2021 4th Quarter Correspondence

Index

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STATE OF WISCONSIN
DEPARTMENT OF JUSTICE

Josh Kaul
Attorney General

17 W. Main Street
P.O. Box 7857
Madison, WI 53707-7857
www.doj.state.wi.us

Sarah K. Larson
Assistant Attorney General
larsonsk@doj.state.wi.us
(608) 266-1221
TTY 1-800-947-3529
FAX (608) 267-2779

October 14, 2021

Timothy Fitzgerald
Aestim100@gmail.com

Dear Timothy Fitzgerald:

The Wisconsin Department of Justice (DOJ) is in receipt of your correspondence, dated September 28, 2021, in which you expressed concerns about some village board meetings not being recorded. You also had concerns that, if recordings were made, they were not being made available to you when you requested them. I also note that, in our telephone conversation on October 13, 2021, we discussed these same matters, as well as your additional question about agendas and notice. Because you requested that DOJ provide you with written information about what we discussed, I am including some general information below about the open meetings law that I hope you will find helpful.

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

The open meetings law requires that "all meetings of all state and local governmental bodies shall be publicly held in places reasonably accessible to members of the public and shall be open to all citizens at all times." Wis. Stat. § 19.81(2). Similarly, an "open session" is defined in Wis. Stat. § 19.82(3) as "a meeting which is held in a place reasonably accessible to members of the public and open to all citizens at all times." A meeting must be preceded by notice providing the time, date, place, and subject matter of the meeting, generally, at least 24 hours before it begins. Wis. Stat. § 19.84. Every meeting of a governmental body must initially be convened in "open session." *See* Wis. Stat. §§ 19.83, 19.85(1). All business of any kind, formal or informal, must be initiated, discussed, and acted upon in "open session," unless one of the exemptions set forth in Wis. Stat. § 19.85(1) applies. Wis. Stat. § 19.83.

The open meetings law "does not require that all meetings be held in publicly owned places but rather in places 'reasonably accessible to members of the public.'" 69 Op. Att'y Gen. 143, 144 (1980) (quoting 47 Op. Att'y Gen. 126 (1978)). As such, DOJ's longstanding advice is that a telephone conference call can be an acceptable method of convening a meeting of a

governmental body. *Id*. at 146. More recently, DOJ guidance deemed video conference calls acceptable as well.

When an open meeting is held by teleconference or video conference, the public must have a means of monitoring the meeting. Under the circumstances present during the meetings in question, a governmental body will typically be able to meet this obligation by providing the public with information (in accordance with notice requirements) for joining the meeting remotely, even if there is no central location at which the public can convene for the meeting. A governmental body conducting a meeting remotely should be mindful of the possibility that it may be particularly burdensome or even infeasible for one or more individuals who would like to observe a meeting to do so remotely—for example, for people without telephone or internet access or who are deaf or hard of hearing—and appropriate accommodations should be made to facilitate reasonable access to the meeting for such individuals.

To be clear, providing only remote access to an open meeting is not always permissible, as past DOJ guidance shows. Where a complex plan, drawing, or chart is needed for display or the demeanor of a witness is significant, a meeting held by telephone conference likely would not be "reasonably accessible" to the public because important aspects of the discussion or deliberation would not be communicated to the public. *See* 69 Op. Att'y Gen. at 145. Further, the type of access that constitutes reasonable access in the circumstances present for the meetings in question, in which health officials were encouraging social distancing (including avoiding large public gatherings) in order to mitigate the impact of COVID-19, may be different from the type of access required in other circumstances. Ultimately, whether a meeting is "reasonably accessible" is a factual question that must be determined on a case-by-case basis. *Id*.

Regarding your concerns about recordings, I first note that, as we discussed in our conversation, DOJ's Office of Open Government (OOG) is not authorized to discuss any legal requirements under the Americans with Disabilities Act (ADA) for providing recordings to you as a "reasonable accommodation," because such a matter is outside the scope of the OOG's statutory duties and responsibilities. However, under the open meetings law, I can provide you with the following information about recordkeeping that I hope you will find helpful.

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

In an effort to increase transparency, DOJ recommends that governmental bodies keep minutes of all meetings. However, there is no requirement under the open meetings law for a governmental body to do so. As just noted, 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). Other statutes outside the open meetings law may prescribe

particular minute-taking requirements for certain governmental bodies and officials that go beyond what is required by the open meetings law, but any such statutes fall outside of the scope of OOG's responsibilities and authority.

Further, the Attorney General has concluded that members of the public not only have a right to attend open meetings, but they also have a concomitant right to take notes at such a meeting, or to do other nondisruptive acts, in order to obtain and preserve "the fullest and most complete information" of what occurred. *See* 66 OAG 318, 324-25 (1977). Further, under Wis. Stat. § 19.90, the government body "shall make a reasonable effort to accommodate any person desiring to record, film or photograph the meeting." That section, however, "does *not* permit recording, filming or photographing such a meeting in a manner that interferes with the conduct of the meeting or the rights of the participants." Wis. Stat. § 19.90.

As we also discussed, the Office of Open Government has issued advisories on conducting open meetings during the COVID-19 pandemic. Those advisories contain recommendations for best practices, including our recommendation that, when possible, a governmental body may wish to consider recording the meeting and posting it on its website as soon as practicable after the meeting concludes. More information can be found on DOJ's website, https://www.doj.state.wi.us/office-open-government/office-open-government.

Finally, regarding your concerns about notice, the open meetings law requires that public notice of all meetings of a governmental body must be given by communication from the governmental body's chief presiding officer or his or her designee to the following: (1) the public; (2) to news media who have filed a written request for such notice; *and* (3) to the official newspaper (designated under Wis. Stat. §§ 985.04, 985.05, and 985.06) or, if there is no such paper, to a news medium likely to give notice in the area. Wis. Stat. § 19.84(1)(b).

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

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

Whether the notice is specific enough is determined on a case-specific basis, based on a reasonableness standard. *State ex rel. Buswell v. Tomah Area Sch. Dist.*, 2007 WI 71, ¶¶ 27–29, 301 Wis. 2d 178, 732 N.W.2d 804. This includes analyzing such factors as the burden of providing more detailed notice, whether the subject is of particular public interest,

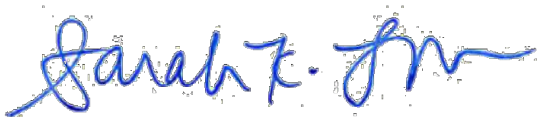
and whether it involves non-routine action that the public would be unlikely to anticipate. *Id.* ¶ 28. There may be less need for specificity where a meeting subject occurs frequently, because members of the public are more likely to anticipate that the meeting subject will be addressed, but novel issues may require more specific notice. *Id.* ¶ 31.

The 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,



Sarah K. Larson
Assistant Attorney General
Office of Open Government

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Josh Kaul
Attorney General

17 W. Main Street
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www.doj.state.wi.us

Sarah K. Larson
Assistant Attorney General
larsonsk@doj.state.wi.us
(608) 266-1221
TTY 1-800-947-3529
FAX (608) 267-2779

October 14, 2021

Jenny Peshut
jennypeshut@yahoo.com

Dear Jenny Peshut:

The Wisconsin Department of Justice (DOJ) is in receipt of your correspondence, dated June 17, 2021, in which you asked: "May a governmental body that schedules meetings Monday through Friday post a meeting notice on a Saturday or Sunday in order to meet the 24 hour meeting notice requirement under the Wisconsin Open Meetings Law?"

The Wisconsin Open Meetings Law, Wis. Stat. §§ 19.81 to 19.98, requires that public notice of all meetings of a governmental body must be given by communication from the governmental body's chief presiding officer or his or her designee to the following: (1) the public; (2) to news media who have filed a written request for such notice; *and* (3) to the official newspaper (designated under Wis. Stat. §§ 985.04, 985.05, and 985.06) or, if there is no such paper, to a news medium likely to give notice in the area. Wis. Stat. § 19.84(1)(b).

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

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.

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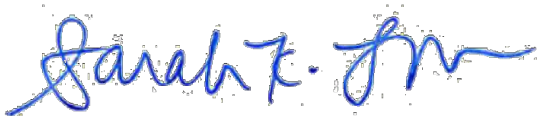

Assistant Attorney General
Office of Open Government

SKL:lah

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Josh Kaul
Attorney General

17 W. Main Street
P.O. Box 7857
Madison, WI 53707-7857
www.doj.state.wi.us

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

December 15, 2021

Steven Alt
[redacted]
Glendale, WI 53209
lightguy7@att.net

Dear Steven Alt:

The Wisconsin Department of Justice (DOJ) is in receipt of your correspondence, dated December 10, 2020, regarding your public records request to the superintendent of the Glendale River Hills School District. You wrote that the "Glendale School Board refuses to honor Wisconsin's Public Records Law, Wis. Stat. § 19.31-19.39."

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

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

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

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

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

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

The public records law provides several remedies for a requester dissatisfied with an authority's response, or lack of response, to a public records request. A requester may file an action for mandamus, with or without an attorney, asking a court to order release of the records. 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, DOJ respectfully declines to pursue an action for mandamus.

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

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

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

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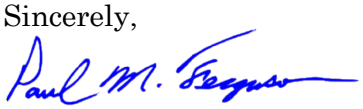

Paul M. Ferguson
Assistant Attorney General
Office of Open Government

PMF:lah

STATE OF WISCONSIN
DEPARTMENT OF JUSTICE

Josh Kaul
Attorney General

17 W. Main Street
P.O. Box 7857
Madison, WI 53707-7857
www.doj.state.wi.us

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

December 15, 2021

Randall Borman
[redacted]
Arena, WI 53503
whitebaer@frontier.com

Dear Randall Borman:

The Wisconsin Department of Justice (DOJ) is in receipt of your correspondence, dated July 6, 2020, regarding your request to your lawyer for a copy of an arrest video from "a couple of years ago." You have not received a response from your lawyer and asked, "[H]ow I can get that video and get it analized [sic]."

DOJ's Office of Open Government (OOG) works to increase government openness and transparency with a focus on the Wisconsin Open Meetings Law, Wis. Stat. §§ 19.81 to 19.98, and the Wisconsin Public Records Law, Wis. Stat. §§ 19.31 to 19.39. Based on the information you provided in your correspondence, it appears that some of your correspondence, regarding how to get a video analyzed, is outside this scope. Therefore, we are unable to offer you assistance regarding matters that are outside the scope of the OOG's legal authority and responsibilities.

However, we can address your correspondence to the extent it concerns the public records law. The public records law authorizes requesters to inspect or obtain copies of "records" created or maintained by an "authority." 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.

From the limited information provided in your correspondence, it appears that your lawyer is not an "authority" as defined above. Therefore, you may wish to submit a public records request to the law enforcement agency that conducted your arrest asking for the arrest video that you seek.

In order to submit a public records request, there are no "magic words" that are required and an authority may not require that a requester fill out a specific form in order to submit a request. One may submit a request verbally or in writing. A request for records is sufficient if it is directed to an authority and reasonably describes the records or information requested. Wis. Stat. § 19.35(1)(h). Under the public records law, a request need not be made in person, and generally, a requester is not required to identify themselves or to state the purpose of the request. *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").

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

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

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

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

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Sincerely,

Paul M. Ferguson
Assistant Attorney General
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PMF:lah

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(608) 266-1221
TTY 1-800-947-3529
FAX (608) 267-2779

December 21, 2021

William Lundy
bill_lundy@maqs.net

Dear William Lundy:

The Wisconsin Department of Justice (DOJ) is in receipt of your correspondence, dated March 4, 2021 and April 8, 2021, regarding the applicability of the public records law and open meetings law to the Lawrence Lake Protection and Rehabilitation District, of which you are the chairperson. In your March 4, 2021 correspondence, you asked whether records pertaining to "proprietary contracts" and "bids" for lake treatments must be disclosed in response to a public records request by the "unsuccessful bidder," given that the "bids were provided [to the district] in confidence." Before addressing your specific questions, we can provide some general information that we hope you will find helpful.

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

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.

As can be seen by this definition, any "public body corporate" created by "any law" or "ordinance" is an "authority" under the public records law. *See* Wis. Stat. § 19.32(1). Similarly, "a special purpose district" is also an "authority." *Id.* A "special purpose district" means "a district, other than a state governmental unit or a county, city, village, or town, that is created to perform a particular function and whose geographic jurisdiction is limited to some portion of this state." *See* Wis. Stat. § 19.32(3m).

As is pertinent to your inquiry, a public inland lake protection and rehabilitation district is an "authority" subject to the public records law, because it is a "public body corporate" and "special purpose district" with the powers of a municipal corporation and is either created by a statute or is established by a county or municipality. *See, e.g., Donaldson v. Board of Commissioners of Rock-Koshkonong Lake District*, 2004 WI 67, ¶¶ 22–23, 272 Wis. 2d 146, 680 N.W.2d 762.

Similarly, the Attorney General has previously concluded that such a district, established by a county or a municipality pursuant to Wis. Stat. §§ 33.21 to 33.27, is a "governmental body" subject to the Wisconsin Open Meetings Law, Wis. Stat. §§ 19.81 to 19.98. *See* DuVall Correspondence (November 6, 1986).

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

Based on the limited information provided in your correspondence, DOJ has insufficient information to evaluate whether the "proprietary contracts" and "bids" in question must be disclosed to the requester here in response to the public records request. However, DOJ can provide you with the following information that we hope you will find helpful.

Pursuant to Wis. Stat. § 19.35(1)(a), the exemptions to the requirement of a governmental body to meet in open session under Wis. Stat. § 19.85 are indicative of public policy, "but may be used as grounds for denying public access to a record only if the authority or legal custodian . . . makes a specific demonstration that there is a need to restrict public access at the time that the request to inspect or copy the record is made." Well-established public policies regarding the confidentiality of this information are evidenced in Wis. Stat. § 19.85(1)(e) and could indicate that disclosure of certain information would adversely impact

this public interest. *See* Wis. Stat. § 19.85(1)(e) (a closed session is authorized for "[d]eliberating or negotiating the purchasing of public properties, the investing of public funds, or conducting other specified public business, whenever competitive or bargaining reasons require a closed session"). Therefore, in applying the balancing test, the authority could conclude that the public interest in disclosure of this information is outweighed by the public interest in nondisclosure.

However, a records custodian denying access to records on the basis of public policy expressed by one of the Wis. Stat. § 19.85(1) open meetings exceptions must do more than identify the exception under which the meeting was closed and assert that the reasons for closing the meeting still exist and therefore justify denying access to the requested records. The records custodian instead must state specific public policy reasons for the denial, as evidenced by existence of the related open meetings exception.

For example, pursuant to Wis. Stat. §§ 19.35(1)(a) and 19.85(1)(e), the authority might determine that, until a procurement or negotiating process is completed, the information set forth in proprietary contracts or bids should remain confidential for competitive or bargaining reasons. As a matter of public policy, an authority might decide that disclosing those bids during negotiations would provide an unfair advantage and chill the process by discouraging businesses from submitting full and forthcoming responses that could harm their competitive edge in the pending negotiations. Therefore, in balancing the needs of the authority to have a robust, competitive selection process with the public interest in releasing the requested information, the authority might conclude that the authority's interest in the negotiations or procurement outweighs the temporary delay in the release of the information to the public at that time. However, it is also advisable that the authority inform the requester that they have a right to renew their request upon close of the negotiations or procurement, because the open meetings law exemptions may only be used as grounds to deny public access to the records if there is a need to restrict public access at that time.

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).

In your April 8, 2021 correspondence, you also raised some questions about the open meetings law. You indicated that, at the "exact time" the in-person meeting in question was to begin at the town hall, the board experienced a "catastrophic failure of the communications equipment that was to be used to connect two other members of the board." The board then "moved the meeting location from the public building to a private residence about 200 yards away" to the home of the town's chairperson where "the equipment could connect and a virtual meeting could take place." You also indicated that "[o]ne person came at the correct start time, and the board had "waited 20 minutes at the public location to see if any public members would show up." You state that a member of the board is "claiming the entire meeting was illegal due to the move," and asked DOJ to advise you.

Based on the limited information provided in your correspondence, DOJ has insufficient information to evaluate whether the meeting in question was proper under the open meetings law, because it is unclear from your correspondence whether the meeting was noticed as an in-person meeting, a virtual meeting, or both. However, DOJ can provide you with the following general information which we hope you will find helpful.

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

The open meetings law requires that "all meetings of all state and local governmental bodies shall be publicly held in places reasonably accessible to members of the public and shall be open to all citizens at all times." Wis. Stat. § 19.81(2). Similarly, an "open session" is defined in Wis. Stat. § 19.82(3) as "a meeting which is held in a place reasonably accessible to members of the public and open to all citizens at all times." A meeting must be preceded by notice providing the time, date, place, and subject matter of the meeting, generally, at least 24 hours before it begins. Wis. Stat. § 19.84. Every meeting of a governmental body must initially be convened in "open session." *See* Wis. Stat. §§ 19.83, 19.85(1). All business of any kind, formal or informal, must be initiated, discussed, and acted upon in "open session," unless one of the exemptions set forth in Wis. Stat. § 19.85(1) applies. Wis. Stat. § 19.83.

The open meetings law "does not require that all meetings be held in publicly owned places but rather in places 'reasonably accessible to members of the public.'" 69 Op. Att'y Gen. 143, 144 (1980) (quoting 47 Op. Att'y Gen. 126 (1978)). As such, DOJ's longstanding advice is that a telephone conference call can be an acceptable method of convening a meeting of a governmental body. *Id*. at 146. More recently, DOJ guidance deemed video conference calls acceptable as well.

When an open meeting is held by teleconference or video conference, the public must have a means of monitoring the meeting. Under the circumstances present during the meetings in question, a governmental body will typically be able to meet this obligation by providing the public with information (in accordance with notice requirements) for joining the meeting remotely, even if there is no central location at which the public can convene for the meeting. A governmental body conducting a meeting remotely should be mindful of the possibility that it may be particularly burdensome or even infeasible for one or more individuals who would like to observe a meeting to do so remotely—for example, for people without telephone or internet access or who are deaf or hard of hearing—and appropriate accommodations should be made to facilitate reasonable access to the meeting for such individuals.

To be clear, providing only remote access to an open meeting is not always permissible, as past DOJ guidance shows. Where a complex plan, drawing, or chart is needed for display or the demeanor of a witness is significant, a meeting held by telephone conference likely would not be "reasonably accessible" to the public because important aspects of the discussion or deliberation would not be communicated to the public. *See* 69 Op. Att'y Gen. at 145.

Further, the type of access that constitutes reasonable access in the circumstances present for the meetings in question, in which health officials were encouraging social distancing (including avoiding large public gatherings) in order to mitigate the impact of COVID-19, may be different from the type of access required in other circumstances. Ultimately, whether a meeting is "reasonably accessible" is a factual question that must be determined on a case-by-case basis. *Id*.

DOJ's Office of Open Government has issued advisories on conducting open meetings during the COVID-19 pandemic. Those advisories contain recommendations for best practices, including our recommendation that, when possible, a governmental body may wish to consider recording the meeting and posting it on its website as soon as practicable after the meeting concludes. More information can be found on DOJ's website, https://www.doj.state.wi.us/office-open-government/office-open-government.

Finally, the open meetings law contains a provision on the exclusion of members. Wisconsin Stat. § 19.89 states, in part, "No duly elected or appointed member of a governmental body may be excluded from any meeting of such body." Therefore, a duly elected or appointed member of the board cannot be excluded from a meeting of the board. The law also provides, "Unless the rules of a governmental body provide to the contrary, no member of the body may be excluded from any meeting of a subunit of that governmental body." Wis. Stat. § 19.89. Thus, a member of the board may not be excluded from a meeting of a subunit of the board, such as a committee, unless the rules of the board provide otherwise.

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

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

The information provided in this letter is provided pursuant to Wis. Stat. §§ 19.39 and 19.98, and does not constitute an informal or formal opinion of the Attorney General pursuant to Wis. Stat. § 165.015(1).

Sincerely,

Sarah K. Larson
Assistant Attorney General
Office of Open Government

SKL:lah

STATE OF WISCONSIN
DEPARTMENT OF JUSTICE

Josh Kaul
Attorney General

17 W. Main Street
P.O. Box 7857
Madison, WI 53707-7857
www.doj.state.wi.us

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

December 22, 2021

Tyler Hoffman
[redacted]
Amery, WI 54001
1jetherow@gmail.com

Dear Tyler Hoffman:

The Wisconsin Department of Justice (DOJ) is in receipt of your correspondence, dated March 25, 2020, in which you requested "the AG step in and force Polk County sheriff office / county government to provide public records." You have made "5 separate requests for complaint records" and they responded "on the first 2 requests by saying there was no responding records to provide and then the last 3 the[y] lumped the requests together and said [you] have to pay $107.32." You wrote that these requests were made on separate days and you "don't see how they can put the requests together to say it is one request." I also note that, on September 12, 2019, we had a telephone conversation regarding similar issues.

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

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

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

If an authority denies a written request, in whole or in part, the authority must provide a written statement of the reasons for 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).

Regarding fees, under the public records law, "[A]n authority may charge a fee not exceeding the actual, necessary, and direct costs *of four specific tasks:* (1) 'reproduction and transcription'; (2) 'photographing and photographic processing'; (3) 'locating'; and (4) 'mailing or shipping.'" *Milwaukee Journal Sentinel v. City of Milwaukee*, 2012 WI 65, ¶ 54 (citation omitted) (emphasis in original).

The amount of such fees may vary depending on the authority. However, an authority may not profit from complying with public records requests. *WIREdata, Inc. v. Vill. of Sussex*, 2008 WI 69, ¶¶ 103, 107, 310 Wis. 2d 397, 751 N.W.2d 736 (an authority may not profit from its response to a public records request, but may recoup all of its actual costs). An authority may not charge for the time it takes to redact records. *Milwaukee Journal Sentinel*, 2012 WI 65, ¶¶ 1 & n.4, 6, 58 (Abrahamson, C.J., lead opinion); *Id.* ¶ 76 (Roggensack, J., concurring).

The law also permits an authority to impose a fee for locating records if the cost is $50.00 or more. Wis. Stat. § 19.35(3)(c). Additionally, an authority may require prepayment for the costs associated with responding to a public records request if the total amount exceeds $5.00. Wis. Stat. § 19.35(3)(f). Generally, the rate for an actual, necessary, and direct charge for staff time (such as for locating a record) should be based on the pay rate of the lowest paid employee capable of performing the task.

For more information on permissible fees, please see the Office of Open Government Advisory: Charging Fees under the Wisconsin Public Records Law, which was issued on August 8, 2018 and can be found on DOJ's website (https://www.doj.state.wi.us/office-open-government/oog-advisories-and-attorney-general-opinions). DOJ's Office of Open Government (OOG) also encourages authorities and requesters to maintain an open line of communication. This helps to avoid misunderstandings between an authority and a requester. It is also helpful in resolving issues such as those related to fees. If a requester is

concerned about potential fees, it may be helpful that he or she express such concerns in the request.

Turning now to the specific fee concerns you raised in your correspondence about the authority "lump[ing]" three separate "requests together" that you "made on separate days," I first note that DOJ cannot definitively conclude that such fees were permissible, nor can DOJ definitively conclude that a fee violation has occurred. Based on the limited information provided in your correspondence, DOJ does not have sufficient information about how the authority processed the requests or what the requests were about. However, we can provide you with some general information about aggregating fees, based on the Attorney General's previous guidance on the subject. *See, e.g.,* Seymer Correspondence (April 14, 2016); Seymer Correspondence (July 7, 2016).

The law states, in part, "[A]n authority may impose a fee upon a requester for locating a record, not exceeding the actual, necessary and direct cost of location, if the cost is $50 or more." Wis. Stat. § 19.35(3)(c). Therefore, although the law is silent about aggregating fees, the law does not expressly authorize the aggregation of location costs for multiple requests from the same requester that occur close in time.

Many authorities are concerned about the time and taxpayer expense involved with responding to public records requests. This concern may lead to the aggregation of location costs associated with some requests. To be clear, DOJ is dedicated to open and transparent government and endeavors to promote open government principles and educate authorities and the public alike on such matters. DOJ and the OOG encourage authorities to consider public records requests with these principles in mind.

The public records law begins with a presumption of complete public access; however, such access must be "consistent with the conduct of governmental business." Wis. Stat. § 19.31. Some authorities with limited resources struggle to balance their obligations under the law with the taxpayer expense incurred by fulfilling their obligations. This is one of the reasons why the OOG encourages communication between an authority and a requester. Because the law does not expressly authorize an authority to aggregate location costs for records requests that occur close in time, DOJ cannot sanction such an approach. However, ensuring open and transparent government is a responsibility shared by everyone. Authorities have a responsibility to follow the public records law, and the public has a responsibility to act in good faith in submitting public records requests.

DOJ has previously advised that, although location costs will vary depending on the request, detailed and specific requests may help keep such costs low. *See* Seymer Correspondence (July 7, 2016). Further, in order to ease the burden on an authority and the taxpayers, certain requests may be able to be combined into one request. *Id.*

For example, instead of submitting a number of separate requests in the same week, requesters could submit a single request seeking the same records. Thus, an authority need only process and complete the necessary clerical work for one request, instead of multiple requests. Moreover, it may also be beneficial for requesters to combine requests in order to facilitate more efficient response times, thereby ensuring that requesters will receive quicker

responses providing them with the records they seek. *See* Seymer Correspondence (April 14, 2016).

Therefore, it is possible that a court could conclude here that the authority should not have aggregated fees, because the law does not expressly authorize the aggregation of location costs for multiple requests from the same requester that occur close in time. However, as noted above, ensuring open and transparent government is a responsibility shared by everyone, and the public has a responsibility to act in good faith in submitting public records requests.

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. As your matter does not appear to present novel issues of law that coincide with matters of statewide concern, we respectfully decline to pursue an action for mandamus on your behalf at this time.

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

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

The Attorney General and the 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

STATE OF WISCONSIN
DEPARTMENT OF JUSTICE

Josh Kaul
Attorney General

17 W. Main Street
P.O. Box 7857
Madison, WI 53707-7857
www.doj.state.wi.us

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

December 22, 2021

Manila Shaver
[redacted]
Hudson, WI 54016
bshaver2634@gmail.com

Dear Manila Shaver:

The Wisconsin Department of Justice (DOJ) is in receipt of your correspondence, dated June 18, 2020, regarding your public records request to the Roberts-Warren Fire Department. You wrote that you "continue to have" a "difficult time" "obtaining a response to [your] public data request." You provided a packet of information which we have reviewed. You requested DOJ "obtain a response to [your] public data request."

DOJ's Office of Open Government (OOG) works to increase government openness and transparency with a focus on the Wisconsin Open Meetings Law, Wis. Stat. §§ 19.81 to 19.98, and the Wisconsin Public Records Law, Wis. Stat. §§ 19.31 to 19.39. While a portion of your correspondence pertained to the public records law, it also discussed a matter outside the scope of the OOG's responsibilities. As a result, we are unable to offer you assistance regarding your concerns regarding the alleged "invoicing [of] individuals involved in emergency incidents contrary to [Roberts-Warren Fire Department] bylaws, state statue [sic] and their lawful authority to do so" as referenced in your May 11, 2020 letter. We can, however, provide you with some general information about the public records law that we hope you will find helpful.

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

Under the public records law, a "record" is defined as any material on which written, drawn, printed, spoken, visual, or electromagnetic information or electronically generated or stored data is recorded or preserved, regardless of physical form or characteristics, which has been created or is being kept by an authority. Wis. Stat. § 19.32(2). This definition encompasses electronic records and communications, including emails. Emails sent or

received on an authority's computer system are records, as are emails conducting government business sent or received on the personal email account by an authority's officer or employee.

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

When submitting a public records request, a requester should take care to ask for records containing the information they seek, as opposed to simply asking a question or asking for information. This is important because the public records law "does not require an authority to provide requested information if no record exists, or to simply answer questions about a topic of interest to the requester." *Journal Times v. City of Racine Board of Police and Fire Commissioners*, 2015 WI 56, 55 (citation omitted); *see also State ex rel. Zinngrabe v. Sch. Dist. of Sevastopol*, 146 Wis. 2d 629, 431 N.W.2d 734 (Ct. App. 1988). An authority 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). Additionally, 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.

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

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

577, 866 N.W.2d 563 (an authority "can be swamped with public records requests and may need a substantial period of time to respond to any given request").

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

The village's response denying your initial public records request indicated that they were "denying your request based on the fact that this should have gone to the Roberts-Warrant Fire Association and not the Village of Roberts" because the fire association "keeps their own policies and records." It is unclear from this response whether the village did not have any records responsive to your request or if the village also had the records in question. Nevertheless, it appears from subsequent communications that the village did not have the records or data you sought. It also appears that the fire association provided you with responsive records and attempted to answer many of your questions in response to your information requests.

As noted above, a "record" is defined as any material that is created or being kept by an authority. *See* Wis. Stat. § 19.32(2). Therefore, under the public records law, the availability of the same records elsewhere is not a sufficient basis for denial if the authority also maintains or possesses the same record. However, if the authority does not have the records in question, it cannot fulfill a request for such records. Nevertheless, it is advisable that the authority notify the requester that they do not have responsive records. Moreover, as also noted above, it is also advisable that a requester take care to ask for records containing the information they seek, as opposed to simply asking a question or asking for information. This is important because 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.

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

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

in cases presenting novel issues of law that coincide with matters of statewide concern. As your matter does not appear to present novel issues of law that coincide with matters of statewide concern, we respectfully decline to pursue an action for mandamus on your behalf at this time.

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

Lawyer Referral and Information Service
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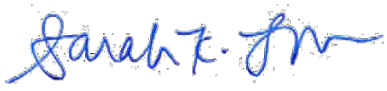
If you would like to learn more about the public records law, DOJ's Office of Open Government offers several open government resources through the Wisconsin DOJ website (https://www.doj.state.wi.us/office-open-government/office-open-government). DOJ provides the full Wisconsin public records law and 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

STATE OF WISCONSIN
DEPARTMENT OF JUSTICE

Josh Kaul
Attorney General

17 W. Main Street
P.O. Box 7857
Madison, WI 53707-7857
www.doj.state.wi.us

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

December 22, 2021

Melissa Thiel Collar
Legal Counsel
Green Bay Area Public School District
200 South Broadway Street
Green Bay, WI 54303
mmthielcollar@gbaps.org

Dear Melissa Thiel Collar :

The Wisconsin Department of Justice (DOJ) is in receipt of your correspondence, dated January 27, 2021, in which you asked, "Can a requester avoid the location cost threshold set forth in Wis. Stat. § 19.35(3)(c) by revising a records request to break up the request into multiple individual requests for individual records so that the cost of locating one record from the original request does not exceed $50.00 in location costs." You also asked, "alternatively, can a records custodian assess locating costs when a records requester submits numerous serial requests, the cost of locating one record which would not exceed $50.00, whereby the records custodian would be permitted to aggregate the costs of all such requests and assess locating costs in excess of $50.00 for all such requests to the records requester."

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

Under the public records law, "[A]n authority may charge a fee not exceeding the actual, necessary, and direct costs *of four specific tasks:* (1) 'reproduction and transcription'; (2) 'photographing and photographic processing'; (3) 'locating'; and (4) 'mailing or shipping.'" *Milwaukee Journal Sentinel v. City of Milwaukee*, 2012 WI 65, ¶ 54, 341 Wis. 2d 607, 815 N.W.2d 367 (citation omitted) (emphasis in original). An authority may <u>not</u> charge for the time it takes to redact records. *Milwaukee Journal Sentinel*, 2012 WI 65, ¶¶ 1 & n.4, 6, 58 (Abrahamson, C.J., lead opinion); *Id.* ¶ 76 (Roggensack, J., concurring).

The amount of such fees may vary depending on the authority. However, an authority may not profit from complying with public records requests. *WIREdata, Inc. v. Vill. of Sussex*, 2008 WI 69, ¶¶ 103, 107, 310 Wis. 2d 397, 751 N.W.2d 736 (an authority may not profit from its response to a public records request but may recoup all of its actual costs). An authority may choose to provide copies of a requested record without charging fees or by reducing fees where an authority determines that waiver or reduction of the fee is in the public interest. Wis. Stat. § 19.35(3)(e).

The law also permits an authority to impose a fee for locating records if the cost is $50.00 or more. Wis. Stat. § 19.35(3)(c). An authority may require a requester prepay any such fees if the total amount exceeds $5.00. Wis. Stat. § 19.35(3)(f). Generally, the rate for an actual, necessary, and direct charge for staff time should be based on the pay rate (including fringe benefits) of the lowest paid employee capable of performing the task.

For more information on permissible fees, please see the Office of Open Government Advisory: Charging Fees under the Wisconsin Public Records Law, which was issued on August 8, 2018 and can be found on DOJ's website (https://www.doj.state.wi.us/office-open-government/oog-advisories-and-attorney-general-opinions). DOJ's Office of Open Government (OOG) also encourages authorities and requesters to maintain an open line of communication. This helps to avoid misunderstandings between an authority and a requester. It is also helpful in resolving issues such as those related to fees. If a requester is concerned about potential fees, it may be helpful that he or she express such concerns in the request.

Turning now to the specific fee concerns you raised in your correspondence, I first note that a court might have concluded that a fee violation occurred if the district had actually levied the fees set forth in the district's pre-payment letter, which it did not. Based on the information provided in your correspondence, the district was originally going to charge $70.40 in fees, which included:

- "Location time" of $25.80 for an HR specialist for "searching for records related to request for 2 employee personnel files"; and
- "Location time" of $44.55 for a paralegal for "examining of records related to request for 2 employee personnel files."

If the latter fee—for "examining" the records—was for the purpose of reviewing and redacting the responsive records that the HR specialist had already located, such fees would be impermissible. Once an authority locates records that are responsive to the request, the authority may not charge to examine the records for redaction. *See Milwaukee Journal Sentinel*, 2012 WI 65, ¶¶ 1 & n.4, 6, 58 (Abrahamson, C.J., lead opinion); *Id.* ¶ 76 (Roggensack, J., concurring).

However, based on the information you provided, it also appears the district did not actually charge the requester the fees set forth in the original prepayment letter. Therefore, DOJ cannot conclude that a fee violation has occurred, because those fees were never levied against the requester.

Further, the district has subsequently communicated with the requester to narrow the request. If the request was re-submitted as the requester had proposed, location fees for the request would fall below the $50 threshold. Based on the information you provided to DOJ, this is true regardless of whether the district located one personnel file at a time or both personnel files at the same time. Either way, no location fees can be charged. *See* Wis. Stat. § 19.35(3)(c).

Regarding the aggregation of fees more generally, DOJ can provide you with some further information based on the Attorney General's previous guidance on the subject. *See, e.g.,* Seymer Correspondence (April 14, 2016); Seymer Correspondence (July 7, 2016).

The law states, in part, "[A]n authority may impose a fee upon a requester for locating a record, not exceeding the actual, necessary and direct cost of location, if the cost is $50 or more." Wis. Stat. § 19.35(3)(c). Therefore, although the law is silent about aggregating fees, the law does not expressly authorize the aggregation of location costs for multiple requests from the same requester that occur close in time.

Many authorities are concerned about the time and taxpayer expense involved with responding to public records requests. This concern may lead to the aggregation of location costs associated with some requests. To be clear, DOJ is dedicated to open and transparent government and endeavors to promote open government principles and educate authorities and the public alike on such matters. DOJ and the OOG encourage authorities to consider public records requests with these principles in mind.

The public records law begins with a presumption of complete public access; however, such access must be "consistent with the conduct of governmental business." Wis. Stat. § 19.31. Some authorities with limited resources struggle to balance their obligations under the law with the taxpayer expense incurred by fulfilling their obligations. This is one of the reasons why the OOG encourages communication between an authority and a requester. Because the law does not expressly authorize an authority to aggregate location costs for records requests that occur close in time, DOJ cannot sanction such an approach. However, ensuring open and transparent government is a responsibility shared by everyone. Authorities have a responsibility to follow the public records law, and the public has a responsibility to act in good faith in submitting public records requests.

DOJ has previously advised that, although location costs will vary depending on the request, detailed and specific requests may help keep such costs low. *See* Seymer Correspondence (July 7, 2016). Further, in order to ease the burden on an authority and the taxpayers, and to help ensure that requests are processed more efficiently, a requester may be able to be combined certain requests into one request. *Id.*

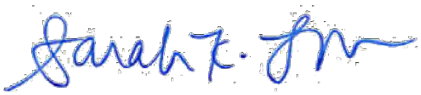
For example, instead of submitting a number of separate requests in a short time frame, requesters could submit a single request seeking the same records. Thus, an authority need only process and complete the necessary clerical work for one request, instead of multiple requests. Moreover, it may also be beneficial for requesters to combine requests in order to facilitate more efficient response times, thereby ensuring that requesters will receive quicker responses providing them with the records they seek. *See* Seymer Correspondence (April 14, 2016).

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

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

The information provided in this letter is provided pursuant to Wis. Stat. § 19.39 and does not constitute an informal or formal opinion of the Attorney General pursuant to Wis. Stat. § 165.015(1).

Sincerely,



Sarah K. Larson
Assistant Attorney General
Office of Open Government

SKL:lah

cc: Melissa Stitz, melissastitz1975@gmail.com

STATE OF WISCONSIN
DEPARTMENT OF JUSTICE

Josh Kaul
Attorney General

17 W. Main Street
P.O. Box 7857
Madison, WI 53707-7857
www.doj.state.wi.us

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

December 27, 2021

John Burks
Jwb-44@hotmail.com

Dear John Burks:

The Wisconsin Department of Justice (DOJ) is in receipt of your undated correspondence, received on October 1, 2020, regrading your public records request to the Milwaukee Police Department (Milwaukee PD). You wrote, "I have not gotten any confirmation [from Milwaukee PD] whatsoever." You noted that one of your requests "goes back as far as July 31." You wrote, "I need to know whom to contact in order to escalate this."

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

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

The public records law does not require a response to a public records request within a specific timeframe. In other words, after a request is received, there is no set deadline by which the authority must respond. However, the law states that upon receipt of a public records request, the authority "shall, as soon as practicable and without delay, either fill the request or notify the requester of the authority's determination to deny the request in whole or in part and the reasons therefor." Wis. Stat. § 19.35(4)(a). A reasonable amount of time for

a response "depends on the nature of the request, the staff and other resources available to the authority to process the request, the extent of the request, and other related considerations." *WIREdata, Inc. v. Vill. of Sussex*, 2008 WI 69, ¶ 56, 310 Wis. 2d 397, 751 N.W.2d 736; *see Journal Times v. Police & Fire Comm'rs Bd.*, 2015 WI 56, ¶ 85, 362 Wis. 2d 577, 866 N.W.2d 563 (an authority "can be swamped with public records requests and may need a substantial period of time to respond to any given request").

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

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

The 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, DOJ respectfully decline to pursue an action for mandamus.

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,

Paul M. Ferguson
Assistant Attorney General
Office of Open Government

PMF:lah

STATE OF WISCONSIN
DEPARTMENT OF JUSTICE

Josh Kaul
Attorney General

17 W. Main Street
P.O. Box 7857
Madison, WI 53707-7857
www.doj.state.wi.us

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

December 27, 2021

Janice Dickman
Douglas Finbraaten
[redacted]
Robbinsdale, MN 55422
Janicedickmandcd@gmail.com
Dougfin522@msn.com

Dear Janice Dickman and Douglas Finbraaten:

The Wisconsin Department of Justice (DOJ) is in receipt of your correspondence, dated August 23, 2020, in which you alleged violations of the open meetings law by the Iron County Board of Adjustment. You wrote, "We believe the failure to disclose the Board's ex parte communication with Heather Palmquist, the Board's refusal to allow us to respond to Ms. Palmquist's letter and oral statements . . . are all in violation of Wisconsin's Open Meetings Law and that we were, therefore, denied a full, fair, and unbiased hearing." Your correspondence states that you included a transcript of the hearing and a letter you received from Heather Palmquist. However, DOJ did not receive this information and therefore, could not review it. I also note that we discussed this matter on December 3, 2019 via telephone.

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, regarding the building variance request and hearing process, 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 you with some general information about the open meetings law. Based on the limited information in your correspondence, we have insufficient information to properly evaluate your matter. Nevertheless, we hope that you find this information helpful.

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

In your correspondence you asked if the Iron County Land and Water Conservation Department was subject to the open meetings law. The open meetings law applies to every meeting of a governmental body. The definition of a governmental body includes a "state or local agency, board, commission, council, department or public body corporate and politic created by constitution, statute, ordinance, rule or order[.]" Wis. Stat. § 19.82(1). A governmental body is a group of people with a collective identity and purpose and a determinate membership with the expectation that it will act collectively in relation to some subject of governmental business. The list of entities is broad enough to include essentially any governmental entity, regardless of what it is labeled. Purely advisory bodies are subject to the law, even though they do not possess final decision making power, as long as they are created by constitution, statute, ordinance, rule, or order. *See State v. Swanson*, 92 Wis. 2d 310, 317, 284 N.W.2d 655 (1979). The Iron County Land and Water Conservation Department is a department within the government of Iron County and meets the definition of "authority" under the public records law. It appears to fall under the jurisdiction of the Land Conservation Committee, which would meet the definition of "governmental body."

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

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

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

There is insufficient information in your correspondence regarding communication between the board and Heather Palmquist to properly evaluate whether any such communication constituted a meeting of the board.

In your correspondence you wrote, "The Board refused to permit us to respond to Ms. Palmquist's letter and/or the comments she made at the meeting." While Wisconsin law requires that meetings of governmental bodies be open to the public so that citizens may attend and observe open session meetings, the law does not require a governmental body to allow members of the public to speak or actively participate in the body's meetings. While the open meetings law does allow a governmental body to set aside a portion of a meeting for public comment, it does not require a body to do so. Wis. Stat. §§ 19.83(2), 19.84(2). There are some other state statutes that require governmental bodies to hold public hearings on specified matters. Unless such a statute specifically applies, however, a governmental body is free to determine for itself whether and to what extent it will allow citizen participation at its meetings. For example, a body may choose to limit the time each citizen has to speak.

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

Under the open meetings law, the Attorney General and the district attorneys have authority to enforce the law. Wis. Stat. § 19.97(1). Generally, the Attorney General may elect to prosecute complaints presenting novel issues of law that coincide with matters of statewide concern. Although you have not asked DOJ to initiate an enforcement action, DOJ respectfully declines to file an enforcement action on your behalf at this time, as your matter does not appear to present novel issues of law that coincide with matters of statewide concern.

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

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

Lawyer Referral and Information Service
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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,

Paul M. Ferguson
Assistant Attorney General
Office of Open Government

PMF:lah

STATE OF WISCONSIN
DEPARTMENT OF JUSTICE

Josh Kaul
Attorney General

17 W. Main Street
P.O. Box 7857
Madison, WI 53707-7857
www.doj.state.wi.us

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

December 27, 2021

Daryise Earl #413453
Kettle Moraine Correctional Institution
Post Office Box 282
Plymouth, WI 53073

Dear Daryise Earl:

The Wisconsin Department of Justice (DOJ) is in receipt of your correspondence, dated July 28, 2020, regarding your public records request to the "Racine Police Department (RPD)" for "a copy of the internal investigation file pertinent to [an] ex-detective['s] . . . termination from the RPD." You stated that your request was forwarded to the Racine City Attorney's office. You wrote, "As of the date of this letter Mr. Earl's records request has yet to be approved / denied." You asked DOJ to "intervene in this matter" and request the City Attorney release the documents to you or "compel them to provide" the records to you.

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).

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

From the limited information you provided in your correspondence, it is unclear whether the records you requested contain specific references to yourself or any children that you may have. If they do not, then the records are not available to you via a public records request submitted pursuant to the public records law. However, DOJ can provide you with some general information regarding the public records law that you may find helpful.

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

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

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

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

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

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

STATE OF WISCONSIN
DEPARTMENT OF JUSTICE

Josh Kaul
Attorney General

17 W. Main Street
P.O. Box 7857
Madison, WI 53707-7857
www.doj.state.wi.us

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

December 27, 2021

Donald Hale #163900
Oakhill Correctional Institution
Post Office Box 938
Oregon, WI 53575

Dear Donald Hale:

The Wisconsin Department of Justice (DOJ) is in receipt of your correspondence, dated September 29, 2020, regarding your public records requests for "unredacted Madison police reports" involving your case. You wrote, "They won't even response to my letters." You asked DOJ for help.

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).

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

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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).

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

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

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

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

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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,

Paul M. Ferguson
Assistant Attorney General
Office of Open Government

PMF:lah

STATE OF WISCONSIN
DEPARTMENT OF JUSTICE

Josh Kaul
Attorney General

17 W. Main Street
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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 27, 2021

Richard Harrison #261812
Green Bay Correctional Institution
Post Office Box 19033
Green Bay, WI 54307

Dear Richard Harrison:

The Wisconsin Department of Justice (DOJ) is in receipt of your correspondence, dated July 21, 2020, regarding your public records request to the "Dane County Bailiff's Supervisor" for reports regarding a November 2019 incident. You asked DOJ to "please look into why they are not sending the reports."

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).

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

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

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

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

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

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

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

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

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

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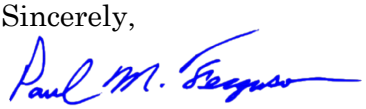
Sincerely,



Paul M. Ferguson
Assistant Attorney General
Office of Open Government

PMF:lah

STATE OF WISCONSIN
DEPARTMENT OF JUSTICE

Josh Kaul
Attorney General

17 W. Main Street
P.O. Box 7857
Madison, WI 53707-7857
www.doj.state.wi.us

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

December 27, 2021

Grant Johnson
directbrander@gmail.com

Dear Grant Johnson:

The Wisconsin Department of Justice (DOJ) is in receipt of your correspondence, dated September 22, 2020 and October 6, 2020, in which you wrote that you "have been waiting on emails since March of 2019, including personal emails from several officials. I'm having a hard time [understanding] why the law does not seem to apply to the city of Franklin, Wisc."

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, it appears that some of the subject matter of your correspondence, including regarding the "sound study," "the Hills Has Eyes events," and comments made by the mayor, are outside this scope. The legal authority of the Attorney General and DOJ is specifically defined, and limited, by laws passed by the Wisconsin Legislature. Therefore, we are unable to offer you assistance regarding your concerns that are outside the scope of the OOG's legal authority and responsibilities.

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

In your correspondence you wrote that you requested "personal emails from several officials." The Wisconsin Supreme Court has said that purely personal emails, evincing no violation of law or policy, sent or received by employees or officers on an authority's computer system are not subject to disclosure in response to a public records request. *Schill v. Wisconsin Rapids Sch. Dist.*, 2010 WI 86, ¶ 9 & n.4 (Abrahamson, C.J., lead opinion), ¶ 148 & n.2 (Bradley, J., concurring), ¶ 173 & n.4 (Gableman, J., concurring), 327 Wis. 2d 572, 582, 786 N.W.2d 177, 183. However, despite the lead opinion in *Schill*, DOJ's position is that purely personal emails sent or received on government email accounts are records under the

public records law, and therefore, such emails are subject to disclosure. In *Schill*, the court held 5-2 that the public records law did not require an authority to disclose such emails. Three justices reached this decision by concluding such emails were not "records." The remaining four justices concluded the emails were "records," but two agreed they did not need to be disclosed under the balancing test. While this area of the law is unsettled, it is reasonable to conclude that should the court again take up the question of whether personal emails sent or received on government email accounts are records, a majority will hold that such emails are records subject to disclosure.

The fact that records, including but not limited to emails, are subject to disclosure does not necessarily mean an authority must disclose them. 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).

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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.

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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, DOJ respectfully declines to pursue an action for mandamus.

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In your October 6, 2020, correspondence you wrote, "Why closed session?" regarding "[f]inancials" and a "[c]losed [d]oor session." The Wisconsin Open Meetings Law, Wis. Stat. §§ 19.81 to 19.98, acknowledges that the public is entitled to the fullest and most complete information regarding government affairs as is compatible with the conduct of governmental business. Wis. Stat. § 19.81(1). All meetings of governmental bodies shall be held publicly and be open to all citizens at all times unless otherwise expressly provided by law. Wis. Stat. § 19.81(2). The provisions of the open meetings law are to be construed liberally to achieve that purpose. Wis. Stat. § 19.81(4).

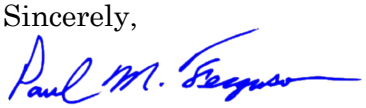
Wisconsin Stat. § 19.85 lists exemptions in which meetings may be convened in closed session. Any exemptions to open meetings are to be viewed with the presumption of openness in mind. Such exemptions should be strictly construed. *State ex rel. Hodge v. Turtle Lake*, 180 Wis. 2d 62, 71, 508 N.W.2d 603 (1993). The exemptions should be invoked sparingly and only where necessary to protect the public interest and when holding an open session would be incompatible with the conduct of governmental affairs. "Mere government inconvenience is . . . no bar to the requirements of the law." *State ex rel. Lynch v. Conta*, 71 Wis. 2d 662, 678, 239 N.W.2d 313 (1976). For additional information on closed session requirements, please the Open Meetings Law Compliance Guide available through DOJ's website (https://www.doj.state.wi.us/office-open-government/office-open-government).

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

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

The information provided in this letter is provided pursuant to Wis. Stat. § 19.39 and 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

Josh Kaul
Attorney General

17 W. Main Street
P.O. Box 7857
Madison, WI 53707-7857
www.doj.state.wi.us

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

December 27, 2021

Troy Klein
[redacted]
Fitchburg, WI 53711
WU921R@notreemail.com

Dear Troy Klein:

The Wisconsin Department of Justice (DOJ) is in receipt of your correspondence, dated September 12, 2020, regarding your questions about the public records law.

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

First, you asked, "Is there a requirement that public agencies subject to the Wisconsin Open/Public Records Laws and Regulations provide an estimate that is the most cost effective for the requestor even if this does NOT involve individual(s) meeting any definition of the lowest paid employee?" Under the public records law, "[A]n authority may charge a fee not exceeding the actual, necessary, and direct costs *of four specific tasks:* (1) 'reproduction and transcription'; (2) 'photographing and photographic processing'; (3) 'locating'; and (4) 'mailing or shipping.'" *Milwaukee Journal Sentinel v. City of Milwaukee*, 2012 WI 65, ¶ 54, 341 Wis. 2d 607, 815 N.W.2d 367 (citation omitted) (emphasis in original).

The amount of such fees may vary depending on the authority. However, an authority may not profit from complying with public records requests. *WIREdata, Inc. v. Vill. of Sussex*, 2008 WI 69, ¶¶ 103, 107, 310 Wis. 2d 397, 751 N.W.2d 736 (an authority may not profit from its response to a public records request but may recoup all of its actual costs). An authority may choose to provide copies of a requested record without charging fees or by reducing fees where an authority determines that waiver or reduction of the fee is in the public interest. Wis. Stat. § 19.35(3)(e). An authority may not charge for the time it takes to redact records. *Milwaukee Journal Sentinel*, 2012 WI 65, ¶¶ 1 & n.4, 6, 58 (Abrahamson, C.J., lead opinion); *Id.* ¶ 76 (Roggensack, J., concurring).

The law permits an authority to impose a fee for locating records if the cost is $50.00 or more. Wis. Stat. § 19.35(3)(c). An authority may require a requester prepay any such fees if the total amount exceeds $5.00. Wis. Stat. § 19.35(3)(f). Generally, the rate for an actual, necessary, and direct charge for staff time should be based on the pay rate (including fringe benefits) of the lowest paid employee capable of performing the task.

For more information on permissible fees, please see the Office of Open Government Advisory: Charging Fees under the Wisconsin Public Records Law, which was issued on August 8, 2018 and can be found on DOJ's website (https://www.doj.state.wi.us/office-open-government/oog-advisories-and-attorney-general-opinions). DOJ's Office of Open Government (OOG) also encourages authorities and requesters to maintain an open line of communication. This helps to avoid misunderstandings between an authority and a requester. It is also helpful in resolving issues such as those related to fees. If a requester is concerned about potential fees, it may be helpful that he or she express such concerns in the request.

Second, you asked, "Is there an implicit requirement that agencies subject to the Wisconsin Open/Public Records Laws and Regulations design and adopt systems with indexing capabilities . . . that facilitate requestor charge/cost which is a low or de minimus record request fulfillment charge or are the agencies free to design/adopt/purchase/lease/utilize systems/standards/conventions/processes/staffing with technical barriers which may be overcome only at great cost and possible technically impossible?" The public records law does not contain a provision requiring an authority to "design and adopt systems with indexing capabilities." Nevertheless, DOJ's Office of Open Government encourages authorities to utilize systems or processes that facilitate more efficient responses to public records requests. (Additional information on records management may be found in Wis. Stat. §§ 16.61 and 19.21.) As explained above, the public records law defines the fees an authority is permitted to charge when responding to public records requests.

Finally, you asked, "Is there an implicit or explicit requirement that state agencies subject to the Wisconsin Public/Open Records Laws and Regulations provide a mechanism . . . to positively verify . . . that a candidate record which meets a[n] open records request is in fact and law to be an original and not a derivative record?

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

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.

By analogy, providing a copy of an electronic document that is "substantially as good" as the original is a sufficient response where the requester does not specifically request access in the original format. *See WIREdata, Inc. v. Vill. of Sussex* ("*WIREdata II*"), 2008 WI 69, ¶¶ 97–98, 310 Wis. 2d 397, 751 N.W.2d 736 (provision of records in PDF format satisfied requests for records in "electronic, digital" format); *State ex rel. Milwaukee Police Ass'n v. Jones*, 2000 WI App 146, ¶ 10, 237 Wis. 2d 840, 615 N.W.2d 190 (holding that provision of an analog copy of a digital audio tape ("DAT") complied with Wis. Stat. § 19.35(1)(c) by providing a recording that was "substantially as audible" as the original); *see also Autotech Techs. Ltd. P'ship v. Automationdirect.com, Inc.*, 248 F.R.D. 556, 558 (N.D. Ill. 2008) (where litigant did not specify a format for production during civil discovery, responding party had option of providing documents in the "form ordinarily maintained or in a reasonably usable form").

Wisconsin Stat. § 19.36(4) provides, however, that material used as input for or produced as the output of a computer is subject to examination and copying. *Jones* ultimately held that, when a requester specifically asked for the original DAT recording of a 911 call, the custodian did not fulfill the requirements of Wis. Stat. § 19.36(4) by providing only the analog copy. *Jones*, 2000 WI App 146, ¶ 17.

In *WIREdata II*, the Wisconsin Supreme Court declined to address the issue of whether the provision of documents in PDF format would have satisfied a subsequent request specifying in detail that the data should be produced in a particular format which included fixed length, pipe delimited, or comma-quote outputs, leaving open the question of the degree to which a requester can specify the precise electronic format that will satisfy a record request. *WIREdata II*, 2008 WI 69, ¶¶ 8 n.7, 93, 96.

Nevertheless, the court of appeals has provided some guidance in *Lueders* 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.*

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

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

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

STATE OF WISCONSIN
DEPARTMENT OF JUSTICE

Josh Kaul
Attorney General

17 W. Main Street
P.O. Box 7857
Madison, WI 53707-7857
www.doj.state.wi.us

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

December 27, 2021

Michael Krajovic
[redacted]
Lake Geneva, WI 53147

Dear Michael Krajovic:

The Wisconsin Department of Justice (DOJ) is in receipt of your correspondence, dated October 23 and 24, 2020, in which you asked a number of questions regarding the open meetings law, including inquiries concerning meeting requirements and walking quorums.

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

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

Under the open meetings law, a "meeting" is defined as:

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

> gathering or conference which is not intended to avoid this subchapter.

Wis. Stat. § 19.82(2).

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

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

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

The requirements of the open meetings law also extend to walking quorums. A "walking quorum" is a series of gatherings among separate groups of members of a governmental body, each less than quorum size, who agree, tacitly or explicitly, to act uniformly in sufficient number to reach a quorum. *State ex rel. Newspapers, Inc. v. Showers*, 135 Wis. 2d 77, 92, 398 N.W.2d 154 (1987). The danger is that a walking quorum may produce a predetermined outcome and thus render the publicly-held meeting a mere formality. *State ex rel. Lynch v. Conta*, 71 Wis. 2d 662, 685–88, 239 N.W.2d 313 (1976). Thus, any attempt to avoid the appearance of a "meeting" through use of a walking quorum or other "elaborate arrangements" is subject to prosecution under the open meetings law. *Id.* at 687.

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

For example, the requirements of the open meetings law cannot be circumvented by using an agent or surrogate to poll the members of governmental bodies through a series of individual contacts. *See* Clifford Correspondence (Apr. 28, 1986); Herbst Correspondence

(Jul. 16, 2008). Similarly, the use of email voting to decide matters fits the definition of a "walking quorum" in violation of the open meetings law, even if the result of the vote is later ratified at a properly noticed meeting. *See* I-01-10 (Jan. 25, 2010).

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

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

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

The use of written communications transmitted by electronic means, such as via email or instant messaging, to discuss or debate a matter also creates the risk that the members of the governmental body have "convened" within the meeting of the open meetings law, depending on how the communication medium is used. *See* Krischan Correspondence (Oct. 3, 2000).[1] On the one hand, if the emails are used a one-way conduit of information from one member of a governmental body to another, they might have the characteristics of a letter or memorandum rather than a meeting. *Id.*

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[1] 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, telephone conference calls, and electronic communications including email.

If the emails closely resemble in-person discussion—such as email replies sent to many members of the governmental body or forwarded to others with attachments—then they may constitute a meeting if they involve enough members to control an action by the body. *Id.* For that reason, the Attorney General "strongly discourages the members of every governmental body from using email to communicate about issues within the body's realm of authority." *Id.*

Similarly, the Attorney General has advised that email "should not be used to carry on private debate and discussion which belongs at a public meeting subject to public scrutiny." *See* Benson Correspondence (Mar. 12, 2004). Emails exchanged "in close proximity in time to each other" could constitute a convening if those emails are akin to a face-to-face meeting. *Id.* For example, if a single official were to email other officials in succession, asking for their support of a particular matter or position, or if the sender (or others forwarding the sender's email) were to reach enough members to constitute a quorum necessary to take or block the action contemplated in the email, then a prohibited walking quorum may occur. *Id.* Email voting is also prohibited, if members vote with the understanding that the body's action would later be determined by the number of email votes in favor of or in opposition to the matter that was the subject of the vote. *See* I-01-10 (Jan. 12, 2010).

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

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

Sincerely,

Paul M. Ferguson
Assistant Attorney General
Office of Open Government

PMF:lah

STATE OF WISCONSIN
DEPARTMENT OF JUSTICE

Josh Kaul
Attorney General

17 W. Main Street
P.O. Box 7857
Madison, WI 53707-7857
www.doj.state.wi.us

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

December 27, 2021

Ann Lewandowski
[redacted]
Waunakee, WI 53597
annlewandowski@ymail.com

Dear Ann Lewandowski:

The Wisconsin Department of Justice (DOJ) is in receipt of your correspondence, dated October 26, 2020, regarding the Village of Waunakee Board of Appeals closed session on October 13, 2020. You wrote the agenda for the meeting stated that the "Board may convene in closed session as authorized by Section 19.85(1)(a) of the Wisconsin Statutes to deliberate concerning a case which the subject of any judicial or quasi-judicial trial or hearing before that governmental body, more specifically the appeal of the Zoning Administrator's decision relating to Quincy Ridge, LLC." You asked, "Can you please clarify where or when a Board of Appeals may convene in closed session? If there is no abililty [sic] to convene in closed session, I ask that you do not commence enforcement action, but instead conduct education on the ability of the board of appeals to enter closed session and whether that vacates the board of appeals decision reached as a consequence of the meeting."

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

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

Wisconsin Stat. § 19.85(1)(a) authorizes a closed session for "[d]eliberating concerning a case which was the subject of any judicial or quasi-judicial trial or hearing before that governmental body." In order for this exemption to apply, there must be a "case" that is the subject of a quasi-judicial proceeding. *Hodge*, 180 Wis. 2d at 72; *cf. State ex rel. Cities Serv. Oil Co. v. Bd. of Appeals of Milwaukee*, 21 Wis. 2d 516, 537, 124 N.W.2d 809 (1963) (allowing zoning appeal boards to deliberate in closed session after hearing, decided before the Legislature added the "case" requirement in 1977). The Wisconsin Supreme Court held that the term "case" contemplates a controversy among parties that are adverse to one another; it does not include a mere request for a permit. *Hodge*, 180 Wis. 2d at 74. An example of a governmental body that considers "cases" and thus can convene in closed session under Wis. Stat. § 19.85(1)(a), where appropriate, is the Wisconsin Employment Relations Commission. 68 Op. Att'y Gen. 171 (1979). Bodies that consider zoning appeals, such as boards of zoning appeals and boards of adjustment, may not convene in closed session. Wis. Stat. §§ 59.694 (counties), 60.65(5) (towns), 62.23(7)(e)3. (cities); White Correspondence (May 1, 2009). The meetings of town, village, and city boards of review regarding appeals of property tax assessments must also be conducted in open session. Wis. Stat. § 70.47(2m).

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

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

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

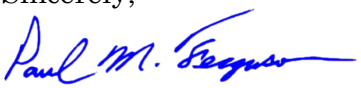
Lawyer Referral and Information Service
State Bar of Wisconsin
P.O. Box 7158
Madison, WI 53707-7158
(800) 362-9082
(608) 257-4666
http://www.wisbar.org/forpublic/ineedalawyer/pages/lris.aspx

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's Office of Open Government is also available to provide open government training to those interested. Those interested in such training may contact our office via email at opengov@widoj.gov or via phone at (608) 267-2220.

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,



Paul M. Ferguson
Assistant Attorney General
Office of Open Government

PMF:lah

STATE OF WISCONSIN
DEPARTMENT OF JUSTICE

Josh Kaul
Attorney General

17 W. Main Street
P.O. Box 7857
Madison, WI 53707-7857
www.doj.state.wi.us

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

December 27, 2021

Ted Ritter
[redacted]
Saint Germain, WI 54558
tritter3@frontier.com

Dear Ted Ritter:

The Wisconsin Department of Justice (DOJ) is in receipt of your correspondence, dated July 30, 2020, in which you wrote, "Since Resource Conservation and Development (RC&D) Councils are no longer affiliated with the Natural Resources Conservation Service (NRCS), are those councils operating in WI subject to WI open meeting laws?"

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

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

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

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

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

Further, under the open meetings law, 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). Groups that include both members and non-members of a parent body, however, are not "subunits" of the parent body.

Based on the limited information you provided in your correspondence, DOJ cannot properly evaluate whether the RC&D is a "governmental body" as defined in Wis. Stat. § 19.82(1), including whether it is a "quasi-governmental corporation" as discussed in the *BDADC* case, and, therefore, subject to the open meetings law.

If you would like to learn more about the open meetings law, DOJ's Office of Open Government offers several open government resources through the Wisconsin DOJ website (https://www.doj.state.wi.us/office-open-government/office-open-government). DOJ provides the full Wisconsin open meetings law 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,

Paul M. Ferguson
Assistant Attorney General
Office of Open Government

PMF:lah

STATE OF WISCONSIN
DEPARTMENT OF JUSTICE

Josh Kaul
Attorney General

17 W. Main Street
P.O. Box 7857
Madison, WI 53707-7857
www.doj.state.wi.us

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

December 27, 2021

Gregg Schneider
[redacted]
Beloit, WI 53511
schneider.gregg@gmail.com

Dear Gregg Schneider:

The Wisconsin Department of Justice (DOJ) is in receipt of your correspondence, dated June 30, 2020, regarding "a school board [convening in closed session to select] interview questions to ask the candidates for a position." The school board "stated that the meeting would not be recorded or aired because the only item on the agenda was in closed session." You asked, "Does selecting interview questions meet the criteria for a closed session under Section 19.85(1)(c)?"

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

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

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

Notice of a contemplated closed session (and any motion to enter into closed session) must contain the subject matter to be considered in closed session. Merely identifying and quoting a statutory exemption is not sufficient. The notice or motion must contain enough information for the public to discern whether the subject matter is authorized for closed session. If a body intends to enter into closed session under more than one exemption, the notice or motion should make clear which exemptions correspond to which subject matter. Furthermore, some specificity is required since many exemptions contain more than one reason for authorizing a closed session. Merely quoting the entire exemption, without specifying the portion of the exemption under which the body intends to enter into closed session, may not be sufficient.

Wisconsin Stat. § 19.85(1) contains eleven exemptions to the open session requirement that permit, but do not require, a governmental body to convene in closed session. One of the exemptions authorizes a closed session for "[c]onsidering employment, promotion, compensation or performance evaluation data of any public employee over which the governmental body has jurisdiction or exercises responsibility." Wis. Stat. § 19.85(1)(c). The language of the exemption refers to a "public employee" rather than to positions of employment in general. The apparent purpose of the exemption is to protect individual employees from having their actions and abilities discussed in public and to protect governmental bodies "from potential lawsuits resulting from open discussion of sensitive information." *Oshkosh Nw. Co. v. Oshkosh Library Bd.*, 125 Wis. 2d 480, 486, 373 N.W.2d 459 (Ct. App. 1985). It is not the purpose of the exemption to protect a governmental body when it discusses general policies that do not involve identifying specific employees. *See* 80 Op. Att'y Gen. 176, 177–78 (1992). *See also Buswell*, 2007 WI 71, ¶ 37 (noting that Wis. Stat. § 19.85(1)(c) "provides for closed sessions for considering matters related to *individual* employees").

Thus, Wis. Stat. § 19.85(1)(c) authorizes a closed session to discuss the qualifications of and salary to offer a specific applicant but does not authorize a closed session to discuss the qualifications and salary range for the position in general. 80 Op. Att'y Gen. 176, 178–82. The section authorizes closure to determine increases in compensation for specific employees. 67 Op. Att'y Gen. 117, 118. Similarly, Wis. Stat. § 19.85(1)(c) authorizes closure to determine which employees to lay off, or whether to non-renew an employee's contract at the expiration of the contract term, but not to determine whether to reduce or increase staffing, in general. *See* 66 Op. Att'y Gen. 211, 213.

Based on the information provided in your correspondence, a closed session under Wis. Stat. § 19.85(1)(c) to select interview questions to ask all candidates for a position would not be permissible because such a discussion would be general in nature and would not pertain to a specific employee.

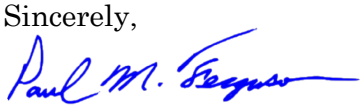
For additional information on closed sessions, please see the Open Meetings Law Compliance Guide available through DOJ's website (https://www.doj.state.wi.us/office-open-government/office-open-government).

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 the 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,



Paul M. Ferguson
Assistant Attorney General
Office of Open Government

PMF:lah

STATE OF WISCONSIN
DEPARTMENT OF JUSTICE

Josh Kaul
Attorney General

17 W. Main Street
P.O. Box 7857
Madison, WI 53707-7857
www.doj.state.wi.us

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

December 27, 2021

Elizabeth Townsend
[redacted]
Scales Mound, IL 61075
elizabethtownsend82@gmail.com

Dear Elizabeth Townsend:

The Wisconsin Department of Justice (DOJ) is in receipt of your correspondence, dated October 15, 2020, regarding alleged violations of the open meetings law by the Lafayette County Board Chairman. You wrote, "My termination was discussed in two closed sessions called to order by Jack Sauer, County Board Chairman. . . . Additionally, many of the closed sessions that are conducted by Lafayette County are against OMA laws." You would like DOJ to "consider an investigation to prevent further OMA violations in Lafayette County."

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

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

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

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

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

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

Wisconsin Stat. § 19.85(1) contains 11 exemptions to the open session requirement that permit, but do not require, a governmental body to convene in closed session. Wisconsin Stat. § 19.85(1)(b) authorizes a closed session for "[c]onsidering dismissal, demotion, licensing or discipline of any public employee or person licensed by a board or commission or the investigation of charges against such person, . . . and the taking of formal action on any such matter." If a closed session for such a purpose will include an evidentiary hearing or final action, then the governmental body must give the public employee actual notice of that closed hearing and/or closed final action. Evidentiary hearings are characterized by the formal examination of charges and by taking testimony and receiving evidence in support or defense of specific charges that may have been made. *See* 66 Op. Att'y Gen. 211, 214 (1977). Where actual notice is required, the notice must state that the person has a right to request that any such evidentiary hearing or final action be conducted in open session. If the person makes such a request, the governmental body may not conduct an evidentiary hearing or take final action in closed session.

However, those provisions on actual notice to the employee would not apply unless the governmental body goes into closed session under Wis. Stat. § 19.85(1)(b). *See* Johnson Correspondence (February 27, 2009). In other words, Wis. Stat. § 19.85(1)(b) requires actual notice to the public employee in question only if the contemplated closed session will include an evidentiary hearing or final action. *Id.* In other circumstances, no actual notice would be required under Wis. Stat. § 19.85(1)(b). *Id.*

For additional information on closed sessions, please see the Open Meetings Law Compliance Guide available through DOJ's website (https://www.doj.state.wi.us/office-open-government/office-open-government).

In your correspondence you wrote that "many of the closed sessions that are conducted by Lafayette County are against OMA laws." The Attorney General and DOJ's Office of Open Government are committed to increasing government openness and transparency. The information you provided is insufficient to properly evaluate your concerns with regard to the "many" closed sessions allegedly held "against OMA laws." However, we hope that you found the information provided above helpful.

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

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

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

Paul M. Ferguson
Assistant Attorney General
Office of Open Government

PMF:lah

STATE OF WISCONSIN
DEPARTMENT OF JUSTICE

Josh Kaul
Attorney General

17 W. Main Street
P.O. Box 7857
Madison, WI 53707-7857
www.doj.state.wi.us

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

December 27, 2021

Jerimy Whitelaw #450188
New Lisbon Correctional Institution
Post Office Box 2000
New Lisbon, WI 53950

Dear Jerimy Whitelaw:

The Wisconsin Department of Justice (DOJ) is in receipt of your correspondence, dated December 11, 2020, regarding your denied public records request to the Milwaukee Police Department (Milwaukee PD). You asked "the attorney general to order the Milwaukee [P]olice [D]epartment to send [you] a copy of all materials that [you] requested in [your] request dated July 2nd 2020. And that the materials be unredacted."

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).

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

In your correspondence, you wrote that the requested records "related to [your] criminal conviction." Along with your correspondence, you provided a copy of Milwaukee PD's letter denying your public records request. The letter states, "Because you are incarcerated, and because your request does not specially reference you or any children that you may have, the Milwaukee Police Department must deny your request." Based on this conflicting information, it is unclear whether the records you requested contain specific references to you or any minor children you may have. As a result, it is unclear whether you are able to obtain the records via a public records request submitted pursuant to the public records law.

Whether the requested records contain specific references to you or any minor children you may have is a fact-specific question that cannot be definitively answered in an inquiry of this nature. When responding to questions about the public records law, DOJ cannot conduct factual investigations to determine the accuracy and completeness of the information that has been provided. If an enforcement action alleging violations of the public records law were commenced, the parties would have an opportunity to develop a more complete factual record related to the issues upon which a court would base its conclusions. As a result, DOJ is unable to properly evaluate your matter. However, we can provide you with some general information regarding the public records law that you may find helpful.

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

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

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

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

70 (Ct. App. 1997). For requesters who are not committed or incarcerated, an action for mandamus arising under the public records law must be commenced within three years after the cause of action accrues. *See* Wis. Stat. § 893.90(2).

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

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

Lawyer Referral and Information Service
State Bar of Wisconsin
P.O. Box 7158
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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,

Paul M. Ferguson
Assistant Attorney General
Office of Open Government

PMF:lah