

2020 2nd Quarter Correspondence

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DEPARTMENT OF JUSTICE

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April 14, 2020

Eddie Brooks #91070
Waupun Correctional Institution
P.O. Box 351
Waupun, WI 53963-0351

Dear Mr. Brooks:

The Wisconsin Department of Justice (DOJ) is in receipt of your correspondence, dated September 30, 2019 and December 15, 2019, in which you petitioned the attorney general to bring a “Writ of Mandamus against Milwaukee Police Department” to provide you with police reports and other records related to your criminal case.

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. You may want to contact the Milwaukee County clerk of court’s office or your trial or appellate counsel to obtain copies of records from your case file.

Although we cannot offer you assistance regarding your concerns that are outside the scope of the OOG’s responsibilities, we can offer you some general information about the 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 public records law is limited to records that contain specific references to yourself or your minor children and are otherwise accessible to you by law. *See* Wis. Stat. § 19.32(1c) and (3). If the records you requested pertain to you, you may request them pursuant to the public records law. However, under the public records law, certain information may still be redacted from the records.

The public records law authorizes requesters to inspect or obtain copies of “records” created or maintained by an “authority.” The purpose of the public records law is to shed light on the workings of government and the official acts of public officers and employees. *Bldg. & Constr. Trades Council v. Waunakee Cmty. Sch. Dist.*, 221 Wis. 2d 575, 582, 585 N.W.2d 726 (Ct. App. 1998). Records are presumed to be open to public inspection and copying, but there are exceptions. Wis. Stat. § 19.31. Requested records fall into one of three categories: (1) absolute right of access; (2) absolute denial of access; and (3) right of access determined by the balancing test. *Hathaway v. Joint Sch. Dist. No. 1 of Green Bay*, 116 Wis. 2d 388, 397, 342 N.W.2d 682 (1984). If neither a statute nor the common law requires disclosure or creates

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

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) (“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. Based on the information provided in your correspondence, it appears that the authority in this case, Milwaukee Police Department, has already indicated to you in the past that they have already provided all records responsive to your request, and they have no other records responsive to your request.

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

It is important to note that the public records law states that no action for mandamus may be commenced by an incarcerated person later than 90 days after the date the request was denied. See Wis. Stat. § 19.37(1m). Inmates who seek mandamus must also exhaust their administrative remedies first before filing an action under Wis. Stat. § 19.37. See Wis. Stat. § 801.07(7); *Moore v. Stahowiak*, 212 Wis. 2d 744, 749-50, 569 N.W.2d 70 (Ct. App. 1997). For

requesters who are not committed or incarcerated, an action for mandamus arising under the public records law must be commenced within three years after the cause of action accrues. *See Wis. Stat. § 893.90(2).*

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

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

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

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

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

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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April 14, 2020

Darrell Rogers #537552
Waupun Correctional Institution
P.O. Box 351
Waupun, WI 53963-0351

Dear Mr. Rogers:

The Wisconsin Department of Justice (DOJ) is in receipt of your correspondence, dated September 29, 2019, in which you requested that DOJ “bring an action for mandamus under Wis. Stat. [§] 19.37(1)(b) ordering Court Reporter Leposava Munns” to release “Unedited Transcripts pursuant to Wis. [Stat. §] SCR 71.04(9)(b)” related to your criminal case, Milwaukee County Case No. 13CF5328.

DOJ’s Office of Open Government (OOG) works to increase government openness and transparency with a focus on the Wisconsin Open Meetings Law, Wis. Stat. §§ 19.81 to 19.98, and the Wisconsin Public Records Law, Wis. Stat. §§ 19.31 to 19.39. Based on the information you provided in your correspondence, it appears that the subject matter of your correspondence, regarding obtaining transcripts of your court case, is outside this scope. You may want to contact the Milwaukee County clerk of court’s office to obtain copies of the case file which should include transcripts that were filed with the court. You could also contact, or re-contact, the court reporter that prepared the original transcripts and request copies. The clerk of court is permitted to charge fees for copies made from the court file, and the court reporter may also charge fees for copies of transcripts. You may also wish to contact your trial or appellate counsel for copies of transcripts.

Although we are unable to offer you assistance regarding your concerns that are outside the scope of the OOG’s responsibilities, we can 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.” 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). However, 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).

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

It is important to note that the public records law states that no action for mandamus may be commenced by an incarcerated person later than 90 days after the date the request was denied. *See* Wis. Stat. § 19.37(1m). Inmates who seek mandamus must also exhaust their administrative remedies first before filing an action under Wis. Stat. § 19.37. *See* Wis. Stat. § 801.07(7); *Moore v. Stahowiak*, 212 Wis. 2d 744, 749-50, 569 N.W.2d 70 (Ct. App. 1997). For

requesters who are not committed or incarcerated, an action for mandamus arising under the public records law must be commenced within three years after the cause of action accrues. *See Wis. Stat. § 893.90(2).*

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

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

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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
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May 26, 2020

Jonathon Pinnow

[REDACTED]
Sun Prairie, WI 53590
jpinnow@mynoblechoice.com

Dear Mr. Pinnow:

The Wisconsin Department of Justice (DOJ) is in receipt of your correspondence, dated October 22, 2019 and November 1, 2019, in which you wrote, "I am a chiropractor and would like to know the statute for patient files record keeping" in Wisconsin.

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. As a result, we are unable to offer you assistance or insight regarding your question relating to "patient files record keeping." However, we can provide you with some general information about the public records law for your information.

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

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

Wis. Stat. § 19.32(1). Only an entity that falls within this definition of “authority” is subject to the provisions of the public records law.

Under the public records law, a “record” is defined 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).

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 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 and maintains a Public Records Law Compliance Guide on its website.

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,

A handwritten signature in blue ink that reads "Sarah K. Larson". The signature is fluid and cursive, with a prominent initial "S" and a stylized "L" at the end.

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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May 26, 2020

Tim Stocks

[REDACTED]
Brodhead, WI 53520
tstocks@frontier.com

Dear Mr. Stocks:

The Wisconsin Department of Justice (DOJ) is in receipt of your correspondence, dated October 21, 2019, in which you wrote, "Is information gathered by security cameras on public property subject to FOIA requests?"

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."

DOJ has insufficient information to fully evaluate your correspondence. However, we can provide you with some general information regarding the public records law that we hope you will find helpful.

The Wisconsin public records law authorizes requesters to inspect or obtain copies of "records" created or maintained by an "authority." The law defines an authority as any of the following having custody of a record:

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

the county or municipality; a university police department under s. 175.42; or a formally constituted subunit of any of the foregoing.

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Under the public records law, a “record” is defined 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).

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

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,

A handwritten signature in blue ink that reads "Sarah K. Larson". The signature is fluid and cursive, with the first name "Sarah" being the most prominent part.

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 10, 2020

Jack Hanson
Research and Policy
Milwaukee Area Service and
Hospitality Workers Organization
jack.hanson@mashworkers.org

Dear Mr. Hanson:

The Wisconsin Department of Justice (DOJ) is in receipt of your correspondence, dated September 23, 2019, regarding your June 18, 2019 public records request “to the City of Milwaukee Mayor’s Office for a full and complete copy of the ‘bid document’ that the City submitted to the Democratic National Committee (DNC) concerning the 2020 Democratic National Convention.” On September 12, 2019, you and I also had a telephone conversation regarding that same public records request.

In your correspondence, you wrote that part of your “request remains unfulfilled.” You asked for “any assistance that [DOJ] could provide – whether formal or informal – in helping to secure release of this important record.” Along with your correspondence, you included your “correspondence with representatives of the City of Milwaukee regarding this matter” and the records you have received, all of which I have reviewed. Before I address the specific circumstances set forth in your correspondence, I would like to give you some general information about the public records law that you might find helpful.

The Wisconsin Public Records Law, Wis. Stat. §§ 19.31 to 19.39, authorizes requesters to inspect or obtain copies of “records” created or maintained by an “authority.” 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 defines an “authority” as any of the following having custody of a record:

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

provides services related to public health or safety to the county or municipality; a university police department under s. 175.42; or a formally constituted subunit of any of the foregoing.

Wis. Stat. § 19.32(1) (emphasis added). Only an entity that falls within this definition of “authority” is subject to the provisions of the public records law.

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

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

As noted above, 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 provides that the records custodian must respond to a public records request either by fulfilling the request or denying the request. *See* Wis. Stat. § 19.35(4)(a); *see also ECO, Inc. v. City of Elkhorn*, 2002 WI App 302, ¶ 24, 259 Wis. 2d 276, 655 N.W.2d 510. The statutory choices are either comply or deny. *WTMJ, Inc. v. Sullivan*, 204 Wis. 2d 452, 457–58, 555 N.W.2d 140 (Ct. App. 1996). Moreover, in general, the availability of a record from other sources is not a sufficient reason for a denial.

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).

Turning now to the specific circumstances as set forth in your correspondence, I first note that the mayor’s office responded to your public records request in a letter dated August 9, 2019. In their response, the mayor’s office indicated that it was their understanding that “you [had] already obtained a copy of this record from the City of Milwaukee City Attorney’s Office,” but that if you wanted the mayor’s office to “resend you a copy,” you should “please let [them] know.” In an email dated August 22, 2019, you wrote that you did “not require another copy” of that record. You later confirmed to me in our September 12, 2019 telephone conversation that you already had a copy of the primary bid document, which you received from the city attorney’s office.

As we also discussed in our telephone conversation, however, your primary concern was not the main bid document that you had already received, but rather, the exhibits that you said were attached to the main bid document. From the information you sent to us, it appears that you asked the mayor's office for those other records in your original June 18, 2019 request. As the mayor's office wrote in their August 9, 2019 response, they did not have any other records responsive to that part of your request. The city attorney's office later responded to you in an email dated August 28, 2019 that, although "staff members in the Mayor's Office seem[ed] to have had a chance to look at the exhibits" at one point, the "exhibits at issue [were] not records" because the "exhibits were neither created nor kept by the Mayor's Office." The city attorney's office further indicated that, at the time of your request, the city did not have copies of those other records you sought.

As noted above, the public records law defines a "record" as "any material ... which *has been created or is being kept* by an authority." See Wis. Stat. § 19.32(2) (emphasis added). The public records law, however, "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, 362 Wis. 2d 577, 866 N.W.2d 563; 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.

On September 10, 2019, Assistant Attorney General Paul Ferguson reached out to the city attorney's office, and they confirmed that, at the time you submitted your public records request, neither the mayor's office nor the city attorney's office had any other records responsive to your request, other than the main bid document that you had already received. During our September 12, 2019 telephone conversation, I relayed that information to you; however, you indicated that you believed that the mayor's office had those records at one point in time and should have retained them.

Records retention is a subject that is generally related to, but different from, the access requirements imposed by the public records law. The public records law only addresses how long an authority must keep its records once an authority receives a public records request. 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). When a requester submits a public records request, the authority is obligated to preserve the requested records until after the request is granted or until at least 60 days after the request is denied (90 days if the requester is a committed or incarcerated person). Other retention periods apply if an authority receives written notice that the requester has commenced a mandamus action (an action to enforce the public records law).

Other than this, the public records law does not address how long an authority must keep its records, and the public records law cannot be used to address an authority's alleged failure to retain records required to be kept under other laws. Instead, record retention is governed by other statutes. Wisconsin Stat. § 16.61 addresses the retention of records for

state agencies, and Wis. Stat. § 19.21 deals with record retention for local government entities. The general statutory requirements for record retention apply equally to electronic records. Most often, record retention schedules, created in accordance with these statutes, govern how long an authority must keep its records and what it must do with them after the retention period ends. The Wisconsin Public Records Board's website, <http://publicrecordsboard.wi.gov/>, has additional information on record retention.

Based on the information available to me, it appears that the city did not have the records at the time you submitted your public records request. In such a case, the record retention obligations under the public records law would not apply. Rather, as we discussed in our telephone conversation, the city's obligation to retain the records would have been governed by the records retention statutes and record retention schedules created pursuant to those statutes.

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. Therefore, we are unable to offer you any further assistance regarding the record retention requirements under Wis. Stat. §§ 16.61 and 19.21 or any pertinent record retention schedules created pursuant to those statutes. As noted above, you may wish to visit the Wisconsin Public Records Board website at <http://publicrecordsboard.wi.gov/> for more information on record retention.

The public records law provides several remedies for a requester dissatisfied with an authority's response, or lack of response, to a public records request. A requester may file an action for mandamus, with or without an attorney, asking a court to order release of the records. Wis. Stat. § 19.37(1)(a). 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). (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.) The Attorney General is authorized to enforce the public records law; however, he generally exercises this authority in cases presenting novel issues of law that coincide with matters of statewide concern. As your matter does not appear to present novel issues of law that coincide with matters of statewide concern, we respectfully decline to pursue an action for mandamus on your behalf at this time.

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

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

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

The Attorney General and 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 and maintains a Public Records Law Compliance Guide on its website.

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

cc: Assistant City Attorney Peter Block



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DEPARTMENT OF JUSTICE**

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June 24, 2020

Dan Stilwell

[REDACTED]
Spooner, WI 54801

Dear Mr. Stilwell:

The Wisconsin Department of Justice (DOJ) is in receipt of your correspondence, dated October 16, 2019, in which you included a request for mandamus “to compel the release of documents/records [you] requested from the Washburn County Circuit Court Clerk, Shannon Anderson or whoever their Records Custodian is.” I have reviewed all of the documentation you included with your correspondence, including:

- 1) Your November 12, 2018 public records request (PRR) and the authority’s November 15, 2018 response;
- 2) Your December 6, 2018 PRR and the authority’s December 10, 2018 response; and
- 3) Your January 20, 2019 PRR and the authority’s February 5, 2019 response.

The Attorney General and DOJ’s Office of Open Government (OOG) appreciate your concern about your public records requests to the clerk of courts. The OOG works to increase government openness and transparency with a focus on the Wisconsin Open Meetings Law, Wis. Stat. §§ 19.81 to 19.98, and the Wisconsin Public Records Law, Wis. Stat. §§ 19.31 to 19.39. Based on the information you provided in your correspondence, it appears that some of the subject matter of your correspondence, regarding your court filings in the court of appeals, is outside this scope. Therefore, we are unable to offer you assistance regarding your concerns that are outside the scope of the OOG’s authority and responsibilities.

Moreover, with respect to #1 and #2, those public records requests involved court filings in the circuit court and court of appeals related to your case against the Labor and Industry Review Commission (LIRC). Therefore, as to #1 and #2, DOJ cannot offer you legal advice or counsel, nor can DOJ file the mandamus action you requested, because DOJ represented LIRC in the underlying circuit court and court of appeals cases, and DOJ may be called upon to represent LIRC in the future.

Before I turn to the concerns in your correspondence regarding #3 above, I would like to offer you some general information about the public records law that you may find helpful. The Wisconsin 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).

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

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, 362 Wis. 2d 577, 866 N.W.2d 563 (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(3)(a), “An authority may impose a fee upon the requester of a copy of a record which may not exceed the actual, necessary and direct cost of reproduction and transcription of the record, unless a fee is otherwise specifically established or authorized to be established by law.”

Under the public records law, “[A]n authority may charge a fee 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, 341 Wis. 2d 607, 815 N.W.2d 367 (citation omitted) (emphasis in original). The amount of such fees may vary depending on the authority. However, an authority may not profit from complying with public records requests. *WIREData, Inc. v. Vill. of Sussex*, 2008 WI 69, ¶¶ 103, 107, 310 Wis. 2d 397, 751 N.W.2d 736 (an authority may not profit from its response to a public records request but may recoup all of its actual costs).

The law permits an authority to impose a fee for locating records if the cost is \$50.00 or more. Wis. Stat. § 19.35(3)(c). An authority may require a requester prepay any such fees if the total amount exceeds \$5.00. Wis. Stat. § 19.35(3)(f). Generally, the rate for an actual, necessary, and direct charge for staff time should be based on the pay rate (including fringe benefits) of the lowest paid employee capable of performing the task. For more information on permissible fees, please see the Office of Open Government Advisory: Charging Fees under the Wisconsin Public Records Law, which was issued on August 8, 2018 and can be found on DOJ’s website (<https://www.doj.state.wi.us/news-releases/office-open-government-advisory-charging-fees-under-wisconsin-public-records-law>).

Turning now to the specific concerns you raised about #3 above (your January 20, 2019 PRR and the clerk’s February 5, 2019 response), I first note that you asked the authority for the “name and contact information for [their] legal records custodian(s),” which is a request for information. As noted above, 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*, 362 Wis. 2d 577, ¶ 55. Nevertheless, it appears that the authority provided you the information you requested in their February 5, 2019 response.

Next, you asked the authority to provide you with a copy of their “Records Release Policy.” The authority responded that “Washburn County Circuit Court Records Release Policy follows Wisconsin Statute Chapter 19: General Duties of Public Officials.” Pursuant to Wis. Stat. § 19.34(1), authorities are required to

adopt, prominently display and make available for inspection and copying at its offices, for the guidance of the public, a notice containing a description of its organization and the established times and places at which, the legal custodian under s. 19.33 from whom, and the methods whereby, the public may obtain information and access to records in its custody, make requests for records, or obtain copies of records, and the costs thereof.

Members of the legislature and members of a local government body are exempt from this requirement.

We have insufficient information to evaluate the authority's response to this part of your request. It is possible that the authority did not construe your request as seeking a copy of the Wis. Stat. § 19.34(1) public record notice, and therefore, it did not have any other records responsive to that part of your request. However, the authority should be able to provide you with a copy of its Wis. Stat. § 19.34(1) public record notice if that is what you were seeking.

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. We encourage you to follow up with the authority to clarify what you were seeking. By copy of this letter, we are also notifying the authority of your concerns.

Finally, you asked the authority to provide you with "a copy of your complete sent and received email history between and including the dates of April 3, 2018 and May 24, 2018 showing at least all sender, recipient, subject and date information." The authority responded that she had "custody of individual emails between the dates you requested" and that if "you are requesting specific subject or sender/recipient, I can provide you with a copy of individual emails at a cost of \$1.25 per page."

As noted above, 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.*

A records custodian should not have to guess at what records a requester desires. *Seifert v. Sch. Dist. of Sheboygan Falls*, 2007 WI App 207, ¶ 42, 305 Wis. 2d 582, 740 N.W.2d 177. A records custodian, however, may not deny a request solely because the records custodian believes that the request could be narrowed. *Gehl*, 306 Wis. 2d 247, ¶ 20. The fact that a public records request may result in generation of a large volume of records is not in itself a sufficient reason to deny a request as not properly limited. *Id.* ¶ 23.

Therefore, a records custodian may contact a requester to clarify the scope of a confusing request, or to advise the requester about the number and cost of records estimated to be responsive to the request. These contacts, which are not required by the public records law, may assist both the records custodian and the requester in determining how to proceed. Records custodians making these courtesy contacts should take care not to communicate with the requester in a way likely to be interpreted as an attempt to chill the requester's exercise of his or her rights under the public records law. However, an authority's request for clarification, in and of itself, is not a denial.

Based on the information you provided, it appears that the authority was asking for clarification on your public records request and was not intending to deny the request. As already noted, the Office of Open Government encourages authorities and requesters to maintain an open line of communication. It appears that the clerk was willing to work with you in order to process your requests. Providing a subject matter or key words to search can help to an authority to more efficiently process searches such as yours. We encourage you to keep communicating with the authority about the records you seek, clarifying your request

to “reasonably describe[] the requested record or the information requested.” Wis. Stat. § 19.35(1)(h).

Further, with respect to fees, the copy fees charged by an authority must not exceed the “actual necessary and direct cost of reproduction and transcription” unless another law established such a fee or authorizes such a fee to be established by law. However, other laws that authorize an authority to charge other fees fall outside of the public records law. The OOG is unable to offer you assistance regarding other laws that are outside the scope of the OOG’s responsibilities and authority, but such laws may include Wis. Stat. § 59.40(3) which directs the clerk of the circuit court to collect certain specified fees, and Wis. Stat. §§ 757.57 and 814.69, which apply to the fees of court reporters.

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

Alternatively, the requester may submit a written request for the district attorney of the county where the record is found, or the Attorney General, to file an action for mandamus seeking release of the requested records. Wis. Stat. § 19.37(1)(b). The Attorney General is authorized to enforce the public records law; however, as noted above, DOJ may be called upon to represent LIRC. Therefore, we respectfully decline your request.

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

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

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

The information provided in this letter 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

Cc: Washburn County Clerk of Courts



**STATE OF WISCONSIN
DEPARTMENT OF JUSTICE**

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June 25, 2020

Jennifer Pavlovic
jenny.pav@charter.net

Dear Ms. Pavlovic:

The Wisconsin Department of Justice (DOJ) is in receipt of your correspondence, dated September 24, 2019, in which you wrote, “I am writing to make a complaint against City of Middleton officials Abby Attoun, Director of Planning and Community Development, and Mike Davis, City Administrator, for abuse of State open records laws.” You wrote, “Ms. Attoun received an email from Madison Gas & Electric executive Don Peterson asking for . . . opponents to the City’s planned expansion of the local airport. . . Ms. Attoun went to a social media post . . . and harvested names and comments of citizens and sent those to Mr. Peterson in response to his inquiry.” You asked DOJ “to demand a more thorough explanation from these officials regarding their behavior, and for any appropriate action to be taken.”

The Attorney General and DOJ’s Office of Open Government (OOG) appreciate your concern about the public records requests law. The OOG works to increase government openness and transparency with a focus on the Wisconsin Open Meetings Law, Wis. Stat. §§ 19.81 to 19.98, and the Wisconsin Public Records Law, Wis. Stat. §§ 19.31 to 19.39. Based on the information you provided in your correspondence, it appears that some of the subject matter of your correspondence, including your request that DOJ “demand a more thorough explanation from these officials regarding their behavior,” is outside this scope. Therefore, we are unable to offer you assistance regarding your concerns that are outside the scope of the OOG’s authority and responsibilities.

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

The public records law 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, electronically stored information constitutes a “record” within the meaning of the public records law so long as the recorded information is created or kept in connection with official business. *See* Wis. Stat. § 19.32(2); *Youmans*, 28 Wis. 2d at 679. For example, emails and other records created or maintained on a personal computer or mobile device, or from a personal email account, constitute records if they relate to government business. Other examples of electronic records within the Wis. Stat. § 19.32(2) definition can include database files, email correspondence, web-based information, PowerPoint presentations, audio and video recordings, and social media content created or kept by an authority.

In your correspondence to DOJ, you indicated that the authority should not have construed Mr. Peterson’s email as a public records request, because he did not use the words “open records request.” However, “magic words” are not required to trigger the authority’s statutory requirement to respond under the public records law. A request is sufficient if it directed at an authority and reasonably describes the information or record requested. *See* Wis. Stat. § 19.35(1)(h); *Seifert v. Sch. Dist. of Sheboygan Falls*, 2007 WI App 207, ¶ 39, 305 Wis. 2d 582, 740 N.W.2d 177.

Finally, you also expressed concern that the authority should not have provided the records because they were compiled from another source. It is true that 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, under the public records law, an authority is not precluded from doing so. Moreover, based on the information you provided to DOJ, including various emails from the city administrator, it appears that at least some of the information provided in response to Mr. Peterson’s public records request had already been provided to other requesters in responses to other public records requests. Public records requests and public records responses are themselves “records” for purposes of the public records law. *Nichols v. Bennett*, 199 Wis. 2d 268, 275, 544 N.W.2d 428 (1996).

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

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.

Jennifer Pavlovic
Page 3

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 blue ink that reads "Sarah K. Larson". The signature is fluid and cursive, with the first name "Sarah" being the most prominent part.

Sarah K. Larson
Assistant Attorney General
Office of Open Government

SKL:lah

cc: Mike Davis, City Administrator



STATE OF WISCONSIN
DEPARTMENT OF JUSTICE

Josh Kaul
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June 30, 2020

Carl Gruber
Sauk County District 27 Supervisor
[REDACTED]
Baraboo, WI 53913
Carl.Gruber@SaukCountyWI.gov

Dear Mr. Gruber:

The Wisconsin Department of Justice (DOJ) is in receipt of your correspondence, dated December 17, 2019, regarding your public records request for “a copy of the ‘open opinions log’ from Sauk County Corporation Counsel Daniel Olson.” Your request was “denied claiming the record does not exist.” You allege that “Mr. Olson illegally denied this request and that the requested log does exist and is readily reproducible,” and made “a subsequent more detailed request” which “has not [been] fulfilled.” You also allege that the “printout of the opinion log,” that you believed existed before, subsequently “disappeared.” You requested DOJ “bring an action for mandamus.”

Before I address the concerns set forth in your correspondence, I would first like to give you some information about the public records law that I hope you find helpful. The Wisconsin Public Records Law, Wis. Stat. §§ 19.31 to 19.39, authorizes requesters to inspect or obtain copies of “records” created or maintained by an “authority.” The purpose of the public records law is to shed light on the workings of government and the official acts of public officers and employees. *Bldg. & Constr. Trades Council v. Waunakee Cmty. Sch. Dist.*, 221 Wis. 2d 575, 582, 585 N.W.2d 726 (Ct. App. 1998).

The public records law “does not require 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, 362 Wis. 2d 577, 866 N.W.2d 563 (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. *See Journal Times*, 2015 WI 56, ¶ 102 (“While it might be a better course to inform a requester that no record exists, the language of the public records law does not specifically require such a response.”). Moreover,

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).

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).

Turning now to the specific concerns set forth in your correspondence, I first note that the authority indicated to you that it did not have records responsive to your first request. An authority cannot fulfill a request for a record if the authority has no such record. 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*, 362 Wis. 2d 577, ¶ 55 (citation omitted).

Regarding your allegation that the record may have existed at one time but then subsequently “disappeared,” this pertains to records retention. Records retention is a subject that is generally related to, but different from, the access requirements imposed by the public records law. The public records law only addresses how long an authority must keep its records once an authority receives a public records request. 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). When a requester submits a public records request, the authority is obligated to preserve the requested records until after the request is granted or until at least 60 days after the request is denied (90 days if the requester is a committed or incarcerated person). Other retention periods apply if an authority receives written notice that the requester has commenced a mandamus action to enforce the public records law.

Other than this, the public records law does not address how long an authority must keep its records, and the public records law cannot be used to address an authority's alleged failure to retain records required to be kept under other laws. Instead, record retention is governed by other statutes. Wisconsin Stat. § 16.61 addresses the retention of records for state agencies, and Wis. Stat. § 19.21 deals with record retention for local government entities. The general statutory requirements for record retention apply equally to electronic records. Most often, record retention schedules, created in accordance with these statutes, govern how long an authority must keep its records and what it must do with them after the retention period ends. The Wisconsin Public Records Board's website, <http://publicrecordsboard.wi.gov/>, has additional information on record retention.

Based on the limited information you provided, it appears that the authority did not have the record at the time you submitted your public records request. Therefore, the record retention obligations under the public records law would not apply. Rather, the authority's obligation to retain the records would have been governed by the records retention statutes and record retention schedules created pursuant to those statutes.

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. Therefore, we are unable to offer you any further assistance regarding the record retention requirements under Wis. Stat. §§ 16.61 and 19.21 or any pertinent record retention schedules created pursuant to those statutes, because those statutes fall outside the scope of the OOG's responsibilities and authority. For more information on records retention, you may wish to visit the Wisconsin Public Records Board website at <http://publicrecordsboard.wi.gov/>.

Regarding your second request that you allege had not been fulfilled at the time of your correspondence to us, the public records law does not require a response to a public records request within a specific timeframe, as noted above. In other words, after a request is received, there is no set deadline by which the authority must respond.

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

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

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

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

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

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

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



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DEPARTMENT OF JUSTICE

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June 30, 2020

Tim McCumber
Sauk County Supervisor #20
[REDACTED]
Merrimac, WI 53561
Timothy.McCumber@SaukCountyWI.gov

Dear Mr. McCumber:

The Wisconsin Department of Justice (DOJ) is in receipt of your correspondence, dated December 17, 2019, regarding your request that DOJ open “an investigation into Sauk County Corporation Counsel Daniel Olson.” You wrote, “[H]e has blocked several requests by myself and other board supervisors from obtaining information regarding his job performance.” You also wrote that you have requested and been denied “copies of his 6th month and annual personnel review,” “key fob swipes information,” and “minutes from a closed session meeting.”

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 your allegation that Sauk County Corporation Counsel Daniel Olson “may be fraudulently submitting his payroll sheets and being compensated for time he is not entitled to,” 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 address your correspondence as it relates to the public records law and open meetings law. To that end, I would like to provide you with some general information first before turning to the specific concerns set forth in your correspondence.

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 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, 362 Wis. 2d 577, 866 N.W.2d 563 (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. See *Journal Times*, 2015 WI 56, ¶ 102 (“While it might be a better course to inform a requester that no record exists, the language of the public records law does not specifically require such a response.”). Moreover, an authority is not required to create a new record by extracting and compiling information from existing records in a new format. See Wis. Stat. § 19.35(1)(L). See also *George v. Record Custodian*, 169 Wis. 2d 573, 579, 485 N.W.2d 460 (Ct. App. 1992).

If 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).

Turning now to the specific concerns set forth in your correspondence, I first note that, in general, employee performance evaluation records are generally not subject to disclosure under the public records law. Wisconsin Stat. § 19.36(10)(d) states, in part, an authority shall not provide access to records containing information relating to employees that an authority uses for staff management planning, including performance evaluations.

That statutory exemption, however, only applies to “employees.” Under the public records law, an “employee” means “any individual who is employed by an authority, other than an individual holding local public office or a state public office, or any individual who is employed by an employer other than an authority.” Wis. Stat. § 19.32(1bg).

“Local public office” has the meaning provided in Wis. Stat. § 19.42(7w), which includes many elective or appointive offices of local government units, and “also includes any appointive office or position of a local governmental unit in which an individual serves as the head of a department, agency, or division of the local governmental unit, but does not include any office or position filled by a municipal employee.” Wis. Stat. § 19.32(1dm).

The performance evaluations of anyone holding a “local public office” as defined by Wis. Stat. § 19.42(7w), including an appointed position, therefore cannot be withheld based solely on the exemption under Wis. Stat. § 19.36(10)(d). A court could reasonably conclude that the position of Corporation Counsel is an appointed position serving as the head of a department and would therefore be a “local public office” under Wis. Stat. § 19.42(7w). In such case, the appointed position of Corporation Counsel would be excluded from the

definition of “employee” under Wis. Stat. § 19.32(1bg), and therefore, the exemption in Wis. Stat. § 19.36(10)(d) would not apply. *See Brown Correspondence* (July 28, 2017).

Regarding your request for “key fob swipes information,” generally 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*, 362 Wis. 2d 577, ¶ 55 (citation omitted). Based on the information you provided us, it appears that you may have received some of that information or similar information. However, DOJ does not have sufficient information to evaluate this issue fully.

Finally, based on the information provided in your correspondence, DOJ has insufficient information to properly address whether meeting minutes existed, and if so, whether they were withheld. In an effort to increase transparency, DOJ recommends that governmental bodies keep minutes of all meetings. However, there is no requirement under the open meetings law for a governmental body to do so. The open meetings law only requires a governmental body to create and preserve a record of all motions and roll-call votes at its meetings. Wis. Stat. § 19.88(3). 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).

Other statutes outside the open meetings law may prescribe particular minute-taking requirements for certain governmental bodies and officials that go beyond what is required by the open meetings law, but any such statutes fall outside of the scope of OOG’s responsibilities and authority. Therefore, we cannot provide assistance regarding such subject matter.

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

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

The information provided in this letter 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 30, 2020

Ramona Moody

[REDACTED]
Grantsburg, WI 54840
deanmona@grantsburgtelcom.net

Dear Ms. Moody:

The Wisconsin Department of Justice (DOJ) is in receipt of your correspondence, dated November 7, 2019, regarding your recent attendance “at a monthly municipal town board meeting where there was someone insisting that everybody in attendance must sign in and provide contact information. . . . The chairman did not push the issue.” You asked, “Could you please tell me what the open meeting laws are pertaining to demanding attendees sign in?”

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 in places reasonably accessible to members of the public and be open to all citizens at all times unless otherwise expressly provided by law. Wis. Stat. §§ 19.81(2), 19.82(3). 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.*

Moreover, 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).

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

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

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

Thus, as can be seen from the discussion above, the open meetings law does not require attendees of open meetings to sign in or provide their contact information. The open meetings law governs public access to and notice of meetings of governmental bodies, and also governs certain recordkeeping requirements, but the open meetings law does not dictate

all procedural aspects of how bodies run meetings. As also noted above, the open meetings law does not require more formal or detailed recordkeeping of other aspects of the meeting, beyond the record of all motions and roll-call votes required by Wis. Stat. § 19.88(3). Other statutes outside the open meetings law may prescribe particular minute-taking or recordkeeping requirements for certain governmental bodies and officials that go beyond what is required by the open meetings law. However, we cannot advise you further on those statutes, as they fall outside the scope of DOJ's Office of Open Government's authority and responsibilities under the open meetings law.

If you would like to learn more about the open meetings law, DOJ's Office of Open Government offers several open government resources through the Wisconsin DOJ website (<https://www.doj.state.wi.us/office-open-government/office-open-government>). DOJ provides the full Wisconsin open meetings law and maintains an Open Meetings Law Compliance Guide on its website.

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 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
Attorney General

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June 30, 2020

Daniel Ouimet

[REDACTED]
Spring Green, WI 53588
douimet62@gmail.com

Dear Mr. Ouimet:

The Wisconsin Department of Justice (DOJ) is in receipt of your correspondence dated October 15, 2019, in which you wrote, "I am writing to request advice as to the applicability of Subchapter V 19.81-19.98 to a violation of open meeting laws in Sauk County after a Board of Adjustment hearing on September 20, 2019." You stated that after the meeting was adjourned, the board members and Sauk County Corporation Counsel continued to meet "for approximately 13 minutes where parties and issues involved were discussed." After you made a public records request "for a letter that the board members were discussing, the 13 minutes of video after adjournment was removed from the Sauk County website." You asked Corporation Counsel for an explanation and you were referred to Lisa Wilson who told you "that the 'pre-meeting' and 'post-meeting' are commonly removed."

Before I address the specific concerns in your correspondence, I would like to give you some information about the open meetings law that I hope you will find helpful. The Wisconsin Open Meetings Law, Wis. Stat. §§ 19.81 to 19.98, acknowledges that the public is entitled to the fullest and most complete information regarding government affairs as is compatible with the conduct of governmental business. Wis. Stat. § 19.81(1). All meetings of governmental bodies shall be held publicly and be open to all citizens at all times unless otherwise expressly provided by law. Wis. Stat. § 19.81(2). The provisions of the open meetings law are to be construed liberally to achieve that purpose. Wis. Stat. § 19.81(4).

The open meetings law applies to every meeting of a governmental body. Under the open meetings law, a "meeting" is defined as:

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

vested in the body. The term does not include any social or chance gathering or conference which is not intended to avoid this subchapter.

Wis. Stat. § 19.82(2).

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

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

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

There is no requirement under the open meetings law for a governmental body to record their meetings or, if meetings are recorded, there is no requirement to post those recordings on their website. The open meetings law only requires a governmental body to create and preserve a record of all motions and roll-call votes at its meetings. Wis. Stat. § 19.88(3). Written minutes are the most common method used to comply with the requirement, but they are not the only permissible method. The recordkeeping requirements under Wis. Stat. § 19.88(3) 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).

Before addressing your concerns, I would also like to give you some information about the public records law that I hope you will find helpful. The Wisconsin Public Records Law, Wis. Stat. §§ 19.31 to 19.39, authorizes requesters to inspect or obtain copies of "records" created or maintained by an "authority." The purpose of the public records law is to shed light on the workings of government and the official acts of public officers and employees. *Bldg. & Constr. Trades Council v. Waunakee Cmty. Sch. Dist.*, 221 Wis. 2d 575, 582, 585 N.W.2d 726 (Ct. App. 1998).

Under the public records law, a "record" is defined 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.

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 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, 362 Wis. 2d 577, 866 N.W.2d 563 (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).

Turning now to the specific concerns in your correspondence, I first note that DOJ has insufficient information to fully evaluate whether there was a potential violation of the open meetings law. You stated that the board members and corporation counsel continued to meet “for approximately 13 minutes where parties and issues involved were discussed.” Given the limited information set forth in your correspondence, however, DOJ cannot determine with certainty whether that gathering constituted a “meeting” under the open meetings law. Such a determination would depend on whether the two *Showers* requirements—numbers and purpose—had been met, as discussed above.

Your correspondence also indicated that the “the 13 minutes of video after adjournment was removed from the Sauk County website,” and that the authority told you that “the ‘pre-meeting’ and ‘post-meeting’ are commonly removed.” Again, DOJ has insufficient information to evaluate these concerns fully. As noted above, there is no requirement under the open meetings law for a governmental body to record their meetings, or, if meetings are recorded, there is no requirement to post those recordings on their website. If a recording was made, it would be “record” subject to disclosure under the public records law. That said, however, the authority may not have had any records responsive to your request if the record had been deleted before the public records request was made. The public records law does not require an authority to provide requested information if no record exists, and an authority cannot fulfill a request for a record if the authority has no such record.

Records retention is a subject that is generally related to, but different from, the access requirements imposed by the public records law. The public records law only addresses how long an authority must keep its records once an authority receives a public records request. 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). When a requester submits a public records request, the authority is obligated to preserve the requested records until after the request is granted or until at least 60 days after the request is denied (90 days if the requester is a committed or incarcerated person). Other retention periods apply if an authority receives written notice that the requester has commenced a mandamus action to enforce the public records law.

Other than this, the public records law does not address how long an authority must keep its records, and the public records law cannot be used to address an authority’s alleged failure to retain records required to be kept under other laws. Instead, record retention is governed by other statutes. Wisconsin Stat. § 16.61 addresses the retention of records for state agencies, and Wis. Stat. § 19.21 deals with record retention for local government entities. The general statutory requirements for record retention apply equally to electronic records. Most often, record retention schedules, created in accordance with these statutes, govern how long an authority must keep its records and what it must do with them after the retention period ends. The Wisconsin Public Records Board’s website, <http://publicrecordsboard.wi.gov/>, has additional information on record retention.

Based on the limited information you provided, it is unclear whether the authority had the record at the time you submitted your public records request. If it did not, the record retention obligations under the public records law would not apply. Rather, the authority’s obligation to retain the records would have been governed by the records retention statutes and record retention schedules created pursuant to those statutes.

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. Therefore, we are unable to offer you any further assistance regarding the record retention requirements under Wis. Stat. §§ 16.61 and 19.21 or any pertinent record retention schedules created pursuant to those statutes, because those

statutes fall outside the scope of the OOG's responsibilities and authority. For more information on records retention, you may wish to visit the Wisconsin Public Records Board website at <http://publicrecordsboard.wi.gov/>.

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

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

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

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

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

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

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

The Attorney General and the 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>). On its website, DOJ provides the full Wisconsin open meetings law and public meetings law, and also maintains an Open Meetings Law Compliance Guide and a Public Records Law Compliance Guide there.

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:lah

Cc: Sauk County Corporation Counsel



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June 30, 2020

Jeffrey Seering

[REDACTED]
Reedsburg, WI 53959
seerjeff@yahoo.com

Dear Mr. Seering:

The Wisconsin Department of Justice (DOJ) is in receipt of your correspondence dated January 24, 2020, March 9, 2020, and May 18, 2020, regarding the Sauk County Executive and Legislative Committee. You wrote, “the committee came out of closed session and voted on a motion to have its committee chair issue subpoenas. There was no listing on the agenda for any action other than adjournment following the closed session.” You “filed an Open Meeting Law violation complaint with the Sauk County Sheriff’s Department which has since been forwarded on to [DOJ].” You requested a statement from the Attorney General that the committee members cited in the complaint “violate[d] the Open Meeting Law and any action they took [] is invalid.” You also “filed an Open Record request with the county to receive copies of the subpoenas issued as a result of that meeting.” You asked, “Are subpoenas issued by a county board committee chairman, a non-judicial act, covered by any closed records rules?”

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 “public elected officials hav[ing] an out from prosecution if an attorney advises them,” 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 address your correspondence as it relates to the open meetings law and public records law. Before doing so, however, I would like to give you 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).

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.

The open meetings law also provides for the timing for releasing agendas, as well as the level of specificity required in agenda items for open meetings, 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. 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).

Moreover, although the open meetings law governs public access to and notice of meetings of governmental bodies, it does not dictate all procedural aspects of how bodies run meetings. For example, the open meetings law does not specify requirements for the process that governmental bodies use to adopt meeting agendas. So long as governmental bodies follow the requirements for adequate and timely notice to the public, the notice complies with the open meetings law.

Regarding public comment periods, 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. Unless such a statute specifically applies, however, a governmental body is free to determine for itself whether and to what extent it will allow citizen participation at its meetings. For example, a body may choose to limit the time each citizen has to speak. *See, e.g.*, Nix Correspondence (October 29, 2002); Lundquist Correspondence (Oct. 25, 2005); Zweig Correspondence (July 13, 2006); Chiaverotti Correspondence (Sept. 19, 2006). Other restrictions on citizen participation will be discussed further below.

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

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

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

A governmental body may not commence a meeting, convene in closed session, and subsequently reconvene in open session within 12 hours after completion of a closed session,

unless public notice of the subsequent open session is given “at the same time and in the same manner” as the public notice of the prior open session. Wis. Stat. § 19.85(2). The notice need not specify the time the governmental body expects to reconvene in open session if the body plans to reconvene immediately following the closed session. If the notice does specify the time, the body must wait until that time to reconvene in open session. When a governmental body reconvenes in open session following a closed session, the presiding officer has a duty to open the door of the meeting room and inform any members of the public that the session is open. Claybaugh Correspondence (Feb. 16, 2006).

Turning now to the specific concerns in your correspondence, you contend that “[t]here was no listing on the agenda for any action other than adjournment following the closed session,” and you requested that DOJ issue a statement that this is a “clear violation” of the open meetings law. Based on the limited information you provided in your correspondence, DOJ has insufficient information to evaluate whether a violation of the open meetings law occurred. However, we hope that the information provided above is helpful.

In your correspondence, you also suggested that the board violated the open meetings law because “[citizen] speakers [at a public comment session] are advised that the county board may not comment on or act upon public comments not related to the agenda.” Regarding restrictions on a public comment period, I wanted to emphasize again that the open meetings law allows, but does not require, a governmental body to designate a portion of an open meeting as a public comment period. Wis. Stat. §§ 19.83(2), 19.84(2). As the Attorney General has previously advised, the statutes are silent regarding any specific procedures to be followed *if* such a public comment period is allowed. *See, e.g.,* Lundquist Correspondence (Oct. 25, 2005); Zweig Correspondence (July 13, 2006); Chiaverotti Correspondence (Sept. 19, 2006). Faced with such statutory silence, Wisconsin open meetings law generally gives local governmental bodies broad discretion to govern their own procedures about whether, and to what extent, to allow public input at a meeting. *Id.*

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

The Office of Open Government generally advises governmental bodies that, if citizens happen to raise subjects during a public comment period that are not properly noticed on an agenda or elsewhere, the governmental body should: 1) limit the discussion of that subject;

and 2) defer any extensive deliberation to a later meeting for which more specific notice can be given. *See, e.g.*, Sayles Correspondence (Aug. 4, 2017); *see also State ex rel. Buswell v. Tomah Area Sch. Dist.*, 2007 WI 71, ¶ 34, 301 Wis. 2d 178, 732 N.W.2d 804 (a meeting generally “cannot address topics unrelated to the information in the notice.”). We also generally advise that governmental bodies may not take formal action on any subject raised in the public comment period, unless that subject is also identified in the meeting notice. *See, e.g.*, Sayles Correspondence (Aug. 4, 2017).

Based on the limited information in your correspondence, a court would likely find that the restrictions imposed on the public comment period would be valid. As noted above, there are some other state statutes that might impose other requirements on public hearings or public comment, but the OOG cannot advise you on those matters, as they are outside of the OOG’s authority and responsibilities.

Regarding your public records request “with the county to receive copies of the subpoenas issued as a result of that meeting,” you asked, “Are subpoenas issued by a county board committee chairman, a non-judicial act, covered by any closed records rules?” DOJ has insufficient information from your correspondence to fully evaluate these concerns. However, I can provide you with some general information about the public records law that I hope you will find helpful.

The Wisconsin Public Records Law, Wis. Stat. §§ 19.31 to 19.39, authorizes requesters to inspect or obtain copies of “records” created or maintained by an “authority.” 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).

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

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

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

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

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

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:

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

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

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

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



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June 30, 2020

Donald Vogt

[REDACTED]
Manitowoc, WI 54220
donvogt65@yahoo.com

Dear Mr. Vogt:

The Wisconsin Department of Justice (DOJ) is in receipt of your correspondence, dated October 27, 2019, regarding your public records request for “the sentencing transcript on a criminal case.” The court reporter told you “it would cost [you] \$88 to receive it.” You then asked the court reporter if you “could come there and read it, and was told [you] had to pay for it.” You asked three questions: (1) “Is a transcript already prepared subject to open records?”; (2) “[I]s it lawful to deny access to the record unless \$88 is paid even though it has been prepared but not proofed?”; and (3) “Do I need to pay for the record if I only wish to read it?”

DOJ’s Office of Open Government (OOG) works to increase government openness and transparency with a focus on the Wisconsin Open Meetings Law, Wis. Stat. §§ 19.81 to 19.98, and the Wisconsin Public Records Law, Wis. Stat. §§ 19.31 to 19.39. Some of the subject matter of your correspondence, regarding fees charged for transcripts, is outside of this scope. Therefore, we are unable to offer you assistance regarding your concerns that are outside the scope of the OOG’s authority and responsibilities. Nevertheless, I would like to provide you with 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.” See Wis. Stat. §§ 19.31 to 19.39. The public records law defines an “authority” as any of the following having custody of a record:

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

county or municipality; a university police department under s. 175.42; or a formally constituted subunit of any of the foregoing.

Wis. Stat. § 19.32(1).

The public records law, however, only applies to “records.” The public records law defines a “record” as any material on which written, drawn, printed, spoken, visual, or electromagnetic information or electronically generated or stored data is recorded or preserved, regardless of physical form or characteristics, which has been created or is being kept by an authority. Wis. Stat. § 19.32(2). A “record” includes handwritten, typed, or printed documents; maps and charts; photographs, films, and tape recordings; tapes, optical disks, and any other medium on which electronically generated or stored data is recorded or preserved; and electronic records and communications. *Id.* A “record” does not include . . . materials to which access is limited by copyright, patent, or bequest; and published materials in the possession of an authority other than a public library that are available for sale, or that are available for inspection at a public library.” *Id.*

Pursuant to Wis. Stat. § 19.35(3)(a), “An authority may impose a fee upon the requester of a copy of a record which may not exceed the actual, necessary and direct cost of reproduction and transcription of the record, unless a fee is otherwise specifically established or authorized to be established by law.” Under the public records law, “[A]n authority may charge a fee [for records] not exceeding the actual, necessary, and direct costs of *four specific tasks*: (1) ‘reproduction and transcription’; (2) ‘photographing and photographic processing’; (3) ‘locating’; and (4) ‘mailing or shipping.’” *Milwaukee Journal Sentinel v. City of Milwaukee*, 2012 WI 65, ¶ 54 (citation omitted) (emphasis in original). The amount of such fees may vary depending on the authority. However, an authority may not profit from complying with public records requests. *WIREDATA, Inc. v. Vill. of Sussex*, 2008 WI 69, ¶¶ 103, 107, 310 Wis. 2d 397, 751 N.W.2d 736 (an authority may not profit from its response to a public records request, but may recoup all of its actual costs).

The law permits an authority to impose a fee for locating records if the cost is \$50.00 or more. Wis. Stat. § 19.35(3)(c). An authority may require a requester prepay any such fees if the total amount exceeds \$5.00. Wis. Stat. § 19.35(3)(f). Generally, the rate for an actual, necessary, and direct charge for staff time should be based on the pay rate (including fringe benefits) of the lowest paid employee capable of performing the task. For more information on permissible fees, please see the Office of Open Government Advisory: Charging Fees under the Wisconsin Public Records Law, which was issued on August 8, 2018 and can be found on DOJ’s website (<https://www.doj.state.wi.us/news-releases/office-open-government-advisory-charging-fees-under-wisconsin-public-records-law>).

In short, the copy fees charged by an authority must not exceed the “actual necessary and direct cost of reproduction and transcription” unless another law established such a fee or authorizes such a fee to be established by law. However, other laws that authorize an authority to charge other fees fall outside of the public records law. For example, *see* Wis. Stat. § 59.40(3), which directs the clerk of the circuit court to collect certain specified fees. *See also* Wis. Stat. §§ 757.57 and 814.69, which apply to the fees of court reporters. As noted above, however, the OOG is unable to offer you assistance regarding your concerns that are outside the scope of the OOG’s authority and responsibilities.

Finally, with respect to in-person inspection of records, pursuant to Wis. Stat. § 19.34(1), an “authority” (as defined above) is required to

adopt, prominently display and make available for inspection and copying at its offices, for the guidance of the public, a notice containing a description of its organization and the established times and places at which, the legal custodian under s. 19.33 from whom, and the methods whereby, the public may obtain information and access to records in its custody, make requests for records, or obtain copies of records, and the costs thereof.

Members of the legislature and members of a local government body are exempt from this requirement.

Further, under the public records law, a requester generally may choose to inspect a record and/or to obtain a copy of the record in person, so long as the requester provides the requisite notice to the authority. *See* Wis. Stat. §§ 19.34(2), 19.35(1)(a), and 19.35(1)(b). As stated in Wis. Stat. § 19.35(1)(b), “Except as otherwise provided by law, any requester has a right to inspect a record and to make or receive a copy of a record. If a requester appears personally to request a copy of a record that permits copying, the authority having custody of the record may, at its option, permit the requester to copy the record or provide the requester with a copy substantially as readable as the original.” Wis. Stat. § 19.35(1)(b). A requester must be provided facilities for inspection and copying of requested records comparable to those used by the authority’s employees. Wis. Stat. § 19.35(2). A records custodian may impose reasonable restrictions on the manner of access to an original record if the record is irreplaceable or easily damaged. Wis. Stat. § 19.35(1)(k).

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

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

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