of Justice (DOJ) is in receipt of your correspondence, dated September 4, 2018, in which you included responses by the Kettle Moraine School District to several public records requests. You asked, "Could you please review and comment as to if the fees they are requesting are appropriate and typical?" You also wrote that "parents are receiving threats of being sued in state court and pursuing restraining orders for requests." Lastly, you asked if parents can remain anonymous when placing public records requests.

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 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.

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 attorney for the Kettle Moraine School District on this letter to make her aware of your concerns.

In your correspondence you next wrote that "parents are receiving threats of being sued in state court and pursuing restraining orders for requests." The Wisconsin Supreme Court previously recognized that, when a records custodian's decision to release records implicates the reputational or privacy interests of an individual, the records custodian must notify the subject of the intent to release, and allow a reasonable time for the subject of the record to appeal the records custodian's decision to circuit court. *Woznicki v. Erickson*, 202 Wis. 2d 178, 189-94, 549 N.W.2d 699 (1996), *superseded by statute*, Wis. Stat. §§ 19.356

and 19.36(10)-(12). Succeeding cases applied the *Woznicki* doctrine to all personnel records of public employees. *Klein v. Wis. Res. Ctr.*, 218 Wis. 2d 487, 496-97, 582 N.W.2d 44 (Ct. App. 1998); *Milwaukee Teachers' Educ. Ass'n v. Milwaukee Bd. of Sch. Dirs.*, 227 Wis. 2d 779, 596 N.W.2d 403 (1999).

Wisconsin Stat. § 19.356 now codifies and clarifies pre-release notice requirements (sometimes still called the "*Woznicki* notice") for specific kinds of records, and the statute also codifies judicial review procedures. By enacting Wis. Stat. § 19.356, the legislature sought to limit the extent to which notice was required while recognizing an interest in the privacy and reputation of certain record subjects.

Under the public records law, the notice required by Wis. Stat. § 19.356(2)(a) is limited to three categories of records. Pertinent to your inquiry, notice is required prior to releasing records containing information relating to an "employee" created or kept by an authority and that are the result of an investigation into a disciplinary matter involving the "employee" or possible employment-related violation by the employee of a statute, ordinance, rule, regulation, or policy of the employer. Wis. Stat. § 19.356(2)(a)1. After receiving notice that the authority intends to release records, a record subject may seek to challenge the authority's decision to release the records by initiating a circuit court action seeking an order to restrain the authority from providing access to the records pursuant to Wis. Stat. § 19.356(3)-(5).

The authority may not provide access to the records for a period of 12 days after the notice is sent. Wis. Stat. § 19.356(5). If an action is not timely filed with the court to restrain the release of the records pursuant to Wis. Stat. § 19.356(4), the records may be released on the thirteenth business day after the date the notice is sent. If an action is filed with the court, the records may not be released until judicial proceedings have concluded. For further information regarding notices, please see Wis. Stat. § 19.356, and also see pages 50-56 of the Public Records Law Compliance Guide available through DOJ's website (<https://www.doj.state.wi.us/office-open-government/office-open-government>).

Lastly, in your correspondence you asked if parents can remain anonymous when placing public records requests. 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).

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.

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'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.

Melissa Smiley
April 9, 2019
Page 5

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Sincerely,



Sarah K. Larson
Assistant Attorney General
Office of Open Government

SKL:amh:lah

Cc: Kristi Foy, Attorney for Kettle Moraine School District



STATE OF WISCONSIN
DEPARTMENT OF JUSTICE

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April 11, 2019

Anonymous
Ksuhow!@gmail.com

Dear Anonymous:

The Wisconsin Department of Justice (DOJ) is in receipt of your correspondence, dated September 12, 2018, in which you requested DOJ “look into Milwaukee Area Technical College not responding to open records requests.” You also requested “an internal audit be done on Milwaukee Area Technical College’s administration.”

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.

The Office of Open Government works to increase government openness and transparency and we do so with a focus on the Wisconsin public records law and open meetings law. While a portion of your correspondence pertained to the public records law, it also discussed a matter outside the scope of the Office of Open Government’s responsibilities. As a result, we are unable to offer you assistance or insight regarding your request for an internal audit.

Although I cannot offer you legal advice or counsel regarding your public records issue because DOJ may be called upon to represent the Milwaukee Area Technical College, I would like to offer you some general information about the public records law 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. Statutes, case law, and the public records law balancing test, which weighs the public interest in disclosure of a record against the public interest in nondisclosure, provide such exceptions.

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

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

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

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

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

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April 23, 2019

Steven Bach
[REDACTED]
Baraboo, WI 53913

Dear Mr. Bach:

The Wisconsin Department of Justice (DOJ) is in receipt of your correspondence, dated September 12, 2018 and October 17, 2018, in which you wrote, "I believe that the events that occurred at the August 21, 2018 meeting of the Sauk County Board raise serious questions that the Wisconsin Open Meetings Law may have been violated." You stated that the Board removed a resolution from the agenda "because a committee had rescinded it less than an hour before" the meeting. You wrote, "It is my understanding that the Wisconsin Open Meetings Law requires a minimum of a 24 hour public notice when an agenda is changed." You requested that DOJ "investigate this matter."

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

Public notice of every meeting of a governmental body must be provided at least 24 hours prior to the commencement of such a meeting. Wis. Stat. § 19.84(3). When calculating the 24-hour notice period, Wis. Stat. § 990.001(4)(a) requires that Sundays and legal holidays shall be excluded. If, for good cause, such notice is impossible or impractical, shorter notice may be given, but in no case may the notice be less than two hours in advance of the meeting. Wis. Stat. § 19.84(3). Furthermore, the law requires separate public notice

for each meeting of a governmental body at a time and date “reasonably proximate to the time and date of the meeting.” Wis. Stat. § 19.84(4).

Public notice of a meeting must provide the “time, date, place and subject matter of the meeting, including that intended for consideration at any contemplated closed session.” Wis. Stat. § 19.84(2). The notice must be in such a form so as to reasonably apprise the public of this information. *Id.* For additional information on the notice requirements of the open meetings law, please see pages 13 through 18 of the Open Meetings Law Compliance Guide available through DOJ’s website (<https://www.doj.state.wi.us/office-open-government/office-open-government>).

A governmental body, when conducting a meeting, is free to discuss any aspect of any subject identified in the public notice of that meeting, as well as issues reasonably related to that subject, but may not address any topics that are not reasonably related to the information in the notice. *State ex rel. Buswell v. Tomah Area Sch. Dist.*, 2007 WI 71, ¶ 34, 301 Wis. 2d 178, 732 N.W.2d 804. There is no requirement, however, that a governmental body must follow the agenda in the order listed on the meeting notice, unless a particular agenda item has been noticed for a specific time. Stencil Correspondence (Mar. 6, 2008). Nor is a governmental body required to actually discuss every item contained in the public notice. It is reasonable, in appropriate circumstances, for a body to cancel a previously planned discussion or postpone it to a later date. Black Correspondence (Apr. 22, 2009); Krueger Correspondence (Feb. 13, 2019).

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

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

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

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

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

Under the open meetings law, the district attorney cannot act to enforce the law unless he or she receives a verified complaint. Therefore, to ensure the district attorney has the authority to enforce the law, you must file a verified complaint. This also ensures that you have the option to file suit, as explained in the previous paragraph, should the district attorney refuse or otherwise fail to commence an enforcement action. For further information, please see pages 29-30 of the Open Meetings Law Compliance Guide located on DOJ's website (<https://www.doj.state.wi.us/office-open-government/office-open-government>), and Wis. Stat. § 19.97. Appendix B of the Open Meetings Law Compliance Guide provides a sample template for a verified open meetings law complaint.

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

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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.

Steven Bach
April 23, 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 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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April 24, 2019

Carrie Arneson
clarneson@hotmail.com

Dear Ms. Arneson:

The Wisconsin Department of Justice (DOJ) is in receipt of your correspondence, dated September 9, 2018, regarding your open meetings law concerns in the Village of Waunakee. You wrote, "In regards to the public noticing relating to zoning, the Village has routinely omitted information such as project name, location address, and new zoning type in public notices." You provided links to various board agendas, and asked if those agendas "constitute adequate public notice." You also asked if the Board properly went into closed session on May 21, 2018 "to discuss the development agreement and associated funds."

The Attorney General and DOJ's Office of Open Government (OOG) are committed to increasing government openness and transparency, and DOJ endeavors to offer guidance in these areas with a focus on the Wisconsin Open Meetings Law, Wis. Stat. §§ 19.81 to 19.98, and the Wisconsin Public Records Law, Wis. Stat. §§ 19.31 to 19.39. Based on the information you provided in your correspondence, it appears that some of the subject matter of your correspondence—for example, public hearings under zoning ordinances—is outside this scope. Other laws outside of the open meetings law may set forth the various types of notices and public hearings required for meetings of a governmental body, but I cannot advise you on those matters, as those matters fall outside the scope of the OOG's authority and responsibilities. However, to the extent your correspondence concerns the open meetings law, I can provide 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).

Regarding notice, the open meetings law requires that public notice of all meetings of a governmental body must be given by communication from the governmental body's chief presiding officer or his or her designee to the following: (1) the public; (2) to news media who have filed a written request for such notice; and (3) to the official newspaper (designated under Wis. Stat.

§§ 985.04, 985.05, and 985.06) or, if there is no such paper, to a news medium likely to give notice in the area. Wis. Stat. § 19.84(1).

The open meetings law provides for the level of specificity required in agenda items for open meetings as well as the timing for releasing agendas in order to provide proper notice. Wis. Stat. § 19.84(2). Public notice of every meeting of a governmental body must be provided at least 24 hours prior to the commencement of such a meeting. Wis. Stat. § 19.84(3). If, for good cause, such notice is impossible or impractical, shorter notice may be given, but in no case may the notice be less than two hours in advance of the meeting. *Id.* Furthermore, the law requires separate public notice for each meeting of a governmental body at a time and date “reasonably proximate to the time and date of the meeting.” Wis. Stat. § 19.84(4).

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

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

The open meetings law does not expressly require that the notice indicate whether a meeting will be purely deliberative or if action will be taken. *State ex rel. Olson v. City of Baraboo Joint Review Bd.*, 2002 WI App 64, ¶ 15, 252 Wis. 2d 628, 643 N.W.2d 796. But the information in the notice must be sufficient to alert the public to the importance of the meeting, so that they can make an informed decision whether to attend. *Id.* Thus, in some circumstances, a failure to expressly state whether action will be taken at a meeting could be a violation of the open meetings law. *Id.* See also Herbst Correspondence (July 16, 2008). For additional information on the notice requirements of the open meetings law, please see pages 13 through 19 of the Open Meetings Law Compliance Guide available through DOJ’s website (<https://www.doj.state.wi.us/office-open-government/office-open-government>).

Whether the notices you identified in your correspondence were sufficient under the open meetings law would depend on a reasonableness standard and would take into account a variety of factors. *Buswell*, 2007 WI 71, ¶¶ 27–29. Using the limited information provided in your correspondence, a court might conclude that the notices in question were reasonably likely to apprise the public of the subject matters to be discussed at the meetings, because they listed the zoning projects to be discussed, including locations, basic descriptions of the properties, and some addresses. *Id.* ¶¶ 36–37, 41. Therefore, a court might conclude that the notices were not misleading

or vague under the open meetings law. *Id.* However, a court would also need to analyze all other relevant facts before deciding whether the notice in question was reasonable. *Id.*

In your correspondence, you suggested that the notices in question might have been deficient, because they lacked “zoning information,” “included rezoning items without the old and new zoning specified,” and failed “to specify what the proposed new zoning would be” on various projects. There may be requirements about these zoning matters contained in other laws, but again, I cannot advise you on those matters, as they fall outside the scope of the OOG’s authority and responsibilities. Under the open meetings law, a court might decide that, by reading the notices, the public would still be reasonably apprised that the board would be discussing the zoning of those particular properties, and that the burden of providing more specific or multi-faceted zoning information would be too great. *Buswell*, 2007 WI 71, ¶¶ 42–45. Therefore, depending on the circumstances, a court might decide that providing that level of specificity was not required if it was too burdensome or unreasonable, even though it might have been beneficial or helpful to the public to include that level of detail in the notice. *Id.*

In your correspondence, you also asked whether the notice for the May 21, 2018 meeting was sufficient, when the notice stated that the board wanted to “[d]iscuss and take action on Octopi Development Agreement and Municipal Revenue Obligation.” Again, this description of the particular project may or may not have been reasonably likely to apprise the public of the subject matter to be discussed at that meeting. However, the limited information provided in your correspondence makes it difficult to properly evaluate, because such an inquiry is very fact-intensive. *Buswell*, 2007 WI 71, ¶¶ 27–29. A court’s determination of the matter would depend, in part, on whether the public in your community would understand what the “Octopi Development” was, without any further description. *Id.* ¶¶ 42–45. You have indicated that there was “vigorous public interest” in this development project. Therefore, a court might find that the public would be reasonably apprised of the subject matter of the meeting, based on this description alone, but again, the court’s determination of the reasonableness of the notice would depend on the court’s analysis of all the relevant facts. *Id.*

You also asked whether the board appropriately closed the May 21, 2018 meeting under the open meetings law. Regarding closed sessions, Wis. 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.

Here, the May 21, 2018 meeting notice cited Wis. Stat. § 19.85(1)(e). Under that subsection of the open meetings law, a closed session is authorized for “[d]eliberating or negotiating the purchasing of public properties, the investing of public funds, or conducting other specified public business, whenever competitive or bargaining reasons require a closed session.” Wis. Stat. § 19.85(1)(e). Thus, the Wis. Stat. § 19.85(1)(e) exemption is not limited to deliberating or negotiating the purchase of public property or the investing of public funds, because the exemption also authorizes a closed session for “conducting other specified public business.” For example, the Attorney General has determined that the exemption authorized a school board to convene in closed session to develop negotiating strategies for collective bargaining. 66 Op. Att’y Gen. 93, 96-97 (1977). Therefore, going into closed session to “discuss the development agreement and associated funds” may have been permissible under one or more of the Wis. Stat. § 19.85(1)(e) exemption, including “conducting other specific public business,” but there is insufficient information in your correspondence to thoroughly evaluate.

However, it is important to note two things. First, exemptions authorizing a governmental body to meet in closed session should be construed narrowly. Governmental officials must keep in mind that this exemption is restrictive, not expansive. 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. Second, a closed session under this exemption is only permissible “whenever competitive or bargaining reasons require a closed session.” The use of the word “require” in Wis. Stat. § 19.85(1)(e) limits that exemption to situations in which competitive or bargaining reasons leave a governmental body with no option other than to close the meeting. *State ex rel. Citizens for Responsible Dev. v. City of Milton*, 2007 WI App 114, ¶ 14, 300 Wis. 2d 649, 731 N.W.2d 640. When a governmental body seeks to convene in closed session under Wis. Stat. § 19.85(1)(e), the burden is on the body to show that competitive or bargaining interests require closure. *Id.* ¶¶ 6-8.

Under the open meetings law, the Attorney General and the district attorneys have authority to enforce the law. Wis. Stat. § 19.97(1). Generally, the Attorney General may elect to prosecute complaints presenting novel issues of law that coincide with matters of statewide concern. You did not specifically request the Attorney General to file an enforcement action; nonetheless, we respectfully decline to pursue an enforcement action at this time. However, by way of a copy of this letter, I am making the Village aware of your concerns.

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

even after 20 days have passed.) Such actions by an individual must be commenced within two years after the cause of action accrues. Wis. Stat. § 893.93(2)(a).

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

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

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

Sincerely,



Sarah K. Larson
Assistant Attorney General
Office of Open Government

SKL:amh:lah

Cc: Administrator, Village of Waunakee



STATE OF WISCONSIN
DEPARTMENT OF JUSTICE

Josh Kaul
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April 24, 2019

Sam Kaufmann
Badgersam0209@gmail.com

Dear Mr. Kaufmann:

The Wisconsin Department of Justice (DOJ) is in receipt of your correspondence, dated September 7, 2018, regarding your open meetings law concerns in the Village of Waunakee. Your questions pertain to the notices of the following meetings: 1) the Village of Waunakee Plan Commission meeting on September 10, 2018; and 2) the Waunakee-Westport Join Plan Commission meeting on September 11, 2018.

The Attorney General and DOJ's Office of Open Government (OOG) are committed to increasing government openness and transparency, and DOJ endeavors to offer guidance in these areas with a focus on the Wisconsin Open Meetings Law, Wis. Stat. §§ 19.81 to 19.98, and the Wisconsin Public Records Law, Wis. Stat. §§ 19.31 to 19.39. Other laws outside of the open meetings law may set forth the various types of notices and public hearings required for meetings of a governmental body, but I cannot advise you on those matters, as those matters fall outside the scope of the OOG's authority and responsibilities. However, to the extent your correspondence concerns the open meetings law, I can provide some information that you may find helpful.

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

The law requires that public notice of all meetings of a governmental body must be given by communication from the governmental body's chief presiding officer or his or her designee to the following: (1) the public; (2) to news media who have filed a written request for such notice; *and* (3) to the official newspaper (designated under Wis. Stat. §§ 985.04, 985.05, and 985.06) or, if there is no such paper, to a news medium likely to give notice in the area. Wis. Stat. § 19.84(1)(b). In addition to these three requirements, other statutes may also set forth the type of notice required for a meeting of a governmental body, but as already noted, I cannot advise you on other statutes that fall outside of the scope of the OOG's authority and responsibilities. In general, however, when a specific statute prescribes the type of meeting notice a governmental body must

give, the body must comply with the requirements of that statute as well as the notice requirements of the open meetings law. Wis. Stat. § 19.84(1)(a).

The open meetings law provides for the level of specificity required in agenda items for open meetings as well as the timing for releasing agendas in order to provide proper notice. Wis. Stat. § 19.84(2). Public notice of every meeting of a governmental body must be provided at least 24 hours prior to the commencement of such a meeting. Wis. Stat. § 19.84(3). If, for good cause, such notice is impossible or impractical, shorter notice may be given, but in no case may the notice be less than two hours in advance of the meeting. *Id.* Furthermore, the law requires separate public notice for each meeting of a governmental body at a time and date “reasonably proximate to the time and date of the meeting.” Wis. Stat. § 19.84(4).

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

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

The open meetings law does not expressly require that the notice indicate whether a meeting will be purely deliberative or if action will be taken. *State ex rel. Olson v. City of Baraboo Joint Review Bd.*, 2002 WI App 64, ¶ 15, 252 Wis. 2d 628, 643 N.W.2d 796. But the information in the notice must be sufficient to alert the public to the importance of the meeting, so that they can make an informed decision whether to attend. *Id.* Thus, in some circumstances, a failure to expressly state whether action will be taken at a meeting could be a violation of the open meetings law. *Id.* See also Herbst Correspondence (July 16, 2008). For additional information on the notice requirements of the open meetings law, please see pages 13 through 19 of the Open Meetings Law Compliance Guide available through DOJ’s website (<https://www.doj.state.wi.us/office-open-government/office-open-government>).

I will now address the concerns you have outlined in your correspondence. First, you expressed various concerns about the specificity of the notice for the September 10, 2018 meeting. As noted above, whether a notice is sufficient under the open meetings law would depend on a reasonableness standard and would take into account a variety of factors. *Buswell*, 2007 WI 71, ¶¶ 27–29. Using the limited information provided in your correspondence, a court might conclude that the notice in question was reasonably likely to apprise the public of the subject matters to be discussed at the meetings, because it listed the zoning projects to be discussed, including locations, basic descriptions of the properties, and some addresses. *Id.* ¶¶ 36–37, 41. Therefore, a court might

conclude that the notice was not misleading or vague under the open meetings law. *Id.* However, a court would also need to analyze all other relevant facts before deciding whether the notice in question was reasonable. *Id.*

Your correspondence suggested that the September 10, 2018 notice might be deficient because it did not specify “what the new zoning would be.” There may be requirements about these zoning matters contained in other laws, but again, I cannot advise you on those matters, as they fall outside the scope of the OOG’s authority and responsibilities. Under the open meetings law, a court might decide that, by reading the notice, the public would still be reasonably apprised that the governmental body would be discussing the zoning of those particular properties, and that the burden of providing more specific or multi-faceted zoning information would be too great. *Buswell*, 2007 WI 71, ¶¶ 42–45. Therefore, depending on the circumstances, a court might decide that providing that level of specificity was not required if it was too burdensome or unreasonable, even though it might have been beneficial or helpful to the public to include that level of detail in the notice. *Id.* However, the limited information provided in your correspondence makes it difficult to properly evaluate because such an inquiry is very fact-intensive. *Id.* ¶¶ 27–29.

Next, with respect to a specific proposed project that was listed on the notice for the September 10, 2018 meeting, you expressed concerns that the “majority of citizens received no notification of the meeting where they could learn about the project.” Similarly, you allege that the “legal notice” and the “newspaper legal notice” for the September 11, 2018 meeting contained no notice of various projects, and made “no mention” of various “meeting agenda items.” You asked, “Is this lack of noticing for items other than the public hearings allowed?” From the limited information you provided, it is unclear to me whether you are asking about the notices to the public, newspaper notices, or both. It is also unclear from your correspondence whether you are alleging that there were no public notices posted, or whether you are saying that citizens did not directly receive notices from the governmental body—for example, in the mail or via email.

Generally, however, it is important to note that notice to the public, notice to news media, and notice to the official newspaper are separate requirements. First, as to the public notice, the chief presiding officer may give notice of a meeting to the public by posting the notice in one or more places likely to be seen by the general public. *See* 66 Op. Att’y Gen. 93, 95 (1977). As a general rule, the Attorney General has advised that the governmental body post notices at three different locations within the jurisdiction that the governmental body serves. *Id.* Alternatively, the chief presiding officer may give notice to the public by paid publication in a news medium likely to give notice in the jurisdictional area the body serves. *See* 63 Op. Att’y Gen. 509, 510–11 (1974). If the presiding officer gives notice in this manner, he or she must ensure that the notice is actually published. Meeting notices may also be posted at a governmental body’s website as a supplement to other public notices, but web posting should not be used as a substitute for other methods of notice. *See* Peck Correspondence (Apr. 17, 2006).

Second, as to the notice to the news media, the chief presiding officer must give notice of each meeting to members of the news media who have submitted a written request for notice. Wis. Stat. § 19.84(1)(b); *State ex rel. Lawton v. Town of Barton*, 2005 WI App 16, ¶¶ 3–4, 7, 278 Wis. 2d 388, 692 N.W.2d 304. Although this notice may be given in writing or by telephone, it is preferable to give notice in writing to help ensure accuracy and so that a record of the notice exists. *See* 65 Op. Att’y Gen. Preface, v–vi (1976); 65 Op. Att’y Gen. 250, 251 (1976). Governmental bodies cannot

charge the news media for providing statutorily required notices of public meetings. *See* 77 Op. Att'y Gen. 312, 313 (1988).

Third, as to the notice to the newspaper, the chief presiding officer must give notice to the officially designated newspaper or, if none exists, to a news medium likely to give notice in the area. Wis. Stat. § 19.84(1)(b). The governmental body is not required to pay for, and the newspaper is not required to publish, such notice. *See* 66 Op. Att'y Gen. 230, 231 (1977). As noted above, however, the requirement to provide notice to the officially designated newspaper is distinct from the requirement to provide notice to the public. If the chief presiding officer chooses to provide notice to the public by paid publication in a news medium, the officer must ensure that the notice is in fact published. *See* Mallin Correspondence (Mar. 14, 2016).

In short, the open meetings law requires that "notice of all meetings of a governmental body must be given by communication from the governmental body's chief presiding officer or designee" to the following: 1) the public, 2) news media who have filed a request for such notice, and 3) the official newspaper. Wis. Stat. § 19.84(1)(b). All three requirements are separate, and all of the notices must be sufficient.

Under the open meetings law, the Attorney General and the district attorneys have authority to enforce the law. Wis. Stat. § 19.97(1). Generally, the Attorney General may elect to prosecute complaints presenting novel issues of law that coincide with matters of statewide concern. You did not specifically request the Attorney General to file an enforcement action; nonetheless, we respectfully decline to pursue an enforcement action at this time. However, by way of a copy of this letter, I am making the Village aware of your concerns.

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

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

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

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

Sincerely,



Sarah K. Larson
Assistant Attorney General
Office of Open Government

SKL:amh:lah

Cc: Administrator, Village of Waunakee



STATE OF WISCONSIN
DEPARTMENT OF JUSTICE

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April 24, 2019

Ann Lewandowski
[REDACTED]
Waunakee, WI 53597

Dear Ms. Lewandowski:

The Wisconsin Department of Justice (DOJ) is in receipt of your correspondence, dated September 11, 2018, January 2, 2019, and February 20, 2019, regarding your open meetings law concerns in the Village of Waunakee. I will address all three of your letters to DOJ in this letter.

In your September 11, 2019 correspondence, you wrote that recently “the process has changed for publically [sic] noticing the meetings.” You “have been told that the village does not need to publish a hearing notice because the hearings are considered ‘curtesy’ at the planning commission level.” You also noted you had various “public hearing question[s] on the proposed ordinance changes,” including whether the public could expect an opportunity to “comment on each ordinance change individually” or whether they could be “bundled into a single hearing.”

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 Office of Open Government 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. Based on the limited information contained in your September 11, 2019 correspondence, it appears that certain issues—for example, public hearings under zoning laws and procedures for ordinance changes—fall outside of this scope. Consequently, I cannot advise you on those matters, as they fall outside of the scope of the OOG’s authority and responsibilities. However, to the extent your correspondence concerns the Wisconsin Open Meetings Law, I can provide 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 applies to every “meeting” of a “governmental body.” Wis. Stat. § 19.83. An entity that fits within the definition of governmental body must comply with the

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

The law requires that public notice of all meetings of a governmental body must be given by communication from the governmental body’s chief presiding officer or his or her designee to the following: (1) the public; (2) to news media who have filed a written request for such notice; and (3) to the official newspaper (designated under Wis. Stat. §§ 985.04, 985.05, and 985.06) or, if there is no such paper, to a news medium likely to give notice in the area. Wis. Stat. § 19.84(1). In addition to these requirements, other statutes may also set forth the type of notice required for a meeting of a governmental body, but as already noted, I cannot advise you on other statutes that fall outside of the scope of the OOG’s authority and responsibilities. In general, however, when a specific statute prescribes the type of meeting notice a governmental body must give, the body must comply with the requirements of that statute as well as the notice requirements of the open meetings law. Wis. Stat. § 19.84(1)(a).

It is important to note that notice to the public, notice to news media, and notice to the official newspaper are separate requirements. First, as to the public notice, the chief presiding officer may give notice of a meeting to the public by posting the notice in one or more places likely to be seen by the general public. *See* 66 Op. Att’y Gen. 93, 95 (1977). As a general rule, the Attorney General has advised that the governmental body post notices at three different locations within the jurisdiction that the governmental body serves. *Id.* Alternatively, the chief presiding officer may give notice to the public by paid publication in a news medium likely to give notice in the jurisdictional area the body serves. *See* 63 Op. Att’y Gen. 509, 510–11 (1974). If the presiding officer gives notice in this manner, he or she must ensure that the notice is actually published. Meeting notices may also be posted at a governmental body’s website as a supplement to other public notices, but web posting should not be used as a substitute for other methods of notice. *See* Peck Correspondence (Apr. 17, 2006).

Second, as to the notice to the news media, the chief presiding officer must give notice of each meeting to members of the news media who have submitted a written request for notice. Wis. Stat. § 19.84(1)(b); *State ex rel. Lawton v. Town of Barton*, 2005 WI App 16, ¶¶ 3–4, 7, 278 Wis. 2d 388, 692 N.W.2d 304. Although this notice may be given in writing or by telephone, it is preferable to give notice in writing to help ensure accuracy and so that a record of the notice exists. *See* 65 Op. Att’y Gen. Preface, v–vi (1976); 65 Op. Att’y Gen. 250, 251 (1976). Governmental bodies cannot charge the news media for providing statutorily required notices of public meetings. *See* 77 Op. Att’y Gen. 312, 313 (1988).

Third, as to the notice to the newspaper, the chief presiding officer must give notice to the officially designated newspaper or, if none exists, to a news medium likely to give notice in the area. Wis. Stat. § 19.84(1)(b). The governmental body is not required to pay for, and the newspaper is not required to publish, such notice. *See* 66 Op. Att’y Gen. 230, 231 (1977). As noted above, however, the requirement to provide notice to the officially designated newspaper is distinct from the requirement to provide notice to the public. If the chief presiding officer chooses to provide

notice to the public by paid publication in a news medium, the officer must ensure that the notice is in fact published. *See* Mallin Correspondence (Mar. 14, 2016).

The open meetings law also provides for the level of specificity required in agenda items for open meetings as well as the timing for releasing agendas in order to provide proper notice. Wis. Stat. § 19.84(2). Public notice of every meeting of a governmental body must be provided at least 24 hours prior to the commencement of such a meeting. Wis. Stat. § 19.84(3). If, for good cause, such notice is impossible or impractical, shorter notice may be given, but in no case may the notice be less than two hours in advance of the meeting. *Id.* Furthermore, the law requires separate public notice for each meeting of a governmental body at a time and date “reasonably proximate to the time and date of the meeting.” Wis. Stat. § 19.84(4).

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

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

The open meetings law does not expressly require that the notice indicate whether a meeting will be purely deliberative or if action will be taken. *State ex rel. Olson v. City of Baraboo Joint Review Bd.*, 2002 WI App 64, ¶ 15, 252 Wis. 2d 628, 643 N.W.2d 796. But the information in the notice must be sufficient to alert the public to the importance of the meeting, so that they can make an informed decision whether to attend. *Id.* Thus, in some circumstances, a failure to expressly state whether action will be taken at a meeting could be a violation of the open meetings law. *Id.* *See also* Herbst Correspondence (July 16, 2008). For additional information on the notice requirements of the open meetings law, please see pages 13 through 19 of the Open Meetings Law Compliance Guide available through DOJ’s website (<https://www.doj.state.wi.us/office-open-government/office-open-government>).

Next, in your January 2, 2019 correspondence you wrote, “I believe our village board may have held a closed board retreat sometime in the summer” and “I cannot find any information on the subject matter.” You asked, “May local government boards hold private retreats and under which circumstances?” You also asked, “How can the public learn more about what is discussed?”

As noted above, the open meetings law applies to every meeting of a governmental body. Wis. Stat. § 19.83. A “meeting” is defined as:

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

Wis. Stat. § 19.82(2). A “convening of members” occurs when a group of members gather to engage in formal or informal government business, including discussion, decision, and information gathering. *Badke*, 173 Wis. 2d at 572.

The presence of members of a governmental body, however, does not, in itself, establish the existence of a “meeting” subject to the open meetings law. Under the so-called *Showers* test, a meeting of a governmental body exists, such that prior notice is required by law, when (1) there is a purpose to engage in government business (the purpose requirement); and (2) the number of members present is sufficient to determine the governmental body’s course of action (the numbers requirement). *State ex rel. Newspapers v. Showers*, 135 Wis. 2d 77, 102, 398 N.W.2d 154 (1987). A meeting does not exist where the members are gathered by chance or for social reasons. *Badke*, 173 Wis. 2d at 576.

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

Regarding the numbers requirement, a quorum is the minimum number of a body’s membership necessary to act. Certainly, a majority of the members of a governmental body constitutes a quorum. 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 open meetings law provides that if one-half or more of the members of a body are present at a gathering, the gathering is “rebuttably” presumed to be a “meeting” for the purpose of “exercising the responsibilities, authority, power or duties delegated to or vested in the body.” *See Wis. Stat. § 19.82(2)*. Thus, when one-half or more members convene, the burden of proof rests with the governmental body to establish that a “meeting” was *not* held—for example, by showing that the gathering was by chance or for social reasons, or by showing that the members did not discuss any subject that was within the realm of the board’s authority. *See Wis. Stat. § 19.82(2); Badke*, 173 Wis. 2d at 576; OAG 17–82 (Feb. 12, 1982); Dieck Correspondence (Sept. 12, 2007); Dobbs Correspondence (May 22, 2018).

I have insufficient information from your correspondence to evaluate whether the retreat met either the purpose requirement or the numbers requirement under the *Showers* test.

Nevertheless, if the retreat met both the purpose and numbers requirements under the *Showers* test, it is possible that it was a “meeting” subject to the open meetings law’s requirements.

Regarding the board retreat, you also asked, “How can the public learn more about what is discussed?” 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, and I cannot provide assistance regarding such subject matter.

If you would like to learn more about what was discussed at the board retreat, you could submit a public records request to the governmental body. 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.

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 “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.

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. Although you did not specifically request the Attorney General to file an action for mandamus, nonetheless, we respectfully decline to do so at this time.

Finally, in your February 20, 2019 correspondence, you asked, "can village board members and staff utilize the public comment period to make comments on items not on the agenda?" You also stated that the village board restricts public comment to items not on the agenda, and asked, "how do we encourage the board members to appropriately limit public comment" to agenda items.

Although the open meetings law requires that meetings of governmental bodies be open to the public so that citizens may attend and observe open session meetings, the open meetings law does not require a governmental body to allow members of the public to speak or actively participate in the body's meetings. Thus, while the open meetings law permits a governmental body to set aside a portion of a meeting for public comment, it does not require a body to do so. Wis. Stat. §§ 19.83(2), 19.84(2). There are some other state statutes that require governmental bodies to hold public hearings on specified matters, but I cannot advise you on those statutes, as they fall outside of the OOG's authority and responsibilities. Unless such a statute specifically applies, 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.

The Office of Open Government generally advises governmental bodies that, if citizens happen to raise subjects during a public comment period that are not properly noticed on an agenda or elsewhere, the governmental body should: 1) limit the discussion of that subject; and 2) defer any extensive deliberation to a later meeting for which more specific notice can be given. *See, e.g., Sayles Correspondence (Aug. 4, 2017); see also Buswell, 2007 WI 71, ¶ 34 (a meeting generally "cannot address topics unrelated to the information in the notice.")*. Governmental bodies may not take formal action on any subject raised in the public comment period, unless that subject is also identified in the meeting notice. *See, e.g., Sayles Correspondence (Aug. 4, 2017)*.

Under the open meetings law, the Attorney General and the district attorneys have authority to enforce the law. Wis. Stat. § 19.97(1). Generally, the Attorney General may elect to prosecute complaints presenting novel issues of law that coincide with matters of statewide concern. You did not specifically request the Attorney General to file an enforcement action;

nonetheless, we respectfully decline to pursue an enforcement action at this time. By way of a copy of this letter, however, I am making the Village aware of your concerns.

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

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

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

<http://www.wisbar.org/forpublic/inneedalawyer/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 and Public Records Law, maintains Open Meetings Law and Public Records Law Compliance Guides, 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: Administrator, Village of Waunakee



STATE OF WISCONSIN
DEPARTMENT OF JUSTICE

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April 24, 2019

Jeremy M. Blank #341893
Redgranite Correctional Institution
1006 County Road EE
Post Office Box 925
Redgranite, WI 54970-0925

Dear Mr. Blank:

The Wisconsin Department of Justice (DOJ) is in receipt of your correspondence, dated September 14, 2018, regarding your public records request for “video footage from the two cameras on F-South Unit for 09/04/2018 during 6:00 p.m. through 9:00 p.m.” You asked, “under the circumstances below, does Wisconsin’s Open Records laws (1) require me to provide a reason (or need) for the requested ‘record’; and (2) am I legally entitled to obtain the records sought?”

First, it should be noted that, as an incarcerated person, your right to request records under the Wisconsin Public Records Law, Wis. Stat. §§ 19.31 to 19.39, is limited to records that contain specific references to yourself or your minor children and are otherwise accessible to you by law. *See* Wis. Stat. § 19.32(1c) and (3). If the records you requested pertain to you, you may request them pursuant to the public records law. However, 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).

A request for records is sufficient if it is directed to an authority and reasonably describes the records or information requested. Wis. Stat. § 19.35(1)(h). 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. However, the request must be reasonably specific as to the subject matter and length of time involved. Wis. Stat. § 19.35(1)(h); *Schopper v. Gehring*, 210 Wis. 2d 208, 212-13, 565 N.W.2d 187 (Ct. App. 1997). Under the public records law, there is no requirement that a request must be made or fulfilled in person. *See* Wis. Stat. § 19.35(1)(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”).

Therefore, regarding your first question, a requestor does not need to provide a reason for the requested records when making a public records request.

Regarding your second question, as stated above, if the records you requested pertain to you, you may request them pursuant to the public records law. 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.

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

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

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. 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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Jeremy M. Blank #341893

April 24, 2019

Page 4

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

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

Sincerely,

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

Sarah K. Larson
Assistant Attorney General
Office of Open Government

SKL:amh:lah



STATE OF WISCONSIN
DEPARTMENT OF JUSTICE

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FAX 608/267-2779

April 24, 2019

Sandra Roemer
[REDACTED]
Baraboo, WI 53913

Dear Ms. Roemer:

The Wisconsin Department of Justice (DOJ) is in receipt of your correspondence, dated September 14, 2018, in which you asked, "Is a Police Department unable to delete a post on their own Facebook wall due to the requirements of Wisconsin's Open Records Law?"

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). A record includes handwritten, typed, or printed documents; maps and charts; photographs; films, and tape recordings; tapes, optical disks, and any other medium on which electronically generated or stored data is recorded or preserved; and electronic records and communications.

Whether material is a "record" subject to disclosure under the public records law depends on whether the record is created or kept in connection with the official purpose or function of the agency. See OAG I-06-09, at 2 (Dec. 23, 2009). Not everything a public official or employee creates is a public record. The substance or content, not the medium, format, or location, controls whether something is a record. *State ex rel. Youmans v. Owens*, 28 Wis. 2d 672, 679, 137 N.W.2d 470 (1965). Generally, an electronic communication regarding official government business—including a posting on an official governmental social media account, such as Facebook—will constitute a "record," and would therefore be subject to disclosure under the public records law.

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

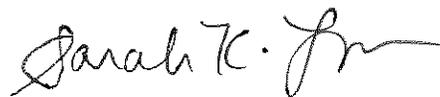
Further, records retention is a subject that is generally related to, but different from, the access requirements imposed by the public records law. The general statutory requirements for record retention by state agencies, Wis. Stat. § 16.61, and local units of government, Wis. Stat. § 19.21, apply equally to electronic records. Although the public records law addresses the duty to *disclose* records, it is not a means of enforcing the duty to *retain* records, except for the period after a request for particular records is submitted. See *State ex rel. Gehl v. Connors*, 2007 WI App 238, ¶ 15 n.4 (citing Wis. Stat. § 19.35(5)) (citation omitted). The duty to retain records is governed by the records retention statutes and record retention schedules created pursuant to those statutes. For more information on record retention, you may wish to visit the Wisconsin Public Records Board website at <http://publicrecordsboard.wi.gov/>.

If you would like to learn more about the Wisconsin Public Records Law, DOJ's Office of Open Government offers several open government resources through the Wisconsin DOJ website (<https://www.doj.state.wi.us/office-open-government/office-open-government>). DOJ provides the full Wisconsin Public Records Law, Wis. Stat. §§ 19.31 to 19.39, maintains a Public Records Law Compliance Guide, and provides a recorded webinar and associated presentation documentation.

Thank you for your correspondence. We are dedicated to the work necessary to preserve Wisconsin's proud tradition of open government. If you have additional questions or concerns, DOJ maintains a Public Records Open Meetings (PROM) help line to respond to individuals' open government questions. The PROM telephone number is (608) 267-2220.

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

Sincerely,



Sarah K. Larson
Assistant Attorney General
Office of Open Government

SKL:amh:lah



STATE OF WISCONSIN
DEPARTMENT OF JUSTICE

Josh Kaul
Attorney General

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May 9, 2019

Donna Hann

[REDACTED]
Watertown, WI 53094

Dear Ms. Hann:

The Wisconsin Department of Justice (DOJ) is in receipt of your correspondence, dated September 18, 2018, regarding your public records request to the Town of Ixonia for "a copy of the open records policy." You requested the copy be emailed to you. The town clerk responded to your request stating, "We currently do not e-mail Open Records requests per our Open Records policy" and that you could obtain a copy of the policy during regular working hours for \$0.25 per page. You wrote, "I would like to file a complaint against the Town of Ixonia's policy of charging 25 cent for any requests they receive."

With respect to fees 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). 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/office-open-government/oog-advisories-and-attorney-general-opinions>).

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. It is also helpful in resolving issues such as those related to fees. If a requester is concerned about potential fees, it may be helpful that he or she express such concerns in the request.

With respect to your questions about the manner of accessing records, 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) (emphasis added). 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).

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 would like the records in a specific format, 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).

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

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

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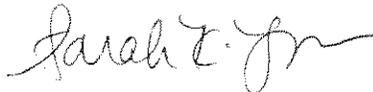
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DOJ appreciates your concern. We are dedicated to the work necessary to preserve Wisconsin's proud tradition of open government. Thank you for your correspondence.

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



STATE OF WISCONSIN
DEPARTMENT OF JUSTICE

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May 30, 2019

Erin Shannon
Post Office Box 388
Tenino, WA 98589

Dear Ms. Shannon:

The Wisconsin Department of Justice (DOJ) is in receipt of your correspondence, dated September 24, 2018, in which you asked, “does Wisconsin’s open public meetings law expressly exempt the collective bargaining negotiations between government agencies and public sector unions? If not, does Wisconsin’s law expressly specify that such collective bargaining negotiations be open to the public?”

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

The open meetings law applies to every “meeting” of a “governmental body.” Wis. Stat. § 19.83. An entity that fits within the definition of governmental body must comply with the requirements of the open meetings law. The definition of a “governmental body” includes a “state or local agency, board, commission, council, department or public body corporate and politic created by constitution, statute, ordinance, rule or order[.]” Wis. Stat. § 19.82(1). The list of entities is broad enough to include essentially any governmental entity, regardless of what it is labeled. Purely advisory bodies are subject to the law, even though they do not possess final decision making power, as long as they are created by constitution, statute, ordinance, rule, or order. *See State v. Swanson*, 92 Wis. 2d 310, 317, 284 N.W.2d 655 (1979).

The definition of “governmental body” explicitly excludes bodies that are formed for or meeting for the purpose of collective bargaining with municipal or state employees under subchapters I, IV, or V of Wis. Stat. ch. 111. A body formed exclusively for the purpose of collective bargaining is not subject to the open meetings law. Wis. Stat. § 19.82(1). A body formed for other purposes, in addition to collective bargaining, is not subject to the open meetings law when conducting collective bargaining. Wis. Stat. § 19.82(1). The Attorney General has, however, advised multi-purpose bodies to comply with the open meetings law,

including the requirements for convening in closed session, when meeting for the purpose of forming negotiating strategies to be used in collective bargaining. 66 Op. Att'y Gen. 93, 96-97 (1977). The collective bargaining exclusion does not permit any body to consider the final ratification or approval of a collective bargaining agreement under subchapters I, IV, or V of Wis. Stat. ch. 111 in closed session. Wis. Stat. § 19.85(3).

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.

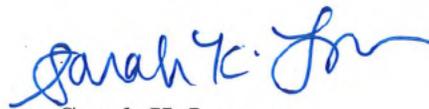
Under the open meetings law, a closed session is authorized for “[d]eliberating or negotiating the purchasing of public properties, the investing of public funds, or conducting other specified public business, whenever competitive or bargaining reasons require a closed session.” Wis. Stat. § 19.85(1)(e). The Wis. Stat. § 19.85(1)(e) exemption is not limited to deliberating or negotiating the purchase of public property or the investing of public funds. For example, the Attorney General has determined that the exemption authorized a school board to convene in closed session to develop negotiating strategies for collective bargaining. 66 Op. Att'y Gen. 93, 96-97 (1977).

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

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

The information provided in this letter is provided pursuant to Wis. Stat. § 19.98 and 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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May 30, 2019

Robert Bollig

[REDACTED]
New Lisbon, WI 53950

Dear Mr. Bollig:

The Wisconsin Department of Justice (DOJ) is in receipt of your correspondence, dated September 28, 2018, in which you requested DOJ “look into an issue that [you] had with the Juneau County Board of Governors open meeting” on January 23, 2018. You wrote, “I attempted to exercise my right as a citizen of the county to attend an open meeting of the Juneau County Board. Before I entered the room, I was arrested for disorderly conduct and told that I couldn’t be there.”

The Attorney General and DOJ’s Office of Open Government (OOG) are committed to increasing government openness and transparency. The OOG works in furtherance of this with a focus on the Wisconsin Open Meetings Law, Wis. Stat. §§ 19.81 to 19.98, and the Wisconsin Public Records Law, Wis. Stat. §§ 19.31 to 19.39. The OOG is only authorized to provide assistance within this scope. The information you provided in your correspondence is insufficient to properly evaluate the issues you raised. Additionally, based on the information you provided, it appears some of the subject matter of your correspondence is outside the OOG’s scope. Therefore, the OOG cannot provide assistance regarding your arrest. However, I can provide you with some general information about the open meetings law that you may find helpful.

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

For example, the Attorney General has concluded that members of the public not only have a right to attend open meetings, but they also have a concomitant right to take notes at such a meeting, or to do other nondisruptive acts, in order to obtain and preserve “the fullest and most complete information” of what occurred. *See* 66 OAG 318, 324-25 (1977). Further, under Wis. Stat. § 19.90, the government body “shall make a reasonable effort to

accommodate any person desiring to record, film or photograph the meeting.” That section, however, “does *not* permit recording, filming or photographing such a meeting in a manner that interferes with the conduct of the meeting or the rights of the participants.” Wis. Stat. § 19.90.

Similarly, a governmental body must meet in a facility which gives reasonable public access, and may not systematically exclude or arbitrarily refuse admittance to any individual. *State ex rel. Badke v. Vill. Board of Vill. of Greendale*, 173 Wis. 2d 553, 494 N.W.2d 408 (1993). The open meetings law, however, does not require absolute accessibility. *Id.*

As noted above, Wis. Stat. § 19.81(1) states that the public is entitled to “the fullest and most complete information regarding government affairs *as is compatible with the conduct of government business.*” Thus, while the public generally has the right to attend open session meetings under the open meetings law, other laws might apply to those who disrupt open meetings. Section 19.98 only authorizes the Attorney General to provide interpretations of the open meetings law to members of the public; therefore, I am unable to address the applicability of other laws to your situation.

Further, while Wisconsin law requires that meetings of governmental bodies be open to the public so that citizens may attend and observe open session meetings, the law does not require a governmental body to allow members of the public to speak or actively participate in the body’s meetings. While the open meetings law does allow a governmental body to set aside a portion of a meeting for public comment, it does not require a body to do so. Wis. Stat. §§ 19.83(2), 19.84(2). There are some other state statutes that require governmental bodies to hold public hearings on specified matters. Unless such a statute specifically applies, however, a governmental body is free to determine for itself whether and to what extent it will allow citizen participation at its meetings. For example, a body may choose to limit the time each citizen has to speak, and members of the public may also be asked to leave if they become disruptive or otherwise interfere with the conduct of the meeting. *See, e.g., Nix Correspondence* (Oct. 29, 2002); *Fechner Correspondence* (Mar. 22, 2018).

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

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

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

Lawyer Referral and Information Service
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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 is provided pursuant to Wis. Stat. § 19.98 and does not constitute an informal or formal opinion of the Attorney General pursuant to Wis. Stat. § 165.015(1).

Sincerely,



Sarah K. Larson
Assistant Attorney General
Office of Open Government

SKL:amh:lah



STATE OF WISCONSIN
DEPARTMENT OF JUSTICE

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Attorney General

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FAX (608) 267-2779

June 4, 2019

Mary Lou Peters

[REDACTED]
Howards Grove, WI 53083

Dear Ms. Peters:

The Wisconsin Department of Justice (DOJ) is in receipt of your October 15, 2018 correspondence in which you wrote, "I am appealing the enclosed denial to you with copies of all paperwork." The Department of Corrections (DOC) denied your public records request for "the actual confidential informant statements" regarding your son and denied your appeal of their decision.

The Attorney General and DOJ's Office of Open Government appreciate your concern about this issue. DOJ cannot offer you legal advice or counsel concerning this matter as DOJ may be called upon to represent DOC. 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).

Law enforcement agencies, including the DOC, must withhold access to records involving confidential informants. Wis. Stat. § 19.36(8)(b). "Informant" includes someone giving information under circumstances "in which a promise of confidentiality would reasonably be implied." Wis. Stat. § 19.36(8)(a)1. If a record is opened for inspection, the

records custodian must delete any information that would identify the informant. Wis. Stat. § 19.36(8)(b). If no portion of the record can be disclosed without identifying the confidential informant, the records custodian may withhold the record in its entirety. *Id.*

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 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 DOC. 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.

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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Mary Lou Peters
June 4, 2019
Page 3

the full Wisconsin public records law, maintains a Wisconsin 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 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,



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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Sarah K. Larson
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June 4, 2019

Bryan Polcyn
WITI-TV Milwaukee
bryan.polcyn@fox6now.com

Dear Mr. Polcyn:

This Wisconsin Department of Justice (DOJ) is in receipt of your correspondence, dated October 5, 2018, regarding your public records request to the Milwaukee County House of Correction. You requested “records and/or information including names of employees, their job titles, salaries, hours worked for a specified time period, and wages earned for that same time period, among other things.” You included a string of email correspondence you had with Superintendent Michael Hafemann in an attempt to narrow or clarify your request. You wrote, “I have a hard time believing that the House of Correction does not create and/or maintain any records of its own employees’ names, job titles, salaries, hours worked and wages earned.” You requested the Office of Open Government “review this case to determine if House of Correction is properly complying with state open records law in relation to my request.”

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).

Based on the correspondence you sent, I first note that you were provided with some documents responsive to parts of your request. I also note, however, that the authority also told you they did not have or maintain records responsive to the rest of your request.

The public records law only applies to records in the custody of an authority. Wis. Stat. § 19.32(1). The public records law “does not require an authority to provide requested information if no record exists, or to simply answer questions about a topic of interest to the requester.” *Journal Times v. City of Racine Board of Police and Fire Commissioners*, 2015 WI 56, ¶ 55 (citation omitted) (“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.

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

Based on your correspondence, I also note that the authority directed you to another authority which may have maintained the types of records you sought. I encourage you to communicate directly with that other authority, as 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.

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,¹ or the Attorney General, to file an action for mandamus

¹ In Milwaukee County, the Milwaukee County Office of Corporation Counsel—not the district attorney—serves as legal counsel for the purposes of enforcement of the public records law.

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

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

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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 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,



Sarah K. Larson
Assistant Attorney General
Office of Open Government

SKL:amh:lah



STATE OF WISCONSIN
DEPARTMENT OF JUSTICE

Josh Kaul
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FAX 608/267-2779

June 4, 2019

Peggy Meegan

McHenry, IL 60050

Dear Ms. Meegan:

This letter is in response to your correspondence, dated October 10, 2018, in which you wrote, "I want to know if I have the legal right to get records from the House of Corrections in Franklin, Wi." You specifically want to get the dates your son was "transported from the HOC to the Milwaukee Courthouse." You asked, "Could you please let me know how I might get this information?"

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).

In order to obtain records from an authority, you should a public records request specifying the records you seek. Requests do not have to be in writing and the requester generally does not have to identify himself or herself. Wis. Stat. §§ 19.35(1)(h), 19.35(1)(i). The requester does not need to state the purpose of the request. *Id.* "Magic words" are not required. A request which reasonably describes the subject matter and length of time involved is sufficient. Wis. Stat. § 19.35(1)(h).

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 denying the written request. Wis. Stat. § 19.35(4)(b). Specific policy reasons, rather than mere statements of legal conclusion or recitation of exemptions, must be given. *Pangman & Assocs. v. Zellmer*, 163 Wis. 2d 1070, 1084, 473 N.W.2d 538 (Ct. App. 1991); *Vill. of Butler v. Cohen*, 163 Wis. 2d 819, 824-25, 472 N.W.2d 579 (Ct. App. 1991). 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 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,¹ or the Attorney General, to file an action for mandamus seeking release of the requested records. Wis. Stat. § 19.37(1)(b). The Attorney General is authorized to enforce the public records law; however, he generally exercises this authority only in cases presenting novel issues of law that coincide with matters of statewide concern. Although you did not specifically request the Attorney General to file an action for mandamus, nonetheless, we respectfully decline to pursue a mandamus action at this time.

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

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¹ In Milwaukee County, the Milwaukee County Office of Corporation Counsel—not the district attorney—serves as legal counsel for the purposes of enforcement of the public records law.

Peggy Meegan
June 4, 2019
Page 3

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 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 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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TTY 1-800-947-3529
FAX 608/267-2779

June 5, 2019

Cleveland Lee, Sr.

[REDACTED]
Houston, TX 77014

Dear Mr. Lee:

The Wisconsin Department of Justice (DOJ) is in receipt of your correspondence, dated November 4, 2018 and March 15, 2019, in which you requested "that an action for mandamus be brought asking the court to order release" of records you requested from the Department of Corrections (DOC).

The Attorney General and DOJ's Office of Open Government (OOG) appreciate your concerns. DOJ cannot offer you legal advice or counsel concerning this matter as DOJ may be called upon to represent DOC. 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.

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).

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 OOG encourages authorities and requesters to maintain an open line of communication. This helps to avoid misunderstandings between an authority and a requester.

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

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

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

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

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

The information provided in this letter 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,



Sarah K. Larson
Assistant Attorney General
Office of Open Government

SKL:lah



STATE OF WISCONSIN
DEPARTMENT OF JUSTICE

Josh Kaul
Attorney General

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FAX 608/267-2779

June 5, 2019

Jeffrey Haasch

[REDACTED]
River Falls, WI 54022

Dear Mr. Haasch:

The Wisconsin Department of Justice (DOJ) is in receipt of your correspondence, dated October 27, 2018, November 29, 2018, December 13, 2018, January 4, 2019, March 12, 2019, and April 17, 2019 regarding your "being barred from a public meeting in Pierce County."

The Attorney General and DOJ's Office of Open Government (OOG) appreciate your concerns regarding the Wisconsin Open Meetings Law, Wis. Stat. §§ 19.81 to 19.98. However, DOJ cannot offer you legal advice or counsel concerning your open meetings law issue as DOJ may be called upon to represent Pierce County District Attorney Sean Froelich.

The OOG works to increase government openness and transparency and we do so with a focus on the Wisconsin public records law and open meetings law. 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. However, we can provide you with some general information regarding 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 government bodies shall be held publicly and be open to all citizens at all times unless otherwise expressly provided by law. Wis. Stat. § 19.81(2). The provisions of the open meetings law are to be construed liberally to achieve that purpose. Wis. Stat. § 19.81(4).

For example, the Attorney General has concluded that members of the public not only have a right to attend open meetings, but they also have a concomitant right to take notes at such a meeting, or to do other nondisruptive acts, in order to obtain and preserve "the fullest and most complete information" of what occurred. See 66 OAG 318, 324-25 (1977). Further, under Wis. Stat. § 19.90, the government body "shall make a reasonable effort to

accommodate any person desiring to record, film or photograph the meeting.” That section, however, “does *not* permit recording, filming or photographing such a meeting in a manner that interferes with the conduct of the meeting or the rights of the participants.” Wis. Stat. § 19.90.

Similarly, a governmental body must meet in a facility which gives reasonable public access, and may not systematically exclude or arbitrarily refuse admittance to any individual. *State ex rel. Badke v. Vill. Board of Vill. of Greendale*, 173 Wis. 2d 553, 494 N.W.2d 408 (1993). The open meetings law, however, does not require absolute accessibility. *Id.*

As noted above, Wis. Stat. § 19.81(1) states that the public is entitled to “the fullest and most complete information regarding government affairs *as is compatible with the conduct of government business.*” Thus, while the public generally has the right to attend open session meetings under the open meetings law, other laws might apply to those who disrupt open meetings.

Further, 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. Although the open meetings law does allow a governmental body to set aside a portion of a meeting for public comment, it does not require a body to do so. Wis. Stat. §§ 19.83(2) and 19.84(2). There are some other state statutes that require governmental bodies to hold public hearings on specified matters. Unless such a statute specifically applies, however, a governmental body is free to determine for itself whether and to what extent it will allow citizen participation at its meetings. For example, a body may choose to limit the time each citizen has to speak, and members of the public may also be asked to leave if they become disruptive or otherwise interfere with the conduct of the meeting. *See Nix Correspondence* (October 29, 2002).

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, as stated above, DOJ may be called upon to represent District Attorney Sean Froelich. Therefore, we respectfully decline to pursue an enforcement action.

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

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

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

The information provided in this letter is provided pursuant to Wis. Stat. § 19.98 and does not constitute an informal or formal opinion of the Attorney General pursuant to Wis. Stat. § 165.015(1).

Sincerely,



Sarah K. Larson
Assistant Attorney General
Office of Open Government

SKL:lah



STATE OF WISCONSIN
DEPARTMENT OF JUSTICE

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FAX 608/267-2779

June 5, 2019

Sue Meinecke

[REDACTED]
Grafton, WI 53024

Dear Ms. Meinecke:

The Wisconsin Department of Justice (DOJ) is in receipt of your correspondence, dated November 25, 2018, regarding your public records requests to the Grafton Village Administrator and Fire Chief for "information from the Spring 2018 election period." You wrote, "I contacted the Ozaukee County District Attorney twice to request his help and have not received a response." You also included response letters you received from the Village Administrator and Fire Chief which provided explanations for their denial of certain records.

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

DOJ has insufficient information to evaluate whether the explanations provided by the Village Administrator and Fire Chief for denying certain records are sufficient. However, we can provide you with some general information regarding your public records requests that I hope you will find helpful.

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

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

The public records law defines a “record” as any material on which written, drawn, printed, spoken, visual, or electromagnetic information or electronically generated or stored data is recorded or preserved, regardless of physical form or characteristics, which has been created or is being kept by an authority. Wis. Stat. § 19.32(2). “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).

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 Wisconsin Supreme Court has said that purely personal emails, evincing no violation of law or policy, sent or received by employees or officers on an authority’s computer system are not subject to disclosure in response to a public records request. *Schill v. Wisconsin Rapids Sch. Dist.*, 2010 WI 86, ¶ 9 & n.4 (Abrahamson, C.J., lead opinion), ¶ 148 & n.2 (Bradley, J., concurring), ¶ 173 & n.4 (Gableman, J., concurring), 327 Wis. 2d 572, 582, 786 N.W.2d 177, 183. However, despite the lead opinion in *Schill*, DOJ’s position is that purely personal emails sent or received on government email accounts are records under the public records law, and therefore, such emails are subject to disclosure. In *Schill*, the court held 5-2 that the public records law did not require an authority to disclose such emails. Three justices reached this decision by concluding such emails were not “records.” The remaining four justices concluded the emails were “records,” but two agreed they did not need to be disclosed under the balancing test. While this area of the law is unsettled, it is reasonable to conclude that should the court again take up the question of whether personal emails sent or received on government email accounts are records, a majority will hold that such emails are records subject to disclosure.

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.

Wis. Stat. § 19.36(10)(d) states, in part, an authority shall not provide access to records containing information that an authority uses for staff management planning, including performance evaluations.

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. Although you did not specifically request the Attorney General to file an action for mandamus, nonetheless, we respectfully decline to pursue a mandamus action at this time.

Based on the information you provided in your correspondence, it appears that you have already attempted to contact your county district attorney regarding your concerns. I encourage you to follow up with that office regarding your concerns.

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

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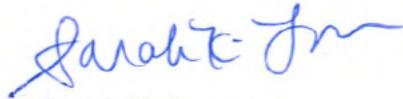
Sue Meinecke
June 5, 2019
Page 4

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 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,



Sarah K. Larson
Assistant Attorney General
Office of Open Government

SKL:lah



STATE OF WISCONSIN
DEPARTMENT OF JUSTICE

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June 5, 2019

Joanne Bungert
Deputy City Attorney
City of Green Bay
joannebu@greenbaywi.gov

Dear Ms. Bungert:

The Wisconsin Department of Justice (DOJ) is in receipt of your correspondence to Assistant Attorney General Paul Ferguson, dated September 26, 2018, regarding a request for a legal opinion “regarding walking quorums, mayors that are legally a member of the City Council, and the practice of meeting individually with Council members regarding upcoming business that the City Council will be voting on.”

The Attorney General and DOJ’s Office of Open Government appreciate your concern for open government 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 give formal legal opinions to district attorneys and county corporation counsel under certain circumstances. Wis. Stat. §§ 165.25(3) and 59.42(1)(c). The Attorney General cannot provide you with the opinion you requested because you do not meet this criteria. However, I can provide you with some general guidance regarding the Wisconsin Open Meetings Law, Wis. Stat. §§ 19.81 to 19.98.

The open meetings law acknowledges that the public is entitled to the fullest and most complete information regarding government affairs as is compatible with 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. Based on the limited information provided in your correspondence, it appears that the mayor is a member of the City Council, and therefore would be subject to the open meetings law.

A meeting occurs when a convening of members of a governmental body satisfies two requirements. *See State ex rel. Newspapers, Inc. v. Showers*, 135 Wis. 2d 77, 398 N.W.2d 154 (1987). The first requirement under the so-called *Showers* test is that there must be a purpose to engage in governmental business (the purpose requirement). Second, the number of members present must be sufficient to determine the governmental body's course of action (the numbers requirement). A meeting does not include any social or chance gathering or conference that is not intended to avoid the requirements of the open meetings law.

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 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.* Where there is no express or tacit agreement, exchanges among separate groups of members may take place without violating the open meetings law.

For additional information, please see the enclosed March 5, 2019 letter responding to correspondence that DOJ received from Alderman Chris Wery regarding similar issues. I hope that you find it instructive or useful in analyzing the issues in your correspondence.

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

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

Joanne Bungert
June 5, 2019
Page 3

The information provided in this letter is provided pursuant to Wis. Stat. § 19.98 and 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

Enclosure

cc: Alderman Chris Wery (w/o enclosure)



STATE OF WISCONSIN
DEPARTMENT OF JUSTICE

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June 17, 2019

Chris Henige
[REDACTED]
Fredonia, NY 14063

Dear Mr. Henige:

The Wisconsin Department of Justice (DOJ) is in receipt of your correspondence, dated October 12, 2018 and January 11, 2019, regarding your public records request to the University of Wisconsin-Whitewater (UW-Whitewater) and your concerns regarding proper meeting notice and exclusion of members from meetings. Further, based on the information in your correspondence, it appears that you have filed an open meetings law complaint against UW-Whitewater.

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, and the Wisconsin open meetings law, Wis. Stat. §§ 19.81 to 19.98. However, DOJ cannot offer you legal advice or counsel concerning your public records request or open meetings law issues, as DOJ may be called upon to represent UW-Whitewater.

The Office of Open Government works to increase government openness and transparency and we do so with a focus on the Wisconsin public records law and open meetings law. While a portion of your correspondence pertained to the public records law and open meetings law, it also discussed matters outside the scope of the Office of Open Government's responsibilities. As a result, we are unable to offer you assistance or insight on those matters.

The Attorney General and the Office of Open Government appreciates 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.

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 stated, DOJ may be called upon to represent UW-Whitewater. Therefore, the Attorney General respectfully declines to take any action in this matter, including filing an action for mandamus on your behalf.

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. However, DOJ may be called upon to represent UW-Whitewater in the open meetings law complaint you have filed against UW-Whitewater. Therefore, the Attorney General respectfully declines to take any action in this matter, including pursuing an enforcement action.

More frequently, the district attorney of the county where the alleged violation occurred may enforce the law. In your January 11, 2019 correspondence you wrote that you filed a "verified open meetings complaint with the District Attorney of Walworth County." If the district attorney refuses or otherwise fails to commence an action to enforce the open meetings law within 20 days after receiving the verified complaint, the individual may bring an action in the name of the state. Wis. Stat. § 19.97(4). (Please note a district attorney may still commence an enforcement action even after 20 days have passed.) Such actions by an individual must be commenced within two years after the cause of action accrues. Wis. Stat. § 893.93(2)(a).

You may also 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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Chris Henige
June 17, 2019
Page 3

open-government). DOJ provides the full Wisconsin public records law and open meetings law, maintains a Public Records Law Compliance Guide and Open Meetings Law 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 is provided pursuant to Wis. Stat. §§ 19.39 and 19.98, and 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: UW System Legal Counsel



STATE OF WISCONSIN
DEPARTMENT OF JUSTICE

Josh Kaul
Attorney General

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June 17, 2019

Alfredo Vega, #110892
Green Bay Correctional Institution
Post Office Box 19033
Green Bay, WI 54307

Dear Mr. Vega:

The Wisconsin Department of Justice (DOJ) is in receipt of your correspondence, dated November 20, 2018, in which you requested the DOJ to file an action for mandamus asking Milwaukee County Circuit Court Judge Jeffrey Wagner to release a record "marked as exhibit 19/ March 29, 1994." Your request to Milwaukee County District Attorney John Chisholm for this record was denied.

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. Based on the information in your correspondence, it appears that some of your concerns relate to matters outside the scope of the Office of Open Government's authority and responsibilities. Consequently, we are unable to offer you assistance or insight on those matters.

Further, DOJ cannot offer you legal advice or counsel about your specific concerns, as DOJ may be called upon to represent members of the judiciary or the District Attorney. You may wish to contact your previous defense counsel regarding those matters, including your request to obtain documents from your court file. Although we cannot offer you legal advice or counsel, we can provide you with some general information regarding the public records law which I hope you will find helpful.

First, it should be noted that, as an incarcerated person, your right to request records under the 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). Based on the information you provided, the records you requested may pertain to you; therefore, you may request those records pursuant to the public records law. However, under the public records law, certain information may still be redacted from the records.

The public records law authorizes requesters to inspect or obtain copies of "records" created or maintained by an "authority." Records are presumed to be open to public inspection and copying, but there are exceptions. 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 authority's 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. It should be noted that the public records balancing test must be applied on a case-by-case basis.

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).

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 v. Joint Sch. Dist. No. 1, City of Green Bay*, 116 Wis. 2d 388, 397, 342 N.W.2d 682 (1984). 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); *see also Democratic Party of Wisconsin*, 2016 WI 100, ¶ 12.

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,¹ or the Attorney General, to file an action for mandamus seeking release of the requested records. Wis. Stat. § 19.37(1)(b). The Attorney General is 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 members of the judiciary or the District Attorney. Therefore, we respectfully decline to pursue an action for mandamus.

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 as follows:

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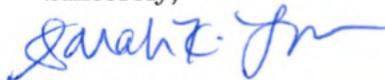
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We are dedicated to the work necessary to preserve Wisconsin's proud tradition of open government. Thank you for your correspondence.

The information provided in this letter 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,



Sarah K. Larson
Assistant Attorney General
Office of Open Government

SKL:lah

¹ In Milwaukee County, the Milwaukee County Office of Corporation Counsel—not the district attorney—serves as legal counsel for the purposes of enforcement of the public records law.



STATE OF WISCONSIN
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June 18, 2019

Donna Swanson
[REDACTED]
Platteville, WI 53818

Dear Ms. Swanson:

The Wisconsin Department of Justice (DOJ) is in receipt of your correspondence, dated November 29, 2018, regarding your Town Board's budget meeting. You wrote that after a short discussion regarding compensation for the board supervisors, treasurer, and clerk, "a motion was made and seconded and a vote was taken to raise the salaries." You asked if the board violated state statute because the "agenda for the budget meeting had no mention of action being taken on the increase in salaries for the board supervisors, treasurer and clerk."

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.

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

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

Regarding your specific inquiry, the open meetings law does not expressly require that the notice indicate whether a meeting will be purely deliberative or if action will be taken. *State ex rel. Olson v. City of Baraboo Joint Review Bd.*, 2002 WI App 64, ¶ 15, 252 Wis. 2d 628, 643 N.W.2d 796. The *Buswell* decision inferred from this that “adequate notice . . . may not require information about whether a vote on a subject will occur, so long as the subject matter of the vote is adequately specified.” *Buswell*, 2007 WI 71, ¶ 37 n.7. But the information in the notice must be sufficient to alert the public to the importance of the meeting, so that they can make an informed decision whether to attend. *Id.* Thus, in some circumstances, a failure to expressly state whether action will be taken at a meeting could be a violation of the open meetings law. *Id.* See also Herbst Correspondence (July 16, 2008). However, based on the limited information you provided in your correspondence, I do not have sufficient information to determine whether or not the board violated the open meetings law.

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>).

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

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

Under the open meetings law, the district attorney cannot act to enforce the law unless he or she receives a verified complaint. Therefore, to ensure the district attorney has the authority to enforce the law, you must file a verified complaint. This also ensures that you have the option to file suit should the district attorney refuse or otherwise fail to commence

an enforcement action, as explained in the previous paragraph. For further information, please see pages 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.

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 is provided pursuant to Wis. Stat. § 19.98 and does not constitute an informal or formal opinion of the Attorney General pursuant to Wis. Stat. § 165.015(1).

Sincerely,



Sarah K. Larson
Assistant Attorney General
Office of Open Government

SKL:lah



STATE OF WISCONSIN
DEPARTMENT OF JUSTICE

Josh Kaul
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FAX 608/267-2779

June 20, 2019

Joe Brauer

[REDACTED]
Rhineland, WI 54501

Dear Mr. Brauer:

The Wisconsin Department of Justice (DOJ) is in receipt of your correspondence, dated December 10, 2018, in which you asked, "Can a City Administrator review/reveal information via email to City Counsel, Committee members, and Department Heads his/her suggestions/recommendations in writing for an upcoming Committee meeting which will be reviewed/revealed in a Closed Session at that meeting."

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

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

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

Regarding the numbers requirement, a quorum is the minimum number of a body's membership necessary to act. Certainly a majority of the members of a governmental body

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

The requirements of the open meetings law also extend to walking quorums. A "walking quorum" is a series of gatherings among separate groups of members of a governmental body, each less than quorum size, who agree, tacitly or explicitly, to act uniformly in sufficient number to reach a quorum. See *Showers*, 135 Wis. 2d at 92. The danger is that a walking quorum may produce a predetermined outcome and thus render the publicly held meeting a mere formality. See *State ex rel. Lynch v. Conta*, 71 Wis. 2d 662, 685–88, 239 N.W.2d 313 (1976). Thus, any attempt to avoid the appearance of a "meeting" through use of a walking quorum or other "elaborate arrangements" is subject to prosecution under the open meetings law. *Id.* at 687.

The essential feature of a walking quorum is the element of agreement among members of a body to act uniformly in sufficient numbers to reach a quorum. Where there is no such express or tacit agreement, exchanges among separate groups of members may take place without violating the open meetings law. A walking quorum, however, may be found when the members: 1) have effectively engaged in collective discussion or information gathering outside of the context of a properly noticed meeting; and 2) have agreed with each other to act in some uniform fashion.

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.

The Attorney General has previously opined that, if email communications closely resemble an in-person discussion, then they may constitute a meeting if they involve enough members to control an action by the body. Krischan Correspondence (Oct. 3, 2000). Although no Wisconsin court has applied the open meetings law to these kinds of electronic communications, it is likely that the courts will try to determine whether the communications in question are more like an in-person discussion—*e.g.*, a rapid back-and-forth exchange of viewpoints among multiple members—or more like non-electronic written correspondence, which generally does not raise open meetings law concerns. In addressing these questions, courts are likely to consider such factors as the following: (1) the number of participants involved in the communications; (2) the number of communications regarding the subject; (3) the time frame within which the electronic communications occurred; and (4) the extent of the conversation-like interactions reflected in the communications. Schmiede Correspondence (Aug. 22, 2018).

In short, a court could construe back and forth communication on electronic media as a convening of members under the open meetings law, because it resembles an in-person

discussion. *See* Krischan Correspondence (Oct. 3, 2000). A court could also find that there is a “close proximity” of time of the exchanges over electronic media if a single official uses electronic media to communicate with others in succession, asking—explicitly or tacitly—for their support of a particular position. *See* Benson Correspondence (Mar. 12, 2004). Regardless of how a court would view such communications, however, in the interest of government openness and transparency such discussions and decisions should occur in the light of a properly noticed open meeting.

For these reasons, the Attorney General has cautioned that members of governmental bodies should reduce any possible appearance of impropriety by minimizing inter-member communications. *See* Kay Correspondence (Apr. 25, 2007). With respect to email specifically, the Attorney General has strongly discouraged the members of every governmental body from using email to communicate about issues within the body’s realm of authority. *See* Krischan Correspondence (Oct. 3, 2000); Benson Correspondence (Mar. 12, 2004); Schmiege Correspondence (Aug. 22, 2018).

Because the applicability of the open meetings law to such electronic communications depends on the particular way in which a specific message technology is used, these technologies create special dangers for governmental officials trying to comply with the law. Features like “forward” and “reply to all” common in electronic mail programs deprive a sender of control over the number and identity of the recipients who eventually may have access to the sender’s message. Moreover, it is quite possible that, through the use of electronic mail, a quorum of a governmental body may receive information on a subject within the body’s jurisdiction in an almost real-time basis, just as they would receive it in a physical gathering of the members.

Inadvertent violations of the open meetings law through the use of electronic communications can be reduced if electronic mail is used principally to transmit information one-way to a body’s membership; if the originator of the message reminds recipients to reply only to the originator, if at all; and if message recipients are scrupulous about minimizing the content and distribution of their replies. Because of the absence of judicial guidance on the subject, and because electronic mail creates the risk that it will be used to carry on private debate and discussion on matters that belong at public meetings subject to public scrutiny, the Attorney General’s Office strongly discourages the members of every governmental body from using electronic mail to communicate about issues within the body’s realm of authority. *Krischan Correspondence* (Oct. 3, 2000); *Benson Correspondence* (Mar. 12, 2004); *Schmiege Correspondence* (Aug. 22, 2018). Further, members of a governmental body may not decide matters by email voting, even if the result of the vote is later ratified at a properly noticed meeting. *I-01-10* (Jan. 25, 2010).

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

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

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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 is provided pursuant to Wis. Stat. § 19.98 and 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



STATE OF WISCONSIN
DEPARTMENT OF JUSTICE

Josh Kaul
Attorney General

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FAX 608/267-2779

June 20, 2019

John Bourgeois

[REDACTED]
St. Germain, WI 54558

Dear Mr. Bourgeois:

The Wisconsin Department of Justice (DOJ) is in receipt of your correspondence, dated December 11, 2018, regarding your public records request to the St. Germain Town Clerk for "a copy of the email list that the town keeps and uses to notify the citizenry of the town and other announcements, meeting notices etc." The Town Clerk told you that "in order to obtain the Constant Contact Email list, that [you] had to contact the Wisconsin Department of Justice to 'make a determination' if the Town had to release this list under the FOI request." You also had concerns regarding the Town Chairman's use of "his personal email account to conduct Town Business," and noted that the public records "will be lost if or when" the Town Chairman leaves office.

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

Regarding your concerns about personal email accounts being used for government business, I can provide you with some general information that I hope you will find helpful. Nothing in the public records law prohibits a government employee from using a personal email account to conduct official government business, but doing so may result in the creation of a "record" that is subject to disclosure under the public records law. Additionally, government business-related records found on personal email accounts are also subject to record retention requirements. Government employees should contact their agency's legal counsel with any questions regarding such requirements.

The public records law defines a "record" as any material on which written, drawn, printed, spoken, visual, or electromagnetic information or electronically generated or stored

data is recorded or preserved, regardless of physical form or characteristics, which has been created or is being kept by an authority. Wis. Stat. § 19.32(2). A record includes handwritten, typed, or printed documents; maps and charts; photographs, films, and tape recordings; tapes, optical disks, and any other medium on which electronically generated or stored data is recorded or preserved; and electronic records and communications.

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

The fact that a record is subject to disclosure, however, does not necessarily mean an authority must disclose the record. While records are presumed to be open to public inspection and copying, there are exceptions. Wis. Stat. § 19.31. 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).

Regarding the request for DOJ to make a determination as to whether the email list must be released, I do not have sufficient information to make that determination. The answer may also depend, in part, on whether the list contains information about public employees, private citizens, or both. Pursuant to Wis. Stat. § 19.36(10)(a), the home electronic mail addresses of public employees generally must be redacted from records, unless access is specifically authorized or required by statute, or unless the employee authorizes the authority to provide access to such information. Pursuant to the Wis. Stat. § 19.35(1)(a) balancing test, an authority may also determine that citizens’ personal email addresses should be redacted. In performing the balancing test, an authority may determine that the public interest in disclosure of the personal email addresses of private citizens is outweighed by the public interest in the expectation of privacy on the part of individuals in their personal lives.

The public records law provides several remedies for a requester dissatisfied with an authority’s response, or lack of response, to a public records request. A requester may file an

action for mandamus, with or without an attorney, asking a court to order release of the records. Wis. Stat. § 19.37(1)(a).

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

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

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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 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,



Sarah K. Larson
Assistant Attorney General
Office of Open Government



STATE OF WISCONSIN
DEPARTMENT OF JUSTICE

Josh Kaul
Attorney General

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Sarah K. Larson
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June 25, 2019

Beverly Vaillancourt

████████████████████
La Valle, WI 53941

Dear Ms. Vaillancourt:

The Wisconsin Department of Justice (DOJ) is in receipt of your correspondence, dated December 10, 2018, in which you asked, in part, if “the applications [for town clerk are] subject to an open records request?”

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 the hiring process of a town clerk, which is outside the scope of the OOG’s responsibilities. However, we can address your correspondence to the extent it concerns 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).

Pursuant to Wis. Stat. § 19.35(4)(b), “If an authority denies a written request in whole or in part, the requester shall receive from the authority a written statement of the reasons for denying the written request.” Specific policy reasons, rather than mere statements of legal

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

Turning now to your specific question as to whether applications for town clerk are subject to public records request, I do not have sufficient information to fully evaluate or address this question. “[A]pplications” could refer to various types of records, and each type of record could contain various kinds of information, all of which may be treated differently under the public records law. Therefore, I am unable to definitively answer your question, but I can give you some general information under the public records law that might be helpful to your understanding.

First, the position of town clerk might qualify as a “local public office” if it meets the statutory criteria set forth 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).

The Attorney General, however, has previously opined that the definition of “local public office” under Wis. Stat. § 19.42(7w) is complex and involves a number of considerations. See 81 Op. Att’y Gen. 37, 40 (1993). For example, “local public office” would not apply to an officer appointed to serve an indefinite term who was also removable for cause, or an officer appointed by a body other than the governing body or the executive or administrative head of the local government. *Id.* Therefore, depending on the governance structure of the town, the position of “town clerk” may or may not constitute a local public office under the public records law.

Second, the law regarding “final candidates” for “local public office” is also complex and involves a number of considerations. Under Wis. Stat. § 19.37(7)(b), certain applicants for public positions, including certain applicants for local public offices, may request confidentiality for their applications. These confidentiality provisions, however, would not apply to “final candidates” for the position, including each applicant for a “local public office” who is “seriously considered” for the position. See Wis. Stat. § 19.37(7)(a)1.b. Under the public records law, “final candidates” would include “each of the 5 applicants who are considered the most qualified” whenever “there are at least 5 applicants.” See Wis. Stat. § 19.37(7)(a)2.a. “Final candidates” would also include “each applicant” whenever “there are fewer than 5 applicants.” See Wis. Stat. § 19.37(7)(a)2.b. Therefore, the applicants for the position of town clerk may or may not be entitled to confidentiality of their applications, depending on whether or not they requested confidentiality, and depending on whether or not they are a “final candidate” for a “local public office” under the public records law.

Finally, other confidentiality provisions may apply to certain information within the applications if the applicant already holds a local public office. Under Wis. Stat. § 19.36(11), “[u]nless access is specifically authorized or required by statute, an authority shall not provide . . . information maintained, prepared, or provided by an employer concerning the home address, home electronic mail address, home telephone number, or social security number of an individual who holds a local public office or a state public office, unless the individual authorizes the authority to provide access to such information.” Wis. Stat. § 19.36(11). Therefore, if this kind of information is contained in the record, it must be withheld if the applicant already holds a local public office, unless the individual authorizes the authority to provide access.

Based on the limited information you provided in your correspondence, I am unable to determine whether the “applications” for town clerk and the information therein must be disclosed if a public records request is made for them under the public records law. Nevertheless, I hope you find this information helpful. Please also keep in mind that the public records law should be construed in every instance with a presumption of complete public access, and any limitation on that access, such as Wis. Stat. § 19.36(7), should be narrowly construed. *See* 81 Op. Att’y Gen. 37, 38 (1993). *See* also Baker Correspondence (July 12, 2004).

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

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

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

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

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Sincerely,



Sarah K. Larson
Assistant Attorney General
Office of Open Government

SKL:lah



STATE OF WISCONSIN
DEPARTMENT OF JUSTICE

Josh Kaul
Attorney General

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June 25, 2019

Jessica Arp
WISC-TV News 3
jarp@wisctv.com

Dear Ms. Arp:

The Wisconsin Department of Justice (DOJ) is in receipt of your correspondence, dated October 22, 2019, forwarding three emails to me regarding public records requests you made to the Madison Metropolitan School District, Middleton-Cross Plains Area School District, and the University of Wisconsin-Madison. I also note that we discussed your concerns related to the first two requests in a telephone conversation on October 11, 2018.

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 to the University of Wisconsin-Madison as DOJ may be called upon to represent the University of Wisconsin-Madison, which is part of the University of Wisconsin System. Regarding your other public records requests to the Madison Metropolitan School District and Middleton-Cross Plains Area School District, however, I can provide you with some general information which I hope you will find helpful.

The public records law authorizes requesters to inspect or obtain copies of "records" created or maintained by an "authority." Records are presumed to be open to public inspection and copying, but there are exceptions. Wis. Stat. § 19.31. A statute may provide such an exception. If a federal or state statute prohibits the release of a record in response to a public records request, an authority's records custodian cannot release the record. Wis. Stat. § 19.36(1). (The common law and the public records law balancing test, which weighs the public interest in disclosure of a record against the public interest in nondisclosure, also provide other exceptions to disclosure.)

One such federal statute, the Federal Educational Records Privacy Act (FERPA), generally prohibits a federally funded educational institution, such as the Madison Metropolitan School District and the Middleton-Cross Plains Area School District, from disclosing a student's personally identifiable information contained in a student's educational records without the written consent of the student's parents. *See* 20 U.S.C. §§ 1232g(b)(1)

and 1232g(d). The Wisconsin pupil records statute, Wis. Stat. § 118.125(2), also generally requires confidentiality for “[a]ll pupil records,” although the disclosure of certain information may be allowed if the school district has designated that information as “directory data” and other public notice requirements have been met. *See* Wis. Stat. §§ 118.125(1)(b) and (2)(j). Under Wis. Stat. § 118.125(1)(d), “[p]upil records” means “all records relating to individual pupils maintained by a school,” subject to some exceptions not relevant here.

Well-established public policy recognizing the confidentiality and privacy of student educational records and personally identifiable information contained in such records is expressed in FERPA and Wis. Stat. § 118.125. Moreover, well-established public policy recognizing the confidentiality and privacy of children and juveniles is also expressed in other statutes such as Wis. Stat. §§ 48.396 and 938.396. Thus, under the public records balancing test, the same public policy interest in protecting the confidentiality of pupil records evidenced by those statutes could weigh in favor of protecting the confidentiality of information obtained from those records.

In your correspondence, you asked whether the authorities should have redacted the personally identifiable information of students, instead of denying your requests in full. I do not have sufficient information from your correspondence to fully evaluate or address this question, but I can provide you with some general information which you may find helpful.

The Wisconsin Supreme Court has concluded that the plain language of FERPA prohibits non-consensual disclosure of personally identifiable information contained within education records. *State ex rel. Osborn v. Bd. of Regents*, 2002 WI 83, ¶¶ 22–23, 254 Wis. 2d 266, 647 N.W.2d 158. In contrast, FERPA does not prohibit the disclosure of records where personally identifiable information is not included. *Id.* ¶¶ 23, 25, 31–32.

In order to determine whether the records contain personally identifiable information under FERPA, courts look to the regulations adopted to implement FERPA. *Osborn*, 254 Wis. 2d 266, ¶ 23. Based on the definitions set forth in those regulations, the Wisconsin Supreme Court has concluded that “only if the open records request seeks information that would make a student’s identity traceable, may a custodian rely on FERPA to deny the request on the basis that it seeks personally identifiable information.” *Osborn*, 254 Wis. 2d 266, ¶ 23. In certain instances, the public records law balancing test may also provide a basis for a complete or partial denial of access. *Id.* ¶¶ 32–40.

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

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 with regard to your public records requests to the school districts. Further, we respectfully decline to pursue an action for mandamus on your behalf with regard to your public records request to the University of Wisconsin-Madison. As stated above, DOJ may be called upon to represent the University of Wisconsin-Madison.

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:

Lawyer Referral and Information Service
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(608) 257-4666

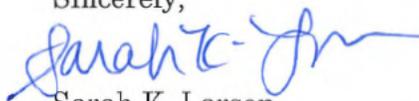
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The Attorney General and the Office of Open Government are committed to increasing government openness and transparency, and DOJ endeavors to offer guidance in these areas. DOJ offers several open government resources through its website (<https://www.doj.state.wi.us/office-open-government/office-open-governme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



Sarah K. Larson
Assistant Attorney General
Office of Open Government



STATE OF WISCONSIN
DEPARTMENT OF JUSTICE

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June 25, 2019

Dennis Strong, #243904
Racine Correctional Institution
Post Office Box 900
Sturtevant, WI 53177-0900

Dear Mr. Strong:

The Wisconsin Department of Justice (DOJ) is in receipt of your correspondence, dated December 18, 2018, regarding your public records requests to the Redgranite Correctional Institution (RGCI). You wrote, the "RGCI Administration has yet to fulfill a single open records request nor to have even acknowledged receipt of the same."

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 Department of Corrections (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). Based on the limited information you provided, it is unclear if the records you seek are regarding yourself or your minor children. Therefore, you may not be entitled to request some of the records you seek. Second, even if you are entitled to request the records, 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).

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

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

The public records law 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, although you did not specifically request the Attorney General to file an action for mandamus, nonetheless, we respectfully decline to pursue a mandamus action.

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 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,



Sarah K. Larson
Assistant Attorney General
Office of Open Government

SKL:lah



STATE OF WISCONSIN
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June 27, 2019

Michael Brittain

████████████████████
Genoa City, WI 53128

Dear Mr. Brittain:

The Wisconsin Department of Justice (DOJ) is in receipt of your correspondence, dated January 5, 2019, regarding your public records request to the Village of Bloomfield Custodian of Records. You received "two denial letters from President Grolle claiming attorney-client privilege." You requested DOJ file a "Petition for Writ of Mandate [sic] to enforce Gary Grolle, Village of Bloomfield to release open records requested May 31, 2018."

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).

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.

Based on the information you set forth in your correspondence, it appears that you did receive many of the records you requested (206 pages provided in one response, and 344 pages provided in a supplemental response). However, the records custodian indicated that he was withholding some records on the ground of the attorney-client privilege. 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, Inc.*, 199 Wis. 2d at 782-83. Therefore, an authority may deny a records request if the records fall within the attorney-client privilege. I have insufficient information to determine whether the withheld records fall within the attorney-client privilege, but I hope you find this information helpful.

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

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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Sincerely,



Sarah K. Larson
Assistant Attorney General
Office of Open Government

SKL:lah