

2020 4th Quarter Correspondence

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November 24, 2020

Anonymous
[REDACTED]

Dear Anonymous:

The Wisconsin Department of Justice (DOJ) is in receipt of your correspondence, dated December 15, 2019, regarding your “April 2018 written record request sent to the Shawano County Clerk for a photo copy of the Private Onsite Wastewater Treatment System special assessment resolution (Wi Statute 66.0703(4) to be sent via text messaging.” You received a response to your request, however, “[t]he text did not include the photo of the requested resolution.” You wrote, “I have not been provided with any written statement from the Shawano County Clerk informing me if the clerk lacks the capabilities, equipment, or skills to sent photos of request records via text messaging, will not provide access to requesters who do not identify themselves, refusing to send photos of requested records via text messaging, or the reasons if the requested 2 page POWTS preliminary resolution is exempt from public disclosure.” You also wrote that “[v]erbal requests were made in person for access” to the records, but “access was not provided.”

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

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

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

Under the public records law, there is no requirement that a request must be made or fulfilled in person, and generally, one may submit a request verbally or in writing. *See* Wis. Stat. § 19.35(1)(h) (“A request may be made orally, but a request must be in writing before an action to enforce the request is commenced” under Wis. Stat. § 19.37.). If a requester appears personally to request a copy of a record, Wis. Stat. § 19.35(1)(b) requires that copies of written documents be “substantially as readable” as the original. *Lueders v. Krug*, 2019 WI App 36, ¶ 6, 388 Wis. 2d 147, 931 N.W.2d 898. Wisconsin Stat. § 19.35(1)(c) and (d) also require that audiotapes be “substantially as audible,” and copies of videotapes be “substantially as good” as the originals.

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

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

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

The public records law 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.

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).

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). In the *Lueders* case, the Wisconsin Court of Appeals has provided some guidance on whether an authority needs to provide records in a format specified by the requester, holding that the requester in that case was “entitled to the e-mails in electronic form” when the request was for emails “in electronic form.” *Lueders*, 2019 WI App 36, ¶ 15. The court also stated that the authority must provide “electronic copies,” not paper copies of records, to a requester who asks for records in electronic format. *Id.* However, copying emails onto a flash drive would have contained all the information, including the metadata, that the original emails themselves contained. *Id.* ¶¶ 13–15. The courts have also found that providing a record in PDF format satisfied a request for records in “electronic, digital” format. *WIREDATA II*, 310 Wis. 2d 397, ¶¶ 97–98.

DOJ’s Office of Open Government encourages authorities and requesters to maintain an open line of communication. This helps to avoid misunderstandings between an authority and a requester. We recommend communicating with an authority if you are unable to access the records as provided, and we would encourage an authority to accommodate a requester’s request for a different format if possible.

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

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

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

Lawyer Referral and Information Service
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 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



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December 21, 2020

Nate Cade
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Dear Mr. Cade:

The Wisconsin Department of Justice (DOJ) is in receipt of your correspondence, dated February 10, 2020, regarding the public records request you submitted to the Shorewood School District. In the records you received, one email contained redactions and you “believe that the redacted lines” are not “confidential” and should be disclosed. You asked DOJ to “file a mandamus action seeking the production of this email in an unredacted form.”

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

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

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

819, 824-25, 472 N.W.2d 579 (Ct. App. 1991). In every written denial, the authority must also inform the requester that “if the request for the record was made in writing, then the determination is subject to review by mandamus under s. 19.37(1) or upon application to the attorney general or a district attorney.” Wis. Stat. § 19.35(4)(b).

The reasons provided for a denial must be specific and sufficient. While a records custodian is not required to provide facts supporting the reasons identified for denying all or part of a public records request, a records custodian must provide specific reasons for any such denial. *See Hempel*, 284 Wis. 2d 162, ¶¶ 25-26, 79. Simply stating a conclusion without explaining the specific reasons for the denial does not satisfy the specificity requirement. If a statute requires the confidentiality of all or part of a requested record, citation to the statute is sufficient. If a records custodian relies on the public records balancing test to deny all or part of the record, the records custodian must provide a public policy reason supporting the decision. *Portage Daily Register v. Columbia Cty. Sheriff’s Dep’t*, 2008 WI App 30, ¶ 14, 308 Wis. 2d 357, 746 N.W.2d 525. The specificity requirement helps prevent records custodians from arbitrarily denying access to public records without conducting the balancing test. It also provides the requester with sufficient notice of the reasons for denial.

Our office has insufficient information to evaluate the redactions to the requested records because the only explanation of the reason for the redactions is found in the January 31, 2020 email from the school district that accompanied your correspondence. It is unclear whether the school district has provided you with a written statement of the reasons for the redactions beyond the email, which cites “confidentiality.” The email does not cite any statutory, common law, or public records balancing test reasons for the redactions. Additionally, the email did not provide the mandamus language required by Wis. Stat. § 19.35(4)(b). If the school district did not provide any additional written explanation, it is likely that a court could find the school district’s explanation of the reason for the redactions does not comply with Wis. Stat. § 19.35(4)(b).

By way of copy of this letter, DOJ’s Office of Open Government advises the Shorewood School District to provide you with a written statement of the reasons for the redactions that complies with the requirements of Wis. Stat. § 19.35(4)(b), if they have not already done so.

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

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 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,



Paul M. Ferguson
Assistant Attorney General
Office of Open Government

PMF:lah

Cc: Dr. Bryan Davis (via email)
Marta Kwiatkowski (via email)
Pablo Muirhead (via email)
Paru Shah (via email)



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DEPARTMENT OF JUSTICE

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December 21, 2020

Mindy Howe

[REDACTED]
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Dear Ms. Howe:

The Wisconsin Department of Justice (DOJ) is in receipt of your correspondence, dated February 4, 2020, in which you wrote, "I was told [b]y my school superintendent that subcommittee meeting minutes were not required to be public. Is this correct?"

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). A formally constituted subunit of a governmental body is itself a governmental body and thus subject to the open meetings law. *See* Wis. Stat. § 19.82(1).

In an effort to increase transparency, DOJ's Office of Open Government (OOG) 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).

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). However, we cannot advise you further on those statutes, as they fall outside the scope of the OOG's authority and responsibilities under the open meetings law.

In short, the open meetings law does not dictate all procedural aspects of how bodies run meetings, including the drafting and dissemination of minutes. For example, while the open meetings law does not require governmental bodies to post minutes and agendas online, it also does not prohibit such practices. In the interest of government transparency, the OOG encourages the dissemination of minutes.

A governmental body's meeting minutes, including those of a formally constituted subunit, are records subject to disclosure pursuant to the Wisconsin Public Records Law, Wis. Stat. §§ 19.31 to 19.39. The public records law authorizes requesters to inspect or obtain copies of records created or maintained by an authority. A governmental body is also an authority for the purposes of the public records law. *See* Wis. Stat. § 19.32(1). 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. If an authority denies a written request, in whole or in part, the authority must provide a written statement of the reasons for such a denial and inform the requester that the determination is subject to review by mandamus under Wis. Stat. § 19.37(1) or upon application to the attorney general or a district attorney. Wis. Stat. § 19.35(4)(b). If the governmental body in question has created meeting minutes and you wish to receive them, you may wish to submit a public records request for the minutes.

If you would like to learn more about the open meetings law or 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 Open Meetings Law and Wisconsin Public Records Law and maintains an Open Meetings Law Compliance Guide and a Public Records 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,



Paul M. Ferguson
Assistant Attorney General
Office of Open Government



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December 21, 2020

Lawrence Kahlscheuer

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ldkahlscheuer@frontier.com

Dear Mr. Kahlscheuer:

The Wisconsin Department of Justice (DOJ) is in receipt of your correspondence, dated January 29, 2020, in which you wrote, “If a township creates a committee with membership to be up to 7, how can a quorum be determined. At present three members have been approved by the town board with two that have written their wish to be on the committee but not yet approved. Can a meeting be called now with only three or do they need to wait until the board approves 4 additional to make the total – ‘up to 7?’”

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

The open meetings law defines a “meeting” is defined as:

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

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

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.

Based on the limited information in your correspondence, we cannot make a definitive determination of whether a quorum existed, because such a determination would depend, in part, on how the committee was formed. As explained above, *Showers* requires that a meeting of a governmental body occurs only if there are a sufficient number of members present to determine the body's course of action. In order to determine whether a sufficient number of members are present to determine a body's course of action, however, the membership of the body must be numerically definable. In other words, the directive creating the body must also confer collective power and define when that power exists. For example, the Attorney General's Office has previously concluded that a loosely constituted group of citizens and local officials instituted by a mayor to discuss various issues related to a dam closure was not a governmental body, because no rule or order defined the group's membership, and no provision existed for the group to exercise collective power. Godlewski Correspondence (Sept. 24, 1998).

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

2006). Groups that include both members and non-members of a parent body are not “subunits” of the parent body. Nonetheless, such groups frequently fit within the definition of a “governmental body”—*e.g.*, as advisory groups to the governmental bodies or government officials that created them.

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

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

It is important to note that the phrase “convening of members” in Wis. Stat. § 19.82(2) is not limited to situations in which members of a body are simultaneously gathered in the same location, but may also include other situations in which members are able to effectively communicate with each other and to exercise the authority vested in the body, even if they are not physically present together. Whether such a situation qualifies as a “convening of members” under the open meetings law depends on the extent to which the communications in question resemble a face-to-face exchange.

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

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,

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

Sarah K. Larson
Assistant Attorney General
Office of Open Government

SKL:lah



**STATE OF WISCONSIN
DEPARTMENT OF JUSTICE**

Josh Kaul
Attorney General

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Madison, WI 53707-7857
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Paul M. Ferguson
Assistant Attorney General
fergusonpm@doj.state.wi.us
(608) 266-1221
TTY 1-800-947-3529
FAX (608) 267-2779

December 21, 2020

Scott Michalak

[REDACTED]
Marshall, WI 53559
michalak433@msn.com

Dear Mr. Michalak:

The Wisconsin Department of Justice (DOJ) is in receipt of your correspondence, dated February 19, 2020, in which you wrote, "I am a Marshall village trustee. I have been having trouble getting my village president putting things on the agenda[,] also I have been told that I can not [sic] change an ordinance by our village clerk." You asked, "What do I have to do to get things on the agenda and can I indeed offer changes to existing ordinances[?]" On April 9, 2020, you spoke with Assistant Attorney General Sarah Larson regarding some of the issues raised in your correspondence.

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 "putting things on the agenda" and "offer[ing] changes to existing ordinances," is outside this scope. Therefore, the OOG cannot provide you with assistance regarding such subject matter. Additionally, the information you provided in your correspondence is insufficient to properly evaluate the issue you raised regarding "putting things on the agenda."

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

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 open government-related questions or concerns, you may wish to contact DOJ's Public Records Open Meetings (PROM) help line. 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,



Paul M. Ferguson
Assistant Attorney General
Office of Open Government

PMF:lah



**STATE OF WISCONSIN
DEPARTMENT OF JUSTICE**

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FAX (608) 267-2779

December 21, 2020

Gary Miller
imgrmiller@msn.com

Dear Mr. Miller:

The Wisconsin Department of Justice (DOJ) is in receipt of your correspondence, dated January 13, 2020, regarding alleged open meetings law violations by the Hurley School Board specifically related to the notice provisions under Wis. Stat. § 19.84(2). You wrote, “Our complaint specifically deals with the public notice for the meeting, the agenda items, and the subsequent meeting minutes all as covered by Wisconsin State Statutes.” You included five open meetings law complaints that were submitted to Iron County District Attorney Andrew Tingstad, and he declined to pursue an enforcement action. You wrote, “we are seeking [DOJ’s] assistance in assuring that the Open Meetings Law is justly enforced and that our complaint receives an appropriate review and response.” We have reviewed the complaints along with the supporting documentation that you included. You also called into our Public Records Open Meetings (PROM) help line and we discussed this issue on November 6, 2019.

The Attorney General and DOJ’s Office of Open Government (OOG) are committed to increasing government openness and transparency. The OOG works in furtherance of this with a focus on the Wisconsin Open Meetings Law, Wis. Stat. §§ 19.81 to 19.98, and the Wisconsin Public Records Law, Wis. Stat. §§ 19.31 to 19.39. The OOG is only authorized to provide assistance within this scope. Based on the information you provided, it appears that some of the subject matter of your correspondence, such as alleged conflicts of interest and other alleged ethics violations under Wis. Stat. §§ 19.41(1) and 19.46, is outside of that scope. Therefore, the OOG cannot provide you with legal assistance on matters outside of the OOG’s scope of authority and responsibilities. However, to the extent your correspondence concerns the open meetings law, we can provide some general information that you may find helpful.

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

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. 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).

A governmental body, when conducting a meeting, is free to discuss any aspect of any subject identified in the public notice of that meeting, as well as issues reasonably related to that subject, but may not address any topics that are not reasonably related to the information in the notice. *Buswell*, 2007 WI 71, ¶ 34. There is no requirement, however, that a governmental body must follow the agenda in the order listed on the meeting notice, unless a particular agenda item has been noticed for a specific time. Stencil Correspondence (Mar. 6, 2008). Nor is a governmental body required to actually discuss every item contained in the

public notice. It is reasonable, in appropriate circumstances, for a body to cancel a previously planned discussion or postpone it to a later date. Black Correspondence (Apr. 22, 2009); Krueger Correspondence (Feb. 13, 2019).

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. Other statutes may govern those issues or set forth certain procedures, but as noted above, we cannot assist you with matters outside of the open meetings law. So long as governmental bodies follow the requirements for adequate and timely notice to the public, the notice complies with the open meetings law.

Turning now to your specific concerns about the January 21, 2019 school board meeting, I first caution that any conclusions we have reached in this letter are based solely on the limited information you sent us in your correspondence, not on any factual investigation that we have conducted. The agenda item in question, under the heading “Board Action Items” listed the following agenda subject: “Discussion and possible action regarding further consideration of referendum question and additional options for decision on change to School District mascot.” You have raised a number of alleged violations of the open meetings law pertaining to this agenda item, and I will address each in turn.

First, you allege that this notice was not sufficiently specific enough because it was a change from what the community might have expected at the meeting, given the previous two meetings and other community events. As noted above, whether a notice is sufficient under the open meetings law would depend on a reasonableness standard and would take into account a variety of factors. Using the limited information provided in your correspondence, we are unable to make a definitive determination about the reasonableness of this notice, but a court might find that the subject was of particular public interest and involved a non-routine action that the public would be unlikely to anticipate. However, a court might also find that the notice gave the public sufficient information about the business to be conducted that alerted them to the importance of the meeting so they could make an informed decision whether to attend, even if it might have been beneficial or helpful to the public to include more detail in the notice. A court would need to analyze all other relevant facts before deciding whether the notice in question was reasonable.

Moreover, whether the notice is reasonable “cannot be determined from the standpoint of when the meeting actually takes place,” but rather, must be “based upon what information is available to the officer noticing the meeting at the time the notice is provided, and based upon what it would be reasonable for the officer to know.” *Buswell*, 2007 WI 71, ¶ 32. Whether a meeting notice reasonably apprises the public of the meeting’s subject matter may also depend in part on the surrounding circumstances. A notice that might be adequate, standing alone, may nonetheless fail to provide reasonable notice if it is accompanied by other statements or actions that expressly contradict it, or if the notice is misleading when considered in the light of long-standing policies of the governmental body. *See, e.g.*, Linde Correspondence (May 4, 2007); Koss Correspondence (May 30, 2007); Musolf Correspondence (July 13, 2007); Martinson Correspondence (Mar. 2, 2009).

Second, you allege that the notice was not specific enough because it was unclear that a school board vote would be taken on the item. As noted above, 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, but 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. Here, the agenda item was listed under the heading “Board Action Items,” and indicated that the board would have a “[d]iscussion and possible action regarding further consideration of the referendum question” as well as “additional options for decision on change.”

Although the agenda could have more specifically stated that a vote would be taken, the agenda indicated that there might be “possible action” or a “decision on change,” signaling to the public that some board action would likely be taken at the meeting. Regarding your allegation that the board did not have authority to vote on the issue because it could not “rescind” the allegedly “binding referendum” that the community had passed, the OOG cannot advise you as to those matters, as they are outside the scope of the open meetings law. If you have further questions about how other laws pertaining to the board’s powers may interact with the open meetings law, you may wish to consult with private counsel.

In a third, related allegation, you allege that the notice published in the newspaper differed from, and conflicted with, the agenda posted to the public, because the newspaper notice indicated “discussion and possible further consideration” of the issue whereas the public notice indicated “discussion and possible *action* regarding further consideration” of the issue (emphasis added). Both notices, however, indicate that there would be a discussion on “[a]dditional options for decision on change.”

The law requires that public notice of all meetings of a governmental body must be given by communication from the governmental body’s chief presiding officer or his or her designee to each of the following: (1) the public; (2) to news media who have filed a written request for such notice; *and* (3) to the official newspaper (designated under Wis. Stat. §§ 985.04, 985.05, and 985.06) or, if there is no such paper, to a news medium likely to give notice in the area. Wis. Stat. § 19.84(1)(b). In addition, when another specific statute prescribes the type of meeting notice a governmental body must give, the body must comply with the requirements of that statute as well as the notice requirements of the open meetings law. Wis. Stat. § 19.84(1)(a).

It is important to note that notice to the public, notice to news media, and notice to the official newspaper are separate requirements. First, as to the public notice, communication from the chief presiding officer of a governmental body or such person’s designee shall be made to the public using one of the following methods: 1) Posting a notice in at least 3 public places likely to give notice to persons affected; 2) Posting a notice in at least one public place likely to give notice to persons affected and placing a notice electronically on the governmental body’s Internet site; or 3) By paid publication in a news medium likely to give notice to persons affected. Wis. Stat. § 19.84(1)(b). If the presiding officer gives notice in the third manner, he or she must ensure that the notice is actually published.

Second, as to the notice to the news media, the chief presiding officer must give notice of each meeting to members of the news media who have submitted a written request for

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

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

Based on the information you sent in your correspondence, it appears that the public notice was physically posted in at least one public place plus posted online, thereby satisfying the requirement for public notice (the first requirement in the notice statute). In other words, it appears that notice to the official newspaper (the third requirement in the notice statute) was not intended to effectuate notice to the public (the first requirement in the notice statute). Because the governmental body was not required to ensure that the newspaper notice was in fact published, the body was also not required to ensure that what was published in the newspaper was the same as the public notice. While it is good practice for a governmental body to try to ensure consistency between the notices, a governmental body cannot control what is actually published in the newspaper—absent paid publication—nor was the body not required to do so here, so long as the public notice was otherwise satisfied.

Governmental bodies should ensure that meeting notices are worded as clearly as possible to avoid any potential confusion among the public. Additionally, as a best practice governmental bodies should ensure that all notices are identical to the extent possible. Further, the courts have held that “there is no requirement in the notice statute that the notice provided be exactly correct in every detail.” *Olson*, 252 Wis. 2d 628, ¶ 14. There is also no *per se* rule that the notice statute is “violated in each instance that a public notice contains any type of incorrect information, even when it is not misleading to the public.” *Id.*

Here, the two notices were substantially similar in that they both indicated there would be a discussion and further consideration of the issue. The public notice also included the language that a “possible action” might be taken, and as noted above, the agenda item, was listed under the heading “Board Action Items,” signaling to the public that some board action would likely be taken at the meeting.

Your fourth open meetings law allegation is that the January 21, 2019 meeting did not accommodate sufficient public comment or input on the measure. While Wisconsin law requires that meetings of governmental bodies be open to the public so that citizens may attend and observe open session meetings, the law does not require a governmental body to allow members of the public to speak or actively participate in the body’s meetings. While the

open meetings law allows a governmental body to set aside a portion of a meeting for public comment, it does not require a body to do so. Wis. Stat. §§ 19.83(2), 19.84(2). Under the open meetings law, a governmental body is free to determine for itself whether and to what extent it will allow citizen participation at its meetings. For example, a body may choose to limit the time each citizen has to speak. There are some other state statutes that may require governmental bodies to hold public hearings on specified matters, and those statutes may also impact public comment periods. Again, however, the OOG is not authorized to give legal advice or counsel on matters outside the scope of the open meetings law. If you have further questions about how other laws may interact with the open meetings law, you may wish to consult with private counsel.

Finally, I wanted to address your implied, but not explicit, fifth allegation that the members of this body illegally convened outside of the context of an open meeting by texting amongst themselves before the meeting. Although I do not have sufficient information to address whether a walking quorum violation occurred, I still wanted to provide you with some general information about walking quorums that I hope you find helpful.

The open meetings law applies to every meeting of a governmental body. 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.

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

The essential feature of a walking quorum is the element of agreement among members of a body to act uniformly in sufficient numbers to reach a quorum. Where there is no such express or tacit agreement, exchanges among separate groups of members may take place without violating the open meetings law.

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

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

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

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

It is important to note that the phrase “convening of members” in Wis. Stat. § 19.82(2) is not limited to situations in which members of a body are simultaneously gathered in the same location, but may also include other situations in which members are able to effectively communicate with each other and to exercise the authority vested in the body, even if they are not physically present together. Whether such a situation qualifies as a “convening of members” under the open meetings law depends on the extent to which the communications in question resemble a face-to-face exchange. A convening of members may occur through written correspondence and electronic communications.

Regarding your request for enforcement, as you are aware, under the open meetings law, the Attorney General and the district attorneys have authority to enforce the law. Wis. Stat. § 19.97(1). Generally, the Attorney General may elect to prosecute complaints presenting novel issues of law that coincide with matters of statewide concern. As your matter does not appear to present novel issues of law that coincide with matters of statewide concern, we respectfully decline to file an enforcement action on your behalf 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).

Based on the information contained in your correspondence, it appears that you filed a complaint with the district attorney and the district attorney declined to prosecute the complaint. Although the Attorney General is also declining to pursue an enforcement action at this time, by copy of this letter, we are informing the governmental body of your concerns. Further, the open meeting law's other enforcement options may still be available to you, and 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 open meetings law and maintains an 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. § 19.98 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: Hurley School Board



**STATE OF WISCONSIN
DEPARTMENT OF JUSTICE**

**Josh Kaul
Attorney General**

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FAX (608) 267-2779

December 21, 2020

Bert Saari

[REDACTED]
Hurley, WI 54550

Dear Mr. Saari:

The Wisconsin Department of Justice (DOJ) is in receipt of your correspondence, dated December 4, 2019, regarding alleged open meetings law violations by the Hurley School Board specifically related to the notice provisions under Wis. Stat. § 19.84(2). You included five open meetings law complaints that you submitted to Iron County District Attorney Andrew Tingstad, and he declined to pursue an enforcement action. We have reviewed the complaints along with the supporting documentation that you included. I also note that I had a phone conversation on November 6, 2019 with Mr. Gary Miller regarding this same matter.

The Attorney General and DOJ's Office of Open Government (OOG) are committed to increasing government openness and transparency. The OOG works in furtherance of this with a focus on the Wisconsin Open Meetings Law, Wis. Stat. §§ 19.81 to 19.98, and the Wisconsin Public Records Law, Wis. Stat. §§ 19.31 to 19.39. The OOG is only authorized to provide assistance within this scope. Based on the information you provided, it appears that some of the subject matter of your correspondence, such as alleged conflicts of interest and other alleged ethics violations under Wis. Stat. §§ 19.41(1) and 19.46, is outside of that scope. Therefore, the OOG cannot provide you with legal assistance on matters outside of the OOG's scope of authority and responsibilities. However, to the extent your correspondence concerns the open meetings law, we can provide some general information that you may find helpful.

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

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. 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).

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

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. Other statutes may govern those issues or set forth certain procedures, but as noted above, we cannot assist you with matters outside of the open meetings law. So long as governmental bodies follow the requirements for adequate and timely notice to the public, the notice complies with the open meetings law.

Turning now to your specific concerns about the January 21, 2019 school board meeting, I first caution that any conclusions we have reached in this letter are based solely on the limited information you sent us in your correspondence, not on any factual investigation that we have conducted. The agenda item in question, under the heading “Board Action Items” listed the following agenda subject: “Discussion and possible action regarding further consideration of referendum question and additional options for decision on change to School District mascot.” You have raised a number of alleged violations of the open meetings law pertaining to this agenda item, and I will address each in turn.

First, you allege that this notice was not sufficiently specific enough because it was a change from what the community might have expected at the meeting, given the previous two meetings and other community events. As noted above, whether a notice is sufficient under the open meetings law would depend on a reasonableness standard and would take into account a variety of factors. Using the limited information provided in your correspondence, we are unable to make a definitive determination about the reasonableness of this notice, but a court might find that the subject was of particular public interest and involved a non-routine action that the public would be unlikely to anticipate. However, a court might also find that the notice gave the public sufficient information about the business to be conducted that alerted them to the importance of the meeting so they could make an informed decision whether to attend, even if it might have been beneficial or helpful to the public to include more detail in the notice. A court would need to analyze all other relevant facts before deciding whether the notice in question was reasonable.

Moreover, whether the notice is reasonable “cannot be determined from the standpoint of when the meeting actually takes place,” but rather, must be “based upon what information is available to the officer noticing the meeting at the time the notice is provided, and based upon what it would be reasonable for the officer to know.” *Buswell*, 2007 WI 71, ¶ 32. Whether a meeting notice reasonably apprises the public of the meeting’s subject matter may also depend in part on the surrounding circumstances. A notice that might be adequate, standing alone, may nonetheless fail to provide reasonable notice if it is accompanied by other statements or actions that expressly contradict it, or if the notice is misleading when considered in the light of long-standing policies of the governmental body. *See, e.g.*, Linde Correspondence (May 4, 2007); Koss Correspondence (May 30, 2007); Musolf Correspondence (July 13, 2007); Martinson Correspondence (Mar. 2, 2009).

Second, you allege that the notice was not specific enough because it was unclear that a school board vote would be taken on the item. As noted above, 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, but 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. Here, the

agenda item was listed under the heading “Board Action Items,” and indicated that the board would have a “[d]iscussion and possible action regarding further consideration of the referendum question” as well as “additional options for decision on change.”

Although the agenda could have more specifically stated that a vote would be taken, the agenda indicated that there might be “possible action” or a “decision on change,” signaling to the public that some board action would likely be taken at the meeting. Regarding your allegation that the board did not have authority to vote on the issue because it could not “rescind” the allegedly “binding referendum” that the community had passed, the OOG cannot advise you as to those matters, as they are outside the scope of the open meetings law. If you have further questions about how other laws pertaining to the board’s powers may interact with the open meetings law, you may wish to consult with private counsel.

In a third, related allegation, you allege that the notice published in the newspaper differed from, and conflicted with, the agenda posted to the public, because the newspaper notice indicated “discussion and possible further consideration” of the issue whereas the public notice indicated “discussion and possible *action* regarding further consideration” of the issue (emphasis added). Both notices, however, indicate that there would be a discussion on “[a]dditional options for decision on change.”

The law requires that public notice of all meetings of a governmental body must be given by communication from the governmental body’s chief presiding officer or his or her designee to each of the following: (1) the public; (2) to news media who have filed a written request for such notice; *and* (3) to the official newspaper (designated under Wis. Stat. §§ 985.04, 985.05, and 985.06) or, if there is no such paper, to a news medium likely to give notice in the area. Wis. Stat. § 19.84(1)(b). In addition, when another specific statute prescribes the type of meeting notice a governmental body must give, the body must comply with the requirements of that statute as well as the notice requirements of the open meetings law. Wis. Stat. § 19.84(1)(a).

It is important to note that notice to the public, notice to news media, and notice to the official newspaper are separate requirements. First, as to the public notice, communication from the chief presiding officer of a governmental body or such person’s designee shall be made to the public using one of the following methods: 1) Posting a notice in at least 3 public places likely to give notice to persons affected; 2) Posting a notice in at least one public place likely to give notice to persons affected and placing a notice electronically on the governmental body’s Internet site; or 3) By paid publication in a news medium likely to give notice to persons affected. Wis. Stat. § 19.84(1)(b). If the presiding officer gives notice in the third manner, he or she must ensure that the notice is actually published.

Second, as to the notice to the news media, the chief presiding officer must give notice of each meeting to members of the news media who have submitted a written request for notice. Wis. Stat. § 19.84(1)(b); *State ex rel. Lawton v. Town of Barton*, 2005 WI App 16, ¶¶ 3–4, 7, 278 Wis. 2d 388, 692 N.W.2d 304. Although this notice may be given in writing or by telephone, it is preferable to give notice in writing to help ensure accuracy and so that a record of the notice exists. *See* 65 Op. Att’y Gen. Preface, v–vi (1976); 65 Op. Att’y Gen. 250,

251 (1976). Governmental bodies cannot charge the news media for providing statutorily required notices of public meetings. *See* 77 Op. Att’y Gen. 312, 313 (1988).

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

Based on the information you sent in your correspondence, it appears that the public notice was physically posted in at least one public place plus posted online, thereby satisfying the requirement for public notice (the first requirement in the notice statute). In other words, it appears that notice to the official newspaper (the third requirement in the notice statute) was not intended to effectuate notice to the public (the first requirement in the notice statute). Because the governmental body was not required to ensure that the newspaper notice was in fact published, the body was also not required to ensure that what was published in the newspaper was the same as the public notice. While it is good practice for a governmental body to try to ensure consistency between the notices, a governmental body cannot control what is actually published in the newspaper—absent paid publication—nor was the body not required to do so here, so long as the public notice was otherwise satisfied.

Governmental bodies should ensure that meeting notices are worded as clearly as possible to avoid any potential confusion among the public. Additionally, as a best practice governmental bodies should ensure that all notices are identical to the extent possible. Further, the courts have held that “there is no requirement in the notice statute that the notice provided be exactly correct in every detail.” *Olson*, 252 Wis. 2d 628, ¶ 14. There is also no *per se* rule that the notice statute is “violated in each instance that a public notice contains any type of incorrect information, even when it is not misleading to the public.” *Id.*

Here, the two notices were substantially similar in that they both indicated there would be a discussion and further consideration of the issue. The public notice also included the language that a “possible action” might be taken, and as noted above, the agenda item, was listed under the heading “Board Action Items,” signaling to the public that some board action would likely be taken at the meeting.

Your fourth open meetings law allegation is that the January 21, 2019 meeting did not accommodate sufficient public comment or input on the measure. While Wisconsin law requires that meetings of governmental bodies be open to the public so that citizens may attend and observe open session meetings, the law does not require a governmental body to allow members of the public to speak or actively participate in the body’s meetings. While the open meetings law allows a governmental body to set aside a portion of a meeting for public comment, it does not require a body to do so. Wis. Stat. §§ 19.83(2), 19.84(2). Under the open meetings law, a governmental body is free to determine for itself whether and to what extent it will allow citizen participation at its meetings. For example, a body may choose to limit the

time each citizen has to speak. There are some other state statutes that may require governmental bodies to hold public hearings on specified matters, and those statutes may also impact public comment periods. Again, however, the OOG is not authorized to give legal advice or counsel on matters outside the scope of the open meetings law. If you have further questions about how other laws may interact with the open meetings law, you may wish to consult with private counsel.

Finally, I wanted to address your implied, but not explicit, fifth allegation that the members of this body illegally convened outside of the context of an open meeting by texting amongst themselves before the meeting. Although I do not have sufficient information to address whether a walking quorum violation occurred, I still wanted to provide you with some general information about walking quorums that I hope you find helpful.

The open meetings law applies to every meeting of a governmental body. 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.

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

The essential feature of a walking quorum is the element of agreement among members of a body to act uniformly in sufficient numbers to reach a quorum. Where there is no such express or tacit agreement, exchanges among separate groups of members may take place without violating the open meetings law.

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

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

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

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

It is important to note that the phrase “convening of members” in Wis. Stat. § 19.82(2) is not limited to situations in which members of a body are simultaneously gathered in the same location, but may also include other situations in which members are able to effectively communicate with each other and to exercise the authority vested in the body, even if they are not physically present together. Whether such a situation qualifies as a “convening of members” under the open meetings law depends on the extent to which the communications in question resemble a face-to-face exchange. A convening of members may occur through written correspondence and electronic communications.

Regarding your request for enforcement, as you are aware, under the open meetings law, the Attorney General and the district attorneys have authority to enforce the law. Wis. Stat. § 19.97(1). Generally, the Attorney General may elect to prosecute complaints

presenting novel issues of law that coincide with matters of statewide concern. As your matter does not appear to present novel issues of law that coincide with matters of statewide concern, we respectfully decline to file an enforcement action on your behalf 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).

Based on the information contained in your correspondence, it appears that you filed a complaint with the district attorney and the district attorney declined to prosecute the complaint. Although the Attorney General is also declining to pursue an enforcement action at this time, by copy of this letter, we are informing the governmental body of your concerns. Further, the open meeting law's other enforcement options may still be available to you, and you may wish to contact a private attorney regarding your matter. The State Bar of Wisconsin operates an attorney referral service. The referral service is free; however, a private attorney may charge attorney's fees. You may reach the service using the contact information below:

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

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

Sincerely,

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

Cc: Hurley School Board



STATE OF WISCONSIN
DEPARTMENT OF JUSTICE

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December 21, 2020

Cal Smith
wolfbane4550@gmail.com

Dear Mr. Smith:

The Wisconsin Department of Justice (DOJ) is in receipt of your correspondence, dated January 25, 2019, in which you wrote, "I am appealing the denial [of] my request to the Calumet County Sheriffs Office for any and all recordings of Bobby Dassey's interview on Nov 9, 2005."

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

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

Whether an investigation or litigation is ongoing and whether the confidentiality of the requested records is material to that ongoing investigation or litigation are factors that an authority may consider in applying the balancing test. Cf. *Linzmeier v. Forcey*, 2002 WI 84, ¶¶ 30, 32, 39, 41, 254 Wis. 2d 306, 646 N.W.2d 811; *Journal/Sentinel, Inc. v. Aagerup*, 145 Wis. 2d 818, 824-27, 429 N.W.2d 772 (Ct. App. 1988); *Democratic Party of Wisconsin v. Wisconsin Dep't of Justice*, 2016 WI 100, ¶ 12, 372 Wis. 2d 460, 888 N.W.2d 584. An authority could determine that release of records while an investigation or litigation is in progress could

compromise the investigation or litigation. Therefore, when performing the public records balancing test, an authority could conclude that the public interest in effectively investigating and litigating a case and in protecting the integrity of the current investigation or litigation outweighs the public interest in disclosing the requested records at that time. *Id.*; Wis. Stat. § 19.35(1)(a).

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

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

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

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

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

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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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December 21, 2020

Shawnette Stephens

[REDACTED]
Rockford, IL 61109
shawnettstephens@yahoo.com

Dear Ms. Stephens:

The Wisconsin Department of Justice (DOJ) is in receipt of your correspondence, dated January 6 and 17, 2020, in which you wrote that you contacted the Wisconsin Court of Appeals and requested that two court opinions “be removed from appearing directly on the internet and instead accessed through WSCCA website” and “requested discouraging search engine indexing of the opinions that make them available on the internet on a global scale without request or visit to the government official website.” Your requests were denied “based on (1) Wisconsin’s strict open records law and (2) WSCCA was not responsible for information published on other websites.” You requested “this [be] investigated and the opinions to no longer appear in Google search result of [your] name.”

DOJ’s Office of Open Government (OOG) works to increase government openness and transparency with a focus on the Wisconsin Open Meetings Law, Wis. Stat. §§ 19.81 to 19.98, and the Wisconsin Public Records Law, Wis. Stat. §§ 19.31 to 19.39. The public records law authorizes requesters to inspect or obtain copies of “records” created or maintained by an “authority.” 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).

Based on the information you provided in your correspondence, it appears that the subject matter of your correspondence, regarding court opinions “appearing directly on the internet” and “search engine indexing of the opinions,” is outside the scope of the public records law. Therefore, we are unable to offer you assistance regarding your concerns that are outside the scope of the OOG’s responsibilities.

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.

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

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

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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December 21, 2020

Eric Wanta

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River Falls, WI 54022
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Dear Mr. Wanta:

The Wisconsin Department of Justice (DOJ) is in receipt of your correspondence, dated January 26, 2020, regarding your public records request to “Ellsworth Area Ambulance Service Inc.” You wrote, “I was told in person in December of 2019 by the board chair, that I would not be getting any records and that I should sue him.” You asked, “What are the proper next steps to follow? Is there a form I fill out via the AG’s office to request the open records documents?”

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 Wisconsin 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). Only an entity that falls within this definition of “authority” is subject to the provisions of the public records law.

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

All records made by an ambulance service provider, an emergency medical technician or a first responder in administering emergency care procedures to and handling and transporting sick, disabled or injured individuals shall be maintained as confidential patient health care records pursuant to Wis. Stat. §§ 256.15(12) and 146.82(5)(c). Wisconsin Stat. § 256.15(12)(b), however, provides a limited disclosure exception for ambulance service providers who also are “authorities” under the public records law: information contained on a record of an ambulance run which identifies the ambulance service provider and emergency medical technicians involved; date of the call, dispatch and response times; reason for the dispatch; location to which the ambulance was dispatched; destination of any transport by the ambulance; and name, age, and gender of the patient. Disclosure of this information is subject to the usual case-by-case, totality of circumstances public records balancing test. See 78 Op. Att’y Gen. 71, 76 (1989); OGA I-03-07, at 6-8 (Sept. 27, 2007).

It is unclear from your correspondence whether you submitted your request in writing. Requests do not have to be in writing, and a request for records is sufficient if it is directed to an authority and reasonably describes the records or information requested. See Wis. Stat. § 19.35(1)(h). Generally, there are no “magic words” that are required, and no specific form is permitted to be required in order to submit a public records request.

DOJ’s Office of Open Government (OOG) encourages authorities and requesters to maintain an open line of communication. Although public records requests are not required to be in writing, the OOG advises requesters to submit requests in writing. This helps to avoid misunderstandings between an authority and a requester. Further, 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.

If an authority denies a written request, in whole or in part, the authority must provide a written statement of the reasons for denying the written request. Wis. Stat. § 19.35(4)(b). Specific policy reasons, rather than mere statements of legal conclusion or recitation of exemptions, must be given. *Pangman & Assocs. v. Zellmer*, 163 Wis. 2d 1070,

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

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

While DOJ is declining to pursue an action for mandamus at this time, I am sending a copy of this letter to the Ellsworth Area Ambulance Service to inform them of your concerns. In addition, the other enforcement options listed above may still be available to you, and you may wish to contact a private attorney regarding this matter. The State Bar of Wisconsin operates an attorney referral service. The referral service is free; however, a private attorney may charge attorney’s fees. You may reach the service using the contact information below:

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

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

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



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December 21, 2020

Jerome Wilson

[REDACTED]
Menomonee Falls, WI 53051
jcspwil@sbcglobal.net

Dear Mr. Wilson:

The Wisconsin Department of Justice (DOJ) is in receipt of your correspondence, dated February 17, 2020, in which you wrote, “I would like to know how i [sic] can file a mandamus under state statue 19.37(1)(b).”

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 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).

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

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

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

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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.

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

Sincerely,



Paul M. Ferguson
Assistant Attorney General
Office of Open Government

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