THE CITY OF

Fitchburg

OFFICE OF THE CITY ATTORNEY

OPEN MEETING,

PUBLIC DOCUMENTS &

CODE OF ETHICS MANUAL

INTRODUCTION

This packet is designed as a reference with regard to open meetings, open records and ethics questions you might have. The packet contains the Wisconsin Department of Justice compliance outlines for both the State's Open Records Law and Open Meetings Law. In addition, we have attached a compilation of ethics guidelines and opinions from the Wisconsin Government Accountability Board. We have also included an opinion Mark Sewell drafted as part of an ethics issue raised recently in the City.

Obviously, there is a lot of material. Much of what is contained in these documents, especially in the Department of Justice Compliance Guides, you don't need to know. City staff takes care of maintaining records, posting notices, preparing agendas, and determining whether issues are proper for a closed session. City staff is also available to give opinions on open records, open meetings, and ethics questions. Below is a brief overview of the most common issues members of governing boards within the City face.

OPEN RECORDS

With regard to the open records law, the primary issue for council members is to understand that records are very broadly defined and that they include all e-mails you create or received that are related to your official capacity as a council member. We strongly advise that you use only your City e-mail account for City business. This allows City staff to respond to open records requests without you having to provide e-mails from your private computers.

OPEN MEETINGS

With regards to the open meeting law, a core concept is that the citizens have a right to have the business of government conducted in the open. As such, one of the primary issues for council members is the unintended creation of a meeting. In order to create a meeting under the open meetings law, there must be sufficient members present to either approve a matter or block a matter from being approved. In addition, the purpose of the meeting must be to discuss City business. As such, social gatherings with a majority of a governing body are not going to be considered a meeting, so long as the topic of discussion does not turn to City business.

Meetings can be created by a series of closely spaced telephone calls between members of a governing body or even potentially by e-mail exchanges. As is the case with much of the open meetings law, there is a lot of grey area. If the exchange looks like a one-way distribution of information, it is not likely to be determined a meeting. However, if a number of simultaneous or near simultaneous exchanges take place, like the type of exchange at a meeting, more questions about the propriety of that exchange are going to arise.

A few other common issues do arise. If you know that a large number of members of one committee are going to attend another meeting, please let the City administrator know so that we can properly post the meeting. Also, with regard to discussion at a meeting, if an item is not on the agenda, please do not discuss it. The City can amend agendas up to 24 hours before a meeting. If you want to discuss something, get it on the agenda. Finally, with regard to closed sessions, if a committee wants to hold a closed session, let staff know so that we can approve the closed session and the language necessary on the agenda to go into that closed session.

ETHICS

Members of a governing board and other municipal officials cannot accept goods or services provided because of their position that is not provided to the general public. A common example is a football ticket. If you are allowed to buy at face value a ticket that everyone else does not have an opportunity to purchase at that same value, you should not buy the ticket. The rule regarding acceptance of goods and services does not include campaign contributions, things of insubstantial value ($5.00 or less), and items provided by the City or approved of by the City.

In addition to accepting goods and services, members of governing boards and other municipal officials cannot debate or vote on things have a direct or indirect impact on the board member, a member of the board member's immediate family or an organization where the member or immediate family member is an officer or director or controls at least 10% of the organization. One exception to the rule above is that members of the governing board may vote on items that have a general impact. Taxes, and special assessments may, for example, have a substantial impact on the board member but have that same impact on a substantial number of others in the community.

Finally, there is an old criminal statute that prohibits any official action if the board member or officer has direct or indirect financial interest in any public contract. The statute prohibits being both a member of the council and in the officer's private capacity bidding for or entering into a contract in which the officer has a pecuniary interest. The problem is that this statute has been the subject of so many interpretations by the Wisconsin Attorney General and the League of Wisconsin Municipalities, that if there is an issue where your company has a contract with the City, we should discuss it.

CONCLUSION

The purpose of this overview is not to give you all of the answers to open government and ethics questions. The purpose is to give you some understanding of the potential pitfalls associated with those areas of the law. Our door is always open for discussions on these topics. If you have any questions, please feel more than free to contact us at any time.

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November 2015

Wisconsin Public Records Law Compliance Guide

Wisconsin Department of Justice
Attorney General Brad D. Schimel

Attorney General's Message

By Attorney General Brad D. Schimel

It is imperative that we recognize that transparency is the cornerstone of democracy and that citizens cannot hold their elected officials accountable in a representative government unless government is performed in the open.

As Wisconsin Attorney General, I recognize the important role the Department of Justice has in ensuring that Wisconsin's open government laws are properly and faithfully executed by public officials. I will not hesitate to voice my objection to any law that would curtail the public's right to open government. That's why this year, we announced that the Attorney General's Office of Open Government was open for business. The creation of this new office was necessary to meet my goals for increasing openness and transparency and improving DOJ's service to clients and citizens in this important area.

This compliance guide may be accessed, downloaded or printed free of charge from the Wisconsin Department of Justice website www.doj.state.wi.us and clicking on the "Office of Open Government" box toward the bottom of the page. I encourage you to share this guide with your constituencies and colleagues. Wisconsin's open government laws promote democracy by ensuring that all state, regional and local governments conduct their business with transparency. Wisconsin citizens have a right to know how their government is spending their tax dollars and exercising the powers granted by the people. This guide is a resource for all Wisconsinites to understand and exercise their right to access their government. I hope you do.

I am grateful to the records custodians and all those who perform public duties and I encourage them to contact the Office of Open Government if we can be of assistance. Additionally, I am grateful to those who continue to reach out to me and my staff to keep the conversation going on this important issue.

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Public Records/Open Meetings (PROM) Help Line: (608) 267-2220

Wisconsin Public Records Law Compliance Guide

(November 2015)

Wisconsin Department of Justice
Brad D. Schimel, Attorney General

Office of Open Government
Paul M. Ferguson, Assistant Attorney General

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INTRODUCTION

The Wisconsin public records law authorizes requesters to inspect or obtain copies of "records" maintained by government "authorities." The identity of the requester or the reason why the requester wants particular records generally do not matter for purposes of the public records law. Records are presumed to be open to inspection and copying, but there are some exceptions. Requirements of the public records law apply to records that exist at the time a public records request is made. The public records law does not require authorities to provide requested information if no responsive record exists, and generally does not require authorities to create new records in order to fulfill public records requests. The public records statutes, Wis. Stat. §§ 19.31-19.39, do not address the general duty to retain records. This outline is intended to provide general information about the public records law.

PUBLIC POLICY AND PURPOSE

"[I]t is declared to be the public policy of this state that all persons are entitled to the greatest possible information regarding the affairs of government and the official acts of those officers and employees who represent them."[1] This is one of the strongest declarations of policy found in the Wisconsin statutes.[2]

Wisconsin legislative policy favors the broadest practical access to government.[3] Providing citizens with information on the affairs of government is:

> [A]n essential function of a representative government and an integral part of the routine duties of officers and employees whose responsibility it is to provide such information. To that end, ss. 19.32 to 19.37 shall be construed in every instance with a presumption of complete public access, consistent with the conduct of governmental business. The denial of public access generally is contrary to the public interest, and only in an exceptional case may access be denied.[4]

Courts interpret the public records law in light of this policy declaration, to foster transparent government.[5]

The purpose of the Wisconsin public records law is to shed light on the workings of government and the official acts of public officers and employees.[6] Its goal is to provide access to records that assist the public in becoming an informed electorate.[7] The public records law therefore serves a basic tenet of our democratic system by providing opportunity for public oversight of government.[8]

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[1] Wis. Stat. § 19.31.
[2] *Zellner v. Cedarburg Sch. Dist.* ("*Zellner I*"), 2007 WI 53, ¶ 49, 300 Wis. 2d 290, 731 N.W.2d 240.
[3] *Hempel v. City of Baraboo*, 2005 WI 120, ¶ 22, 284 Wis. 2d 162, 699 N.W.2d 551; *Seifert v. Sch. Dist. of Sheboygan Falls*, 2007 WI App 207, ¶ 15, 305 Wis. 2d 582, 740 N.W.2d 177.
[4] Wis. Stat. § 19.31.
[5] *Milwaukee Journal Sentinel v. City of Milwaukee*, 2012 WI 65, ¶ 40, 341 Wis. 2d 607, 815 N.W.2d 367 (Abrahamson, C.J., lead opinion).
[6] *Bldg. & Constr. Trades Council v. Waunakee Cmty. Sch. Dist.*, 221 Wis. 2d 575, 582, 585 N.W.2d 726 (Ct. App. 1998).
[7] *Milwaukee Journal Sentinel*, 2012 WI 65, ¶ 73, 341 Wis. 2d 607, 815 N.W.2d 367 (Roggensack, J., concurring).
[8] *ECO, Inc. v. City of Elkhorn*, 2002 WI App 302, ¶ 16, 259 Wis. 2d 276, 655 N.W.2d 510; *Nichols v. Bennett*, 199 Wis. 2d 268, 273, 544 N.W.2d 428 (1996); *Linzmeyer v. Forcey*, 2002 WI 84, ¶ 15, 254 Wis. 2d 306, 646 N.W.2d 811. *See John K. MacIver Inst. for Pub. Policy, Inc. v. Erpenbach*, 2014 WI App 49, ¶ 32, 354 Wis. 2d 61, 848 N.W.2d 862 ("Transparency and oversight are essential to honest, ethical governance.").

The presumption favoring disclosure is strong, but not absolute.[9]

The general rule is that "[e]xcept as otherwise provided by law, any requester has a right to inspect any record."[10] Any record specifically exempted from disclosure by state or federal law or authorized to be exempted from disclosure by state law is exempt from disclosure under Wis. Stat. § 19.35(1), except that any portion of the record containing public information is open to public inspection.[11]

SOURCES OF WISCONSIN PUBLIC RECORDS LAW

Wisconsin Stat. §§ 19.31-19.39 (the public records statutes). The public records statutes and related Wisconsin statutes can be accessed on the Wisconsin State Legislature's website: http://docs.legis.wisconsin.gov/ and in Appendix C of this guide.

Wisconsin Stat. § 19.85(1) (exemptions to the open meetings law, referred to in the public records law), also accessible at http://docs.legis.wisconsin.gov/.

Court decisions.

Attorney General opinions and correspondence. Volumes 71-81 of the Attorney General opinions, as well as opinions from 1995-present, can be accessed at http://docs.legis.wisconsin.gov/misc/oag. Certain opinions and resources also can be accessed at http://www.doj.state.wi.us/office-open-government/office-open-government.

Other sources described below in this outline.

Note: The United States Freedom of Information Act (FOIA), 5 U.S.C. § 552, does not apply to states.[12] Nonetheless, the public policies expressed in FOIA exceptions may be relevant to application of the common law balancing test discussed in Analyzing the Request, *Step Four*, below.[13] Generally, the Wisconsin Public Records Law provides for greater access to state governmental records than FOIA does to federal records.[14]

KEY DEFINITIONS

"Record"

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.[15]

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[9] *Hempel*, 2005 WI 120, ¶ 28.
[10] Wis. Stat. § 19.35(1)(a).
[11] Wis. Stat. § 19.36(1).
[12] *State ex rel. Hill v. Zimmerman*, 196 Wis. 2d 419, 428 n.6, 538 N.W.2d 608 (Ct. App. 1995) (FOIA applies to certain records created by the federal government and its agencies).
[13] *Linzmeyer*, 2002 WI 84, ¶¶ 32-33.
[14] *See, e.g.*, *Wis. Family Counseling Servs., Inc. v. State*, 95 Wis. 2d 670, 672-73, 291 N.W.2d 631 (Ct. App. 1980).
[15] Wis. Stat. § 19.32(2).

- Must be created or kept in connection with official purpose or function of the agency.[16] Content determines whether a document is a "record," not medium, format, or location.[17]

- Not everything a public official or employee creates is a public record.[18]

- "Record" includes:

    - Handwritten, typed, or printed documents.

    - Maps and charts.

    - Photographs, films, and tape recordings.

    - Tapes, optical disks, and any other medium on which electronically generated or stored data is recorded or preserved.

    - Electronic records and communications.

        - Information regarding government business kept or received by an elected official on her website, "Making Salem Better," more likely than not constitutes a record.[19]

        - Email sent or received on an authority's computer system is a record. This includes personal email sent by officers or employees of the authority.[20]

        - Email conducting government business sent or received on the personal email account of an authority's officer or employee also constitutes a record.

- "Record" also includes contractors' records. Each authority must make available for inspection and copying any record produced or collected under a contract entered into by the authority with a person other than an authority to the same extent as if the record were maintained by the authority.[21]

    - Access to contractors' records does not extend to information produced or collected under a subcontract to which the authority is not a party, *unless* the information is required by or provided to the authority under the general contract to which the authority is a party.[22]

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[16] 72 Op. Att'y Gen. 99, 101 (1983); *State ex rel. Youmans v. Owens*, 28 Wis. 2d 672, 679, 137 N.W.2d 470 (1965).
[17] OAG I-06-09, at 2 (Dec. 23, 2009). *See MacIver Inst.*, 2014 WI App 49, ¶ 18 (emails sent to an elected lawmaker for the purpose of influencing the lawmaker's position on a public policy, maintained on a government email system, are records).
[18] *In re John Doe Proceeding*, 2004 WI 65, ¶ 45, 272 Wis. 2d 208, 680 N.W.2d 792 (citing *State v. Panknin*, 217 Wis. 2d 200, 209–10, 579 N.W.2d 52 (Ct. App. 1998) (concluding that personal notes of a sentencing judge are not public records)); OAG I-06-09, at 3 n.1. *But see Schill v. Wis. Rapids Sch. Dist.*, 2010 WI 86, ¶ 152, 327 Wis. 2d 572, 786 N.W.2d 177 (Bradley, J., concurring); *Id.* ¶ 173 (Gableman, J., concurring); *Id.* ¶ 188 (Roggensack, J., dissenting) (personal email sent or received on an authority's computer system is a record as defined by Wis. Stat. § 19.32(2)).
[19] OAG I-06-09, at 2-3.
[20] *Schill*, 2010 WI 86, ¶ 152 (Bradley, J., concurring); *Id.* ¶ 173 (Gableman, J., concurring); *Id.* ¶ 188 (Roggensack, J., dissenting).
[21] Wis. Stat. § 19.36(3).
[22] *Bldg. & Constr. Trades Council*, 221 Wis. 2d at 585.

- Interpreting the scope of contractors' records covered by this provision, the Wisconsin Court of Appeals has held that the term "collect" in the Wis. Stat. § 19.36(3) language requiring disclosure of "any record . . . collected under a contract entered into by the authority with a person other than an authority to the same extent as if the record were maintained by the authority" means "to bring together in one place." The court determined that the statute was not written so narrowly as to require that the contract be for the purpose of collecting the records, and could refer to a contract between the authority's contractor and a subcontractor.[23]

  Affirming the court of appeals holding, the Wisconsin Supreme Court held that law firm invoices in possession of the insurance company—but not the policyholder—are "contractors' records" under § 19.36(3) and are therefore subject to disclosure.[24] *Juneau County Star-Times* involved law firm invoicing records generated when a Juneau County Sheriff's Department employee sued the county. Juneau County contracted with a liability insurer to defend the county in lawsuits, and in turn, the liability insurer contracted with a law firm to provide legal defense for the county. The court held the law firm invoices were contractor records under Wis. Stat. § 19.36(3) because the liability insurance policy created a contractual relationship between the county and the law firm. The supreme court also concluded that records produced or collected "under" a contract for § 19.36(3) purposes means records that are produced or collected "in accordance with, pursuant to, in compliance with, in carrying out, subject to, or because of" a contract, or "in the course of" the contracted-for matter.[25] As before, a subcontractor's records produced or collected under a contract with an entity other than an authority are not subject to disclosure under the public records law unless something "bridge[s] the gap" between the authority and the subcontractor.[26] In construing § 19.36(3), the supreme court adopted commonly understood meanings of the terms "produced," "collected," and "under" in the context of the factual setting of this case.[27]

- A governmental entity cannot evade its public records responsibilities by shifting a record's creation or custody to an agent.[28]

- "Record" does not include:

  - Drafts, notes, preliminary documents, and similar materials prepared for the originator's personal use or by the originator in the name of a person for whom the originator is working.[29]

    - This exception is generally limited to documents that are circulated to those persons

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[23] *Juneau Cty. Star-Times v. Juneau Cty.*, 2011 WI App 150, ¶¶ 13-30, 337 Wis. 2d 710, 807 N.W.2d 655, *aff'd*, 2013 WI 4.
[24] *Juneau Cty. Star-Times v. Juneau Cty.*, 2013 WI 4, ¶¶ 81-83, 345 Wis. 2d 122, 824 N.W.2d 457.
[25] *Id.* ¶¶ 37, 57, 83.
[26] *Id.* ¶¶ 75-78 (citing *Bldg. & Constr. Trades Council.*, 221 Wis. 2d 575) (payroll records of subcontractor who had contracted only with general contractor were *not* § 19.36(3) contractors' records on account of general contractor's contract with authority, to which subcontractor was not a party).
[27] *Juneau Cty.*, 2013 WI 4, ¶¶ 13, 57.
[28] *Journal/Sentinel, Inc. v. Sch. Bd. of Shorewood*, 186 Wis. 2d 443, 453, 521 N.W.2d 165 (Ct. App. 1994); *WIREdata, Inc. v. Vill. of Sussex* ("*WIREdata II*"), 2008 WI 69, ¶ 89, 310 Wis. 2d 397, 751 N.W.2d 736 (contract assessor records).
[29] Wis. Stat. § 19.32(2); *Panknin*, 217 Wis. 2d at 209-10 (personal notes of sentencing judge are not public records).

over whom the person for whom the draft is prepared has authority.[30]

- A document is not a draft if it is used for the purposes for which it was commissioned.[31]
- Preventing "final" corrections from being made does not indefinitely qualify a document as a draft.[32]
- Labeling each page of the document "draft" does not indefinitely qualify a document as a draft for public records purposes.[33]
- This exclusion will be narrowly construed; the burden of proof is on the records custodian.[34]

- Published material available for sale or at the library is not a record.[35]
- Materials which are purely the personal property of the custodian and have no relation to his or her office.[36]
  - However, personal email sent or received on an authority's computer system is a record.[37]
  - Consequently, the definition of "record" does not exempt purely personal email if it is sent or received on an authority's computer system (although it need not be disclosed if purely personal). This exemption should be narrowly construed.[38]
- Material with access limited due to copyright, patent, or bequest.[39]

  The copyright exception may not apply when the "fair use" exception to copyright protection can be asserted. Whether use of a particular copyrighted work is a "fair use" depends on: (1) The purpose and character of the use, including whether the use is for commercial or nonprofit educational purposes; (2) The nature of the copyrighted work; (3) The amount and substantiality of the portion used in relation to the copyrighted work as a whole; and (4) The effect of the use upon the potential market for or value of the copyrighted work.[40] *Note*: whether a particular use violates the copyright law is a matter of federal law.

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[30] 77 Op. Att'y Gen. 100, 102-03 (1988).
[31] *Fox v. Bock*, 149 Wis. 2d 403, 414, 438 N.W.2d 589 (1989); *Journal/Sentinel*, 186 Wis. 2d at 455-56.
[32] *Fox*, 149 Wis. 2d at 417.
[33] *Id.*
[34] *Id.* at 411, 417.
[35] Wis. Stat. § 19.32(2).
[36] Wis. Stat. § 19.32(2).
[37] *Schill*, 2010 WI 86, ¶ 152 (Bradley, J., concurring); *Id.* ¶ 173 (Gableman, J., concurring); *Id.* ¶ 188 (Roggensack, J., dissenting).
[38] *See* Memorandum from J.B. Van Hollen, Attorney General, to Interested Parties (July 28, 2010), https://www.doj.state.wi.us/sites/default/files/dls/memo-ip-schill.pdf.
[39] Wis. Stat. § 19.32(2).
[40] *Zellner I*, 2007 WI 53, ¶ 28.

- *Note*: Statutory exceptions are instances in derogation of legislative intent and should be narrowly construed.[41]

- "Record" does not include an identical copy of an otherwise available record.[42] An identical copy, for this purpose, is not meaningfully different from an original for purposes of responding to a specific public records request.[43]

- Public records requests and responses are themselves "records" for purposes of the public records law.[44]

"Requester"

- Generally, any person who requests inspection or a copy of a record.[45]

- *Exception*: Any of the following persons are defined as "requesters" only to the extent that the person requests inspection or copies of a record that contains specific references to that person or his or her minor children for whom the person has not been denied physical placement under Wis. Stat. ch. 767:

  - A person committed under the mental health law, sex crimes law, sex predator law, or found not guilty by reasons of mental disease or defect, while that person is placed in an inpatient treatment facility.[46]

  - A person incarcerated in a state prison, county jail, county house of correction or other state, county or municipal correctional detention facility, or who is confined as a condition of probation.[47]

- *Note*: There is generally a greater right to obtain records containing personally identifiable information about the requester himself or herself, subject to exceptions specified in Wis. Stat. § 19.35(1)(am).[48]

"Authority"

Defined in Wis. Stat. § 19.32(1) as any of the following having custody of a record, and some others:

- A state or local office.

  - A public or governmental entity, not an independent contractor hired by the public or governmental entity, is the "authority" for purposes of the public records law.[49]

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[41] *Id.* ¶ 31 (citing *Fox*, 149 Wis. 2d at 411).
[42] *Stone v. Bd. of Regents of Univ. of Wis. Sys.*, 2007 WI App 223, ¶ 20, 305 Wis. 2d 679, 741 N.W.2d 774.
[43] *Id.* ¶ 18. *Cf.* Wis. Stat. § 16.61(2)(b)5.
[44] *Nichols*, 199 Wis. 2d at 275.
[45] Wis. Stat. § 19.32(3).
[46] Wis. Stat. § 19.32(1b), (1d), and (3).
[47] Wis. Stat. § 19.32(1c), (1e), and (3).
[48] *See* Analyzing the Request, Special Issues, Records About the Requester, below.
[49] *WIREdata II*, 2008 WI 69, ¶ 75 (municipality's independent contractor assessor not an authority for public records purposes).

- Only "authorities" are proper recipients of public records requests, and only communications from authorities should be construed as denials of public records requests.[50]

- An elective official.

- An 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.

  - A corporation is a quasi-governmental corporation for purposes of the public records law "if, based on the totality of circumstances, it resembles a governmental corporation in function, effect, or status."[51]

  - Quasi-governmental corporations are not limited to corporations created by acts of government.[52]

  - Determining whether a corporation is a quasi-governmental corporation requires a case by case analysis.[53] No one factor is conclusive. The non-exclusive list of factors considered in *Beaver Dam Area Development Corp.* fall into five basic categories:[54]

    - The extent to which the private corporation is supported by public funds;

    - Whether the private corporation serves a public function and, if so, whether it also has other, private functions;

    - Whether the private corporation appears in its public presentations to be a governmental entity;

    - The extent to which the private corporation is subject to governmental control; and

    - The degree of access that government bodies have to the private corporation's records.

  - A special purpose district.

  - Any court of law.

  - The state assembly or senate.

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[50] *WIREdata II*, 2008 WI 69, ¶¶ 77-78.
[51] *State v. Beaver Dam Area Dev. Corp.*, 2008 WI 90, ¶ 9, 312 Wis. 2d 84, 752 N.W.2d 295.
[52] *Id.* 2008 WI 90, ¶ 44.
[53] *Id.* ¶¶ 8-9.
[54] OAG I-02-09 (Mar. 19, 2009).

- A nonprofit corporation that receives more than 50% of its funds from a county or municipality and which provides services related to public health or safety to the county or municipality.

- A university police department under Wis. Stat. § 175.42.

- A formally constituted sub-unit of any of the above.[55]

"Legal Custodian"

- The legal custodian is vested by the authority with full legal power to render decisions and carry out the authority's statutory public records responsibilities.[56]

- Identified in Wis. Stat. § 19.33(1)-(5):

  - An elective official is the legal custodian of his or her records and the records of his or her office. An elective official may designate an employee to act as the legal custodian.

  - The chairperson of a committee of elective officials, or the chairperson's designee, is the legal custodian of the records of the committee. Similarly, the co-chairpersons of a joint committee of elective officials, or their designees, are the legal custodians of the records of the committee.

  - For every other authority, the authority must designate one or more positions occupied by an officer or employee of the authority or the unit of government of which it is a part to be its legal custodian and fulfill its duties under the public records law. If no designation is made, the default is the authority's highest ranking officer and its chief administrative officer, if there is such a person.

  - There are special provisions in Wis. Stat. § 19.33(5) if the members of an authority are appointed by another authority.

- No elective official is responsible for the records of any other elective official unless he or she has possession of the records of that other elected official.[57]

- Legal custodian of law enforcement records, for purposes of public records requests:

  - The legal custodian of a law enforcement record is the authority for which the record is stored, processed, or otherwise used.[58]

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[55] *See Wis. Prof'l Police Ass'n v. Wis. Ctys. Ass'n*, 2014 WI App 106, ¶ 15, 357 Wis. 2d 687, 855 N.W.2d 715 (unincorporated association is not an "authority").
[56] Wis. Stat. § 19.33(4).
[57] Wis. Stat. § 19.35(6).
[58] Wis. Stat. § 19.35(7)(b).

- The legal custodian is *not* the local information technology authority having custody of a law enforcement record for the primary purpose of information storage, information technology processing, or other information technology.[59]

- Denial of misdirected requests. A local information technology authority that receives a request for access to information in a law enforcement record must deny any portion of the request that relates to information in a local law enforcement record.[60]

  - Wis. Stat. § 19.35(7)(a)2 defines "law enforcement record" as a record that is created or received by a law enforcement agency and that relates to an investigation conducted by a law enforcement agency or a request for a law enforcement agency to provide law enforcement services.

  - "Law enforcement agency" means a governmental unit of one or more persons employed full time by the state or a political subdivision of the state for the purpose of preventing and detecting crime and enforcing state laws or local ordinances, employees of which are authorized to make arrests for crimes while acting within the scope of their authority.[61]

  - "Local information technology authority" means a local public office or local governmental unit whose primary function is information storage, information technology processing, or other information technology usage.[62]

"Record Subject"

An individual about whom personally identifiable information is contained in a record.[63]

"Personally Identifiable Information"

Information that can be associated with a particular individual through one or more identifiers or other information or circumstances.[64]

"Local Public Office"

Defined in Wis. Stat. §§ 19.32(1dm) and 19.42(7w). Includes, among others, the following (excluding any office that is a state public office):

- An elective office of a local governmental unit (as defined in Wis. Stat. § 19.42(7u)).

- A county administrator or administrative coordinator, or a city or village manager.

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[59] Wis. Stat. § 19.35(7)(b).
[60] Wis. Stat. § 16.35(7)(c).
[61] Wis. Stat. § 19.35(7)(a)1., by cross-reference to Wis. Stat. § 165.83(1)(b).
[62] Wis. Stat. § 19.35(7)(a)3.
[63] Wis. Stat. § 19.32(2g).
[64] Wis. Stat. §§ 19.32(1r) and 19.62(5).

- An appointive office or position of a local governmental unit (as defined in Wis. Stat. § 19.42(7u)) in which an individual serves for a specified term, except a position limited to the exercise of ministerial action or a position filled by an independent contractor.

- An appointive office or position of a local government which is filled by the governing body of the local government or the executive or administrative head of the local government and in which the incumbent serves at the pleasure of the appointing authority, except a clerical position, a position limited to the exercise of ministerial action, or a position filled by an independent contractor.

- Any appointive office or position of a local governmental unit (as defined in Wis. Stat. § 19.42(7u)) in which an individual serves as the head of a department, agency, or division of the local governmental unit, but does not include any office or position filled by a municipal employee (as defined in Wis. Stat. § 111.70(1)(i)).

- The statutory definition of "local public office" does not include any position filled by an independent contractor.[65]

"State Public Office"

Defined in Wis. Stat. §§ 19.32(4) and 19.42(13). Includes, among others, the following:

- State constitutional officers and other elected state officials identified in Wis. Stat. § 20.923(2).

- Most positions to which individuals are regularly appointed by the Governor.

- State agency positions identified in Wis. Stat. § 20.923(4).

- State agency deputies and executive assistants, and Office of Governor staff identified in Wis. Stat. § 20.923(8)-(10).

- Division administrators of offices created under Wis. Stat. ch. 14, or departments or independent agencies created under Wis. Stat. ch. 15.

- Legislative staff identified in Wis. Stat. § 20.923(6)(h).

- Specified technical college district executives and Wisconsin Technical College System senior executive positions identified in Wis. Stat. § 20.923(7).

- Municipal judges.

[65] *WIREdata II*, 2008 WI 69, ¶ 75 (contract assessors).

BEFORE ANY REQUEST: PROCEDURES FOR AUTHORITIES

Records Policies

An authority (except members of the legislature and members of any local governmental body) must adopt, display, and make available for inspection and copying at its offices a notice about its public records policies.[66] The authority's notice must include:

- A description of the organization.
- The established times and places at which the public may obtain information and access to records in the organization's custody, or make requests for records, or obtain copies of records.
- The costs for obtaining records.
- The identity of the legal custodian(s).
- The methods for accessing or obtaining copies of records.
- For authorities that do not have regular office hours, any advance notice of intent requirement to inspect or copy records.
- The identification of each position that constitutes a local public office or a state public office.

Hours for Access

There are specific statutory requirements regarding hours of access.[67]

- If the authority maintains regular office hours at the location where the records are kept, public access to the records is permitted during those office hours unless otherwise specifically authorized by law.
- If there are no regular office hours at the location where the records are kept, the authority must:
    - Provide access upon at least 48 hours' written or oral notice of intent to inspect or copy a record, or
    - Establish a period of at least 2 consecutive hours per week during which access to records of the authority is permitted. The authority may require 24 hours' advance written or oral notice of intent to inspect or copy a record.

Facilities for Requesters

An authority must provide facilities comparable to those used by its employees to inspect, copy, and abstract

[66] Wis. Stat. § 19.34(1).
[67] Wis. Stat. § 19.34(2).

records. The authority is not required to purchase or lease photocopying or other equipment or provide a separate room.[68]

Fees for Responding[69]

For detailed information about permissible fees, *see* Inspection, Copies, and Fees below.

Records Retention Policies

Records retention is a subject that is generally related to, but different from, the access requirements imposed by the public records law.[70] ***Caution***: Under the public records law, an authority may not destroy a record after receipt of a request for that record until at least sixty days after denial or until related litigation is completed.[71] The sixty-day time period excludes Saturdays, Sundays, and legal holidays.[72]

- The records retention provisions of Wis. Stat. § 19.21 are not part of the public records law.[73]
- An authority's alleged failure to keep records required to be kept under other law may not be attacked under the public records law.[74]

THE REQUEST

Written or Oral

Requests do not have to be in writing.[75]

Requester Identification

The requester generally does not have to identify himself or herself.[76]

Caution: Certain substantive statutes, such as those concerning student records and health records, may restrict record access to specified persons. When records of that nature are the subject of a public records request, the records custodian should confirm before releasing the records that the requester is someone statutorily authorized to obtain the requested records.[77]

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[68] Wis. Stat. § 19.35(2).
[69] Wis. Stat. § 19.35(3).
[70] *See* Wis. Stat. § 16.61 for retention requirements applicable to state authorities and Wis. Stat. § 19.21 for retention requirements applicable to local authorities.
[71] Wis. Stat. § 19.35(5).
[72] *See* Wis. Stat. § 19.345.
[73] *State ex rel. Gehl v. Connors*, 2007 WI App 238, ¶ 13, 306 Wis. 2d 247, 742 N.W.2d 530.
[74] *Id.* ¶ 13.
[75] Wis. Stat. § 19.35(1)(h).
[76] Wis. Stat. § 19.35(1)(i).
[77] *See* Wis. Stat. § 19.35(1)(i) for other limited circumstances in which a requester may be required to show identification.

Purpose

The requester does not need to state the purpose of the request.[78]

Reasonable Specificity

The request must be reasonably specific as to the subject matter and length of time involved.[79]

- The purpose of the time and subject matter limitations is to prevent unreasonably burdening a records custodian by requiring the records custodian to spend excessive amounts of time and resources deciphering and responding to a request.[80]

- The public records law will not be interpreted to impose such a burden upon a records custodian that normal functioning of the office would be severely impaired.[81]

- A records custodian should not have to guess at what records a requester desires.[82]

- A records custodian may not deny a request solely because the records custodian believes that the request could be narrowed.[83]

- The fact that a public records request may result in generation of a large volume of records is not in itself a sufficient reason to deny a request as not properly limited.[84]

    - At some point, an overly broad request becomes sufficiently excessive to warrant rejection pursuant to Wis. Stat. § 19.35(1)(h).[85]

    - The public records law does not impose unlimited burdens on authorities and records custodians.[86]

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

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[78] Wis. Stat. § 19.35(1)(h) and (i).
[79] Wis. Stat. § 19.35(1)(h); *Schopper v. Gehring*, 210 Wis. 2d 208, 212-13, 565 N.W.2d 187 (Ct. App. 1997) (request for tape and transcript of three hours of 911 calls on 60 channels is not reasonably specific).
[80] *Schopper*, 210 Wis. 2d at 213; *Gehl*, 2007 WI App 238, ¶ 17.
[81] *Schopper*, 210 Wis. 2d at 213.
[82] *Seifert*, 2007 WI App 207, ¶ 42.
[83] *Gehl*, 2007 WI App 238, ¶ 20.
[84] *Id*. ¶ 23.
[85] *Id*. ¶ 24.
[86] *Id*. ¶ 23 (request too burdensome when it would have required production of voluminous records relating to virtually all county zoning matters over a two-year period, without regard to the parties involved or whether the matters implicated requester's interests in any way).

Format

- "Magic words" are not required. A request which reasonably describes the information or record requested is sufficient.[87]

- A request, reasonably construed, triggers the statutory requirement to respond. For example, a request made under the "Freedom of Information Act" should be interpreted as being made under the Wisconsin public records law.[88]

- A request is sufficient if it is directed at an authority and reasonably describes the records or information requested.[89]

- No specific form is permitted to be required by the public records law.

Ongoing Requests

"Continuing" requests are not contemplated by the public records law. "The right of access applies only to records that exist at the time the request is made, and the law contemplates custodial decisions being made with respect to a specific request at the time the request is made."[90]

Requests Are Records

Public records requests received by an authority are themselves "records" for purposes of the public records law.[91]

THE RESPONSE TO THE REQUEST

Mandatory

The records custodian must respond to a public records request.[92]

Timing

Response must be provided "as soon as practicable and without delay."[93]

- The public records law does not require a response within any specific date and time, such as "two weeks" or "48 hours."[94]

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[87] Wis. Stat. § 19.35(1)(h).
[88] *See ECO, Inc.*, 2002 WI App 302, ¶ 23.
[89] *Seifert*, 2007 WI App 207, ¶ 39 (request for records created during investigation or relate to disposition of investigation not construed to include billing records of attorneys involved in investigation).
[90] 73 Op. Att'y Gen. 37, 44 (1984).
[91] *Nichols*, 199 Wis. 2d at 275.
[92] *ECO, Inc.*, 2002 WI App 302, ¶¶ 24.
[93] Wis. Stat. § 19.35(4)(a).
[94] *See Journal Times v. City of Racine Bd. of Police & Fire Comm'rs*, 2015 WI 56, ¶ 85, 362 Wis. 2d 577, 866 N.W.2d 563.

- DOJ policy is that ten working days generally is a reasonable time for responding to a simple request for a limited number of easily identifiable records. For requests that are broader in scope, or that require location, review or redaction of many documents, a reasonable time for responding may be longer. However, if a response cannot be provided within ten working days, it is DOJ's practice to send a communication indicating that a response is being prepared.

- An authority is not obligated to respond within a timeframe unilaterally identified by a requester, such as: "I will consider my request denied if no response is received by Friday and will seek all available legal relief." To avoid later misunderstandings, it may be prudent for an authority receiving such a request to send a brief acknowledgment indicating when a response reasonably might be anticipated.

- What constitutes a reasonable time for a response to any specific request 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 related considerations. Whether an authority is acting with reasonable diligence in responding to a particular request will depend on the totality of circumstances surrounding that request.[95]

- Requests for public records should be given high priority.

- Compliance at some unspecified future time is not authorized by the public records law. The records custodian has two choices: comply or deny.[96]

- An authority should not be subjected to the burden and expense of a premature public records lawsuit while it is attempting in good faith to respond, or to determine how to respond, to a public records request.[97]

- An arbitrary and capricious delay or denial exposes the records custodian to punitive damages and a $1,000.00 forfeiture.[98] See Enforcement and Penalties, below.

Format

If the request is in writing, a denial or partial denial of access also must be in writing.[99]

Content of Denials

Reasons for denial must be *specific* and *sufficient*.[100]

- A records custodian need not provide facts supporting the reasons it identifies for denying a public records request, but must provide specific reasons for the denial.[101]

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[95] *WIREdata II*, 2008 WI 69, ¶ 56.
[96] *WTMJ, Inc. v. Sullivan*, 204 Wis. 2d 452, 457-58, 555 N.W.2d 140 (Ct. App. 1996).
[97] *WIREdata II*, 2008 WI 69, ¶ 56.
[98] Wis. Stat. § 19.37.
[99] Wis. Stat. § 19.35(4)(b).
[100] *Cf. Hempel*, 2005 WI 120, ¶¶ 25-26.
[101] *Id.* ¶ 79.

- Just stating a conclusion without explaining specific reasons for denial does not satisfy the requirement of specificity.
    - If confidentiality of requested records is guaranteed by statute, citation to that statute is sufficient.
    - If further discussion is needed, a records custodian's denial of access to a public record must be accompanied by a statement of the specific public policy reasons for refusal.[102]
        - The records custodian must give a public policy reason why the record warrants confidentiality, but need not provide a detailed analysis of the record and why public policy directs that it be withheld.[103]
        - The specificity requirement is not met by mere citation to the open meetings exemption statute, or bald assertion that release is not in the public interest.[104] For further information about how public policies underlying open meetings law exemptions may be considered in the public records balancing test, see Analyzing the Request, *Step Four*, below.
    - Need to restrict access still must exist at the time the request is made for the record. Reason to close a meeting under Wis. Stat. § 19.85 is not sufficient reason alone to subsequently deny access to a record of the meeting.[105]
- The purpose of the specificity requirement is to give adequate notice of the basis for denial, and to ensure that the records custodian has exercised judgment.[106]
- The specificity requirement provides a means of preventing records custodians from arbitrarily denying access to public records without weighing the relative harm of non-disclosure against the public interest in disclosure.[107]
- The sufficiency requirement provides the requester with sufficient notice of the reasons for denial to enable him or her to prepare a challenge, and provides a basis for review in the event of a court action.[108]
- An offer of compliance, but conditioned on unauthorized costs and terms, constitutes a denial.[109]
- If no responsive records exist, the authority should say so in its response. An authority also should indicate in its response if responsive records exist but are not being provided due to a statutory exception, a case law exception, or the balancing test. Records or portions of records not

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[102] *Chvala v. Bubolz*, 204 Wis. 2d 82, 86-87, 552 N.W.2d 892 (Ct. App. 1996).
[103] *Portage Daily Register v. Columbia Cty. Sheriff's Dep't*, 2008 WI App 30, ¶ 14, 308 Wis. 2d 357, 746 N.W.2d 525.
[104] *Journal/Sentinel, Inc. v. Aagerup*, 145 Wis. 2d 818, 823, 429 N.W.2d 772 (Ct. App. 1988). *But see State ex rel. Blum v. Bd. of Educ.*, 209 Wis. 2d 377, 386-88, 565 N.W.2d 140 (Ct. App. 1997) (failure to cite statutory section that warrants withholding requested records does not mandate that court order access).
[105] Wis. Stat. § 19.35(1)(a).
[106] *Journal/Sentinel*, 145 Wis. 2d at 824.
[107] *Portage Daily Register*, 2008 WI App 30, ¶ 14.
[108] *Id*.
[109] *WIREdata, Inc. v. Vill. of Sussex* ("*WIREdata I*"), 2007 WI App 22, ¶ 57, 298 Wis. 2d 743, 729 N.W.2d 757.

being provided should be identified with sufficient detail for the requester to understand what is being withheld, such as "social security numbers" or "purely personal e-mails sent or received by employees that evince no violation of law or policy."

- Denial of a written request must inform the requester that the denial is subject to review in an action for mandamus under Wis. Stat. § 19.37(1), or by application to the local district attorney or Attorney General.[110]

- The adequacy of a custodian's asserted reasons for withholding requested records, or redacting portions of the records before release, may be challenged by filing a court action called a petition for writ of mandamus. For more information about filing a mandamus action see Enforcement and Penalties, Mandamus, below.

- If denial of a public records request is challenged in a mandamus proceeding, the court will examine the sufficiency of the reasons stated for denying the request. On mandamus review, custodians who are lawmakers are not entitled to a heightened level of deference to their application of the balancing test.[111]

    - On review, it is not the court's role to hypothesize or consider reasons not asserted by the records custodian's response. If the custodian fails to state sufficient reasons for denying the request, the court will issue a writ of mandamus compelling disclosure of the requested records.[112]

    - The reviewing court is free to evaluate the strength of the records custodian's reasoning, in the absence of facts. But factual support for the records custodian's reasoning in the statement of denial likely will strengthen the custodian's case before the reviewing court.[113] A reviewing court may examine requested records *in camera* on mandamus, but is not required to do so. *In camera* review is not necessary when a custodian identifies policy reasons of sufficient specificity for nondisclosure, and those reasons override the presumption in favor of disclosure. In *Ardell*, for example, the authority identified a domestic abuse injunction against the requester and his subsequent conviction for violating that injunction as reasons for denying a request for records about an employee who had obtained the injunction against the requester. The facts were undisputed, eliminating any need to speculate as to how the requester would use the requested information to harm the employee. The requester's violent history clearly indicated harmful intent inconsistent with the purpose of the public records law.[114]

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[110] Wis. Stat. § 19.35(4)(b).

[111] *MacIver Inst.*, 2014 WI App 49, ¶ 15.

[112] *Osborn v. Bd. of Regents of Univ. Wis. Sys.*, 2002 WI 83, ¶ 16, 254 Wis. 2d 266, 647 N.W.2d 158; *accord Beckon v. Emery*, 36 Wis. 2d 510, 516, 153 N.W.2d 501 (1967) (court may order mandamus even if sound, but unstated, reasons exist or can be conceived of by the court); *Kroeplin v. Wis. Dep't of Natural Res.*, 2006 WI App 227, ¶ 45, 297 Wis. 2d 254, 725 N.W.2d 286. *Cf. Blum*, 209 Wis. 2d at 388-91 (an authority's failure to cite specific *statutory* exemption justifying nondisclosure does not preclude the court from considering statutory exemption).

[113] *Hempel*, 2005 WI 120, ¶ 80. *See State ex rel. Ardell v. Milwaukee Bd. of Sch. Dirs.*, 2014 WI App 66, ¶¶ 18-19, 354 Wis. 2d 471, 849 N.W.2d 894.

[114] *Compare MacIver Inst.*, 2014 WI App 49, ¶ 26 ("While Erpenbach correctly asserts that the *possibility* of threats, harassment or reprisals alone is a legitimate consideration for a custodian, the public interest weight given to such a consideration increases or decreases depending on the likelihood of threats, harassment or reprisals actually occurring."). *See also Lakeland Times v. Lakeland Union High Sch.*,

Redaction

If part of the record is disclosable, that part must be disclosed.[115]

- An authority is not relieved of the duty to redact non-disclosable portions just because the authority believes that redacting confidential information is burdensome.[116]

- However, an authority does not have to extract information from existing records and compile it in a new format.[117]

Motive and Context

A requester need not state or provide a reason for his or her request.[118] When performing the balancing test described below in Analyzing the Request, *Step Four*, however, a record custodian "almost inevitably must evaluate context to some degree."[119]

Obligation to Preserve Responsive Records

When a public records request is made, the authority is obligated to preserve responsive records for certain periods of time.

- After receiving a request for inspection or copying of a record, the authority may not destroy the record until after the request is granted or until at least sixty days after the request is denied (ninety days if the requester is a committed or incarcerated person).[120] These time periods exclude Saturdays, Sundays, and legal holidays.[121]

- If the authority receives written notice that a mandamus action relating to a record has been commenced under Wis. Stat. § 19.37 (an action to enforce the public records law), the record may not be destroyed until after the order of the court relating to that record is issued and the deadline for appealing that order has passed.[122]

- If the court order in a mandamus action is appealed, the record may not be destroyed until the court order resolving the appeal is issued.[123]

- If the court orders production of any record and the order is not appealed, the record may not be destroyed until after the request for inspection or copying has been granted.[124]

No. 2014AP95, 2014 WL 4548127, ¶¶ 42-43 (Wis. Ct. App. Sept. 16, 2014) (unpublished) (*in camera* review not necessary when a requested record falls within a statutory or common law exception to the public records law).

[115] Wis. Stat. § 19.36(6).

[116] *Osborn*, 2002 WI 83, ¶ 46.

[117] Wis. Stat. § 19.35(1)(L); *WIREdata I*, 2007 WI App 22, ¶ 36.

[118] Wis. Stat. § 19.35(1)(i).

[119] *Hempel*, 2005 WI 120, ¶ 66.

[120] Wis. Stat. § 19.35(5).

[121] *See* Wis. Stat. § 19.345.

[122] Wis. Stat. § 19.35(5).

[123] Wis. Stat. § 19.35(5).

[124] Wis. Stat. § 19.35(5).

- An authority or custodian does not violate Wis. Stat. § 19.35(5) by destroying an identical copy of an otherwise available record.[125]

Responses Are Records

Responses to public records requests are themselves "records" for purposes of the public records law.[126]

Access to Information vs. Participation in Electronic Forum

The public records law right of access extends to making available for inspection and copying the information contained on a limited access website used by an elected official to gather and provide information about official business, but not necessarily participation in the online discussion itself.[127]

Certain Shared Law Enforcement Records

See Key Definitions, Legal Custodian, above, for special rules governing response to requests for certain shared law enforcement records.

ANALYZING THE REQUEST

Access Presumed

The public records law presumes complete public access to public records, but there are some restrictions and exceptions.[128]

- 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 balancing test.[129]

- If neither a statute nor case 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," described more fully in Analyzing the Request, *Step Four*, below, determines whether the presumption of openness is overcome by another public policy concern.[130]

- Unless a statutory or court-created exception makes a record confidential, each public records request requires a fact-specific analysis. "The custodian, mindful of the strong presumption of openness, must perform the [public] records analysis on a case-by-case basis."[131]

- The legislature has entrusted records custodians with substantial discretion.[132]

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[125] *Stone*, 2007 WI App 223, ¶ 20.
[126] *Nichols*, 199 Wis. 2d at 275.
[127] OAG I-06-09, at 3-4.
[128] Wis. Stat. § 19.31; *Youmans*, 28 Wis. 2d at 683.
[129] *Hathaway v. Joint Sch. Dist. No. 1 of Green Bay*, 116 Wis. 2d 388, 397, 342 N.W.2d 682 (1984).
[130] *Hempel*, 2005 WI 120, ¶ 4.
[131] *Id.* ¶ 62.
[132] *Id.*

- However, an authority or a records custodian cannot unilaterally implement a policy creating a "blanket exemption" from the public records law.[133]

Caution: Wisconsin Stat. § 19.35(1)(am) gives a person greater rights of access than the general public to records containing personally identifiable information about that person.[134]

Caution: An agreement to keep certain records confidential will not necessarily override disclosure requirements of the public records law.[135]

Suggested Four-Step Approach

Additional information about each step is explained below.

- *Step One*: Is there such a record?
    - If yes, proceed to Step Two.
    - If no, analysis stops—no record access.
- *Step Two*: Is the requester entitled to access the record pursuant to statute or court decision?
    - If yes, record access is permitted.
    - If no, proceed to Step Three.
- *Step Three*: Is the requester prohibited from accessing the record pursuant to statute or court decision?
    - If yes, analysis stops—no record access.
    - If no, proceed to Step Four.
- *Step Four*: Does the balancing test compel access to the record?
    - If yes, record access is permitted.
    - If no, analysis stops—no record access.

Step One: Is There Such a Record?

- The public records law provides access to existing records maintained by authorities.

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[133] *Id.* ¶ 69.
[134] *See* Analyzing the Request, Special Issues, below.
[135] *See* Analyzing the Request, Special Issues, below.

- "[T]he 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."[136]

- An authority is not required to create a new record by extracting and compiling information from existing records in a new format.[137]

- An authority is not required to tell a requester that a record does not exist even if "it might be a better course to inform a requester that no record exists."[138]

  However, if no responsive record exists, the records custodian should inform the requester.[139]

- The purpose of the public records law is to provide access to recorded information in records. Granting access to just one of two or more identical records fulfills this purpose.[140]

Step Two: Is the Requester Entitled to Access the Record Pursuant to Statute or Court Decision?

- By statute expressly requiring access.[141] For example:
  - Uniform traffic accident reports.[142]
  - Books and papers that are "required to be kept" by the sheriff, clerk of circuit court, register of deeds, county treasurer, register of probate, county clerk, and county surveyor.[143]
    - The burden is on the requester to show that the requested record is one that is "required to be kept."[144]
    - ***Caution***: Even statutory rights to access that appear absolute can be limited if another statute allows the records to be sealed, if disclosure infringes on a constitutional right, or if the administration of justice requires limiting access to judicial records.[145]

- By court decision expressly requiring access. For example:
  - Daily arrest logs or police "blotters" at police departments.[146]

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[136] *Journal Times*, 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).
[137] *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).
[138] *Journal Times*, 2015 WI 56, ¶ 102.
[139] *Cf. State ex rel. Zinngrabe*, 146 Wis. 2d 629.
[140] *Stone*, 2007 WI App 223, ¶ 20.
[141] *Youmans*, 28 Wis. 2d at 685.
[142] Wis. Stat. § 346.70(4)(f); *see also State ex rel. Young v. Shaw*, 165 Wis. 2d 276, 290-91, 477 N.W.2d 340 (Ct. App. 1991).
[143] Wis. Stat. § 59.20(3)(a).
[144] *See State ex rel. Schultz v. Bruendl*, 168 Wis. 2d 101, 110, 483 N.W.2d 238 (Ct. App. 1992) (discusses when records are "required to be kept" under predecessor statute, Wis. Stat. § 59.14); *see also State ex rel. Journal Co. v. Cty. Court for Racine Cty.*, 43 Wis. 2d 297, 307, 168 N.W.2d 836 (1969) (statute compels court clerk to disclose memorandum decision impounded by judge because it is a paper "required to be kept in his office").
[145] *See State ex rel. Bilder v. Twp. of Delavan*, 112 Wis. 2d 539, 554-56, 334 N.W.2d 252 (1983); *Schultz*, 168 Wis. 2d at 108; *In re John Doe Proceeding*, 2003 WI 30, ¶¶ 59-72, 260 Wis. 2d 653, 660 N.W.2d 260; *State v. Stanley*, 2012 WI App 42, ¶¶ 60-64, 340 Wis. 2d 663, 814 N.W.2d 867; *C.L. v. Edson*, 140 Wis. 2d 168, 409 N.W.2d 417 (Ct. App. 1987).
[146] *Newspapers, Inc. v. Breier*, 89 Wis. 2d 417, 440, 279 N.W.2d 179 (1979).

- In these cases, the courts concluded that case-by-case determination of public access would impose excessive and unwarranted administrative burdens.

Step Three: Is the Requester Prohibited From Accessing the Record Pursuant to Statute or Court Decision?

- Wisconsin Stat. § 19.36(2)-(13) lists records specifically exempt from disclosure pursuant to the public records statute itself. Other state and federal statutes, and court decisions, also require that certain types of records remain confidential.
    - "Any record which is specifically exempted from disclosure by state or federal law or authorized to be exempted from disclosure by state law is exempt from disclosure [under the public records law]."[147]
    - Many of these exceptions are discussed elsewhere in this outline, but some key examples are set forth below.
    - An agency cannot create an exception to Wis. Stat. §§ 19.31 and 19.35 by adopting an administrative rule inconsistent with the public records law.[148]
    - Even statutory exemptions not asserted by custodian prior to litigation may be considered by a court during a mandamus action.[149]
    - Legislative ratification of a collective bargaining agreement, without enacting companion legislation expressly amending the public records law, does not create an exception to the public records law.[150] The public's rights under the public records law may not be contracted away through the collective bargaining process.[151]
    - ***Caution:*** Statutory exemptions are narrowly construed.[152]
- Exempt from disclosure by the public records statutes. For example:
    - Information maintained, prepared, or provided by an employer concerning the home address, home email address, home telephone number, or social security number of an employee.[153]
    - Information maintained, prepared, or provided by an employer concerning the home address, home email address, home telephone number, or social security number of an individual who holds a local public office or a state public office.

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[147] Wis. Stat. § 19.36(1).
[148] *Chvala*, 204 Wis. 2d at 91.
[149] *Journal Times*, 2015 WI 56, ¶ 69.
[150] *Milwaukee Journal Sentinel v. Wis. Dep't of Admin.*, 2009 WI 79, ¶ 3, 319 Wis. 2d 439, 768 N.W.2d 700.
[151] *Id.* ¶ 53.
[152] *Chvala*, 204 Wis. 2d at 88; *Hathaway*, 116 Wis. 2d at 397.
[153] Wis. Stat. § 19.36(10)(a).

Exception: The home address of an individual holding an elective public office or the home address of an individual who, as a condition of employment, is required to live in a specific location may be disclosed.[154]

- Information related to a current investigation of possible employee criminal conduct or misconduct connected to employment prior to the disposition of the investigation.[155]

  - ***Caution***: This exemption does not apply to individuals holding a local public office or state public office in the authority to which the request is addressed.[156]

  - An "investigation" reaches its final "disposition" when the public employer has completed the investigation, and acts to impose discipline. A post-investigation grievance filed pursuant to a collective bargaining agreement does not extend the "investigation" for purposes of the statute.[157]

  - This exception codifies common law standards and continues the tradition of keeping records related to misconduct investigations closed while those investigations are ongoing, but providing public oversight over the investigations after they have concluded.[158]

- Information pertaining to an employee's employment examination, except an examination score if access to that score is not otherwise prohibited.[159]

  - ***Caution***: This exemption does not apply to individuals holding a local public office or state public office in the authority to which the request is addressed.[160]

  - See also Wis. Stat. § 230.13 (providing that certain personnel records of state employees and applicants for state employment are or may be closed to the public).

- Information relating to one or more specific employees that is used by an authority or by the employer of the employees for staff management planning, including performance evaluations, judgments, or recommendations concerning future salary adjustments or other wage treatments, management bonus plans, promotions, job assignments, letters of reference, or other comments or ratings relating to employees.[161]

  - ***Caution***: This exemption does not apply to individuals holding a local public office or state public office in the authority to which the request is addressed.[162]

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[154] Wis. Stat. § 19.36(11).
[155] Wis. Stat. § 19.36(10)(b).
[156] *See* Wis. Stat. § 19.32(1bg).
[157] *See Local 2489, AFSCME, AFL-CIO v. Rock Cty.*, 2004 WI App 210, ¶¶ 12, 15, 277 Wis. 2d 208, 689 N.W.2d 644; *Zellner I*, 2007 WI 53, ¶¶ 33-38.
[158] *Kroeplin*, 2006 WI App 227, ¶ 31.
[159] Wis. Stat. § 19.36(10)(c).
[160] *See* Wis. Stat. § 19.32(1bg).
[161] Wis. Stat. § 19.36(10)(d). *See Lakeland Times*, 2014 WL 4548127, ¶¶ 22-37 (report of comments about job applicant obtained from former employer is a record used for staff management planning because it concerned job performance and reputation of an employee; thus, it was exempt from disclosure pursuant to Wis. Stat. § 19.36(10)(d)).
[162] *See* Wis. Stat. § 19.32(1bg).

        - Wisconsin Stat. § 19.36(10)(d) does not apply to records of investigations into alleged employee misconduct, and does not create a blanket exemption for disciplinary and misconduct investigation records.[163]

        - See also Wis. Stat. § 230.13 (providing that certain personnel records of state employees and applicants for state employment are closed to the public).

    - Investigative information obtained for law enforcement purposes, when required by federal law or regulation to be kept confidential, or when confidentiality is required as a condition to receipt of state aids.[164]

    - Computer programs (but the material input and the material produced as the product of a computer program is subject to the right of inspection and copying).[165]

    - Trade secrets.[166]

    - Identities of certain applicants for public positions.[167]

    - Identities of law enforcement informants.[168]

    - Plans or specifications for state buildings.[169]

    - Prevailing wage information.[170]

    - An individual's account or customer numbers with a financial institution.[171]

- Exempt from disclosure by other state statutes (unless authorized by an exception or other provision in the statutes themselves). For example:

    - Pupil records.[172]

    - Patient health care records.[173]

        - "Patient health care records" means, with certain statutory exceptions, all records related to the health of a patient prepared by or under the supervision of a health care provider; and records made by ambulance service providers, EMTs, or first

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[163] *Kroeplin*, 2006 WI App 227, ¶¶ 20, 32.
[164] Wis. Stat. § 19.36(2).
[165] Wis. Stat. § 19.36(4).
[166] Wis. Stat. § 19.36(5); *Beaver Dam Area Dev. Corp.*, 2008 WI 90, ¶ 83.
[167] *See* Wis. Stat. § 19.36(7) for further information.
[168] *See* Wis. Stat. § 19.36(8) and Analyzing the Record, Special Issues, below, for further information.
[169] Wis. Stat. § 19.36(9).
[170] Wis. Stat. § 19.36(12).
[171] Wis. Stat. § 19.36(13).
[172] Wis. Stat. § 118.125(1)(d).
[173] Wis. Stat. § 146.82.

responders in administering emergency care, handling, and transporting sick, disabled, or injured individuals.[174]

- Various statutory provisions allow disclosure to specified persons with or without the patient's consent.[175]

- Wisconsin Stat. § 256.15(12)(b) provides a limited disclosure exception for ambulance service providers who also are "authorities" under the public records law: information contained on a record of an ambulance run which identifies the ambulance service provider and emergency medical technicians involved; date of the call, dispatch and response times; reason for the dispatch; location to which the ambulance was dispatched; destination of any transport by the ambulance; and name, age, and gender of the patient. Disclosure of this information is subject to the usual case-by-case, totality of circumstances public records balancing test.[176]

- Mental health registration and treatment records.[177] These include duplicate copies of statements of emergency detention in the possession of a police department, absent written informed consent or a court order for disclosure.[178]

- Law enforcement, court, and agency records involving children and juveniles.

  - Law enforcement officers' records of children and juveniles.[179]

    - Exceptions include news reporters who wish to obtain information for the purpose of reporting news without revealing the identity of the child or juvenile.[180]

    - Certain exceptions also apply to motor vehicle operation records and operating privilege records.[181]

    - *See* Wis. Stat. §§ 48.396(1)-(1d), (5), and (6), and 938.396(1)-(1j) and (10) for other exceptions.

  - Records of courts exercising jurisdiction over children and juveniles pursuant to Wis. Stat. chs. 48 and 938.[182]

    - Exception for review of Chapter 48 court records by a court of criminal jurisdiction for purpose of conducting or preparing for a proceeding in that court, and for review by a district attorney for the purpose of performing official duties in a court of criminal jurisdiction.[183]

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[174] Wis. Stat. §§ 146.81(4) and 256.15(2)(a).
[175] *See* Wis. Stat. § 146.82.
[176] 78 Op. Att'y Gen. 71, 76 (1989); OAG I-03-07, at 6-8 (Sept. 27, 2007).
[177] Wis. Stat. § 51.30(1)(am), (1)(b), and (4).
[178] *Watton v. Hegerty*, 2008 WI 74, ¶ 30, 311 Wis. 2d 52, 751 N.W.2d 369.
[179] Wis. Stat. §§ 48.396(1)-(1d), (5)-(6), and 938.396(1), (1j), and (10). *See also* Analyzing the Record, Special Issues, below.
[180] Wis. Stat. §§ 48.396(1) and 938.396(1)(b)1.
[181] Wis. Stat. § 938.396(3)-(4).
[182] Wis. Stat. §§ 48.396(2), (6), and 938.396(2), (2g), (2m), and (10).
[183] Wis. Stat. § 48.396(2)(e).

- ◊ Exception for information contained in the electronic records of a Chapter 48 court that may be made available to any other court exercising jurisdiction under Wis. Stat. chs. 48 or 938; a municipal court exercising jurisdiction under Wis. Stat. § 938.17(2); a court of criminal jurisdiction; a person representing the interests of the public under Wis. Stat. §§ 48.09 or 938.09; an attorney or guardian ad litem for a parent or child who is a party to a proceeding in a court assigned to exercise jurisdiction under Wis. Stat. chs. 48 or 938 or a municipal court; a district attorney prosecuting a criminal case; or the Department of Children and Families.[184] Exception excludes information relating to the physical or mental health of an individual or that deals with any other sensitive personal matter of an individual.[185]

- ◊ Exception for review of Chapter 938 court records by law enforcement agency for the purpose of investigating a crime or alleged criminal activity that may result in a court exercising certain jurisdiction under certain provisions of Chapter 938.[186]

- ◊ Exception for review of Chapter 938 court records upon request of a court of criminal jurisdiction to review court records for the purpose of conducting or preparing for a proceeding in that court, upon request of a district attorney to review court records for the purpose of performing official duties in a court of criminal jurisdiction, or upon request of a court of civil jurisdiction or the attorney for a party to a proceeding in that court for the purpose of impeaching a witness.[187]

- ◊ Exception for information contained in the electronic records of a Chapter 938 court that may be made available to any other court exercising jurisdiction under Wis. Stat. chs. 48 or 938; a municipal court exercising jurisdiction under Wis. Stat. § 938.17(2); a court of criminal jurisdiction; a person representing the interests of the public under Wis. Stat. §§ 48.09 or 938.09; an attorney or guardian ad litem for a parent or child who is a party to a proceeding in a court assigned to exercise jurisdiction under Wis. Stat. chs. 48 or 938 or a municipal court; a district attorney prosecuting a criminal case; a law enforcement agency; the Department of Children and Families; or the Department of Corrections.[188] Exception excludes information relating to the physical or mental health of an individual or that deals with any other sensitive personal matter of an individual.[189]

- ◊ Certain exceptions apply to motor vehicle operation records and operating privilege records.[190]

- ◊ *See* Wis. Stat. §§ 48.396(2) and 938.396(2g)-(2m) for other exceptions.

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[184] Wis. Stat. § 48.396(3)(b)1.
[185] Wis. Stat. § 48.396(3)(b)2.
[186] Wis. Stat. § 938.396(2g)(c).
[187] Wis. Stat. § 938.396(2g)(d).
[188] Wis. Stat. § 938.396(2m)(b)1.
[189] Wis. Stat. § 938.396(2m)(b)2.
[190] Wis. Stat. § 938.396(3)-(4).

        - Agency records regarding children in the agency's care or legal custody pursuant to Wis. Stat. ch. 48, the Children's Code.[191] Agency records regarding a juvenile who is or was in the agency's care or legal custody pursuant to Wis. Stat. ch. 938, the Juvenile Justice Code.[192] See Analyzing the Request, Special Issues, Children and Juveniles, below. For other exceptions see Wis. Stat. §§ 48.78(2) and 938.78(2) and (3).

    - Dozens of additional exemptions are embedded in substantive provisions of the Wisconsin Statutes. A comprehensive list of those exemptions is beyond the scope of this outline, but some examples include:

        - Plans and specifications of state-owned or state-leased buildings.[193]

        - Information which likely would result in the disturbance of an archaeological site.[194]

        - Estate tax returns and related documents.[195]

        - Information concerning livestock infected with paratuberculosis.[196]

        - Records of a publicly supported library or library system indicating the identity of any individual who borrows or uses the library's documents, materials, resources, or services may not be disclosed except by court order or to persons acting within the scope of their duties in administration of the library or library system, persons authorized by the individual to inspect the records, custodial parents or guardians of children under the age of 16, specified other libraries, or to law enforcement officers under limited circumstances pursuant to Wis. Stat. § 43.30(1m)-(5).

    - Records custodians, officers, and employees of public records authorities should learn the exemption statutes applicable to their own agencies.

    - Additional exemptions can be located by reviewing the index to the Wisconsin Statutes under both "public records" and the specific subject.

- Exempt from disclosure by federal statutes (unless authorized by an exception or other provision in the statutes themselves). For example:

    - Social security numbers obtained or maintained by an authority pursuant to a provision of law enacted after October 1, 1990.[197]

    - Personally identifiable information contained in student records (applicable to school districts receiving federal funds, with certain exceptions).[198]

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[191] Wis. Stat. § 48.78.
[192] Wis. Stat. § 938.78.
[193] Wis. Stat. § 16.851.
[194] Wis. Stat. § 44.02(23).
[195] Wis. Stat. § 72.06.
[196] Wis. Stat. § 95.232.
[197] *See* 42 U.S.C. § 405(c)(2)(C)(viii)(I).
[198] *See* the Family Educational Rights and Privacy Act (FERPA), 20 U.S.C. § 1232g.

But note: Students and parents (unless parental rights have been legally revoked) are allowed access to the student's own records and may allow access to third parties by written consent.[199]

- Many patient health care records, pursuant to the Health Insurance Portability and Accountability Act of 1996 (HIPAA).[200]

- The USA PATRIOT Act, Pub. L. No. 107-56, 115 Stat. 272, provides that "No person shall disclose to any other person that the Federal Bureau of Investigation has sought or obtained tangible things pursuant to an order under this section."[201] Further, the Act provides that "information obtained by a State or local government from a Federal agency under this section shall remain under the control of the Federal agency, and a State or local law authorizing or requiring such a government to disclose information shall not apply . . . ."[202]

- Personal information in state motor vehicle ("DMV") records.[203]

  - It is a permissible use under the DPPA for a DMV to disclose personal information "[f]or use by any government agency, including any court or law enforcement agency, in carrying out its functions."[204]

  - In the course of carrying out its functions, including responding to public records requests, an authority may disclose personal information obtained from a DMV that is held by the authority. Depending on the totality of circumstances related to a particular public records request, non-DPPA statutory, common law, or balancing test considerations may warrant redaction of certain personal information pursuant to the usual public records law analysis.[205] Subsequent litigation has created uncertainty about how the DPPA intersects with the Wisconsin public records law. The judgment in one Wisconsin circuit court case mirrored the analysis outlined in OAG I-02-08. In *New Richmond News v. City of New Richmond*,[206] a circuit court followed the analysis in the Attorney General's April 29, 2008 informal opinion regarding the intersection of the Wisconsin Public Records Law and the DPPA. On April 16, 2015, the Supreme Court of Wisconsin granted a petition to bypass the court of appeals, and as of November 2015, the matter is pending before the court. Similar DPPA issues also have been raised in federal litigation, but none so far have specifically considered the Wisconsin Public Records Law.[207]

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[199] *Osborn*, 2002 WI 83, ¶ 27.
[200] *See* 42 U.S.C. § 1320d-2, 45 C.F.R. pts. 160 and 164.
[201] 50 U.S.C. § 1861(d)(1).
[202] 6 U.S.C. § 482.
[203] *See* the Driver's Privacy Protection Act (DPPA), 18 U.S.C. §§ 2721-25.
[204] 18 U.S.C. § 2721(b)(1).
[205] OAG I-02-08, at 2 (Apr. 29, 2008).
[206] No. 13-CV-163 (Wis. Cir. Ct. St. Croix Cty. July 2, 2014).
[207] *See e.g. Senne v. Vill. of Palatine*, 784 F.3d 444 (7th Cir. 2015); *see also Pavone v. Law Offices of Anthony Mancini, Ltd.*, No. 15-CV-1538, 2015 WL 4554844 (N.D. Ill. July 28, 2015).

- Exempt from disclosure by state court decisions. "Substantive common law principles construing the right to inspect, copy or receive copies of records shall remain in effect."[208] For example:
    - District attorney prosecution files.[209]
        - ***Caution***: When a requester asked to inspect all public records requests received by the district attorney's office since a certain date, the Wisconsin Supreme Court held that *Foust* did not apply. It is the nature of the documents and not their location that determines their status under the public records statute.[210]
        - When a public records request is directed to a law enforcement agency, rather than a district attorney, the *Foust* exception does not apply. The law enforcement agency and the district attorney are separate authorities for purposes of the public records law. If the law enforcement agency has forwarded a copy of its investigative report to the district attorney, the district attorney may deny access to the report in its possession if the district attorney receives a public records request for the report. If the law enforcement agency receives a public records request for a copy of the same report and the report remains in the law enforcement agency's possession, the law enforcement agency may not rely on *Foust* to deny access to the report. The law enforcement agency instead must perform the usual public records analysis.[211] For further information about requests to law enforcement agencies see Analyzing the Request, Special Issues, Law Enforcement Records, below.
    - Executive privilege.[212]
    - Records rendered confidential by the attorney-client privilege.[213]
    - Records consisting of attorney work product, including the material, information, mental impressions, and strategies an attorney compiles in preparation for litigation.[214]
    - Purely personal emails sent or received by employees or officers on an authority's computer system that evince no violation of law or policy.[215]
        - The authority—not the employee or officer who sent or received a particular email—is responsible for determining whether an email on its computer system is purely personal, and applying the regular public records analysis to those that are not.

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[208] Wis. Stat. § 19.35(1)(a).
[209] *See State ex rel. Richards v. Foust*, 165 Wis. 2d 429, 436, 477 N.W.2d 608 (1991) ("common law limitation does exist against access to prosecutor's files under the public records law").
[210] *Nichols*, 199 Wis. 2d at 274.
[211] *Portage Daily Register*, 2008 WI App 30, ¶¶ 15-22.
[212] 63 Op. Att'y Gen. 400, 410-14 (1974) (origins and scope discussed).
[213] *See George*, 169 Wis. 2d at 582; *Wis. Newspress, Inc. v. Sch. Dist. of Sheboygan Falls*, 199 Wis. 2d 768, 782-83, 546 N.W.2d 143 (1996); *see also* Analyzing the Request, *Step Four*, below.
[214] *Seifert*, 2007 WI App 207, ¶ 28.
[215] *Schill*, 2010 WI 86, ¶ 9 & n.4 (Abrahamson, C.J., lead opinion); *Id.* ¶ 148 & n.2 (Bradley, J., concurring); *Id.* ¶ 173 & n.4 (Gableman, J., concurring).

- The authority's records custodian therefore should identify and screen all emails claimed to be purely personal, and that evince no violation of law or policy.

- Whether an email is "purely personal" should be narrowly construed. Any content related to official duties, the affairs of government, and the official acts of the authority's officers and employees is not purely personal.

- Some emails may contain some content that is purely personal, such as family news, and other content that relates to official functions and responsibilities. The purely personal content should be redacted; the remaining content should be subject to regular public records analysis.[216]

- For additional information, see Memorandum from J.B. Van Hollen, Attorney General, to Interested Parties (July 28, 2010), https://www.doj.state.wi.us/sites/default/files/dls/memo-ip-schill.pdf.

- *Note:* There is no blanket exemption for all personnel records of public employees.[217] As discussed above, certain types of personnel records may be exempt from disclosure by specific statutory provisions. The balancing test, in certain circumstances, also may weigh against disclosure of other personnel records.[218]

Step Four: Does the Balancing Test Compel Access to the Record?

- The balancing test explained.

  - The records custodian must balance the strong *public interest in disclosure of the record against the public interest favoring nondisclosure.*[219]

    - The custodian must identify potential reasons for denial, based on public policy considerations indicating that denying access is or may be appropriate.

    - Those factors must be weighed against public interest in disclosure.

    - Specific policy reasons, rather than mere statements of legal conclusion or recitation of exemptions, must be given.[220]

    - Generally, there are no blanket exemptions from release, and the balancing test must be applied with respect to each individual record.[221]

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[216] *See MacIver Inst.*, 2014 WI App 49, ¶ 19 & n.4 (observing that "[p]ersonal finance or health information" may be subject to redaction as "purely personal" in an email that otherwise is subject to disclosure).
[217] *Wis. Newspress*, 199 Wis. 2d at 775-82.
[218] *See* Analyzing the Request, Special Issues, below.
[219] *Journal Co.*, 43 Wis. 2d at 305.
[220] *Law Offices of 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).
[221] *Milwaukee Journal Sentinel*, 2009 WI 79, ¶ 56.

- The records custodian must consider all relevant factors to determine whether permitting record access would result in harm to the public interest that outweighs the legislative policy recognizing the strong public interest in allowing access.[222]

- The balancing test is a fact-intensive inquiry that must be performed on a case-by-case basis.[223]

- A records custodian is not expected to examine a public records request "in a vacuum."[224] The public records law contemplates examination of all relevant factors, considered in the context of the particular circumstances.[225]

- In other words, the records custodian must determine whether the surrounding circumstances create an exceptional case not governed by the strong presumption of openness.[226]

  An "exceptional case" exists when the circumstances are such that the public policy interests favoring nondisclosure outweigh the public policy interests favoring disclosure, *notwithstanding the strong presumption favoring disclosure*.[227]

- The identity of the requester and the purpose of the request are generally *not* part of the balancing test.[228]

- The *private interest* of a person mentioned or identified in the record is not a proper element of the balancing test, except indirectly.

  - If there is a *public interest* in protecting an individual's privacy or reputational interest as a general matter (for example, to insure that citizens will be willing to take jobs as police, fire, or correctional officers), there is a *public interest* favoring the protection of the individual's privacy interest.[229]

  - Without more, potential for embarrassment is not a sufficient basis for withholding a record.[230]

- Existing public availability of the information contained in a record weakens any argument for withholding the same information pursuant to the balancing test.[231]

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[222] Wis. Stat. § 19.35(1)(a).
[223] *Kroeplin*, 2006 WI App 227, ¶ 37.
[224] *Seifert*, 2007 WI App 207, ¶ 31.
[225] *Id.*
[226] *Hempel*, 2005 WI 120, ¶ 63.
[227] *Id.* ¶ 63.
[228] *See Kraemer Bros., Inc. v. Dane Cty.*, 229 Wis. 2d 86, 102, 599 N.W.2d 75 (Ct. App. 1999). *But see Ardell*, 2014 WI App 66, ¶¶ 16-17 (a requester with documented history of violence towards specific public employee forfeited his right to disclosure of that employee's employment records by demonstrating intent to hurt her, "and it would be contrary to common sense and public policy to permit him to use the open records law to continue his course of intimidation and harassment.").
[229] *See Linzmeyer*, 2002 WI 84, ¶ 31.
[230] *Milwaukee Journal Sentinel*, 2009 WI 79, ¶ 62. *See also MacIver Inst.*, 2014 WI App 49, ¶ 36 (Brown, C.J., concurring) ("when [citizens] communicate their political views to their legislators, they should be prepared to see those communications with their names attached to them publicized . . . .").

- Public policies that may be weighed in the balancing test can be identified through their expression in other areas of the law. Relevant public policies also may be practical or common sense reasons applicable in the totality of circumstances presented by a particular public records request. For example:

    - Policies expressed through recognized evidentiary privileges.

        - Wisconsin Stat. ch. 905 enumerates a dozen different evidentiary privileges, such as lawyer-client, health care provider-patient, husband-wife, clergy-penitent, and others.

        - Evidentiary privileges do not by themselves provide sufficient justification for denying access.[232] However, they may be considered to reflect public policies in favor of protecting the confidentiality of certain kinds of information.

        - The balancing test weight accorded to public policies expressed in evidentiary privileges should be greater where other expressions of the same public policy also support denial of access. For example, weight of the physician-patient privilege is reinforced by Wis. Stat. § 146.82 (Wisconsin patient health care records confidentiality statute), HIPAA, and Wis. Admin. Code § Med 10.03 ("unprofessional conduct" includes divulging patient confidences).

        - ***Caution***: Unlike the other privileges, the attorney-client privilege (Wis. Stat. § 905.03) does provide sufficient grounds to deny access without resorting to the balancing test.[233]

          This is because the attorney-client privilege "is no mere evidentiary rule. It restricts professional conduct."[234]

        - Wisconsin law does not recognize a deliberative process privilege.[235]

    - Policies expressed through exemptions to the open meetings law (Wis. Stat. § 19.85).[236]

        - Exemptions to the open meetings law that allow an authority to meet in closed session, "are indicative of public policy" and can be considered as balancing factors favoring non-disclosure.[237]

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[231] *Milwaukee Journal Sentinel*, 2009 WI 79, ¶ 61 (union member names sought to be withheld were already publicly available in a staff directory).
[232] *See, e.g.*, 1974 Judicial Council note to Wis. Stat. § 905.09.
[233] *George*, 169 Wis. 2d at 582; *Wis. Newspress*, 199 Wis. 2d at 782-83. *See* Analyzing the Request, *Step Three*, above.
[234] *Armada Broad., Inc. v. Stirn*, 177 Wis. 2d 272, 279 n.3, 501 N.W.2d 889 (Ct. App. 1993), *rev'd on other grounds*, 183 Wis. 2d 463, 516 N.W.2d 357 (1994); *see also* SCR 20:1.6(a).
[235] *Sands v. Whitnall Sch. Dist.*, 2008 WI 89, ¶¶ 60-70, 312 Wis. 2d 1, 754 N.W.2d 439.
[236] *Beaver Dam Area Dev. Corp.*, 2008 WI 90, ¶ 82. *See Journal Times v. City of Racine Bd. of Police & Fire Comm'rs*, 2014 WI App 67, ¶ 9, 354 Wis. 2d 591, 849 N.W.2d 888 (records of a closed meeting, such as motions and votes, may be withheld from disclosure in response to a public records request only if the authority makes a specific demonstration of need to restrict access at the time of the request) (reversed on other grounds).
[237] Wis. Stat. § 19.35(1)(a); 73 Op. Att'y Gen. 20, 22 (1984).

- ***Caution***: If a records custodian relies upon the public policy expressed in an open meetings exception to withhold a record, the custodian must make "a specific demonstration that there was a need to restrict public access *at the time that the request* to inspect or copy the record *was made*."[238]

  - ◊ 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 w*hich the meeting was closed a*nd assert that the reasons for *closing* the meeting still exist and therefore justify denying access to the requested records.[239]

  - ◊ The records custodian instead must state specific public policy reasons for the denial, as evidenced by existence of the related open meetings exception.[240]

- Examples of exemptions from the open meetings law:

  - ◊ Quasi-judicial deliberations.[241]

  - ◊ Personnel matters.[242]

    In the employment context, reliance on public policies expressed in various Wis. Stat. § 19.85 exceptions has been examined in many cases.[243]

  - ◊ Considering specific applications of probation, extended supervision or parole, or considering strategies for crime detection or prevention.[244]

  - ◊ Public business involving investments, competitive factors, or negotiations.[245]

  - ◊ Consideration or investigation into sensitive or private matters, "which, if discussed in public, would be likely to have a substantial adverse effect upon the reputation of any person referred to."[246]

  - ◊ Legal advice as to pending or probable litigation.[247]

  - ◊ Proper closing of a meeting under one of the Wis. Stat. § 19.85(1) exemptions is not in and of itself sufficient reason to deny access to records considered or distributed during the closed session, or to minutes of the closed session.[248]

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[238] Wis. Stat. § 19.35(1)(a).
[239] *Oshkosh Nw. Co. v. Oshkosh Library Bd.*, 125 Wis. 2d 480, 485, 373 N.W.2d 459 (Ct. App. 1985).
[240] *Id.*
[241] Wis. Stat. § 19.85(1)(a).
[242] Wis. Stat. § 19.85(1)(b), (c), and (f).
[243] *See, e.g.*, *Wis. Newspress*, 199 Wis. 2d at 784-88 (balancing test weighed in favor of disclosure of completed disciplinary investigation); *Wis. State Journal v. Univ. of Wis.-Platteville*, 160 Wis. 2d 31, 40-42, 465 N.W.2d 266 (Ct. App. 1990) (same).
[244] Wis. Stat. § 19.85(1)(d).
[245] Wis. Stat. § 19.85(1)(e). *Beaver Dam Area Dev. Corp.*, 2008 WI 90, ¶ 81 n.18.
[246] *See* Wis. Stat. § 19.85(1)(f).
[247] Wis. Stat. § 19.85(1)(g).
[248] *See Oshkosh Nw. Co.*, 125 Wis. 2d at 485.

- Policies reflected in exceptions to disclosure under the federal Freedom of Information Act, 5 U.S.C. § 552.[249]

- Various other policies that, depending on the circumstances of an individual request, would be relevant in performing the balancing test. For example,

  - Evidence of official cover-up is a potent reason for disclosing records. Citizens have a very strong public interest in being informed about public officials who have been derelict in their duties.[250]

  - Potential loss of morale if public employees' personnel files are readily disclosed weighs against public access.[251]

  - However, there is a public interest in disciplinary actions taken against public officials and employees—especially those employed in law enforcement.[252] The courts repeatedly have recognized the great importance of disclosing disciplinary records of public officials and employees when their conduct violates the law or significant work rules.[253]

  - Potential difficulty attracting quality candidates for public employment if there is a perception that public personnel files are regularly open for review is a public interest in non-disclosure.[254]

  - Potential chilling of candid employee assessment in personnel records also weighs against disclosure.[255]

  - Broadly sweeping, generalized assertions that records must be withheld to protect the safety of public employees are not sufficient. "Nearly all public officials, due to their profiles as agents of the State, have the potential to incur the wrath of disgruntled members of the public, and may be expected to face heightened public scrutiny; that is simply the nature of public employment."[256] Safety concerns should be particularized when offered to justify withholding or redaction of records. Whether there exists a safety concern sufficient to outweigh the presumption of disclosure is a fact-intensive inquiry to be decided on a case-by-case basis.[257] Statutory provisions such as Wis. Stat. § 19.35(1)(am)2.a. (disclosure of records containing personally identifiable information pertaining to requester would endanger an individual's life or safety) and 19.35(1)(am)2.c. (disclosure of records containing personally identifiable information pertaining to requester would endanger safety of correctional officers) may be

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[249] *See Linzmeyer*, 2002 WI 84, ¶ 32.
[250] *Hempel*, 2005 WI 120, ¶ 68.
[251] *Id.* ¶ 74.
[252] *Kroeplin*, 2006 WI App 227, ¶ 22.
[253] *Id.* ¶ 28.
[254] *Hempel*, 2005 WI 120, ¶ 75.
[255] *Id.* ¶ 77.
[256] *Milwaukee Journal Sentinel*, 2009 WI 79, ¶ 63.
[257] *Ardell*, 2014 WI App 66, ¶ 17.

considered as indicative of public policy recognizing safety concerns properly considered in the balancing test.[258]

- Policies expressed in the Wis. Stat. § 19.35(1)(am) exemptions to disclosure of records containing personally identifiable information.[259]

Special Issues

- Privacy and reputational interests.
  - Numerous statutes and court decisions recognize the importance of an individual's interest in his or her privacy and reputation as a matter of public policy. For example:
    - Wis. Stat. § 995.50 (recognizing "right of privacy").
    - Wis. Stat. § 19.85(1)(f) (open meetings law exemption, see Analyzing the Request, *Step Four*, above).
    - Wis. Stat. § 230.13 (certain state employee personnel records).
    - *Woznicki v. Erickson*.[260]
  - The privacy statute provides that "[i]t is not an invasion of privacy to communicate any information available to the public as a matter of public record."[261]
  - Moreover, the public interest in protecting the privacy and reputational interest of an individual is not equivalent to the individual's personal interest in protecting his or her own character and reputation.[262]
    - The concern is not personal embarrassment and damage to reputation, but whether disclosure would affect any public interest.[263]
    - After an individual has died, the relevant privacy interests are not those of the deceased individual but instead those of the individual's survivors.[264]
  - Privacy-related concerns may outweigh the public interest in disclosure if disclosure would threaten both personal privacy and safety, or if other privacy protections have been established by law (for example, attorney-client privilege).[265]

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[258] *Milwaukee Journal Sentinel*, 2009 WI 79, ¶ 65 n.19. *See MacIver Inst.*, 2014 WI App 49, ¶¶ 23, 26 (taking into consideration whether there was evidence supporting a reasonable probability of threats, harassment or reprisals).
[259] *Seifert*, 2007 WI App 207, ¶¶ 23, 32-34.
[260] *Woznicki v. Erickson*, 202 Wis. 2d 178, 189-94, 549 N.W.2d 699 (1996), *superseded by* Wis. Stat. §§ 19.356 and 19.36(10)-(12).
[261] Wis. Stat. § 995.50(2)(c).
[262] *Zellner I*, 2007 WI 53, ¶ 50.
[263] *Id.* ¶ 52.
[264] *Nat'l Archives & Records Admin. v. Favish*, 541 U.S. 157, 167 (2004) (family had privacy interest in preventing disclosure of death scene photographs of deceased family member).
[265] *Kroeplin*, 2006 WI App 227, ¶ 46.

- The public interest in protecting an individual's reputation is significantly diminished when damaging information about the individual already has been made public.[266]

- In many cases, public interests in confidentiality, privacy, and reputation have been found to outweigh the public interest in disclosure. For example:

  - In *Village of Butler*, the court held that the balance weighed in favor of the public's interest in keeping police personnel records private: "disclosure of the requested records likely would inhibit a reviewer from making candid assessments of their employees in the future . . . . [And] opening these records likely would have the effect of inhibiting an officer's desire or ability to testify in court because he or she would face cross-examination as to embarrassing personal matters. A foreseeable result is that fewer qualified people would accept employment in a position where they could expect that their right to privacy regularly would be abridged."[267]

  - In *Kraemer Brothers*, the court held that the privacy interests of employees of private companies contracting with a public entity outweighed the public interest in disclosure.[268]

  - In *Hempel*, the court held that it was appropriate to consider the confidentiality concerns of witnesses and complainants, and the possible chilling effects on potential future witnesses and complainants, when performing the balancing test.[269]

- In many other cases, however, the public interest in disclosure has been found to outweigh any public interest in privacy and reputation. For example:

  - In *Local 2489*, the court held that the balancing test tipped in favor of public access to a completed investigation of public employee wrongdoing.[270]

  - In *Jensen v. School District of Rhinelander*, the court held that the public interest in disclosure of a school superintendent's performance evaluation outweighed his reputational interest because a public official has a lower expectation of employment privacy and because prior media reports had already compromised the superintendent's reputational interest.[271]

  - In *State ex rel. Journal/Sentinel, Inc. v. Arreola*, the court held that police officers have a lower expectation of privacy.[272] The public interest in being informed of alleged misconduct by law enforcement officers and the extent to which those allegations were properly investigated is particularly compelling.[273]

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[266] *Id.* ¶ 47.
[267] *Vill. of Butler*, 163 Wis. 2d at 831.
[268] *Kraemer Bros.*, 229 Wis. 2d at 92-104.
[269] *Hempel*, 2005 WI 120, ¶¶ 71-73.
[270] *Local 2489*, 2004 WI App 210, ¶¶ 21, 26.
[271] *Jensen v. Sch. Dist. of Rhinelander*, 2002 WI App 78, ¶¶ 22-24, 251 Wis. 2d 676, 642 N.W.2d 638.
[272] *State ex rel. Journal/Sentinel, Inc. v. Arreola*, 207 Wis. 2d 496, 515, 558 N.W.2d 670 (Ct. App. 1996).
[273] *Kroeplin*, 2006 WI App 227, ¶ 46.

In *Zellner I*, the court held that the public has a significant interest in knowing about allegations of public schoolteacher misconduct and how they are handled because teachers are entrusted with the significant responsibility of teaching children.[274]

- In *Breier*, the court held that public interest in disclosure of arrest records outweighed any public interest in the privacy and reputational interests of arrestees.[275]

- In *Atlas Transit, Inc. v. Korte*, the court held that the public interest in disclosure of the names and commercial license numbers of school bus drivers outweighed a slight privacy intrusion.[276]

- Privacy interests may be given greater weight where personal safety is also at issue.[277] The public policy interest in ensuring the safety and welfare of a public employee may, under certain circumstances, overcome the presumption of access to otherwise available records about that employee. In *Ardell*, the authority had documented and well-founded safety concerns for its employee. The employee obtained a domestic abuse injunction against the requester, who pled guilty to two counts of violating that injunction. The court of appeals reasoned that it was plain from the requester's history that his purpose in requesting employment records about the employee was not a legitimate one—to obtain records providing oversight of government operations—instead the requester's intent was to continue to harass and intimidate the employee. By committing acts of violence against the employee and ignoring the domestic abuse injunction, the court reasoned, the requester forfeited his right to the requested records. Consequently, *Ardell* presented exceptional circumstances in which the public policies favoring non-disclosure outweighed those favoring disclosure.

  Under the balancing test, "the possibility of threats, harassment or reprisals alone is a legitimate consideration for a custodian," but "the public interest weight given to such a consideration increases or decreases depending upon the *likelihood* of threats, harassment or reprisals actually occurring."[278]

- Access to FBI rap sheets has been held to be an unwarranted invasion of privacy, categorically.[279]

- Prominent public officials must have a lower expectation of personal privacy than regular public employees; greater scrutiny of public employees than their private sector counterparts comes with the territory of public employment.[280] There is a particularly strong public interest in being informed about public officials who have been derelict in their duties.[281]

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[274] *Zellner I*, 2007 WI 53, ¶ 53.
[275] *Breier*, 89 Wis. 2d at 440.
[276] *Atlas Transit, Inc. v. Korte*, 2001 WI App 286, ¶¶ 9-26, 249 Wis. 2d 242, 638 N.W.2d 625. *See Dumas v. Koebel*, 2013 WI App 152, ¶¶ 20-24, 352 Wis. 2d 13, 841 N.W.2d 319 (Wis. Stat. § 19.36 (12), enacted after *Atlas Transit*, did not bar disclosure of employee's name).
[277] *See Klein v. Wis. Res. Ctr.*, 218 Wis. 2d 487, 496-97, 582 N.W.2d 44 (Ct. App. 1998); *State ex rel. Morke v. Record Custodian*, 159 Wis. 2d 722, 726, 465 N.W.2d 235 (Ct. App. 1990). *See Ardell*, 2014 WI App 66, ¶¶ 9-14.
[278] *MacIver Inst.*, 2014 WI App 49, ¶ 29 (emphasis added).
[279] *U.S. Dep't of Justice v. Reporters Comm. for Freedom of the Press*, 489 U.S. 749, 762-71 (1989).
[280] *Hempel*, 2005 WI 120, ¶ 75; *Kroeplin*, 2006 WI App 227, ¶ 49.
[281] *Kroeplin*, 2006 WI App 227, ¶ 52.

- The federal Driver's Privacy Protection Act (DPPA),[282] provides a federal cause of action for knowingly obtaining, disclosing or using personal information obtained from a state department of motor vehicles (DMV) for any purpose other than a permissible use as provided by the statute.

    - The Attorney General interprets the DPPA as not prohibiting disclosure of driver information if an authority did *not* obtain it from the DMV. This is true even if the information is confidential in the hands of the DMV.[283]

    - Responding to public records requests is a required function of law enforcement agencies and therefore, a permissible use under the law. As a result, personal information or highly restricted personal information *obtained* from the state DMV and contained in law enforcement records may be provided in response to a public records request unless the public records balancing test or statutory prohibitions other than the DPPA preclude disclosure.[284]

    - Please note in *New Richmond News v. City of New Richmond*,[285] a circuit court followed the analysis in the Attorney General's April 29, 2008, informal opinion regarding the intersection of the Wisconsin Public Records Law and the DPPA. On April 16, 2015, the Supreme Court of Wisconsin granted a petition to bypass the court of appeals, and as of November 2015, the matter is pending before the Court.

- Crime victims and their families.

    - State and federal law recognizes rights of privacy and dignity for crime victims and their families.

    - The Wisconsin Constitution, art. I, § 9m, states that crime victims should be treated with "fairness, dignity, and respect for their privacy." Wisconsin Stat. § 950.04(1v)(ag), (1v)(dr), and (2w)(dm) further emphasize the importance of the privacy rights of victims and witnesses.

    - The Wisconsin Statutes recognize that this state constitutional right must be honored vigorously by law enforcement agencies. The statutes further recognize that crime victims include both persons against whom crimes have been committed and a deceased victim's family members.[286]

    - The Wisconsin Supreme Court, speaking of both Wis. Const. art. I, § 9, and related statutes concerning the rights of crime victims, has instructed that "justice requires that all who are engaged in the prosecution of crimes make every effort to minimize further suffering by crime victims."[287]

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[282] 18 U.S.C. §§ 2721-25,
[283] OAG I-02-08 (Apr. 29, 2008).
[284] *Id.*
[285] No. 13-CV-163 (Wis. Cir. Ct. St. Croix Cty. July 2, 2014).
[286] Wis. Stat. §§ 950.01 and 950.02(4)(a).
[287] *Schilling v. Crime Victim Rights Bd.*, 2005 WI 17, ¶ 26, 278 Wis. 2d 216, 692 N.W.2d 623.

- Federal courts, including the United States Supreme Court, have also recognized that family members of a deceased person have personal rights of privacy—in addition to those of the deceased—under both traditional common law and federal statutory law. "Family members have a personal stake in honoring and mourning their dead and objecting to unwarranted public exploitation that, by intruding upon their own grief, tends to degrade the rites and respect they seek to accord to the deceased person who was once their own."[288]

- 2011 Wisconsin Act 283 created three statutory provisions, Wis. Stat. §§ 950.04(1v)(ag), (1v)(dr), and (2w)(dm), related to disclosure of personally identifying information of victims and witnesses by public officials, employees or agencies, which were intended to protect victims and witnesses from inappropriate and unauthorized use of their personal information. These statutes are not intended to and do not prohibit law enforcement agencies or other public entities from disclosing the personal identities of crime victims and witnesses in response to public records requests, although those public records duties should continue to be performed with due regard for the privacy, confidentiality, and safety of crime victims and witnesses.[289]

- Law enforcement records.
  - Public policies favor public safety and effective law enforcement.[290]
  - Police reports of closed investigations.
    - No blanket rule—balancing test must be done on a case-by-case basis.[291]
    - Policy interests against disclosure: interference with police business, privacy and reputation, uncertain reliability of "raw investigative data," revelation of law enforcement techniques, danger to persons named in report.
    - Policy interests favoring disclosure: public oversight of police and prosecutorial actions, reliability of corroborated evidence, degree to which sensitive information already has been made public.
  - Police reports of ongoing investigations.
    - Subject to the balancing test, but policy interests against disclosure most likely will outweigh interests in favor of release.[292]
    - Access to an autopsy report was properly denied when a murder investigation was still open.[293]

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[288] *Favish*, 541 U.S. at 168; *see also Marsh v. Cty. of San Diego*, 680 F.3d 1148 (9th Cir. 2012) (finding that parent had constitutionally protected right to privacy over child's autopsy photos).
[289] *See* Memorandum from J.B. Van Hollen, Wisconsin Attorney General, to Interested Parties (Apr. 27, 2012), https://www.doj.state.wi.us/sites/default/files/dls/act-283-advisory.pdf.
[290] *See Linzmeyer*, 2002 WI 84, ¶ 30.
[291] *Id.* ¶ 42.
[292] *See id.*¶¶ 15-18.

- Fact that a police investigation is open and has been referred to the district attorney's office is not a public policy reason sufficient for the police department to deny access to its investigative report. One or more public policy reasons applicable to the circumstances of the case must be identified in order to deny access, such as protection of crime detection strategy or prevention of prejudice to the ongoing investigation.[294]

- Confidential informants.

  - In a reverse of the usual analysis, records custodians must withhold access to records involving confidential informants unless the balancing test requires otherwise.[295]

  - "Informant" includes someone giving information under circumstances "in which a promise of confidentiality would reasonably be implied."[296]

  - If a record is opened for inspection, the records custodian must delete any information that would identify the informant.[297]

  - Confidential informants outside the law enforcement context: If an authority must promise confidentiality to an informant in order to investigate a civil law violation, the resulting record *may* be protected from disclosure under the balancing test.[298]

    - The test for establishing a valid pledge of confidentiality is demanding.[299]

    - For this kind of confidentiality agreement to override the public records law, the agreement must meet a four-factor test adopted in *Mayfair Chrysler-Plymouth*:[300]

      - There must have been a clear pledge of confidentiality;

      - The pledge must have been made in order to obtain the information;

      - The pledge must have been necessary to obtain the information; and

      - Even if the first three factors are met, the records custodian must determine that the harm to the public interest in permitting inspection outweighs the great public interest in full inspection of public records.

- Special custodial and disclosure rules govern public records requests for certain shared law enforcement records.[301]

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[293] *Journal/Sentinel*, 145 Wis. 2d at 824-27; *see also Favish*, 541 U.S. at 167.
[294] *Portage Daily Register*, 2008 WI App 30, ¶¶ 23-26.
[295] Wis. Stat. § 19.36(8)(b).
[296] Wis. Stat. § 19.36(8)(a)1.
[297] Wis. Stat. § 19.36(8)(b).
[298] *See Mayfair Chrysler-Plymouth, Inc. v. Baldarotta*, 162 Wis. 2d 142, 164-68, 469 N.W.2d 638 (1991) (tax investigation).
[299] *See* 74 Op. Att'y Gen. 14 (1985); 60 Op. Att'y Gen. 284 (1971).
[300] *Mayfair Chrysler-Plymouth*, 162 Wis. 2d at 168.
[301] *See* Key Definitions, above.

- Court records.

  Effective July 1, 2016, Wis. Stat. § 801.19 requires the redaction of social security numbers, employer or tax ID numbers, financial account numbers, driver license numbers and passport numbers from records filed with Wisconsin's circuit courts.[302]

- Children and juveniles.

  Many, but not all, records related to children or juveniles have special statutory confidentiality protections.

  - Law enforcement records.

    - Except as provided in Wis. Stat. § 48.396(1)-(1d), (5), and (6), law enforcement officers' records of children who are the subjects of investigations or other proceedings pursuant to Wis. Stat. ch. 48 are confidential. Subjects covered by Chapter 48 include children in need of protection and services ("CHIPS"), foster care, and other child welfare services.[303]

    - Except as provided in Wis. Stat. § 938.396(1), (1j), and (10), law enforcement officers' records of juveniles who are the subjects of proceedings under the juvenile justice provisions of Wis. Stat. ch. 938, including matters which would be prosecuted as crimes if committed by an adult.[304]

    - Other law enforcement records regarding or mentioning children are not subject to the confidentiality provisions of Wis. Stat. §§ 48.396 or 938.396. These records might involve children who witness crimes, are the victims of crimes that do not lead to Chapters 48 or 938 proceedings, or are mentioned in law enforcement reports for other reasons: for example, a child who happens to witness a bank robbery or be the victim of a hit and run automobile accident.

      - Access to these records should be resolved by application of general public records rules.

      - Balancing test consideration may be given to public policy concerns arising from the ages of the children mentioned, such as whether release of unredacted records would likely subject a child mentioned to bullying at school, further victimization, or some neighborhood retaliation. In such cases, redaction of identifying information about children mentioned may be warranted under the balancing test.

  - Court records. Records of courts exercising jurisdiction over children pursuant to Chapter 48 or juveniles pursuant to Chapter 938 are subject to the respective confidentiality restrictions of Wis. Stat. §§ 48.396(2), (6), and 938.396(2), (2g), (2m), and (10). Certain exceptions apply to

[302] *See also* Analyzing the Request, Special Issues, above.
[303] *See also* Analyzing the Request, *Step Three*, above.
[304] *See also* Analyzing the Request, *Step Three*, above.

motor vehicle operation records and operating privilege records pursuant to Wis. Stat. § 938.396(3)-(4), and for certain uses described in Analyzing the Request, *Step Three*, above. See Wis. Stat. §§ 48.396(2), (3), (5), and (6), and 938.396(2g), (2m), and (10) for other exceptions.

Effective July 1, 2016, under Wis Stat. § 48.396(2)(ad), the provisions of Wis. Stat. §§ 801.19 to 801.21 will be applicable to court proceedings under Chapter 48.[305]

- Child protective services and similar agency records.
  - Except as provided in Wis. Stat. § 48.78, the Department of Children and Families, a county department of social services, a county department of human services, a licensed child welfare agency or a licensed day care center may not make available for inspection or disclose the contents of any record kept or information received about a child in its care or legal custody.
  - Except as provided in Wis. Stat. § 938.78, the Department of Children and Families, the Department of Corrections, a county department of social services, a county department of human services, or a licensed child welfare agency may not make available for inspection or disclose the contents of any record kept or information received about a juvenile who is or was in its care or legal custody.
- Student records. Pupil records of elementary and high school students are subject to the confidentiality provisions of Wis. Stat. § 118.125. The Wisconsin Department of Public Instruction provides comprehensive guidance about confidentiality and student records at http://dpi.wi.gov/sspw/pdf/srconfid.pdf.

- Confidentiality agreements. Lawsuit settlement agreements providing that the terms and conditions of the settlement will remain confidential are public records subject to the balancing test.
  - This applies to settlements formally approved by a court.[306]
  - This also applies to settlements not filed with or submitted to a court.[307]
  - Settlement of litigation is in the public interest, and certain parties are more likely to settle their claims if they are guaranteed confidentiality—so there is some public interest in keeping settlement agreements confidential. When applying the balancing test, however, Wisconsin courts usually find that the public interest in disclosure outweighs any public interest in keeping settlement agreements confidential.[308]
  - "[A] generalized interest in encouraging settlement of litigation does not override the public's interest in access to the records of its courts."[309]

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[305] *See also* Analyzing the Request, Special Issues, above.
[306] *See In re Estates of Zimmer*, 151 Wis. 2d 122, 131-37, 442 N.W.2d 578 (Ct. App. 1989).
[307] *See Journal/Sentinel*, 186 Wis. 2d at 451-55; 74 Op. Att'y Gen. 14 (1985).
[308] *See Journal/Sentinel*, 186 Wis. 2d at 458-59; *Zimmer*, 151 Wis. 2d at 133-35; *C.L. v. Edson*, 140 Wis. 2d 168, 184-86, 409 N.W.2d 417 (Ct. App. 1987).
[309] *Zimmer*, 151 Wis. 2d at 135.

- If an authority enters into a confidentiality agreement, it may later find itself in "a no-win" situation where it must choose between violating the agreement or violating the public records law.[310]

- A distinction should be drawn between settlement *agreements* and settlement *negotiations*. There is a strong public interest in maintaining the confidentiality of settlement negotiations that weighs in favoring of nondisclosure under the balancing test. Settlements are cost-effective and benefit judicial efficiency, and parties negotiating freely in confidence allows for more effective negotiations.[311]

- Personnel records and other employment-related records.

  - General concepts applicable to personnel records and the balancing test.

    - The records custodian almost invariably must evaluate context to some degree.[312]

    - The public interest in not injuring the reputations of public employees must be given due consideration, but it is not controlling and would not, by itself, override the strong public interest in obtaining information regarding their activities while on duty.[313]

    - Public employees who serve in a position of trust, such as law enforcement, should expect closer public scrutiny.[314]

    - Public employees have no expectation of privacy in records demonstrating potentially illegal conduct even if disclosure would dilute their effectiveness at their jobs.[315]

    - Persons of public prominence have little expectation of privacy regarding professional conduct, even if allegations against them were disproven.[316]

    - Embarrassing computer use records do not change character as public records under the balancing test even if presented to an employee at a closed and confidential meeting.[317]

  - Factors weighing in favor of disclosure of personnel records.

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[310] *Eau Claire Press Co. v. Gordon*, 176 Wis. 2d 154, 163, 499 N.W.2d 918 (Ct. App. 1993).
[311] *See* Wis. Stat. § 904.85 ("to encourage the candor and cooperation of disputing parties, to the end that disputes may be quickly, fairly and voluntarily settled," communications in mediation are generally not admissible in evidence or subject to discovery or compulsory process and therefore not a public record); *see also Goodyear Tire & Rubber Co. v. Chiles Power Supply, Inc.*, 332 F.3d 976, 979-81 (6th Cir. 2003) (concluding a settlement privilege concerning confidential negotiations should exist).
[312] *Hempel*, 2005 WI 120, ¶ 66.
[313] *Local 2489*, 2004 WI App 210, ¶ 27.
[314] *Kroeplin*, 2006 WI App 227, ¶ 44; *Local 2489*, 2004 WI App 210, ¶ 26.
[315] *State ex rel. Ledford v. Turcotte*, 195 Wis. 2d 244, 252, 536 N.W.2d 130 (Ct. App. 1995).
[316] *Wis. State Journal*, 160 Wis. 2d at 41-42.
[317] *Zellner I*, 2007 WI 53, ¶ 54.

- Records contain or dispel evidence of an official cover-up.[318]

- Records contain evidence/information regarding a school teacher's inappropriate comments toward students[319], or viewing pornography on a school computer.[320]

- The information that would pose the most potential reputational harm already is available in the public domain.[321]

- Employee has other available avenues of recourse, such as the ability to file a response to an inaccurate or misleading fact disclosure.[322]

o Factors weighing against disclosure of personnel records.

- The increased level of embarrassment would have a chilling effect on future witnesses or victims coming forward—especially in sexual harassment case.[323]

- Loss of morale if employees believed their personnel files were readily available to the public. However, the court called this argument only "plausible" and did not "fully endorse" it.[324]

- The scrutiny of rank-and-file employees in the records extends so far such that it may discourage qualified candidates from entering the workforce. However, the court found this factor to weigh only "slightly" in favor of non-disclosure.[325]

- Information gleaned from the investigation could be factually inaccurate and cause unfair damage to the employee's reputation.[326] However, the employee should provide facts establishing that the record contains inaccurate, misleading, and unauthenticated data.[327]

- Disclosure could inhibit future candid assessments of employees in personnel records.[328]

- Release would jeopardize *both* the personal privacy and safety of an employee.[329]

o Personal emails.

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[318] *Hempel*, 2005 WI 120, ¶ 68.
[319] *Linzmeyer*, 2002 WI 84, ¶¶ 4, 25.
[320] *Zellner I*, 2007 WI 53, ¶ 53.
[321] *Kroeplin*, 2006 WI App 227, ¶ 47; *Kailin v. Rainwater*, 226 Wis. 2d 134, 148, 593 N.W.2d 865 (Ct. App. 1999) (concluding that courts "cannot un-ring the bell").
[322] *Zellner I*, 2007 WI 53, ¶ 52 (citing *Jensen*, 2002 WI App 78, ¶ 16). *See* Right to Challenge Accuracy of a Record, below.
[323] *Hempel*, 2005 WI 120, ¶ 73; *Local 2489*, 2004 WI App 210, ¶ 9.
[324] *Hempel*, 2005 WI 120, ¶ 74.
[325] *Id.* ¶ 75.
[326] *Id.* ¶ 76.
[327] *Zellner I*, 2007 WI 53, ¶ 52 (citing *Jensen*, 2002 WI App 78, ¶ 16).
[328] *Hempel*, 2005 WI 120, ¶ 77 (citing *Vill. of Butler*, 163 Wis. at 828 n.3).
[329] *Local 2489*, 2004 WI App 210, ¶ 28 (citing *Ledford*, 195 Wis. 2d at 250-51).

- Purely personal emails sent or received by employees or officers on an authority's computer system, evincing no violation of law or policy, are not subject to disclosure in response to a public records request.[330]

- Personal emails may take on a different character, becoming subject to potential disclosure, if they are used as evidence in a disciplinary investigation or to investigate misuse of government resources. A connection then would exist between the personal content of the emails and a government function, such as a personnel investigation.[331]

- *Schill* does not prevent requesters interested in how an authority's employees and officers are using email accounts on the authority's computer system from obtaining access to records other than purely personal emails. A requester seeking this kind of information could request records showing the number of emails sent or received by a particular employee or officer during a specified time period, for example, and the times and dates of those emails.

- Like other reasons asserted by a records custodian for withholding or redacting requested records, a response asserting that responsive records consist of purely personal emails that will not be disclosed may be challenged by filing a petition for writ of mandamus.[332]

- 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, 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). As a result, it is likely that should the question of whether personal emails sent or received on government email accounts are records come before the court in the future, a majority will find such emails are records and thus, subject to disclosure.

- For additional information, see Memorandum from J.B. Van Hollen, Attorney General, to Interested Parties (July 28, 2010), https://www.doj.state.wi.us/sites/default/files/dls/memo-ip-schill.pdf.

o Other personnel records cross-references in this guide.

- Analyzing the Request, *Step Three*: Exempt from disclosure by public records statutes.

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[330] *Schill*, 2010 WI 86, ¶ 9 & n.4 (Abrahamson, C.J., lead opinion); *Id.* ¶ 148 & n.2 (Bradley, J., concurring); *Id.* ¶ 173 & n.4 (Gableman, J., concurring).
[331] *Id.* ¶ 23 (Abrahamson, C.J., lead opinion); *Id.* ¶ 166 (Bradley, J., concurring); *Id.* ¶ 180 (Gableman, J., concurring).
[332] *See* Enforcement and Penalties, Mandamus, below, for more information about mandamus actions.

- Analyzing the Request, *Step Three*: Information relating to staff management planning.
- Analyzing the Request, *Step Three*: No blanket exemption for all personnel records of public employees.
- Analyzing the Request, *Step Four*: Open meetings law exemptions.
- Analyzing the Request, Special Issues: Privacy-related concerns may outweigh the public interest in disclosure.
- Analyzing the Request, Special Issues: Personnel investigation prepared by an attorney may be withheld if performed after threat of litigation.

- Records about the requester.
  - The fact that a particular record is about the requester generally does not determine who is entitled to access that record.[333]
  - A requester has a greater right of access than the general public to "any personally identifiable information pertaining to the individual in a record containing *personally identifiable information* that is maintained by an authority."[334]
    - This is because an individual requester asking to inspect or copy records pertaining to himself or herself is considered to be substantially different from a requester, "be it a private citizen or a news reporter," who seeks access to records about government activities or other people.[335]
    - The purpose of giving an individual greater access to records under Wis. Stat. § 19.35(1)(am) is so that the individual can determine what information is being maintained, and whether that information is accurate.[336]
    - When it applies, the Wis. Stat. § 19.35(1)(am) right of access to records containing individually identifiable information about the requester is more potent than the general Wis. Stat. § 19.35(1)(a) right of access. The Wis. Stat. § 19.35(1)(am) right is more unqualified.[337]
  - When a person or the person's authorized representative makes a public records request under Wis. Stat. § 19.35(1)(a) or (am) and states that the purpose of the request is to inspect or copy records containing personally identifiable information about the person, the following procedure is required by Wis. Stat. § 19.35(4)(c)1. and 3.[338] A general public records request, not indicating that the purpose of the request is to inspect or copy records

[333] *See* Wis. Stat. § 19.35(1)(a) ("*any requester* has the right to inspect *any record*").
[334] Wis. Stat. § 19.35(1)(am).
[335] *Hempel*, 2005 WI 120, ¶ 34.
[336] *Id.* ¶ 55.
[337] *State ex rel. Greer v. Stahowiak*, 2005 WI App 219, ¶ 10, 287 Wis. 2d 795, 706 N.W.2d 161.
[338] *Hempel*, 2005 WI 120, ¶ 29.

containing personally identifiable information pertaining to the requester, does not trigger the following procedure.[339]

- The records custodian determines if the requester has a right to inspect or copy the records under Wis. Stat. § 19.35(1)(a), the statute creating general public access rights.

- If the records custodian determines that the requester does not have a right to inspect or copy the record under Wis. Stat. § 19.35(1)(a), the records custodian then must determine if the requester has a right to inspect or copy the record under Wis. Stat. § 19.35(1)(am).

- Under Wis. Stat. § 19.35(1)(am), the person is entitled to inspect or receive copies of the records unless the surrounding factual circumstances reasonably fall within one or more of the statutory exceptions to Wis. Stat. § 19.35(1)(am).

- These requests are not subject to the balancing test, because the legislature already has done the necessary balancing by enacting exceptions to the Wis. Stat. § 19.35(1)(am) disclosure requirements.[340]

- The Wis. Stat. § 19.35(1)(am) exceptions mainly protect the integrity of ongoing investigations, the safety of individuals (especially informants), institutional security, and the rehabilitation of incarcerated persons.

- These Wis. Stat. § 19.35(1)(am) exceptions are not to be narrowly construed.[341]

- Wisconsin Stat. § 19.35(1)(am) exceptions include the following:

  - Any record containing personally identifiable information collected or maintained in connection with a complaint, investigation or other circumstances that may lead to an enforcement action, administrative proceeding, arbitration proceeding or court proceeding, or any such record that is collected or maintained in connection with such an action or proceeding.[342]

    - Wisconsin Stat. § 19.35(1)(am) contains no requirement that the investigation be current.[343]

    - This section allows a custodian to deny access to a requester who is, in effect, a potential adversary in litigation or another proceeding unless required to do so under the rules of discovery in actual litigation.[344]

  - Any record containing personally identifiable information that would do any of the following if disclosed:

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[339] *Seifert*, 2007 WI App 207, ¶ 21.
[340] *Hempel*, 2005 WI 120, ¶¶ 3, 27, 56.
[341] *Id.* ¶ 56.
[342] Wis. Stat. § 19.35(1)(am)1.
[343] *Seifert*, 2007 WI App 207, ¶ 36.
[344] *Id.* ¶ 32 (personnel investigation prepared by an attorney may be withheld if performed after threat of litigation).

- Endanger an individual's life or safety.[345]
- Identify a confidential informant.[346]
- Endanger the security—including security of population or staff—of any state prison, jail, secured correctional facility, secured child caring institution, secured group home, mental health institute, center for the developmentally disabled, or facility for the institutional care of sexually violent persons.[347]
- Compromise the rehabilitation of a person in the custody of the department of corrections or detained in a jail or facility identified in Wis. Stat. § 19.35(1)(am)2.c. and d.

◊ Any record that is part of a record series, as defined in Wis. Stat. § 19.62(7), that is not indexed, arranged, or automated in a way that the record can be retrieved by the authority maintaining the record series by use of an individual's name, address, or other identifier.[348]

- Student and pupil records. Although these are generally exempt from disclosure, they are open to students and their parents (except for those legally denied parental rights).[349]
- A patient's access to his or her own mental health treatment records may be restricted by the director of the treatment facility during the course of treatment.[350] However, after discharge, such records are available to the patient.[351]
- After sentencing, a criminal defendant generally is not entitled to access his or her presentence investigation without a court order.[352] A criminal defendant not represented by counsel may view his or her presentence investigation report, but may not keep a copy.[353]
- Other statutes may impose other restrictions on a requester's ability to obtain particular kinds of records about himself or herself.
- Wisconsin Stat. § 19.70(1) provides a procedure for an individual or a person authorized by the individual to challenge the accuracy of a record containing personally identifying information about that individual.[354]

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[345] Wis. Stat. § 19.35(1)(am)2.a.
[346] Wis. Stat. § 19.35(1)(am)2.b.
[347] Wis. Stat. § 19.35(1)(am)2.c.
[348] Wis. Stat. § 19.35(1)(am)3.
[349] *See* FERPA, 20 U.S.C. § 1232g(a)(1); Wis. Stat. § 118.125(2).
[350] Wis. Stat. § 51.30(4)(d)1.
[351] Wis. Stat. § 51.30(4)(d)2.-3.; *State ex rel. Savinski v. Kimble*, 221 Wis. 2d 833, 840-44, 586 N.W.2d 36 (Ct. App. 1998).
[352] Wis. Stat. § 972.15(4); *Hill*, 196 Wis. 2d at 425-28.
[353] Wis. Stat. § 972.15(4m).
[354] *See* Right to Challenge Accuracy of a Record, below.

- Correspondence with elected officials.
    - Names and email addresses of citizens cannot be redacted from correspondence sent to public officials expressing their opinions regarding public policy.[355]
    - There is a strong public interest in knowing "who" is emailing elected officials to attempt to influence public policy and from "where" such individuals are communicating.[356]
    - Citizens have no expectation of privacy regarding the emails they send to elected officials in an attempt to influence public policy.[357]

LIMITED DUTY TO NOTIFY PERSONS NAMED IN RECORDS IDENTIFIED FOR RELEASE

Background

Beginning with *Woznicki*, the Wisconsin Supreme Court recognized that when a records custodian's decision to release records implicates the reputational or privacy interests of an individual, the records custodian must notify the subject of the intent to release, and allow a reasonable time for the subject of the record to appeal the records custodian's decision to circuit court. Succeeding cases applied the *Woznicki* doctrine to all personnel records of public employees.[358]

Notice and Judicial Review Procedures

Wisconsin Stat. § 19.356 now codifies and clarifies pre-release notice requirements and judicial review procedures.

Note: Wisconsin Stat. § 19.356 establishes short time periods, specified in days, during which certain actions must occur. All time periods established in Wis. Stat. §§ 19.31-19.39 exclude Saturdays, Sundays, and legal holidays. Wis. Stat. § 19.345. A time period of a certain number of days specified in Wis. Stat. § 19.356 therefore means that number of business days.

Records for Which Notice Is Required and Pre-Release Court Review May Be Sought

- First, perform the usual public records analysis. Notice is required only if that analysis results in a decision to release certain records.
- Limited to three categories of records by Wis. Stat. § 19.356, created in 2003 Wisconsin Act 47.
- These three categories are:

[355] *MacIver Inst.*, 2014 WI App 49, ¶ 31 ("If a citizen has a genuine concern about his or her views becoming public, he or she need not express such views through means which create a public record.").
[356] *Id.* ¶¶ 19-21.
[357] *Id.* ¶ 29.
[358] *Klein*, 218 Wis. 2d 487; *Milwaukee Teachers' Educ. Ass'n v. Milwaukee Bd. of Sch. Dirs.*, 227 Wis. 2d 779, 596 N.W.2d 403 (1999).

- Records containing information relating to an employee created or kept by an authority and that are the result of an investigation into a disciplinary matter involving the employee or possible employment-related violation by the employee of a statute, ordinance, rule, regulation, or policy of the employer.[359]

- Records obtained by the authority through a subpoena or search warrant.[360]

- Records prepared by an employer other than an authority, if the record contains information relating to an employee of that employer, unless the employee authorizes access.[361] The Attorney General has opined that Wis. Stat. § 19.356(2)(a)3. does not allow release of the information without obtaining authorization from the individual employee.[362]

  Note: "Employees" covered under Wis. Stat. § 19.356(2) do not include individuals holding state public office.[363]

- Notice must be provided to "any record subject to whom the record pertains."[364]

  - For the definitions of "record subject" and "personally identifiable information" see Key Definitions, above.

  - This does not mean that every person mentioned in a record must receive notice. Instead, the record subject must—in some direct way—be a focus or target of the requested record.[365]

- Limited exceptions to the notice requirement apply to access by the affected employee, for purposes of collective bargaining, for investigation of discrimination complaints, or when a record is transferred from the administrator of an educational agency to the state superintendent of public instruction.[366]

- Written notice is required.[367]

- Notice must be served before permitting access to the record and within three business days after making the decision to permit access.[368]

- Notice must be served personally or by certified mail.[369]

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[359] Wis. Stat. § 19.356(2)(a)1.
[360] Wis. Stat. § 19.356(2)(a)2.
[361] Wis. Stat. § 19.356(2)(a)3.
[362] OAG 01-06, at 4-5 (Aug. 3, 2006).
[363] *Moustakis v. State Dep't of Justice*, 2015 WI App 63, ¶¶ 1, 24, 364 Wis. 2d 740, 869 N.W.2d 788.
[364] Wis. Stat. § 19.356(2)(a).
[365] OAG 01-06, at 2-3.
[366] Wis. Stat. § 19.356(2)(b)-(d).
[367] Wis. Stat. § 19.356(2)(a).
[368] Wis. Stat. §§ 19.345 and 19.356(2)(a).
[369] Wis. Stat. § 19.356(2)(a).

- The notice must briefly describe the requested record and include a description of the record subject's rights under Wis. Stat. § 19.356(3) and (4) to seek a court order restraining access of the record.[370] It may be helpful to include copies of the records identified for release and a copy of Wis. Stat. § 19.356.

- Explaining in the notice what, if any, information the authority intends to redact before permitting access may prevent efforts to obtain a court order restraining release. Enclosing copies of the records as redacted for intended release serves the same purpose.

- An expedited procedure for seeking court review after receipt of a notice is set forth in Wis. Stat. § 19.356(3)-(8). Strict timelines apply to the notice and judicial review requirements. Courts must give priority to these judicial reviews.[371] Appeal of a circuit court order on judicial review pursuant to Wis. Stat. § 19.356(4)-(7) must be filed within twenty business days of entry of the circuit court order.[372] It is not necessary for a record subject to formally challenge a proposed records release by filing a Wis. Stat. § 19.356(4)-(8) lawsuit. An authority may change its mind about releasing proposed records upon receipt of additional information after providing required notice to a record subject.[373]

- The authority may not provide access to a requested record within twelve business days of sending the notice. If a judicial review action is commenced, access may not be provided until that review action concludes.[374]

- A notice may include information beyond what the statute requires in order to assist the recipient in understanding why the notice is being provided.

Records for Which Notice Is Required and Supplementation of the Record Is Authorized

- A different kind of notice is required if an authority decides to permit access to a record containing information relating to a record subject who is an officer or an employee of the authority holding a state or local public office.[375]

- Again, first perform the usual public records analysis. Notice is required only if that analysis results in a decision to release certain records.

- For the definitions of "record subject, "state public office" and "local public office" see Key Definitions, above.

- Notice must be served on the record subject personally or by certified mail within three business days of making the decision to permit access to the records, and before releasing the records.[376]

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[370] Wis. Stat. § 19.356(2)(a).
[371] *See* Wis. Stat. § 19.356(3)-(8). *See generally* *Local 2489*, 2004 WI App 210.
[372] *Zellner v. Herrick* ("*Zellner II*"), 2009 WI 80, ¶ 27, 319 Wis. 2d 532, 770 N.W.2d 305.
[373] *Ardell*, 2014 WI App 66, ¶¶ 20-22.
[374] Wis. Stat. §§ 19.345 and 19.356(5).
[375] Wis. Stat. § 19.356(9)(a).
[376] Wis. Stat. §§ 19.345 and 19.356(9)(a).

- The notice must briefly describe the requested records and describe the record subject's right to augment the records as provided in Wis. Stat. § 19.356(9)(b).[377]

- Within five business days after receipt of a notice pursuant to Wis. Stat. § 19.356(9)(a), the record subject may augment the record with written comments and documents of the record subject's choosing.[378]

- The authority must release the record as augmented by the record subject, except as otherwise authorized or required by statute.[379]

  Note: OAG-07-14 (Oct. 15, 2014) explained that Wis. Stat. § 19.356(9)(b) does not apply to a record that only mentions a person holding state or local public office. More is required than a mere passing reference or mention of the record subject's name. Instead, the record must pertain to the record subject in a more substantial way; the record subject must be the focus or subject of the record. Notification obligations under Wis. Stat. § 19.356(9) are not limited to the three circumstances identified in Wis. Stat. § 19.356(2)(a), however.

Courtesy Notice

- Written or verbal notice of anticipated public records releases may be provided as a courtesy to persons not entitled to receive Wis. Stat. § 19.356 notices, such as crime victims or public information officers.

- Courtesy notices are not required by law. They can be used to provide affected persons with some advance notice of public records releases related to those persons.

- The first step is to perform the usual public records analysis. There is no need to consider whether courtesy notice should be provided if no records are going to be released.

- Courtesy notices should not suggest that the recipient is entitled to seek pre-release court review.

- Courtesy notice procedures should not unduly delay related records releases.

ELECTRONIC RECORDS

Introduction

The same general principles apply to records in electronic format, but unique or unresolved problems relating to storage, retention, and access abound.

- The public records law defines the term "record" broadly to include "any material on which written, drawn, printed, spoken, visual or electromagnetic information or electronically generated or stored

[377] Wis. Stat. § 19.356(9)(a).
[378] Wis. Stat. §§ 19.345 and 19.356(9)(b).
[379] Wis. Stat. § 19.356(9)(b).

data is recorded or preserved, regardless of physical form or characteristics, which has been created or is being kept by an authority."[380]

- Because the content or substance of information contained in a document determines whether it is a "record" or not, information concerning public access set forth in the remainder of this outline generally applies.[381] However, many questions unique to electronic records have not yet been addressed by the public records statute itself, by published court decisions, or by opinions of the Attorney General.

Record Identification

- Electronically stored information generally constitutes a "record" within the meaning of the public records law so long as the recorded information is created or kept in connection with official business. The substance, not the format, controls whether it is a record or not.[382]
    - Emails and other records created or maintained on a personal computer or mobile device, or from a personal email account, constitute records if they relate to government business.[383]
    - Examples of electronic records within the Wis. Stat. § 19.32(2) definition can include word processing documents, database files, email correspondence, web-based information, PowerPoint presentations, and audio and video recordings, although access may be restricted pursuant to statutory or court-recognized exceptions.[384]
    - Electronic records include content posted by or on behalf of authorities to social media sites, such as Facebook and Twitter, to the extent that the content relates to government business. If an authority uses social media, the content must be produced if it is responsive to a public records request. This includes not only currently "live" content, but also past content.
    - Wisconsin Stat. § 16.61, which governs retention, preservation, and disposition of state public records, includes "electronically formatted documents" in its definition of public records.
    - If an authority makes use of social media, or if employees use mobile devices to conduct government business (whether the device is personal or provided by the authority), the authority should adopt procedures to retain and preserve all such records consistent with Wis. Stat. § 16.61 (state authorities), Wis. Stat. § 19.21 (local authorities), and applicable records disposition authorizations.
    - Information regarding government business kept or received by an elected official on her personal website, "Making Salem Better," more likely than not constituted a record.[385]

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[380] Wis. Stat. § 19.32(2). *See* Key Definitions, above.
[381] OAG I-06-09, at 2.
[382] *Youmans*, 28 Wis. 2d at 679.
[383] *See* Key Definitions, above.
[384] *See* Analyzing the Request, above.
[385] OAG I-06-09, at 2-3.

- Drafts, notes, and personal use exceptions to the definition of "record" apply to electronic information. Electronic information may fall into these exceptions to the definition of "record," based on application of the general concepts set out in Key Definitions, above.
    - As with paper documents, whether electronic information fits within the "draft" or "notes" exceptions requires consideration of how the information has been used and the individuals to whom the information has been circulated.[386]
    - Personal emails.
        - Purely personal emails sent or received by employees or officers on an authority's computer system, evincing no violation of law or policy, are not subject to disclosure in response to a public records request.[387]
        - Personal emails may take on a different character, becoming subject to potential disclosure, if they are used as evidence in a disciplinary investigation or to investigate misuse of government resources. A connection then would exist between the personal content of the emails and a government function, such as a personnel investigation.[388] For additional information, *see* Memorandum from J.B. Van Hollen, Attorney General, to Interested Parties (July 28, 2010), https://www.doj.state.wi.us/sites/default/files/dls/memo-ip-schill.pdf.
- Electronic documents may contain contextual information and file history preserved only when viewed in certain formats, such as data generated automatically by computer operating systems or software programs. Whether this information is considered a "record" subject to public access is largely unanswered.
    - Metadata. Literally defined as "data about data," metadata has different meanings, depending on context. In the context of word processing documents, metadata is information that may be hidden from view on the computer screen and on a paper copy, but, when displayed, may reveal important information about the document.
        - No controlling Wisconsin precedent addresses the application of the public records law to such data, although a circuit court has held that metadata is not part of the public record because it includes drafts, notes, preliminary computations, and editing information.[389]
        - Legal commentary and federal cases addressing the treatment of metadata during litigation and civil discovery also are helpful for understanding access and retention issues related to metadata.[390]

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[386] *See* Key Definitions, above.

[387] *Schill*, 2010 WI 86, ¶ 9 & n.4 (Abrahamson, C.J., lead opinion); *Id.* ¶ 148 & n.2 (Bradley, J., concurring); *Id.* ¶ 173 & n.4 (Gableman, J., concurring).

[388] *Id.* ¶ 23 (Abrahamson, C.J., lead opinion); *Id.* ¶ 166 (Bradley, J., concurring); *Id.* ¶ 180 (Gableman, J., concurring).

[389] *McKellar v. Prijic*, No. 09-CV-61 (Wis. Cir. Ct. Outagamie Cty. July 29, 2009).

[390] *See, e.g.*, selected publications from The Sedona Conference and its working groups, including *The Sedona Guidelines: Best Practice Guidelines for Managing Information & Records in the Electronic Age* (Sept. 2005), and *The Sedona Principles: Best Practices Recommendations*

- Courts in some other jurisdictions interpreting their freedom of information laws (which may differ significantly from the Wisconsin public records law), have held that metadata is part of electronic records and must be disclosed in response to a freedom of information request for those records.[391]

- Email messages may contain transmission information in the original format that does not appear on a printed copy or when stored electronically. *Armstrong v. Executive Office of the President*,[392] held that when emails are requested under a FOIA request, the electronic version rather than a paper print-out must be provided. In 1999, the same court upheld a federal rule that permitted paper copies to be the only archived public record of emails.[393] Central to the *Public Citizen* decision was the existence of the newly-adopted federal rule requiring that paper print-outs of emails must include the sender, recipient, date, and receipt data. The federal court reasoned that if paper print-outs of emails include this fundamental contextual information, they satisfy federal public records laws.

- Computers contain "cookies," temporary internet files, deleted files, and other files that are not consciously created or kept by the user, but are instead generated or stored automatically. In addition, although a user may delete files, deleted materials remain on the computer until overwritten, unlike conventional documents discarded and destroyed as trash. Some of these materials are akin to drafts or materials prepared for personal use, or are simply not materials created or kept in connection with official business. Nonetheless, when such materials are collected, organized, and kept for an official purpose, they may constitute a record accessible under the public records statute.[394]

Access

If electronically stored material is a record, the records custodian must determine whether the public records law requires access. Recurring issues relating to access include the following.

- Sufficiency of requests. Under Wis. Stat. § 19.35(1)(h), a request must be reasonably limited "as to subject matter or length of time represented by the record."[395] Record requests describing only the format requested ("all e-mails") without reasonable limitations as to time and subject matter are often not legally sufficient. If so, the custodian may insist that the requester reasonably describe the records being requested. Even if a requester appears to limit a request by specifying the time period

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and Principles for Addressing Electronic Document Production (2d ed. June 2007), http://www.thesedonaconference.org/content/miscFiles/publications_html; *see also Williams v. Sprint/United Mgmt. Co.*, 230 F.R.D. 640, 646-47 (D. Kan. 2005); *Autotech Techs. Ltd. P'ship v. Automationdirect.com, Inc.*, 248 F.R.D. 556 (N.D. Ill. 2008).

[391] *E.g.*, *Nat'l Day Laborer Org. Network v. U.S. Immigration & Customs Enforcement Agency*, No. 10 Civ. 3488, 2011 WL 381625 (S.D.N.Y. Feb. 7, 2011) (subsequently withdrawn due to incomplete factual record); *Irwin v. Onondaga Cty. Res. Recovery Agency*, 895 N.Y.S.2d 262, 319 (N.Y. App. Div. 2010); *O'Neill v. City of Shoreline*, 240 P.3d 1149, 1152 (Wash. 2010); *Lake v. City of Phoenix*, 218 P.3d 1004, 1007-08 (Ariz. 2009).

[392] *Armstrong v. Exec. Office of the President*, 1 F.3d 1274 (D.C. Cir. 1993).

[393] *Pub. Citizen v. Carlin*, 184 F.3d 900 (D.C. Cir. 1999).

[394] *See*, *e.g.*, *Zellner I*, 2007 WI 53, ¶¶ 22-31 (holding that a CD-ROM containing adult images and internet searches compiled in the course of an employee disciplinary action was not within the copyright exception to the definition of a public record; assuming without discussion that the material was a record based on its use by the school district).

[395] *See* The Request, above; *Schopper*, 210 Wis. 2d at 212-13.

or particular search terms or individual electronic mail boxes to be searched, such requests for voluminous electronic records have been held to be insufficient and unreasonably burdensome.[396]

- Manner of access.

  - Wisconsin Stat. § 19.35(1)(k) permits an authority to impose reasonable restrictions on the manner of access to original records if they are irreplaceable or easily damaged. Concerns for protecting the integrity of original records may justify denial of direct access to an agency's operating system or to inspect a public employee's assigned computer, if access is provided instead on an alternative electronic storage device, such as a CD-ROM. Security concerns may also justify such a restriction.[397] Provision of a copy of the requested data "in an appropriate format"—in this case, as portable document files ("PDFs")—was sufficient.[398]

  - Records posted on the internet. The Attorney General has advised that agencies may not use online record posting as a substitute for their public records responsibilities; and that publication of documents on an agency website does not qualify for the exceptions for published materials set forth in Wis. Stat. § 19.32(2) or 19.35(1)(g).[399] Nonetheless, providing public access to records via the internet can greatly assist agencies in complying with the statute by making posted materials available for inspection and copying, since that form of access may satisfy many requesters.

  - The public records law right of access extends to making available for inspection and copying the information contained on a limited access website used by an elected official to gather and provide information about official business, but not necessarily participation in the online discussion itself.[400]

- Must the authority provide a record in the format in which the requester asks for it?

  - Wisconsin Stat. § 19.35(1)(b), (c), and (d) require that copies of written documents be "substantially as readable," 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.[401]

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[396] *Gehl*, 2007 WI App 238, ¶¶ 23-24 (search requests for all emails exchanged by numerous individuals without specifying any subject matter, and for searches based on numerous broad search terms, were properly denied as insufficient).

[397] *See WIREdata II*, 2008 WI 69, ¶¶ 97-98 (*reversing* court of appeals decision allowing requesters direct access to an authority's electronic database; recognizing that "such direct access . . . would pose substantial risks").

[398] *Id.* ¶ 97.

[399] Letter from James E. Doyle, Wisconsin Attorney General, to John Muench (July 24, 1998).

[400] OAG I-06-09, at 3-4.

[401] *See WIREdata II*, 2008 WI 69, ¶¶ 97-98 (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.*, 248 F.R.D. at 558 (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.[402] 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,[403] leaving questions concerning the degree to which a requester can specify the precise electronic format that will satisfy a record request to be answered in subsequent cases. Thus, it behooves the records custodian who denies a request that records be provided in a particular electronic format to state a legally sufficient reason for denying access to a copy of a record in the particular format requested.

- Computer programs are expressly protected from examination or copying even though material used as computer input or produced as output may be subject to examination and copying unless otherwise exempt from public access.[404] For the definition of "computer program," see Wis. Stat. § 16.971(4)(c).

- Wisconsin Stat. § 19.35(1)(e) gives requesters a right to receive a written copy of any public record that is not in readily comprehensible form. A requester who prefers paper copies of electronic records may not be able to insist on them, however. If the requester does not have access to a machine that will translate the information into a comprehensible form, the agency can fulfill its duties under the public records law by providing the requester with access to such a machine.[405]

- With limited exceptions, Wis. Stat. § 19.35(1)(L) provides that a records custodian is not required to create a new record by extracting information from an existing record and compiling the information in a new format.[406] Under Wis. Stat. § 19.36(6), however, the records custodian is required to delete or redact confidential information contained in a record before providing access to the parts of a record that are subject to disclosure.

  - When records are stored electronically, the distinction between redaction of existing records and the creation of an entirely new record can become difficult to discern.[407]

  - The Attorney General has advised that where information is stored in a database a person can "within reasonable limits" request a data run to obtain the requested information.[408] Use a rule of reason to determine whether retrieving electronically stored data entails the creation of a new record. Consider the time, expense, and

[402] *Jones*, 2000 WI App 146, ¶ 17.
[403] *WIREdata II*, 2008 WI 69, ¶¶ 8 n.7, 93, and 96.
[404] Wis. Stat. § 19.36(4).
[405] *See* 75 Op. Att'y Gen. at 145.
[406] *George*, 169 Wis. 2d 573.
[407] *See Osborn*, 2002 WI 83, ¶¶ 41-46.
[408] 68 Op. Att'y Gen. 231, 232 (1979).

difficulty of extracting the data requested, and whether the agency itself ever looks at the data in the format requested.[409]

- A requester requesting a copy of a record containing land information from an office or officer of a political subdivision has a right to receive a copy of the record in the same format in which the record is maintained by the custodian, unless the requester requests that a copy be provided in a different format that is authorized by law.[410]

  - "Political subdivision" means any city, village, town, or county.[411]

  - "Land information" means any physical, legal, economic or environmental information, or characteristics concerning land, water, groundwater, subsurface resources, or air in Wisconsin. It includes information relating to topography, soil, soil erosion, geology, minerals, vegetation, land cover, wildlife, associated natural resources, land ownership, land use, land use controls and restriction, jurisdictional boundaries, tax assessment, land value, land survey records and references, geodetic control networks, aerial photographs, maps, planimetric data, remote sensing data, historic and prehistoric sites, and economic projections.[412]

- Wisconsin Stat. § 19.35(1)(a) provides that "any requester has a right to inspect any *record*." Compare this to the language of the federal Freedom of Information Act, 5 U.S.C. § 552, which requires that "public information" be made available. Cases in other jurisdictions have found this distinction significant in deciding whether information must be provided in a particular format.[413]

- Role of the records custodian. Under Wis. Stat. § 19.34(2), the records custodian is legally responsible for providing access to public records.

  - The records custodian must protect the right of public access to electronic records stored on individual employees' computers, such as email, even though the individual employee may act as the *de facto* records custodian of such records. Related problems arise when individual employees or elected officials use personal email accounts to correspond concerning official business.

  - Shared-access databases involving multiple agencies.

    - Information of common use or interest increasingly is shared electronically by multiple agencies. To prevent confusion among participating agencies and unnecessary delays in responding to requests for records, establishment of such a database should be accompanied by detailed rules identifying who may enter information and who is responsible for responding to requests for particular records.

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[409] *Cf. N.Y. Pub. Interest Research Group v. Cohen*, 729 N.Y.S.2d 379, 382-83 (N.Y. Sup. Ct. 2001) (where a "few hours" of computer programming would produce records that would otherwise require weeks or months to redact manually, the court concluded that requiring the necessary programming did not violate the New York statutory prohibition against creation of a new record).
[410] Wis. Stat. § 66.1102(4).
[411] Wis. Stat. § 66.1102(1)(b).
[412] Wis. Stat. § 66.1102(1)(a), incorporating by reference Wis. Stat. § 59.72(1)(a).
[413] *Cf. AFSCME v. Cty. of Cook*, 555 N.E.2d 361, 366 (Ill. 1990); *Farrell v. City of Detroit*, 530 N.W.2d 105, 109 (Mich. Ct. App. 1995).

    - Special custodial and disclosure rules govern public records requests for certain shared law enforcement records.[414]

  - Government data collected and processed by independent contractors. A government entity may not avoid its responsibilities under the public records law by contracting with an independent contractor for the collection and maintenance of government records and then simply directing requesters to the independent contractor for handling of public records requests. The government entity remains the "authority" responsible for complying with the law and is liable for a contractor's failure to comply.[415]

Retention and Storage

- The general statutory requirements for record retention by state agencies, Wis. Stat. § 16.61, and local units of government, Wis. Stat. § 19.21, apply equally to electronic records. Although the public records law addresses the duty to *disclose* records, it is not a means of enforcing the duty to *retain* records, except for the period after a request for particular records is made.[416]

- Issues related to record retention that are exclusive to electronic records often derive from their relative fragility, susceptibility to damage or loss, and difficulties in insuring their authenticity and accessibility.

  - The Wisconsin Department of Administration (DOA) has statutory rule-making authority to prescribe standards for storage of optical disks and electronic records.[417] DOA has promulgated Wis. Admin. Code ch. Adm 12 which governs the management of records stored exclusively in electronic format by state and local agencies, but does not require an agency to maintain records in electronic format. Wisconsin Admin. Code ch. Adm 12 defines terms of art relating to electronic records, establishes requirements for accessibility of electronic records from creation through use, management, preservation, and disposition, and requires that state and local agencies must also comply with the statutes and rules relating to retention of non-electronic records. Wisconsin Admin. Code ch. Adm 12 can be found at http://www.legis.state.wi.us/rsb/code/adm/adm012.pdf. A primer on Wis. Admin. Code ch. Adm 12 can be found at http://publicrecordsboard.wi.gov/docs_all.asp?locid=165, under Reference Materials.

  - Beyond Wis. Admin. Code ch. Adm 12, the Wisconsin Public Records Board has published *Guidelines for the Management and Retention of Public Record E-Mail*, http://publicrecordsboard.wi.gov/docview.asp?docid=21209&locid=165.

  - Documents posted online. In recent years, agencies have frequently taken advantage of the ease of posting public records on government websites. State agencies are required by law, Wis. Stat. § 35.81, *et seq.*, to provide copies of agency publications to the Wisconsin Reference and Loan Library for distribution to public libraries through the Wisconsin Document

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[414] *See* Key Definitions, above.
[415] *WIREdata II*, 2008 WI 69, ¶¶ 82-89.
[416] *See Gehl*, 2007 WI App 238, ¶ 15 n.4 (citing Wis. Stat. § 19.35(5)).
[417] Wis. Stat. §§ 16.611 and 16.612.

Depository Program. The Wisconsin Digital Archives has been established to preserve state agency web content for access and use in the future, and to provide a way for state agencies to fulfill their statutory obligation to participate in the Document Depository Program with materials in electronic formats. For more information about this program, see http://dpi.wi.gov/sites/default/files/imce/rl3/pdf/state_agency_digital_archives_guidelines.pdf.

INSPECTION, COPIES, AND FEES

Inspection

- A requester generally may choose to inspect a record and/or to obtain a copy of the record. "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."[418]

- A requester must be provided facilities for inspection and copying of requested records comparable to those used by the authority's employees.[419]

- A records custodian may impose reasonable restrictions on the manner of access to an original record if the record is irreplaceable or easily damaged.[420]

- For unique issues concerning inspection and copying of electronic records, see Electronic Records, Access, above.

Copies

- A requester is entitled to a copy of a record, including copies of audio recordings and video recordings.[421] The records custodian must provide a copy if requested.[422]

    - If requested by the requester, the authority may provide a transcript of an audio recording instead of a copy of the recording.[423]

    - Any requester has the right to receive from an authority having custody of a record in the form of a video recording, a copy of the recording substantially as good as the original.[424]

    - If an authority receives a request to inspect or copy a handwritten record or a voice recording that the authority is required to protect because the handwriting or recorded voice would identify an informant, the authority must provide—upon request by the requester—a

[418] Wis. Stat. § 19.35(1)(b).
[419] Wis. Stat. § 19.35(2).
[420] Wis. Stat. § 19.35(1)(k).
[421] Wis. Stat. § 19.35(1).
[422] *State ex rel. Borzych v. Paluszcyk*, 201 Wis. 2d 523, 525-27, 549 N.W.2d 253 (Ct. App. 1996).
[423] Wis. Stat. § 19.35(1)(c).
[424] Wis. Stat. § 19.35(1)(d).

transcript of the record or the information contained in the record if the record or information is otherwise subject to copying or inspection under the public records law.[425]

- Except as otherwise provided by law, a requester has a right to inspect records, the form of which does not permit copying (other than written record, audio recordings, video recordings, and records not in readily comprehensible form).[426]
  - The authority may permit the requester to photograph the record.
  - The authority must provide a good quality photograph of a record, the form of which does not permit copying, if the requester asks that a photograph be provided.

- The requester has a right to a copy of the original record, *i.e.*, "source" material.
  - A request for a copy of a 911 call in its original digital form was not met by providing an analog copy.[427]
  - A request for an "electronic/digital" copy was satisfied by provision of a PDF document containing the requested information, even though the PDF did not have all of the characteristics the requester might have wished.[428]
  - A requester requesting a copy of a record containing land information from an office or officer of a political subdivision has a right to receive a copy of the record in the same format in which the record is maintained by the custodian, unless the requester requests that a copy be provided in a different format that is authorized by law.[429]

- The requester does not have a right to make requested copies. If the requester appears in person to request a copy of a record that permits photocopying, the records custodian may decide whether to make copies for the requester or let the requester make them, and how the records will be copied.[430]

Fees

- An authority may charge a requester only for the specific tasks identified by the legislature in the fee provisions of Wis. Stat. § 19.35(3), unless otherwise provided by law.[431]

- *Copy and transcription fees* may be charged.
  - Copy fees are limited to the "actual, necessary and direct cost" of reproduction unless a fee is otherwise specifically established or authorized to be established by law.[432]

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[425] Wis. Stat. § 19.35(1)(em).
[426] Wis. Stat. § 19.35(1)(f).
[427] *Jones*, 2000 WI App 146, ¶¶ 10-19. *See* Electronic Records, Access, above.
[428] *WIREdata II*, 2008 WI 69, ¶ 96.
[429] Wis. Stat. § 66.1102(4). *See* Electronic Records, Access, above.
[430] Wis. Stat. § 19.35(1)(b); *Grebner v. Schiebel*, 2001 WI App 17, ¶¶ 1, 9, 12-13, 240 Wis. 2d 551, 624 N.W.2d 892 (2000) (requester was not entitled to make copies on requester's own portable copying machine).
[431] *Milwaukee Journal Sentinel*, 2012 WI 65, ¶ 50 (Abrahamson, C.J., lead opinion); *Id.* ¶ 76 (Roggensack, J., concurring). *See* Inspection, Copies, and Fees, below.
[432] Wis. Stat. § 19.35(3)(a).

- "Reproduction" means the act, condition, or process of producing a counterpart, image, or copy. Reproduction is a rote, ministerial task that does not alter a record or change the content of the record. It instead involves only copying the record—for example, by printing out a record that is stored electronically or making a photocopy of a paper record.[433]

- DOJ's policy is that photocopy fees should be around $0.15 cents per page, and that anything in excess of $0.25 cents may be suspect.

- *Costs of a computer run* may be imposed on a requester as a copying fee.[434] An authority may charge a requester for any computer programming expenses required to respond to a request.[435]

- *Transcription fees* may be charged, but are limited to the "actual, necessary and direct cost" of transcription, unless a fee is otherwise specifically established or authorized to be established by law.[436]

- *Photography and photographic reproduction fees* may be charged if the authority provides a photograph of a record, the form of which does not permit copying, but are limited to the "actual, necessary and direct" costs.[437]

- *Location costs*. Costs associated with locating records may be charged if they total $50.00 or more. "Locating" a record means to find it by searching, examining, or experimenting. Subsequent review and redaction of the record are separate processes, not included in location of the record, for which a requester may not be charged.[438] Only actual, necessary, and direct location costs are permitted.[439]

- *Mailing and shipping fees* may be charged, but are limited to the "actual, necessary and direct cost" of mailing or shipping.[440]

- An authority may not charge a requester for the costs of deleting, or "redacting," nondisclosable information included in responsive records.[441]

- If a record is produced or collected by a person who is not an authority pursuant to a contract with the authority, *i.e.*, a contractor, the fees for obtaining a copy of the record may not exceed the actual, necessary, and direct cost of reproduction or transcription of the record by the person who makes the reproduction or transcription, unless another fee is established or authorized by law.[442]

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[433] *Milwaukee Journal Sentinel*, 2012 WI 65, ¶ 31 (Abrahamson, C.J., lead opinion).
[434] Wis. Stat. § 19.35(1)(e) and (3)(a); 72 Op. Att'y Gen. 68, 70 (1983).
[435] *WIREdata II*, 2008 WI 69, ¶ 107.
[436] Wis. Stat. § 19.35(3)(a).
[437] Wis. Stat. § 19.35(3)(b).
[438] *Milwaukee Journal Sentinel*, 2012 WI 65, ¶ 29 (Abrahamson, C.J., lead opinion).
[439] Wis. Stat. § 19.35(3)(c).
[440] Wis. Stat. § 19.35(3)(d).
[441] *Milwaukee Journal Sentinel*, 2012 WI 65, ¶¶ 1 & n.4, 6, 58 (Abrahamson, C.J., lead opinion); *Id.* ¶ 76 (Roggensack, J., concurring).
[442] Wis. Stat. § 19.35(3)(g).

- An authority may require prepayment of any fees if the total amount exceeds $5.00.[443] The authority may refuse to make copies until payment is received.[444] Except for prisoners, the statute does not authorize a requirement for prepayment based on the requester's failure to pay fees for a prior request.

- An authority has discretion to provide requested records for free or at a reduced charge.[445]

- An authority may not make a profit on its response to a public records request.[446]

- Generally, the rate for an actual, necessary, and direct charge for staff time should be based on the pay rate of the lowest paid employee capable of performing the task.

- Specific statutes may establish express exceptions to the general fee provisions of Wis. Stat. § 19.35(3). Examples include Wis. Stat. § 814.61(10)(a) (court records), Wis. Stat. § 59.43(2)(b) (land records recorded by registers of deeds), and Wis. Stat. § 6.36(6) (authorizing fees for copies of the official statewide voter registration list).

RIGHT TO CHALLENGE ACCURACY OF A RECORD

Statutory authorization for an individual to challenge the accuracy of a record containing personally identifiable information pertaining to an individual was removed from the public records law by 2013 Wis. Act 171. The same statutory language was renumbered Wis. Stat. § 19.70 and now exists outside the public records law.

An individual authorized to inspect a record under Wis. Stat. § 19.35(1)(a) or (am), or a person authorized by that individual, may challenge the accuracy of a record containing personally identifiable information pertaining to that individual.[447]

Exceptions. This right does not apply if the record has been transferred to an archival repository, or if the record pertains to an individual and a specific state statute or federal law governs challenges to the accuracy of that record.[448]

The challenger must notify the authority, in writing, of the challenge.[450] The authority then may: (1) concur and correct the information; or (2) deny the challenge, notify the challenger of the denial, and allow the challenger to file a concise statement of reasons for the individual's disagreement with the disputed portions of the record. A state authority must also notify the challenger of the reasons for the denial.[451]

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[443] Wis. Stat. § 19.35(3)(f).
[444] *Hill*, 196 Wis. 2d at 429-30.
[445] Wis. Stat. § 19.35(3)(e).
[446] *WIREdata II*, 2008 WI 69, ¶¶ 103, 107.
[447] Wis. Stat. § 19.70(1).
[448] Wis. Stat. § 19.70(2).
[450] Wis. Stat. § 19.70(1).
[451] *See* Wis. Stat. § 19.70(2)(a) and (b).

ENFORCEMENT AND PENALTIES

Mandamus

The public records law encourages assertion of the right to access.

- If an authority withholds a record or part of a record, or delays granting access to a record or part of a record after a written request for disclosure is made, the requester may:
    - Bring an action for mandamus asking a court to order release of the record; or
    - Submit a written request to the district attorney of the county where the record is located or to the Attorney General requesting that an action for mandamus be brought asking the court to order release of the record to the requester.[452]
- Mandamus procedures are set forth in Chapters 781 and 783 of the Wisconsin Statutes.
- Mandamus is the exclusive remedy provided by the legislature to enforce the public records law and obtain the remedies specified in Wis. Stat. § 19.37.[453]
- A request must be made in writing before a mandamus action to enforce the request is commenced.[454]
- In a mandamus action, the court must decide whether the records custodian gave sufficiently specific reasons for denying an otherwise proper public records request. If the records custodian's reasons for denying the request were sufficiently specific, the court must decide whether the records custodian's reasons are based on a statutory or judicial exception or are sufficient to outweigh the strong public policy favoring disclosure. Ordinarily the court examines the record to which access is requested *in camera*.[455]
    - To obtain a writ of mandamus, the requester must establish four things.[456]
        - The requester has a clear right to the records sought.
        - The authority has a plain legal duty to disclose the records.
        - Substantial damage would result if the petition for mandamus was denied.
        - The requester has no other adequate remedy at law.

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[452] Wis. Stat. § 19.37(1).
[453] *Stanley*, 2012 WI App 42, ¶¶ 60-64 (cannot be enforced by supervisory writ); *Capital Times Co. v. Doyle*, 2011 WI App 137, ¶¶ 4-6, 337 Wis. 2d 544, 807 N.W.2d 666; *State v. Zien*, 2008 WI App 153, ¶¶ 34-35, 314 Wis. 2d 340, 761 N.W.2d 15.
[454] Wis. Stat. § 19.35(1)(h).
[455] *Youmans*, 28 Wis. 2d at 682-83; *George*, 169 Wis. 2d at 578, 582-83.
[456] *Watton*, 2008 WI 74, ¶ 8. *See Journal Times*, 2014 WI App 67, ¶ 10 (voluntary release of records following initiation of a mandamus action renders the mandamus action moot).

- A records custodian who has denied access to requested records defeats the issuance of a writ of mandamus compelling their production by establishing, for example, that the requester does not have a clear right to the records.[457]

- The court may allow the parties or their attorneys limited access to the requested record for the purpose of presenting their mandamus cases, under such protective orders or other restrictions as the court deems appropriate.[458] See the *Ardell* discussion at The Response to the Request, Content of Denials, above. A reviewing court may examine requested records *in camera* on mandamus, but is not required to do so. *In camera* review is not necessary when a custodian identifies sufficiently specific public policy reasons supporting nondisclosure and those reasons override the presumption in favor of disclosure.

- Statutes of limitation.

  - Except for committed and incarcerated persons, an action for mandamus arising under the public records law must be commenced with three years after the cause of action accrues.[459]

  - A committed or incarcerated person must bring an action for mandamus challenging denial of a request for access to a record within ninety days after the request is denied by the authority.[460] The ninety-day time period excludes Saturdays, Sundays, and legal holidays.[461]

Penalties Available on Mandamus

- Attorneys' fees, damages of not less than $100.00, and other actual costs shall be awarded to a requester who prevails in whole or in substantial part in a mandamus action concerning access to a record under Wis. Stat. § 19.35(1)(a).[462]

  - The purpose of Wis. Stat. § 19.37(2) is to encourage voluntary compliance, so a judgment or order favorable in whole or in part in a mandamus action is not a necessary condition precedent to finding that a party prevailed against an authority under Wis. Stat. § 19.37(2).[463]

  - ***Caution***: Damages may be awarded if the prevailing requester is a committed or incarcerated person, but that requester is not entitled to any minimum amount of damages.[464]

  - ***Caution***: For an attorney fee award to be made, there must be an attorney-client relationship.[465]

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[457] *Watton*, 2008 WI 74, ¶ 8 n.9.
[458] Wis. Stat. § 19.37(1)(a); *Appleton Post-Crescent v. Janssen*, 149 Wis. 2d 294, 298-305, 441 N.W.2d 255 (Ct. App. 1989) (allowing limited attorney access only for purposes of case preparation).
[459] Wis. Stat. § 893.90(2).
[460] Wis. Stat. § 19.37(1m).
[461] *See* Wis. Stat. § 19.345.
[462] Wis. Stat. § 19.37(2)(a). *See Journal Times*, 2014 WI App 67, ¶¶ 10-11 (even if release of records renders mandamus action moot, authority still may be liable for requester's attorneys fees and costs if mandamus action was a cause of the records release).
[463] *Eau Claire Press Co.*, 176 Wis. 2d at 159-60.
[464] Wis. Stat. § 19.37(2)(a).
[465] *Young*, 165 Wis. 2d at 294-97 (no attorney fees for *pro se* litigant).

- ***Caution***: Costs and fees are only available to a party that has filed, or has requested a district attorney or DOJ to file, an original mandamus action.[466]

- To establish that he or she has "prevailed," the requester must show that the prosecution of the mandamus action could "reasonably be regarded as necessary to obtain the information" and that a "causal nexus" exists between the legal action and the records custodian's disclosure of the requested information.[467]

- There are several cases discussing recovery of attorney fees where plaintiff "substantially prevails" and recovering fees and costs after the case is dismissed for being moot.[468]

- Actual damages shall be awarded to a requester who files a mandamus action under Wis. Stat. § 19.35(1)(am), relating to access to a record containing personally identifiable information, if the court finds that the authority acted in a willful or intentional manner.[469] There are no automatic damages in this type of mandamus case nor is there statutory authority for the court to award attorney fees and costs.

- Punitive damages may be awarded to a requester if the court finds that an authority or legal custodian arbitrarily or capriciously denied or delayed response to a request or charged excess fees.[470] However, a requester cannot obtain punitive damages unless it timely files a mandamus action and actual damages are ordered.[471]

- A civil forfeiture of not more than $1,000.00 may be imposed against an authority or legal custodian who arbitrarily or capriciously denies or delays response to a request or charges excessive fees.[472]

Related Criminal Offenses

In addition to the mandamus relief provided by the public records law, criminal penalties are available for:

- Destruction, damage, removal, or concealment of public records with intent to injure or defraud.[473]

- Alteration or falsification of public records.[474]

Miscellaneous Enforcement Issues

- A requester cannot seek relief under the public records law for alleged violations of record retention statutes when the non-retention or destruction predates submission of the public records request.[475]

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[466] *Stanley*, 2012 WI App 42, ¶¶ 60-64.
[467] *Eau Claire Press Co.*, 176 Wis. 2d at 160.
[468] *Racine Educ. Ass'n v. Bd. of Educ. for Racine Unified Sch. Dist.*, 129 Wis. 2d 319, 326-30, 385 N.W.2d 510 (Ct. App. 1986); *Racine Educ. Ass'n v. Bd. of Educ. for Racine Unified Sch. Dist.*, 145 Wis. 2d 518, 522-25, 427 N.W.2d 414 (Ct. App. 1988); *Eau Claire Press Co.*, 176 Wis. 2d at 159-60.
[469] Wis. Stat. § 19.37(2)(b).
[470] Wis. Stat. § 19.37(3).
[471] *Capital Times Co.*, 2011 WI App 137, ¶¶ 6, 11.
[472] Wis. Stat. § 19.37(4).
[473] Wis. Stat. § 946.72.
[474] Wis. Stat. § 943.38.

- An authority may not avoid liability under the public records law by contracting with an independent contractor for the collection, maintenance, and custody of its records, and by then directing any requester of those records to the independent contractor.[476]

- If the requested records are released before a mandamus action is filed, the plaintiff has no viable claim for mandamus and therefore no right to seek the other remedies provided in Wis. Stat. § 19.37.[477]

- A small claims action is not the proper way to secure production of public records, and one attempt to do so was found to be frivolous.[478]

- In a public records law mandamus action, a requester cannot recover reasonable attorney fees, damages, and other actual costs under Wis. Stat. § 19.37(2) for an alleged violation of the open meetings law.[479]

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[475] *Cf.* Wis. Stat. § 19.35(5). *Gehl*, 2007 WI App 238, ¶¶ 13-15.
[476] *WIREdata II*, 2008 WI 69, ¶ 89.
[477] *Capital Times Co.*, 2011 WI App 137, ¶¶ 12-15.
[478] *Knuth v. Town of Cedarburg*, No. 2009AP1485, 2010 WL 174141 (Wis. Ct. App. Jan. 20, 2010) (unpublished).
[479] *Journal Times*, 2015 WI 56, ¶ 51.

Appendix A

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2005 WI 120, 284 Wis. 2d 162, 699 N.W.2d 551

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151 Wis. 2d 122, 442 N.W.2d 578 (Ct. App. 1989)

In re John Doe Proceeding,
2003 WI 30, 260 Wis. 2d 653, 660 N.W.2d 260

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2004 WI 65, 272 Wis. 2d 208, 680 N.W.2d 792

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2002 WI App 78, 251 Wis. 2d 676,
642 N.W.2d 638

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Journal Times v. City of Racine Bd. of Police & Fire Comm'rs, 2014 WI App 67, 354 Wis. 2d 591, 849 N.W.2d 888, *rev'd*, 2015 WI 56, 362 Wis. 2d 577, 866 N.W.2d 563

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Juneau Cty. Star-Times v. Juneau Cty., 2013 WI 4, 345 Wis. 2d 122, 824 N.W.2d 457

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Klein v. Wis. Res. Ctr., 218 Wis. 2d 487, 582 N.W.2d 44 (Ct. App. 1998)

Knuth v. Town of Cedarburg, No. 2009AP1485, 2010 WL 174141 (Wis. Ct. App. Jan. 20, 2010) (unpublished)

Kraemer Bros., Inc. v. Dane Cty., 229 Wis. 2d 86, 599 N.W.2d 75 (Ct. App. 1999)

Kroeplin v. Wis. Dep't of Natural Res., 2006 WI App 227, 297 Wis. 2d 254, 725 N.W.2d 286

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Mayfair Chrysler-Plymouth, Inc. v. Baldarotta, 162 Wis. 2d 142, 469 N.W.2d 638 (1991)

McKellar v. Prijic, No. 09-CV-61 (Wis. Cir. Ct. Outagamie Cty. July 29, 2009).

Milwaukee Journal Sentinel v. City of Milwaukee, 2012 WI 65, 341 Wis. 2d 607, 815 N.W.2d 367

Milwaukee Journal Sentinel v.Wis. Dep't of Admin., 2009 WI 79, 319 Wis. 2d 439, 768 N.W.2d 700

Milwaukee Teachers' Educ. Ass'n v. Milwaukee Bd. of Sch. Dirs., 227 Wis. 2d 779, 596 N.W.2d 403 (1999)

Nat'l Archives & Records Admin. v. Favish, 541 U.S. 157 (2004)

Nat'l Day Laborer Org. Network v. U.S. Immigration & Customs Enforcement Agency, No. 10 Civ. 3488, 2011 WL 381625 (S.D.N.Y. Feb. 7, 2011) (subsequently withdrawn due to incomplete factual record)

New Richmond News v. City of New Richmond, No. 13-CV-163 (Wis. Cir. Ct. St. Croix Cty. July 2, 2014)

New Richmond News v. City of New Richmond, No. 2014AP1938 (Wis.) (pending)

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Nichols v. Bennett, 199 Wis. 2d 268, 544 N.W.2d 428 (1996)

N.Y. Pub. Interest Research Group v. Cohen, 729 N.Y.S.2d 379 (N.Y. Sup. Ct. 2001)

O'Neill v. City of Shoreline,
240 P.3d 1149 (Wash. 2010)

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2002 WI 83, 254 Wis. 2d 266, 647 N.W.2d 158

Oshkosh Nw. Co. v. Oshkosh Library Bd.,
125 Wis. 2d 480, 373 N.W.2d 459 (Ct. App. 1985)

Pangman & Assocs. v. Zellmer,
163 Wis. 2d 1070, 473 N.W.2d 538 (Ct. App. 1991)

Portage Daily Register v. Columbia Cty. Sheriff's Dep't, 2008 WI App 30, 308 Wis. 2d 357, 746 N.W.2d 525

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184 F.3d 900 (D.C. Cir. 1999)

Racine Educ. Ass'n v. Bd. of Educ. for Racine Unified Sch. Dist., 129 Wis. 2d 319, 385 N.W.2d 510 (Ct. App. 1986)

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2008 WI 89, 312 Wis. 2d 1, 754 N.W.2d 439

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2010 WI 86, 327 Wis. 2d 572, 768 N.W.2d 177

Schilling v. Crime Victims Rights Bd.,
2005 WI 17, 278 Wis. 2d 216, 692 N.W.2d 623

Schopper v. Gehring,
210 Wis. 2d 208, 565 N.W.2d 187 (Ct. App. 1997)

Seifert v. Sch. Dist. of Sheboygan Falls,
2007 WI App 207, 305 Wis. 2d 582, 740 N.W.2d 177

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2008 WI 90, 312 Wis. 2d 84, 752 N.W.2d 295

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217 Wis. 2d 200, 579 N.W.2d 52 (Ct. App. 1998)

State v. Schaefer,
2008 WI 25, 308 Wis. 2d 279, 746 N.W.2d 457

State v. Stanley,
2012 WI App 42, 340 Wis. 2d 663, 14 N.W.2d 867

State v. Zien,
2008 WI App 153, 314 Wis. 2d 340, 61 N.W.2d 15

State ex rel Ardell v. Milwaukee Bd. of Sch. Dirs.,
2014 WI App 106, 354 Wis. 2d 471, 849 N.W.2d 894

State ex rel. Bilder v. Twp. of Delavan,
112 Wis. 2d 539, 334 N.W.2d 252 (1983)

State ex rel. Blum v. Bd. of Educ.,
209 Wis. 2d 377, 565 N.W.2d 140 (Ct. App. 1997)

State ex rel. Borzych v. Paluszcyk,
201 Wis. 2d 523, 549 N.W.2d 253 (Ct. App. 1996)

State ex rel. Gehl v. Connors,
2007 WI App 238, 306 Wis. 2d 247, 742 N.W.2d 530

State ex rel. Greer v. Stahowiak,
2005 WI App 219, 287 Wis. 2d 795, 706 N.W.2d 161

State ex rel. Hill v. Zimmerman,
196 Wis. 2d 419, 538 N.W.2d 608 (Ct. App. 1995)

State ex rel. Journal Co. v. Cty. Court,
43 Wis. 2d 297, 168 N.W.2d 836 (1969)

State ex rel. Journal/Sentinel, Inc. v. Arreola,
207 Wis. 2d 496, 558 N.W.2d 670 (Ct. App. 1996)

State ex rel. Ledford v. Turcotte,
195 Wis. 2d 244, 536 N.W.2d 130 (Ct. App. 1995)

State ex rel. Milwaukee Police Ass'n v. Jones,
2000 WI App 146, 237 Wis. 2d 840, 615 N.W.2d 190

State ex rel. Morke v. Record Custodian,
159 Wis. 2d 722, 465 N.W.2d 235 (Ct. App. 1990)

State ex rel. Richards v. Foust,
165 Wis. 2d 429, 477 N.W.2d 608 (1991)

State ex rel. Savinski v. Kimble,
221 Wis. 2d 833, 586 N.W.2d 36 (Ct. App. 1998)

State ex rel. Schultz v. Bruendl,
168 Wis. 2d 101, 483 N.W.2d 238 (Ct. App. 1992)

State ex rel. Youmans v. Owens,
28 Wis. 2d 672, 137 N.W.2d 470 (1965)

State ex rel. Young v. Shaw,
165 Wis. 2d 276, 477 N.W.2d 340 (Ct. App. 1991)

State ex rel. Zinngrabe v. Sch. Dist. of Sevastopol,
146 Wis. 2d 629, 431 N.W.2d 734 (Ct. App. 1988)

Stone v. Bd. of Regents,
2007 WI App 223, 305 Wis. 2d 679, 741 N.W.2d
774

U. S. Dep't of Justice v. Reporters Comm. for Freedom of the Press, 489 U.S. 749 (1989)

Vill. of Butler v. Cohen,
163 Wis. 2d 819, 472 N.W.2d 579 (Ct. App. 1991)

Watton v. Hegerty,
2008 WI 74, 311 Wis. 2d 52, 751 N.W.2d 369

Williams v. Sprint/United Mgmt. Co.,
230 F.R.D. 640 (D. Kan. 2005)

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2008 WI 69, 310 Wis. 2d 397, 751 N.W.2d 736

WIREdata, Inc. v. Vill. of Sussex,
2007 WI App 22, 298 Wis. 2d 743, 729 N.W.2d 757

Wis. Newspress, Inc. v. Sch. Dist. of Sheboygan Falls,
199 Wis. 2d 768, 546 N.W.2d 143 (1996)

Wis. Prof'l Police Ass'n v. Wis. Cntys. Ass'n,
2014 WI App 66, 354 Wis. 2d 471, 849 N.W.2d 894

Wis. State Journal v. Univ. of Wis-Platteville,
160 Wis. 2d 31, 465 N.W.2d 266 (Ct. App. 1990)

Woznicki v. Erickson,
202 Wis. 2d 178, 549 N.W.2d 699 (1996)

WTMJ, Inc. v. Sullivan,
204 Wis. 2d 452, 555 N.W.2d 140 (Ct. App. 1996)

Zellner v. Cedarburg Sch. Dist.,
2007 WI 53, 300 Wis. 2d 290, 731 N.W.2d 240

Zellner v. Herrick,
2009 WI 80, 319 Wis. 2d 532, 770 N.W.2d 305

Appendix B

Wisconsin Department of Justice

Public Records Notice

WISCONSIN DEPARTMENT OF JUSTICE PUBLIC RECORDS NOTICE

The Wisconsin Department of Justice provides legal services, criminal investigative assistance, crime victim services, and other law enforcement services to state and local government, and in certain matters, directly to state citizens. Within the Department, the Office of Crime Victim Services and the Divisions of Legal Services, Law Enforcement Services, Criminal Investigation, and Management Services are responsible for administering agency programs and services. Several positions within the Department constitute state public offices for purposes of the Wisconsin public records laws, including the positions of Attorney General, Deputy Attorney General, the Division Administrators, and the Director of the Office of Crime Victim Services.

The Department has designated a Custodian of Public Records for the Department and Deputy Custodians for each Division in order to meet its obligations under State public records laws. Members of the public may obtain access to the Department's Public Records, or obtain copies of these records, by making a request of the Department's Custodian of Public Records during the Department's office hours of Monday through Friday, 8:00 a.m. to 4:30 p.m. Such requests should be made to:

Mr. Paul M. Ferguson
Office of Open Government
Wisconsin Department of Justice
17 West Main Street
P.O. Box 7857
Madison, WI 53707-7857

The Department may bill requestors $.15 for each photocopied page provided. The Department may bill $0.14/page for content scanned and provided on a CD or DVD. If pre-existing files need only be copied onto DCs or DVDs, $1.00 per CD or DVD may be charged. If content must be converted from one electronic format to another, $1.00 per CD or DVD may be charged plus staff time and other actual costs to the Department. The actual cost of postage, courier, or delivery services may be charged. There will be an additional charge for criminal history searches, for specialized documents and photographs, and for retrieving records and files from the State Records Center. The cost of locating responsive records may be charged if it exceeds $50.00 and will be calculated as hourly pay rate (including fringe benefits) of person locating records multiplied by actual time expended to locate records. Requests which exceed a total cost of $5.00 may require prepayment. Requesters appearing in person may be asked to make their own copies, or the Department may make copies for requesters at its discretion. All requests will be processed as soon as practicable and without delay.

Below you will find a brief description of the services provided by each Division of the Department.

Division of Legal Services | This division is responsible for providing legal advice and counsel to state and local agencies as well as to citizens in certain matters. The division is comprised of seven units specializing in different areas including Criminal Appeals, Civil Litigation, Special Litigation & Appeals, Environmental Protection, Medicaid Fraud Control, Criminal Litigation and, Consumer Protection & Antitrust Unit.

Division of Criminal Investigation | This division is responsible for investigating, either independently or in conjunction with local law enforcement agencies, certain criminal cases which are of statewide influence and importance. The Division's responsibilities are delegated to several specialized bureaus: Arson Bureau/State Fire Marshall's Office, Financial Crimes Unit, Gaming Bureau, Investigative Services Bureau, Narcotics Bureau, Public Integrity Unit, and the Special Assignments Bureau.

Division of Law Enforcement Services | This division provides technical and scientific assistance to local law enforcement agencies and establishes training standards for law enforcement officers. The division is comprised of the Crime Information Bureau, the Training and Standards Bureau, and the State Crime Laboratories.

Division of Management Services | This division provides basic staff support services to the other divisions within the Department in the areas of budget preparation, fiscal control, personnel management, payroll, training, facilities, and information technology.

Office of Crime Victims Services | The Office of Crime Victims Services provides compensation to persons who are the innocent victims of certain violent crimes or, in the event of death, to their dependents.

Brad D. Schimel, Attorney General (Revised August 2015)

Appendix C

Wis. Stat. §§ 19.31-19.39

(3) (e) and except as provided under sub. (7). This section does not apply to pupil records under s. 118.125.

(7) Notwithstanding any minimum period of time for retention set under s. 16.61 (3) (e), any taped recording of a meeting, as defined in s. 19.82 (2), by any governmental body, as defined under s. 19.82 (1), of a city, village, town or school district may be destroyed no sooner than 90 days after the minutes have been approved and published if the purpose of the recording was to make minutes of the meeting.

(8) Any metropolitan sewerage commission created under ss. 200.21 to 200.65 may provide for the destruction of obsolete commission records. No record of the metropolitan sewerage district may be destroyed except by action of the commission specifically authorizing the destruction of that record. Prior to any destruction of records under this subsection, the commission shall give at least 60 days' prior notice of the proposed destruction to the state historical society, which may preserve records it determines to be of historical interest. Upon the application of the commission, the state historical society may waive this notice. Except as provided under sub. (7), the commission may only destroy a record under this subsection after 7 years elapse from the date of the record's creation, unless a shorter period is fixed by the public records board under s. 16.61 (3) (e).

History: 1971 c. 215; 1975 c. 41 s. 52; 1977 c. 202; 1979 c. 35, 221; 1981 c. 191, 282, 335; 1981 c. 350 s. 13; 1981 c. 391; 1983 a. 532; 1985 a. 180 ss. 22, 30m; 1985 a. 225; 1985 a. 332 s. 251 (1); Sup. Ct. Order, 136 Wis. 2d xi (1987); 1987 a. 147 ss. 20, 25; 1989 a. 248; 1991 a. 39, 185, 316; 1993 a. 27, 60, 172; 1995 a. 27, 201; 1999 a. 150 s. 672.

Sub. (1) provides that a police chief, as an officer of a municipality, is the legal custodian of all records of that officer's department. Town of LaGrange v. Auchinleck, 216 Wis. 2d 84, 573 N.W.2d 232 (Ct. App. 1997), 96−3313.

This section relates to records retention and is not a part of the public records law. An agency's alleged failure to keep sought−after records may not be attacked under the public records law. Gehl v. Connors, 2007 WI App 238, 306 Wis. 2d 247, 742 N.W.2d 530, 06−2455.

Under sub. (1), district attorneys must indefinitely preserve papers of a documentary nature evidencing activities of prosecutor's office. 68 Atty. Gen. 17.

A county with a population under 500,000 may by ordinance under s. 19.21 (6), [now s. 19.21 (5)] provide for the destruction of obsolete case records maintained by the county social services agency under s. 48.59 (1). 70 Atty. Gen. 196.

A VTAE (technical college) district is a "school district" under s. 19.21 (7) [now s. 19.21 (6)]. 71 Atty. Gen. 9.

19.22 Proceedings to compel the delivery of official property. (1) If any public officer refuses or neglects to deliver to his or her successor any official property or things as required in s. 19.21, or if the property or things shall come to the hands of any other person who refuses or neglects, on demand, to deliver them to the successor in the office, the successor may make complaint to any circuit judge for the county where the person refusing or neglecting resides. If the judge is satisfied by the oath of the complainant and other testimony as may be offered that the property or things are withheld, the judge shall grant an order directing the person so refusing to show cause, within some short and reasonable time, why the person should not be compelled to deliver the property or things.

(2) At the time appointed, or at any other time to which the matter may be adjourned, upon due proof of service of the order issued under sub. (1), if the person complained against makes affidavit before the judge that the person has delivered to the person's successor all of the official property and things in the person's custody or possession pertaining to the office, within the person's knowledge, the person complained against shall be discharged and all further proceedings in the matter before the judge shall cease.

(3) If the person complained against does not make such affidavit the matter shall proceed as follows:

(a) The judge shall inquire further into the matters set forth in the complaint, and if it appears that any such property or things are withheld by the person complained against the judge shall by warrant commit the person complained against to the county jail, there to remain until the delivery of such property and things to the complainant or until the person complained against be otherwise discharged according to law.

(b) If required by the complainant the judge shall also issue a warrant, directed to the sheriff or any constable of the county, commanding the sheriff or constable in the daytime to search such places as shall be designated in such warrant for such official property and things as were in the custody of the officer whose term of office expired or whose office became vacant, or of which the officer was the legal custodian, and seize and bring them before the judge issuing such warrant.

(c) When any such property or things are brought before the judge by virtue of such warrant, the judge shall inquire whether the same pertain to such office, and if it thereupon appears that the property or things pertain thereto the judge shall order the delivery of the property or things to the complainant.

History: 1977 c. 449; 1991 a. 316; 1993 a. 213.

19.23 Transfer of records or materials to historical society. (1) Any public records, in any state office, that are not required for current use may, in the discretion of the public records board, be transferred into the custody of the historical society, as provided in s. 16.61.

(2) The proper officer of any county, city, village, town, school district or other local governmental unit, may under s. 44.09 (1) offer title and transfer custody to the historical society of any records deemed by the society to be of permanent historical importance.

(3) The proper officer of any court may, on order of the judge of that court, transfer to the historical society title to such court records as have been photographed or microphotographed or which have been on file for at least 75 years, and which are deemed by the society to be of permanent historical value.

(4) Any other articles or materials which are of historic value and are not required for current use may, in the discretion of the department or agency where such articles or materials are located, be transferred into the custody of the historical society as trustee for the state, and shall thereupon become part of the permanent collections of said society.

History: 1975 c. 41 s. 52; 1981 c. 350 s. 13; 1985 a. 180 s. 30m; 1987 a. 147 s. 25; 1991 a. 226; 1995 a. 27.

19.24 Refusal to deliver money, etc., to successor. Any public officer whatever, in this state, who shall, at the expiration of the officer's term of office, refuse or willfully neglect to deliver, on demand, to the officer's successor in office, after such successor shall have been duly qualified and be entitled to said office according to law, all moneys, records, books, papers or other property belonging to the office and in the officer's hands or under the officer's control by virtue thereof, shall be imprisoned not more than 6 months or fined not more than $100.

History: 1991 a. 316.

19.25 State officers may require searches, etc., without fees. The secretary of state, treasurer and attorney general, respectively, are authorized to require searches in the respective offices of each other and in the offices of the clerk of the supreme court, of the court of appeals, of the circuit courts, of the registers of deeds for any papers, records or documents necessary to the discharge of the duties of their respective offices, and to require copies thereof and extracts therefrom without the payment of any fee or charge whatever.

History: 1977 c. 187, 449.

19.31 Declaration of policy. In recognition of the fact that a representative government is dependent upon an informed electorate, it is declared to be the public policy of this state that all persons are entitled to the greatest possible information regarding the affairs of government and the official acts of those officers and employees who represent them. Further, providing persons with such information is declared to be an essential function of a representative government and an integral part of the routine duties of officers and employees whose responsibility it is to provide such information. To that end, ss. 19.32 to 19.37 shall be construed in every instance with a presumption of complete public access, con-

sistent with the conduct of governmental business. The denial of public access generally is contrary to the public interest, and only in an exceptional case may access be denied.

History: 1981 c. 335, 391.

An agency cannot promulgate an administrative rule that creates an exception to the open records law. Chavala v. Bubolz, 204 Wis. 2d 82, 552 N.W.2d 892 (Ct. App. 1996), 95−3120.

Although the requester referred to the federal freedom information act, a letter that clearly described open records and had all the earmarkings of an open records request was in fact an open records request and triggered, at minimum, a duty to respond. ECO, Inc. v. City of Elkhorn, 2002 WI App 302, 259 Wis. 2d 276, 655 N.W.2d 510, 02−0216.

The public records law addresses the duty to disclose records; it does not address the duty to retain records. An agency's alleged failure to keep sought−after records may not be attacked under the public records law. Section 19.21 relates to records retention and is not a part of the public records law. Gehl v. Connors, 2007 WI App 238, 306 Wis. 2d 247, 742 N.W.2d 530, 06−2455.

The Wisconsin public records law. 67 MLR 65 (1983).

Municipal responsibility under the Wisconsin revised public records law. Maloney. WBB Jan. 1983.

The public records law and the Wisconsin department of revenue. Boykoff. WBB Dec. 1983.

The Wis. open records act: an update on issues. Trubek and Foley. WBB Aug. 1986.

Toward a More Open and Accountable Government: A Call For Optimal Disclosure Under the Wisconsin Open Records Law. Roang. 1994 WLR 719.

Wisconsin's Public−Records Law: Preserving the Presumption of Complete Public Access in the Age of Electronic Records. Holcomb & Isaac. 2008 WLR 515.

Getting the Best of Both Worlds: Open Government and Economic Development. Westerberg. Wis. Law. Feb. 2009.

19.32 Definitions. As used in ss. 19.32 to 19.39:

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

NOTE: Sub. (1) is shown as affected by 2013 Wis. Acts 171 and 265 and as merged by the legislative reference bureau under s. 13.92 (2) (i).

(1b) "Committed person" means a person who is committed under ch. 51, 971, 975 or 980 and who is placed in an inpatient treatment facility, during the period that the person's placement in the inpatient treatment facility continues.

(1bd) "Elective official" means an individual who holds an office that is regularly filled by vote of the people.

(1bg) "Employee" means any individual who is employed by an authority, other than an individual holding local public office or a state public office, or any individual who is employed by an employer other than an authority.

(1c) "Incarcerated person" means a person who is incarcerated in a penal facility or who is placed on probation and given confinement under s. 973.09 (4) as a condition of placement, during the period of confinement for which the person has been sentenced.

(1d) "Inpatient treatment facility" means any of the following:

(a) A mental health institute, as defined in s. 51.01 (12).

(c) A facility or unit for the institutional care of sexually violent persons specified under s. 980.065.

(d) The Milwaukee County mental health complex established under s. 51.08.

(1de) "Local governmental unit" has the meaning given in s. 19.42 (7u).

(1dm) "Local public office" has the meaning given in s. 19.42 (7w), and also includes any appointive office or position of a local governmental unit in which an individual serves as the head of a department, agency, or division of the local governmental unit, but does not include any office or position filled by a municipal employee, as defined in s. 111.70 (1) (i).

(1e) "Penal facility" means a state prison under s. 302.01, county jail, county house of correction or other state, county or municipal correctional or detention facility.

(1m) "Person authorized by the individual" means the parent, guardian, as defined in s. 48.02 (8), or legal custodian, as defined in s. 48.02 (11), of an individual who is a child, as defined in s. 48.02 (2); the guardian of an individual adjudicated incompetent in this state; the personal representative or spouse of an individual who is deceased; or any person authorized, in writing, by an individual to act on his or her behalf.

(1r) "Personally identifiable information" has the meaning specified in s. 19.62 (5).

(2) "Record" means 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. "Record" includes, but is not limited to, handwritten, typed or printed pages, maps, charts, photographs, films, recordings, tapes, optical disks, and any other medium on which electronically generated or stored data is recorded or preserved. "Record" does not include drafts, notes, preliminary computations and like materials prepared for the originator's personal use or prepared by the originator in the name of a person for whom the originator is working; materials which are purely the personal property of the custodian and have no relation to his or her office; materials to which access is limited by copyright, patent or bequest; and published materials in the possession of an authority other than a public library which are available for sale, or which are available for inspection at a public library.

(2g) "Record subject" means an individual about whom personally identifiable information is contained in a record.

(3) "Requester" means any person who requests inspection or copies of a record, except a committed or incarcerated person, unless the person requests inspection or copies of a record that contains specific references to that person or his or her minor children for whom he or she has not been denied physical placement under ch. 767, and the record is otherwise accessible to the person by law.

(3m) "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.

(4) "State public office" has the meaning given in s. 19.42 (13), but does not include a position identified in s. 20.923 (6) (f) to (gm).

History: 1981 c. 335; 1985 a. 26, 29, 332; 1987 a. 305; 1991 a. 39, 1991 a. 269 ss. 26pd, 33b; 1993 a. 215, 263, 491; 1995 a. 158; 1997 a. 79, 94; 1999 a. 9; 2001 a. 16; 2003 a. 47; 2005 a. 387; 2007 a. 20; 2013 a. 171, 265; s. 13.92 (2) (i).

NOTE: 2003 Wis. Act 47, which affects this section, contains extensive explanatory notes.

A study commissioned by the corporation counsel and used in various ways was not a "draft" under sub. (2), although it was not in final form. A document prepared other than for the originator's personal use, although in preliminary form or marked "draft," is a record. Fox v. Bock, 149 Wis. 2d 403, 438 N.W.2d 589 (1989).

A settlement agreement containing a pledge of confidentiality and kept in the possession of a school district's attorney was a public record subject to public access. Journal/Sentinel v. Shorewood School Bd. 186 Wis. 2d 443, 521 N.W.2d 165 (Ct. App. 1994).

Individuals confined as sexually violent persons under ch. 980 are not "incarcerated" under sub. (1c). Klein v. Wisconsin Resource Center, 218 Wis. 2d 487, 582 N.W.2d 44 (Ct. App. 1998), 97−0679.

A nonprofit corporation that receives 50% of its funds from a municipality or county is an authority under sub. (1) regardless of the source from which the municipality or county obtained those funds. Cavey v. Walrath, 229 Wis. 2d 105, 598 N.W.2d 240 (Ct. App. 1999), 98−0072.

A person aggrieved by a request made under the open records law has standing to raise a challenge that the requested materials are not records because they fall within the exception for copyrighted material under sub. (2). Under the facts of this case, the language of sub. (2), when viewed in light of the fair use exception to copyright infringement, applied so that the disputed materials were records within the statutory definition. Zellner v. Cedarburg School District, 2007 WI 53, 300 Wis. 2d 290, 731 N.W.2d 240, 06−1143.

"Record" in sub. (2) and s. 19.35 (5) does not include identical copies of otherwise available records. A copy that is not different in some meaningful way from an original, regardless of the form of the original, is an identical copy. If a copy differs in

some significant way for purposes of responding to an open records request, then it is not truly an identical copy, but instead a different record. Stone v. Board of Regents of the University of Wisconsin, 2007 WI App 223, 305 Wis. 2d 679, 741 N.W.2d 774, 06−2537.

A municipality's independent contractor assessor was not an authority under sub. (1) and was not a proper recipient of an open records request. In this case, only the municipalities themselves were the "authorities" for purposes of the open records law. Accordingly, only the municipalities were proper recipients of the relevant open records requests. WIREdata, Inc. v. Village of Sussex, 2008 WI 69, 310 Wis. 2d 397, 751 N.W.2d 736, 05−1473.

A corporation is quasi−governmental if, based on the totality of circumstances, it resembles a governmental corporation in function, effect, or status, requiring a case−by−case analysis. Here, a primary consideration was that the body was funded exclusively by public tax dollars or interest thereon. Additionally, its office was located in the municipal building, it was listed on the city Web site, the city provided it with clerical support and office supplies, all its assets revert to the city if it ceases to exist, its books are open for city inspection, the mayor and another city official are directors, and it had no clients other than the city. State v. Beaver Dam Area Development Corporation, 2008 WI 90, 312 Wis. 2d 84, 752 N.W.2d 295, 06−0662.

Employees' personal emails were not subject to disclosure in this case. Schill v. Wisconsin Rapids School District, 2010 WI 86, 327 Wis. 2d 572, 786 N.W.2d 177, 08−0967.

Redacted portions of emails, who sent the emails, and where they were sent from were not "purely personal" and therefore subject to disclosure. Public awareness of who is attempting to influence public policy is essential for effective oversight of our government. Whether a communication is sent to a public official from a source that appears associated with a particular unit of government, a private entity, or a nonprofit organization, or from individuals who may be associated with a specific interest or particular area of the state, from where a communication is sent further assists the public in understanding who is attempting to influence public policy and why. The John K. MacIver Institute for Public Policy, Inc. v. Erpenbach, 2014 WI App 49, 354 Wis. 2d 61, 848 N.W.2d 862, 13−1187.

To be a "quasi−governmental corporation" under sub. (1) an entity must first be a corporation. To hold that the term "quasi−governmental corporation" includes an entity that is not a corporation would effectively rewrite the statute to eliminate the legislature's use of the word corporation. Wisconsin Professional Police Association, Inc. v. Wisconsin Counties Association, 2014 WI App 106, ___ Wis. 2d ___, ___ N.W.2d ___, 14−0249.

"Notes" in sub. (2) covers a broad range of frequently created, informal writings. Documents found to be notes in this case were mostly handwritten and at times barely legible. They included copies of post−it notes and telephone message slips, and in other ways appeared to reflect hurried, fragmentary, and informal writing. A few documents were in the form of draft letters, but were created for and used by the originators as part of their preparation for, or as part of their processing after, interviews that they conducted. The Voice of Wisconsin Rapids, LLC v. Wisconsin Rapids Public School District, 2015 WI App 53, ___ Wis. 2d ___, ___ N.W.2d ___, 14−1256.

The exception from the definition of "record" in sub. (2) of notes "prepared for the originator's personal use" may apply to notes that are created or used in connection with government work and with a governmental purpose. The Voice of Wisconsin Rapids, LLC v. Wisconsin Rapids Public School District, 2015 WI App 53, ___ Wis. 2d ___, ___ N.W.2d ___, 14−1256.

A district attorney is not an "employee" under sub. (1bg). District attorneys are specifically excluded from the definition. Moustakis v. State of Wisconsin Department of Justice, 2015 WI App 63, ___ Wis. 2d ___, ___ N.W.2d ___, 14−1853.

"Records" must have some relation to the functions of the agency. 72 Atty. Gen. 99.

The treatment of drafts under the public records law is discussed. 77 Atty. Gen. 100.

Applying Open Records Policy to Wisconsin District Attorneys: Can Charging Guidelines Promote Public Awareness? Mayer. 1996 WLR 295.

19.33 Legal custodians. (1) An elective official is the legal custodian of his or her records and the records of his or her office, but the official may designate an employee of his or her staff to act as the legal custodian.

(2) The chairperson of a committee of elective officials, or the designee of the chairperson, is the legal custodian of the records of the committee.

(3) The cochairpersons of a joint committee of elective officials, or the designee of the cochairpersons, are the legal custodians of the records of the joint committee.

(4) Every authority not specified in subs. (1) to (3) shall designate in writing one or more positions occupied by an officer or employee of the authority or the unit of government of which it is a part as a legal custodian to fulfill its duties under this subchapter. In the absence of a designation the authority's highest ranking officer and the chief administrative officer, if any, are the legal custodians for the authority. The legal custodian shall be vested by the authority with full legal power to render decisions and carry out the duties of the authority under this subchapter. Each authority shall provide the name of the legal custodian and a description of the nature of his or her duties under this subchapter to all employees of the authority entrusted with records subject to the legal custodian's supervision.

(5) Notwithstanding sub. (4), if an authority specified in sub. (4) or the members of such an authority are appointed by another authority, the appointing authority may designate a legal custodian for records of the authority or members of the authority appointed by the appointing authority, except that if such an authority is attached for administrative purposes to another authority, the authority performing administrative duties shall designate the legal custodian for the authority for whom administrative duties are performed.

(6) The legal custodian of records maintained in a publicly owned or leased building or the authority appointing the legal custodian shall designate one or more deputies to act as legal custodian of such records in his or her absence or as otherwise required to respond to requests as provided in s. 19.35 (4). This subsection does not apply to members of the legislature or to members of any local governmental body.

(7) The designation of a legal custodian does not affect the powers and duties of an authority under this subchapter.

(8) No elective official of a legislative body has a duty to act as or designate a legal custodian under sub. (4) for the records of any committee of the body unless the official is the highest ranking officer or chief administrative officer of the committee or is designated the legal custodian of the committee's records by rule or by law.

History: 1981 c. 335; 2013 a. 171.

The right to privacy law, s. 895.50, [now s. 995.50] does not affect the duties of a custodian of public records under s. 19.21, 1977 stats. 68 Atty. Gen. 68.

19.34 Procedural information; access times and locations. (1) Each authority shall adopt, prominently display and make available for inspection and copying at its offices, for the guidance of the public, a notice containing a description of its organization and the established times and places at which, the legal custodian under s. 19.33 from whom, and the methods whereby, the public may obtain information and access to records in its custody, make requests for records, or obtain copies of records, and the costs thereof. The notice shall also separately identify each position of the authority that constitutes a local public office or a state public office. This subsection does not apply to members of the legislature or to members of any local governmental body.

(2) (a) Each authority which maintains regular office hours at the location where records in the custody of the authority are kept shall permit access to the records of the authority at all times during those office hours, unless otherwise specifically authorized by law.

(b) Each authority which does not maintain regular office hours at the location where records in the custody of the authority are kept shall:

1. Permit access to its records upon at least 48 hours' written or oral notice of intent to inspect or copy a record; or

2. Establish a period of at least 2 consecutive hours per week during which access to the records of the authority is permitted. In such case, the authority may require 24 hours' advance written or oral notice of intent to inspect or copy a record.

(c) An authority imposing a notice requirement under par. (b) shall include a statement of the requirement in its notice under sub. (1), if the authority is required to adopt a notice under that subsection.

(d) If a record of an authority is occasionally taken to a location other than the location where records of the authority are regularly kept, and the record may be inspected at the place at which records of the authority are regularly kept upon one business day's notice, the authority or legal custodian of the record need not provide access to the record at the occasional location.

History: 1981 c. 335; 2003 a. 47; 2013 a. 171.

NOTE: 2003 Wis. Act 47, which affects this section, contains extensive explanatory notes.

19.345 Time computation. In ss. 19.33 to 19.39, when a time period is provided for performing an act, whether the period is expressed in hours or days, the whole of Saturday, Sunday, and any legal holiday, from midnight to midnight, shall be excluded in computing the period.

History: 2003 a. 47.

NOTE: 2003 Wis. Act 47, which creates this section, contains extensive explanatory notes.

19.35 Access to records; fees. (1) RIGHT TO INSPECTION. (a) Except as otherwise provided by law, any requester has a right to inspect any record. Substantive common law principles construing the right to inspect, copy or receive copies of records shall remain in effect. The exemptions to the requirement of a governmental body to meet in open session under s. 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 under s. 19.33 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.

(am) In addition to any right under par. (a), any requester who is an individual or person authorized by the individual has a right to inspect any personally identifiable information pertaining to the individual in a record containing personally identifiable information that is maintained by an authority and to make or receive a copy of any such information. The right to inspect or copy information in a record under this paragraph does not apply to any of the following:

1. Any record containing personally identifiable information that is collected or maintained in connection with a complaint, investigation or other circumstances that may lead to an enforcement action, administrative proceeding, arbitration proceeding or court proceeding, or any such record that is collected or maintained in connection with such an action or proceeding.

2. Any record containing personally identifiable information that, if disclosed, would do any of the following:

a. Endanger an individual's life or safety.

b. Identify a confidential informant.

c. Endanger the security, including the security of the population or staff, of any state prison under s. 302.01, jail, as defined in s. 165.85 (2) (bg), juvenile correctional facility, as defined in s. 938.02 (10p), secured residential care center for children and youth, as defined in s. 938.02 (15g), mental health institute, as defined in s. 51.01 (12), center for the developmentally disabled, as defined in s. 51.01 (3), or facility, specified under s. 980.065, for the institutional care of sexually violent persons.

d. Compromise the rehabilitation of a person in the custody of the department of corrections or detained in a jail or facility identified in subd. 2. c.

3. Any record that is part of a records series, as defined in s. 19.62 (7), that is not indexed, arranged or automated in a way that the record can be retrieved by the authority maintaining the records series by use of an individual's name, address or other identifier.

(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.

(c) Except as otherwise provided by law, any requester has a right to receive from an authority having custody of a record which is in the form of a comprehensible audio recording a copy of the recording substantially as audible as the original. The authority may instead provide a transcript of the recording to the requester if he or she requests.

(d) Except as otherwise provided by law, any requester has a right to receive from an authority having custody of a record which is in the form of a video recording a copy of the recording substantially as good as the original.

(e) Except as otherwise provided by law, any requester has a right to receive from an authority having custody of a record which is not in a readily comprehensible form a copy of the information contained in the record assembled and reduced to written form on paper.

(em) If an authority receives a request to inspect or copy a record that is in handwritten form or a record that is in the form of a voice recording which the authority is required to withhold or from which the authority is required to delete information under s. 19.36 (8) (b) because the handwriting or the recorded voice would identify an informant, the authority shall provide to the requester, upon his or her request, a transcript of the record or the information contained in the record if the record or information is otherwise subject to public inspection and copying under this subsection.

(f) Notwithstanding par. (b) and except as otherwise provided by law, any requester has a right to inspect any record not specified in pars. (c) to (e) the form of which does not permit copying. If a requester requests permission to photograph the record, the authority having custody of the record may permit the requester to photograph the record. If a requester requests that a photograph of the record be provided, the authority shall provide a good quality photograph of the record.

(g) Paragraphs (a) to (c), (e) and (f) do not apply to a record which has been or will be promptly published with copies offered for sale or distribution.

(h) A request under pars. (a) to (f) is deemed sufficient if it reasonably describes the requested record or the information requested. However, a request for a record without a reasonable limitation as to subject matter or length of time represented by the record does not constitute a sufficient request. A request may be made orally, but a request must be in writing before an action to enforce the request is commenced under s. 19.37.

(i) Except as authorized under this paragraph, no request under pars. (a) and (b) to (f) may be refused because the person making the request is unwilling to be identified or to state the purpose of the request. Except as authorized under this paragraph, no request under pars. (a) to (f) may be refused because the request is received by mail, unless prepayment of a fee is required under sub. (3) (f). A requester may be required to show acceptable identification whenever the requested record is kept at a private residence or whenever security reasons or federal law or regulations so require.

(j) Notwithstanding pars. (a) to (f), a requester shall comply with any regulations or restrictions upon access to or use of information which are specifically prescribed by law.

(k) Notwithstanding pars. (a), (am), (b) and (f), a legal custodian may impose reasonable restrictions on the manner of access to an original record if the record is irreplaceable or easily damaged.

(L) Except as necessary to comply with pars. (c) to (e) or s. 19.36 (6), this subsection does not require an authority to create a new record by extracting information from existing records and compiling the information in a new format.

(2) FACILITIES. The authority shall provide any person who is authorized to inspect or copy a record under sub. (1) (a), (am), (b) or (f) with facilities comparable to those used by its employees to inspect, copy and abstract the record during established office hours. An authority is not required by this subsection to purchase or lease photocopying, duplicating, photographic or other equipment or to provide a separate room for the inspection, copying or abstracting of records.

(3) FEES. (a) An authority may impose a fee upon the requester of a copy of a record which may not exceed the actual, necessary and direct cost of reproduction and transcription of the record, unless a fee is otherwise specifically established or authorized to be established by law.

(b) Except as otherwise provided by law or as authorized to be prescribed by law an authority may impose a fee upon the

requester of a copy of a record that does not exceed the actual, necessary and direct cost of photographing and photographic processing if the authority provides a photograph of a record, the form of which does not permit copying.

(c) Except as otherwise provided by law or as authorized to be prescribed by law, an 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.

(d) An authority may impose a fee upon a requester for the actual, necessary and direct cost of mailing or shipping of any copy or photograph of a record which is mailed or shipped to the requester.

(e) An authority may provide copies of a record without charge or at a reduced charge where the authority determines that waiver or reduction of the fee is in the public interest.

(f) An authority may require prepayment by a requester of any fee or fees imposed under this subsection if the total amount exceeds $5. If the requester is a prisoner, as defined in s. 301.01 (2), or is a person confined in a federal correctional institution located in this state, and he or she has failed to pay any fee that was imposed by the authority for a request made previously by that requester, the authority may require prepayment both of the amount owed for the previous request and the amount owed for the current request.

(g) Notwithstanding par. (a), if a record is produced or collected by a person who is not an authority pursuant to a contract entered into by that person with an authority, the authorized fees for obtaining a copy of the record may not exceed the actual, necessary, and direct cost of reproduction or transcription of the record incurred by the person who makes the reproduction or transcription, unless a fee is otherwise established or authorized to be established by law.

(4) TIME FOR COMPLIANCE AND PROCEDURES. (a) Each authority, upon request for any record, 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.

(b) If a request is made orally, the authority may deny the request orally unless a demand for a written statement of the reasons denying the request is made by the requester within 5 business days of the oral denial. 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. Every written denial of a request by an authority shall 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.

(c) If an authority receives a request under sub. (1) (a) or (am) from an individual or person authorized by the individual who identifies himself or herself and states that the purpose of the request is to inspect or copy a record containing personally identifiable information pertaining to the individual that is maintained by the authority, the authority shall deny or grant the request in accordance with the following procedure:

1. The authority shall first determine if the requester has a right to inspect or copy the record under sub. (1) (a).

2. If the authority determines that the requester has a right to inspect or copy the record under sub. (1) (a), the authority shall grant the request.

3. If the authority determines that the requester does not have a right to inspect or copy the record under sub. (1) (a), the authority shall then determine if the requester has a right to inspect or copy the record under sub. (1) (am) and grant or deny the request accordingly.

(5) RECORD DESTRUCTION. No authority may destroy any record at any time after the receipt of a request for inspection or copying of the record under sub. (1) until after the request is granted or until at least 60 days after the date that the request is denied or, if the requester is a committed or incarcerated person, until at least 90 days after the date that the request is denied. If an authority receives written notice that an action relating to a record has been commenced under s. 19.37, the record may not be destroyed until after the order of the court in relation to such record is issued and the deadline for appealing that order has passed, or, if appealed, until after the order of the court hearing the appeal is issued. If the court orders the production of any record and the order is not appealed, the record may not be destroyed until after the request for inspection or copying is granted.

(6) ELECTIVE OFFICIAL RESPONSIBILITIES. No elective official is responsible for the record of any other elective official unless he or she has possession of the record of that other official.

(7) LOCAL INFORMATION TECHNOLOGY AUTHORITY RESPONSIBILITY FOR LAW ENFORCEMENT RECORDS. (a) In this subsection:

1. "Law enforcement agency" has the meaning given s. 165.83 (1) (b).

2. "Law enforcement record" means a record that is created or received by a law enforcement agency and that relates to an investigation conducted by a law enforcement agency or a request for a law enforcement agency to provide law enforcement services.

3. "Local information technology authority" means a local public office or local governmental unit whose primary function is information storage, information technology processing, or other information technology usage.

(b) For purposes of requests for access to records under sub. (1), a local information technology authority that has custody of a law enforcement record for the primary purpose of information storage, information technology processing, or other information technology usage is not the legal custodian of the record. For such purposes, the legal custodian of a law enforcement record is the authority for which the record is stored, processed, or otherwise used.

(c) A local information technology authority that receives a request under sub. (1) for access to information in a law enforcement record shall deny any portion of the request that relates to information in a local law enforcement record.

History: 1981 c. 335, 391; 1991 a. 39, 1991 a. 269 ss. 34am, 40am; 1993 a. 93; 1995 a. 77, 158; 1997 a. 94, 133; 1999 a. 9; 2001 a. 16; 2005 a. 344; 2009 a. 259, 370; 2013 a. 171.

NOTE: The following annotations relate to public records statutes in effect prior to the creation of s. 19.35 by ch. 335, laws of 1981.

A mandamus petition to inspect a county hospital's statistical, administrative, and other records not identifiable with individual patients, states a cause of action under this section. State ex rel. Dalton v. Mundy, 80 Wis. 2d 190, 257 N.W.2d 877 (1977).

Police daily arrest lists must be open for public inspection. Newspapers, Inc. v. Breier, 89 Wis. 2d 417, 279 N.W.2d 179 (1979).

This section is a statement of the common law rule that public records are open to public inspection subject to common law limitations. Section 59.14 [now 59.20 (3)] is a legislative declaration granting persons who come under its coverage an absolute right of inspection subject only to reasonable administrative regulations. State ex rel. Bilder v. Town of Delavan, 112 Wis. 2d 539, 334 N.W.2d 252 (1983).

A newspaper had the right to intervene to protect its right to examine sealed court files. State ex rel. Bilder v. Town of Delavan 112 Wis. 2d 539, 334 N.W.2d 252 (1983).

Examination of birth records cannot be denied simply because the examiner has a commercial purpose. 58 Atty. Gen. 67.

Consideration of a resolution is a formal action of an administrative or minor governing body. When taken in a proper closed session, the resolution and result of the vote must be made available for public inspection absent a specific showing that the public interest would be adversely affected. 60 Atty. Gen. 9.

Inspection of public records obtained under official pledges of confidentiality may be denied if: 1) a clear pledge has been made in order to obtain the information; 2) the pledge was necessary to obtain the information; and 3) the custodian determines that the harm to the public interest resulting from inspection would outweigh the public interest in full access to public records. The custodian must permit inspection of information submitted under an official pledge of confidentiality if the official or agency had specific statutory authority to require its submission. 60 Atty. Gen. 284.

The right to inspection and copying of public records in decentralized offices is discussed. 61 Atty. Gen. 12.

Public records subject to inspection and copying by any person would include a list of students awaiting a particular program in a VTAE (technical college) district school. 61 Atty. Gen. 297.

The investment board can only deny members of the public from inspecting and copying portions of the minutes relating to the investment of state funds and docu-

ments pertaining thereto on a case−by−case basis if valid reasons for denial exist and are specially stated. 61 Atty. Gen. 361.

Matters and documents in the possession or control of school district officials containing information concerning the salaries, including fringe benefits, paid to individual teachers are matters of public record. 63 Atty. Gen. 143.

The department of administration probably had authority under s. 19.21 (1) and (2), 1973 stats., to provide a private corporation with camera−ready copy of session laws that is the product of a printout of computer stored public records if the costs are minimal. The state cannot contract on a continuing basis for the furnishing of this service. 63 Atty. Gen. 302.

The scope of the duty of the governor to allow members of the public to examine and copy public records in his custody is discussed. 63 Atty. Gen. 400.

The public's right to inspect land acquisition files of the department of natural resources is discussed. 63 Atty. Gen. 573.

Financial statements filed in connection with applications for motor vehicle dealers' and motor vehicle salvage dealers' licenses are public records, subject to limitations. 66 Atty. Gen. 302.

Sheriff's radio logs, intradepartmental documents kept by the sheriff, and blood test records of deceased automobile drivers in the hands of the sheriff are public records, subject to limitations. 67 Atty. Gen. 12.

Plans and specifications filed under s. 101.12 are public records and are available for public inspection. 67 Atty. Gen. 214.

Under s. 19.21 (1), district attorneys must indefinitely preserve papers of a documentary nature evidencing activities of prosecutor's office. 68 Atty. Gen. 17.

The right to examine and copy computer−stored information is discussed. 68 Atty. Gen. 231.

After the transcript of court proceedings is filed with the clerk of court, any person may examine or copy the transcript. 68 Atty. Gen. 313.

NOTE: The following annotations relate to s. 19.35.

Although a meeting was properly closed, in order to refuse inspection of records of the meeting, the custodian was required by sub. (1) (a) to state specific and sufficient public policy reasons why the public's interest in nondisclosure outweighed the right of inspection. Oshkosh Northwestern Co. v. Oshkosh Library Board, 125 Wis. 2d 480, 373 N.W.2d 459 (Ct. App. 1985).

Courts must apply the open records balancing test to questions involving disclosure of court records. The public interests favoring secrecy must outweigh those favoring disclosure. C. L. v. Edson, 140 Wis. 2d 168, 409 N.W.2d 417 (Ct. App. 1987).

Public records germane to pending litigation were available under this section even though the discovery cutoff deadline had passed. State ex rel. Lank v. Rzentkowski, 141 Wis. 2d 846, 416 N.W.2d 635 (Ct. App. 1987).

To upheld a custodian's denial of access, an appellate court will inquire whether the trial court made a factual determination supported by the record of whether documents implicate a secrecy interest, and, if so, whether the secrecy interest outweighs the interests favoring release. Milwaukee Journal v. Call, 153 Wis. 2d 313, 450 N.W.2d 515 (Ct. App. 1989).

That releasing records would reveal a confidential informant's identity was a legally specific reason for denial of a records request. The public interest in not revealing the informant's identity outweighed the public interest in disclosure of the records. Mayfair Chrysler−Plymouth v. Baldarotta, 162 Wis. 2d 142, 469 N.W.2d 638 (1991).

Items subject to examination under s. 346.70 (4) (f) may not be withheld by the prosecution under a common law rule that investigative material may be withheld from a criminal defendant. State ex rel. Young v. Shaw, 165 Wis. 2d 276, 477 N.W.2d 340 (Ct. App. 1991).

Prosecutors' files are exempt from public access under the common law. State ex rel. Richards v. Foust, 165 Wis. 2d 429, 477 N.W.2d 608 (1991).

Records relating to pending claims against the state under s. 893.82 need not be disclosed under s. 19.35. Records of non−pending claims must be disclosed unless an *in camera* inspection reveals that the attorney−client privilege would be violated. George v. Record Custodian, 169 Wis. 2d 573, 485 N.W.2d 460 (Ct. App. 1992).

The public records law confers no exemption as of right on indigents from payment of fees under sub. (3). George v. Record Custodian, 169 Wis. 2d 573, 485 N.W.2d 460 (Ct. App. 1992).

The denial of a prisoner's information request regarding illegal behavior by guards on the grounds that it could compromise the guards' effectiveness and subject them to harassment was insufficient. State ex. rel. Ledford v. Turcotte, 195 Wis. 2d 244, 536 N.W.2d 130 (Ct. App. 1995), 94−2710.

The amount of prepayment required for copies may be based on a reasonable estimate. State ex rel. Hill v. Zimmerman, 196 Wis. 2d 419, 538 N.W.2d 608 (Ct. App. 1995), 94−1861.

The *Foust* decision does not automatically exempt all records stored in a closed prosecutorial file. The exemption is limited to material actually pertaining to the prosecution. Nichols v. Bennett, 199 Wis. 2d 268, 544 N.W.2d 428 (1996), 93−2480.

Department of Regulation and Licensing test scores were subject to disclosure under the open records law. Munroe v. Braatz, 201 Wis. 2d 442, 549 N.W.2d 452 (Ct. App. 1996), 95−2557.

Subs. (1) (i) and (3) (f) did not permit a demand for prepayment of $1.29 in response to a mail request for a record. Borzych v. Paluszcyk, 201 Wis. 2d 523, 549 N.W.2d 253 (Ct. App. 1996), 95−1711.

An agency cannot promulgate an administrative rule that creates an exception to the open records law. Chavala v. Bubolz, 204 Wis. 2d 82, 552 N.W.2d 892 (Ct. App. 1996), 95−3120.

While certain statutes grant explicit exceptions to the open records law, many statutes set out broad categories of records not open to an open records request. A custodian faced with such a broad statute must state with specificity a public policy reason for refusing to release the requested record. Chavala v. Bubolz, 204 Wis. 2d 82, 552 N.W.2d 892 (Ct. App. 1996), 95−3120.

The custodian is not authorized to comply with an open records request at some unspecified date in the future. Such a response constitutes a denial of the request. WTMJ, Inc. v. Sullivan, 204 Wis. 2d 452, 555 N.W.2d 125 (Ct. App. 1996), 96−0053.

Subject to the redaction of officers' home addresses and supervisors' conclusions and recommendations regarding discipline, police records regarding the use of deadly force were subject to public inspection. State ex rel. Journal/Sentinel, Inc. v. Arreola, 207 Wis. 2d 496, 558 N.W.2d 670 (Ct. App. 1996), 95−2956.

A public school student's interim grades are pupil records specifically exempted from disclosure under s. 118.125. If records are specifically exempted from disclosure, failure to specifically state reasons for denying an open records request for those records does not compel disclosure of those records. State ex rel. Blum v. Board of Education, 209 Wis. 2d 377, 565 N.W.2d 140 (Ct. App. 1997), 96−0758.

Requesting a copy of 180 hours of audiotape of "911" calls, together with a transcription of the tape and log of each transmission received, was a request without "reasonable limitation" and was not a "sufficient request" under sub. (1) (h). Schopper v. Gehring, 210 Wis. 2d 208, 565 N.W.2d 187 (Ct. App. 1997), 96−2782.

If the requested information is covered by an exempting statute that does not require a balancing of public interests, there is no need for a custodian to conduct such a balancing. Written denial claiming a statutory exception by citing the specific statute or regulation is sufficient. State ex rel. Savinski v. Kimble, 221 Wis. 2d 833, 586 N.W.2d 36 (Ct. App. 1998), 97−3356.

Protecting persons who supply information or opinions about an inmate to the parole commission is a public interest that may outweigh the public interest in access to documents that could identify those persons. State ex rel. Bergmann v. Faust, 226 Wis. 2d 273, 595 N.W.2d 75 (Ct. App. 1999), 98−2537.

Sub. (1) (b) gives the record custodian, and not the requester, the choice of how a record will be copied. The requester cannot elect to use his or her own copying equipment without the custodian's permission. Grebner v. Schiebel, 2001 WI App 17, 240 Wis. 2d 551, 624 N.W.2d 892, 00−1549.

Requests for university admissions records focusing on test scores, class rank, grade point average, race, gender, ethnicity, and socio−economic background was not a request for personally identifiable information, and release was not barred by federal law or public policy. That the requests would require the university to redact information from thousands of documents under s. 19.36 (6) did not essentially require the university to create new records and, as such, did not provide grounds for denying the request under s. 19.35 (1) (L). Osborn v. Board of Regents of the University of Wisconsin System, 2002 WI 83, 254 Wis. 2d 266, 647 N.W.2d 158, 00−2861.

The police report of a closed investigation regarding a teacher's conduct that did not lead either to an arrest, prosecution, or any administrative disciplinary action, was subject to release. Linzmeyer v. Forcey, 2002 WI 84, 254 Wis. 2d 306, 646 N.W.2d 811, 01−0197.

The John Doe statute, s. 968.26, which authorizes secrecy in John Doe proceedings, is a clear statement of legislative policy and constitutes a specific exception to the public records law. On review of a petition for a writ stemming from a secret John Doe proceeding, the court of appeals may seal parts of a record in order to comply with existing secrecy orders issued by the John Doe judge. Unnamed Persons Numbers 1, 2, and 3 v. State, 2003 WI 30, 260 Wis. 2d 653, 660 N.W.2d 260, 01−3220.

Sub. (1) (am) is not subject to a balancing of interests. Therefore, the exceptions to sub. (1) (am) should not be narrowly construed. A requester who does not qualify for access to records under sub. (1) (am) will always have the right to seek records under sub. (1) (a), in which case the records custodian must determine whether the requested records are subject to a statutory or common law exception, and if not whether the strong presumption favoring access and disclosure is overcome by some even stronger public policy favoring limited access or nondisclosure determined by applying a balancing test. Hempel v. City of Baraboo, 2005 WI 120, 284 Wis. 2d 162, 699 N.W.2d 551, 03−0500.

Sub. (1) (a) does not mandate that, when a meeting is closed under s. 19.85, all records created for or presented at the meeting are exempt from disclosure. The court must still apply the balancing test articulated in *Linzmeyer*. Zellner v. Cedarburg School District, 2007 WI 53, 300 Wis. 2d 290, 731 N.W.2d 240, 06−1143.

A general request does not trigger the sub. (4) (c) review sequence. Sub. (4) (c) recites the procedure to be employed if an authority receives a request under sub. (1) (a) or (am). An authority is an entity having custody of a record. The definition does not include a reviewing court. Seifert v. School District of Sheboygan Falls, 2007 WI App 207, 305 Wis. 2d 582, 740 N.W.2d 177, 06−2071.

The open records law cannot be used to circumvent established principles that shield attorney work product, nor can it be used as a discovery tool. The presumption of access under sub. (1) (a) is defeated because the attorney work product qualifies under the "otherwise provided by law" exception. Seifert v. School District of Sheboygan Falls, 2007 WI App 207, 305 Wis. 2d 582, 740 N.W.2d 177, 06−2071.

Sub. (1) (am) 1. plainly allows a records custodian to deny access to one who is, in effect, a potential adversary in litigation or other proceeding unless or until required to do so under the rules of discovery in actual litigation. The balancing of interests under sub. (1) (a) must include examining all the relevant factors in the context of the particular circumstances and may include the balancing the competing interests consider sub. (1) (am) 1. when evaluating the entire set of facts and making its specific demonstration of the need for withholding the records. Seifert v. School District of Sheboygan Falls, 2007 WI App 207, 305 Wis. 2d 582, 740 N.W.2d 177, 06−2071.

The sub. (1) (am) analysis is succinct. There is no balancing. There is no requirement that the investigation be current for the exemption for records "collected or maintained in connection with a complaint, investigation or other circumstances that may lead to . . . [a] court proceeding" to apply. Seifert v. School District of Sheboygan Falls, 2007 WI App 207, 305 Wis. 2d 582, 740 N.W.2d 177, 06−2071.

"Record" in sub. (5) and s. 19.32 (2) does not include identical copies of otherwise available records. A copy that is not different in some meaningful way from an original, regardless of the form of the original, is an identical copy. If a copy differs in some significant way for purposes of responding to an open records request, then it is not truly an identical copy, but instead a different record. Stone v. Board of Regents of the University of Wisconsin, 2007 WI App 223, 305 Wis. 2d 679, 741 N.W.2d 774, 06−2537.

Schopper does not permit a records custodian to deny a request based solely on the custodian's assertion that the request could reasonably be narrowed, nor does *Schopper* require that the custodian take affirmative steps to limit the search as a prerequisite to denying a request under sub. (1) (h). The fact that the request may result in the generation of a large volume of records is not, in itself, a sufficient reason to deny a request as not properly limited, but at some point, an overly broad request becomes

sufficiently excessive to warrant rejection under sub. (1) (h). Gehl v. Connors, 2007 WI App 238, 306 Wis. 2d 247, 742 N.W.2d 530, 06−2455.

The public records law addresses the duty to disclose records; it does not address the duty to retain records. An agency's alleged failure to keep sought−after records may not be attacked under the public records law. Section 19.21 relates to records retention and is not a part of the public records law. Gehl v. Connors, 2007 WI App 238, 306 Wis. 2d 247, 742 N.W.2d 530, 06−2455.

Foust held that a common law categorical exception exists for records in the custody of a district attorney's office, not for records in the custody of a law enforcement agency. A sheriff's department is legally obligated to provide public access to records in its possession, which cannot be avoided by invoking a common law exception that is exclusive to the records of another custodian. That the same record was in the custody of both the law enforcement agency and the district attorney does not change the outcome. To the extent that a sheriff's department can articulate a policy reason why the public interest in disclosure is outweighed by the interest in withholding the particular record it may properly deny access. Portage Daily Register v. Columbia Co. Sheriff's Department, 2008 WI App 30, 308 Wis. 2d 357, 746 N.W.2d 525, 07−0323.

When requests are complex, municipalities should be afforded reasonable latitude in time for their responses. An authority should not be subjected to the burden and expense of a premature public records lawsuit while it is attempting in good faith to respond, or to determine how to respond, to a request. What constitutes a reasonable time for a response by an authority 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. Village of Sussex, 2008 WI 69, 310 Wis. 2d 397, 751 N.W.2d 736, 05−1473.

Employees' personal emails were not subject to disclosure in this case. Schill v. Wisconsin Rapids School District, 2010 WI 86, 327 Wis. 2d 572, 786 N.W.2d 177, 08−0967.

Under sub. (3) the legislature provided four tasks for which an authority may impose fees on a requester: "reproduction and transcription," "photographing and photographic processing," "locating," and "mailing or shipping." For each task, an authority is permitted to impose a fee that does not exceed the "actual, necessary and direct" cost of the task. The process of redacting information from a record does not fit into any of the four statutory tasks. Milwaukee Journal Sentinel v. City of Milwaukee, 2012 WI 65, 341 Wis. 2d 607, 815 N.W.2d 367, 11−1112.

Redacted portions of emails, who sent the emails, and where they were sent from were not "purely personal" and therefore subject to disclosure. Public awareness of who is attempting to influence public policy is essential for effective oversight of our government. Whether a communication is sent to a public official from a source that appears associated with a particular unit of government, a private entity, or a nonprofit organization, or from individuals who may be associated with a specific interest or particular area of the state, from where a communication is sent further assists the public in understanding who is attempting to influence public policy and why. The John K. MacIver Institute for Public Policy, Inc. v. Erpenbach, 2014 WI App 49, 354 Wis. 2d 61, 848 N.W.2d 862, 13−1187.

The record requester's identity was relevant in this case. As a general proposition, the identity and purpose of the requester of public records is not a part of the balancing test to be applied in determining whether to release records. However, the determination of whether there is a safety concern that outweighs the presumption of disclosure is a fact−intensive inquiry determined on a case−by−case basis. Ardell v. Milwaukee Board of School Directors, 2014 WI App 66, 354 Wis. 2d 471, 849 N.W.2d 894, 13−1650.

In the present case, although the defendant commission's responses did not state that no record existed, that omission did not impair the court's ability to determine whether a statutory exemption to disclosure applied. Under the facts of the case, the defendant commission lawfully denied the plaintiff newspaper's request because no responsive record existed at the time of the request. The Journal Times v. City of Racine Board of Police and Fire Commissioners, 2015 WI 56, ___ Wis. 2d ___, ___ N.W.2d ___, 13−1715.

Sub. (4) (a) does not requires immediate disclosure of a record. It allows a custodian a reasonable amount of time to respond to a public records request. The Journal Times v. City of Racine Board of Police and Fire Commissioners, 2015 WI 56, ___ Wis. 2d ___, ___ N.W.2d ___, 13−1715.

There is no obligation to create a record in response to an open records request and a requester is not entitled to the release of information in response to a public records request. The Journal Times v. City of Racine Board of Police and Fire Commissioners, 2015 WI 56, ___ Wis. 2d ___, ___ N.W.2d ___, 13−1715.

A custodian may not require a requester to pay the cost of an unrequested certification. Unless the fee for copies of records is established by law, a custodian may not charge more than the actual and direct cost of reproduction. 72 Atty. Gen. 36.

Copying fees, but not location fees, may be imposed on a requester for the cost of a computer run. 72 Atty. Gen. 68.

The fee for copying public records is discussed. 72 Atty. Gen. 150.

Public records relating to employee grievances are not generally exempt from disclosure. Nondisclosure must be justified on a case−by−case basis. 73 Atty. Gen. 20.

The disclosure of an employee's birthdate, sex, ethnic heritage, and handicapped status is discussed. 73 Atty. Gen. 26.

The department of regulation and licensing may refuse to disclose records relating to complaints against health care professionals while the matters are merely "under investigation." Good faith disclosure of the records will not expose the custodian to liability for damages. Prospective continuing requests for records are not contemplated by public records law. 73 Atty. Gen. 37.

Prosecutors' case files are exempt from disclosure. 74 Atty. Gen. 4.

The relationship between the public records law and pledges of confidentiality in settlement agreements is discussed. 74 Atty. Gen. 14.

A computerized compilation of bibliographic records is discussed in relation to copyright law; a requester is entitled to a copy of a computer tape or a printout of information on the tape. 75 Atty. Gen. 133 (1986).

Ambulance records relating to medical history, condition, or treatment are confidential while other ambulance call records are subject to disclosure under the public records law. 78 Atty. Gen. 71.

Courts are likely to require disclosure of legislators' mailing and distribution lists absent a factual showing that the public interest in withholding the records outweighs the public interest in their release. OAG 2−03.

If a legislator custodian decides that a mailing or distribution list compiled and used for official purposes must be released under the public records statute, the persons whose names, addresses or telephone numbers are contained on the list are not entitled to notice and the opportunity to challenge the decision prior to release of the record. OAG 2−03.

Access Denied: How *Woznicki v. Erickson* Reversed the Statutory Presumption of Openness in the Wisconsin Open Records Law. Munro. 2002 WLR 1197.

19.356 Notice to record subject; right of action. **(1)** Except as authorized in this section or as otherwise provided by statute, no authority is required to notify a record subject prior to providing to a requester access to a record containing information pertaining to that record subject, and no person is entitled to judicial review of the decision of an authority to provide a requester with access to a record.

(2) (a) Except as provided in pars. (b) to (d) and as otherwise authorized or required by statute, if an authority decides under s. 19.35 to permit access to a record specified in this paragraph, the authority shall, before permitting access and within 3 days after making the decision to permit access, serve written notice of that decision on any record subject to whom the record pertains, either by certified mail or by personally serving the notice on the record subject. The notice shall briefly describe the requested record and include a description of the rights of the record subject under subs. (3) and (4). This paragraph applies only to the following records:

1. A record containing information relating to an employee that is created or kept by the authority and that is the result of an investigation into a disciplinary matter involving the employee or possible employment−related violation by the employee of a statute, ordinance, rule, regulation, or policy of the employee's employer.

2. A record obtained by the authority through a subpoena or search warrant.

3. A record prepared by an employer other than an authority, if that record contains information relating to an employee of that employer, unless the employee authorizes the authority to provide access to that information.

(b) Paragraph (a) does not apply to an authority who provides access to a record pertaining to an employee to the employee who is the subject of the record or to his or her representative to the extent required under s. 103.13 or to a recognized or certified collective bargaining representative to the extent required to fulfill a duty to bargain or pursuant to a collective bargaining agreement under ch. 111.

(c) Paragraph (a) does not apply to access to a record produced in relation to a function specified in s. 106.54 or 230.45 or subch. II of ch. 111 if the record is provided by an authority having responsibility for that function.

(d) Paragraph (a) does not apply to the transfer of a record by the administrator of an educational agency to the state superintendent of public instruction under s. 115.31 (3) (a).

(3) Within 5 days after receipt of a notice under sub. (2) (a), a record subject may provide written notification to the authority of his or her intent to seek a court order restraining the authority from providing access to the requested record.

(4) Within 10 days after receipt of a notice under sub. (2) (a), a record subject may commence an action seeking a court order to restrain the authority from providing access to the requested record. If a record subject commences such an action, the record subject shall name the authority as a defendant. Notwithstanding s. 803.09, the requester may intervene in the action as a matter of right. If the requester does not intervene in the action, the authority shall notify the requester of the results of the proceedings under this subsection and sub. (5).

(5) An authority shall not provide access to a requested record within 12 days of sending a notice pertaining to that record under sub. (2) (a). In addition, if the record subject commences an action under sub. (4), the authority shall not provide access to the requested record during pendency of the action. If the record subject appeals or petitions for review of a decision of the court or the time for appeal or petition for review of a decision adverse to the

record subject has not expired, the authority shall not provide access to the requested record until any appeal is decided, until the period for appealing or petitioning for review expires, until a petition for review is denied, or until the authority receives written notice from the record subject that an appeal or petition for review will not be filed, whichever occurs first.

(6) The court, in an action commenced under sub. (4), may restrain the authority from providing access to the requested record. The court shall apply substantive common law principles construing the right to inspect, copy, or receive copies of records in making its decision.

(7) The court, in an action commenced under sub. (4), shall issue a decision within 10 days after the filing of the summons and complaint and proof of service of the summons and complaint upon the defendant, unless a party demonstrates cause for extension of this period. In any event, the court shall issue a decision within 30 days after those filings are complete.

(8) If a party appeals a decision of the court under sub. (7), the court of appeals shall grant precedence to the appeal over all other matters not accorded similar precedence by law. An appeal shall be taken within the time period specified in s. 808.04 (1m).

(9) (a) Except as otherwise authorized or required by statute, if an authority decides under s. 19.35 to permit access to a record containing information relating to a record subject who is an officer or employee of the authority holding a local public office or a state public office, the authority shall, before permitting access and within 3 days after making the decision to permit access, serve written notice of that decision on the record subject, either by certified mail or by personally serving the notice on the record subject. The notice shall briefly describe the requested record and include a description of the rights of the record subject under par. (b).

(b) Within 5 days after receipt of a notice under par. (a), a record subject may augment the record to be released with written comments and documentation selected by the record subject. Except as otherwise authorized or required by statute, the authority under par. (a) shall release the record as augmented by the record subject.

History: 2003 a. 47; 2011 a. 84.

NOTE: 2003 Wis. Act 47, which creates this section, contains extensive explanatory notes.

The right of a public employee to obtain de novo judicial review of an authority's decision to allow public access to certain records granted by this section is no broader than the common law right previously recognized. It is not a right to prevent disclosure solely on the basis of a public employee's privacy and reputational interests. The public's interest in not injuring the reputations of public employees must be given due consideration, but it is not controlling. Local 2489 v. Rock County, 2004 WI App 210, 277 Wis. 2d 208, 689 N.W.2d 644, 03−3101.

An intervenor as of right under the statute is "a party" under sub. (8) whose appeal is subject to the "time period specified in s. 808.04 (1m)." The only time period referenced in s. 808.04 (1m) is 20 days. Zellner v. Herrick, 2009 WI 80, 319 Wis. 2d 532, 770 N.W.2d 305, 07−2584.

This section does not set forth the only course of action that the subject of a disclosure may engage in to prevent disclosure. Subs. (3) and (4) state that "a record subject may commence an action." The plain language of the statute in no way discourages the subject of a records request from engaging in less litigious means to prevent disclosure nor does it prevent a records custodian from changing its mind. Ardell v. Milwaukee Board of School Directors, 2014 WI App 66, 354 Wis. 2d 471, 849 N.W.2d 894, 13−1650.

A district attorney is not an "employee" as defined in s. 19.32 (1bg) and therefore requested records in this case relating to any complaints or investigations regarding the named district attorney did not contain information "relating to an employee" under sub. (2) (a) 1. Moustakis v. State of Wisconsin Department of Justice, 2015 WI App 63, ___ Wis. 2d ___, ___ N.W.2d ___, 14−1853.

Sub. (2) (a) 1. must be interpreted as requiring notification when an authority proposes to release records in its possession that are the result of an investigation by an employer into a disciplinary or other employment matter involving an employee, but not when there has been an investigation of possible employment−related violation by the employee and the investigation is conducted by some entity other than the employee's employer. OAG 1−06.

Sub. (2) (a) 2. is unambiguous. If an authority has obtained a record through a subpoena or a search warrant, it must provide the requisite notice before releasing the records. The duty to notify, however, does not require notice to every record subject who happens to be named in the subpoena or search warrant records. Under sub. (2) (a), DCI must serve written notice of the decision to release the record to any record subject to whom the record pertains. OAG 1−06.

To the extent any requested records proposed to be released are records prepared by a private employer and those records contain information pertaining to one of the private employer's employees, sub. (2) (a) 3. does not allow release of the information without obtaining authorization from the individual employee. OAG 1−06.

Sub. (9) does not require advance notification and a 5−day delay before releasing a record that mentions the name of a person holding state or local public office in any way. A record mentioning the name of a public official does not necessarily relate to that public official within the meaning of sub. (9) (a). Sub. (9) is not limited, however, to the specific categories of records enumerated in sub. (2) (a). OAG 7−14.

19.36 Limitations upon access and withholding. **(1)** APPLICATION OF OTHER LAWS. Any record which is specifically exempted from disclosure by state or federal law or authorized to be exempted from disclosure by state law is exempt from disclosure under s. 19.35 (1), except that any portion of that record which contains public information is open to public inspection as provided in sub. (6).

(2) LAW ENFORCEMENT RECORDS. Except as otherwise provided by law, whenever federal law or regulations require or as a condition to receipt of aids by this state require that any record relating to investigative information obtained for law enforcement purposes be withheld from public access, then that information is exempt from disclosure under s. 19.35 (1).

(3) CONTRACTORS' RECORDS. Subject to sub. (12), each authority shall make available for inspection and copying under s. 19.35 (1) any record produced or collected under a contract entered into by the authority with a person other than an authority to the same extent as if the record were maintained by the authority. This subsection does not apply to the inspection or copying of a record under s. 19.35 (1) (am).

(4) COMPUTER PROGRAMS AND DATA. A computer program, as defined in s. 16.971 (4) (c), is not subject to examination or copying under s. 19.35 (1), but the material used as input for a computer program or the material produced as a product of the computer program is subject to the right of examination and copying, except as otherwise provided in s. 19.35 or this section.

(5) TRADE SECRETS. An authority may withhold access to any record or portion of a record containing information qualifying as a trade secret as defined in s. 134.90 (1) (c).

(6) SEPARATION OF INFORMATION. If a record contains information that is subject to disclosure under s. 19.35 (1) (a) or (am) and information that is not subject to such disclosure, the authority having custody of the record shall provide the information that is subject to disclosure and delete the information that is not subject to disclosure from the record before release.

(7) IDENTITIES OF APPLICANTS FOR PUBLIC POSITIONS. (a) In this subsection:

1. "Final candidate" means each applicant who is seriously considered for appointment or whose name is certified for appointment, and whose name is submitted for final consideration to an authority for appointment, to any of the following:

a. A state position that is not a position in the classified service and that is not a position in the University of Wisconsin System.

b. A local public office.

c. The position of president, vice president, or senior vice president of the University of Wisconsin System; the position of chancellor of an institution; or the position of the vice chancellor who serves as deputy at each institution.

2. "Final candidate" includes all of the following, but only with respect to the offices and positions described under subd. 1. a. and b.:

a. Whenever there are at least 5 applicants for an office or position, each of the 5 applicants who are considered the most qualified for the office or position by an authority.

b. Whenever there are fewer than 5 applicants for an office or position, each applicant.

c. Whenever an appointment is to be made from a group of more than 5 applicants considered the most qualified for an office or position by an authority, each applicant in that group.

3. "Institution" has the meaning given in s. 36.05 (9).

(b) Every applicant for a position with any authority may indicate in writing to the authority that the applicant does not wish the authority to reveal his or her identity. Except with respect to an applicant whose name is certified for appointment to a position in

the state classified service or a final candidate, if an applicant makes such an indication in writing, the authority shall not provide access to any record related to the application that may reveal the identity of the applicant.

(8) IDENTITIES OF LAW ENFORCEMENT INFORMANTS. (a) In this subsection:

1. "Informant" means an individual who requests confidentiality from a law enforcement agency in conjunction with providing information to that agency or, pursuant to an express promise of confidentiality by a law enforcement agency or under circumstances in which a promise of confidentiality would reasonably be implied, provides information to a law enforcement agency or, is working with a law enforcement agency to obtain information, related in any case to any of the following:

a. Another person who the individual or the law enforcement agency suspects has violated, is violating or will violate a federal law, a law of any state or an ordinance of any local government.

b. Past, present or future activities that the individual or law enforcement agency believes may violate a federal law, a law of any state or an ordinance of any local government.

2. "Law enforcement agency" has the meaning given in s. 165.83 (1) (b), and includes the department of corrections.

(b) If an authority that is a law enforcement agency receives a request to inspect or copy a record or portion of a record under s. 19.35 (1) (a) that contains specific information including but not limited to a name, address, telephone number, voice recording or handwriting sample which, if disclosed, would identify an informant, the authority shall delete the portion of the record in which the information is contained or, if no portion of the record can be inspected or copied without identifying the informant, shall withhold the record unless the legal custodian of the record, designated under s. 19.33, makes a determination, at the time that the request is made, that the public interest in allowing a person to inspect, copy or receive a copy of such identifying information outweighs the harm done to the public interest by providing such access.

(9) RECORDS OF PLANS OR SPECIFICATIONS FOR STATE BUILDINGS. Records containing plans or specifications for any state−owned or state−leased building, structure or facility or any proposed state−owned or state−leased building, structure or facility are not subject to the right of inspection or copying under s. 19.35 (1) except as the department of administration otherwise provides by rule.

(10) EMPLOYEE PERSONNEL RECORDS. Unless access is specifically authorized or required by statute, an authority shall not provide access under s. 19.35 (1) to records containing the following information, except to an employee or the employee's representative to the extent required under s. 103.13 or to a recognized or certified collective bargaining representative to the extent required to fulfill a duty to bargain under ch. 111 or pursuant to a collective bargaining agreement under ch. 111:

(a) Information maintained, prepared, or provided by an employer concerning the home address, home electronic mail address, home telephone number, or social security number of an employee, unless the employee authorizes the authority to provide access to such information.

(b) Information relating to the current investigation of a possible criminal offense or possible misconduct connected with employment by an employee prior to disposition of the investigation.

(c) Information pertaining to an employee's employment examination, except an examination score if access to that score is not otherwise prohibited.

(d) Information relating to one or more specific employees that is used by an authority or by the employer of the employees for staff management planning, including performance evaluations, judgments, or recommendations concerning future salary adjustments or other wage treatments, management bonus plans, promotions, job assignments, letters of reference, or other comments or ratings relating to employees.

(11) RECORDS OF AN INDIVIDUAL HOLDING A LOCAL PUBLIC OFFICE OR A STATE PUBLIC OFFICE. Unless access is specifically authorized or required by statute, an authority shall not provide access under s. 19.35 (1) to records, except to an individual to the extent required under s. 103.13, containing information maintained, prepared, or provided by an employer concerning the home address, home electronic mail address, home telephone number, or social security number of an individual who holds a local public office or a state public office, unless the individual authorizes the authority to provide access to such information. This subsection does not apply to the home address of an individual who holds an elective public office or to the home address of an individual who, as a condition of employment, is required to reside in a specified location.

(12) INFORMATION RELATING TO CERTAIN EMPLOYEES. Unless access is specifically authorized or required by statute, an authority may not provide access to a record prepared or provided by an employer performing work on a project to which s. 16.856 or 84.062 applies, or on which the employer is otherwise required to pay prevailing wages, if that record contains the name or other personally identifiable information relating to an employee of that employer, unless the employee authorizes the authority to provide access to that information. In this subsection, "personally identifiable information" does not include an employee's work classification, hours of work, or wage or benefit payments received for work on such a project.

NOTE: Sub. (12) is shown as amended eff. 1−1−17 by 2015 Wis. Act 55. Prior to 1−1−17 it reads:

(12) INFORMATION RELATING TO CERTAIN EMPLOYEES. Unless access is specifically authorized or required by statute, an authority shall not provide access to a record prepared or provided by an employer performing work on a project to which s. 66.0903, 103.49, or 103.50 applies, or on which the employer is otherwise required to pay prevailing wages, if that record contains the name or other personally identifiable information relating to an employee of that employer, unless the employee authorizes the authority to provide access to that information. In this subsection, "personally identifiable information" does not include an employee's work classification, hours of work, or wage or benefit payments received for work on such a project.

(13) FINANCIAL IDENTIFYING INFORMATION. An authority shall not provide access to personally identifiable information that contains an individual's account or customer number with a financial institution, as defined in s. 134.97 (1) (b), including credit card numbers, debit card numbers, checking account numbers, or draft account numbers, unless specifically required by law.

History: 1981 c. 335; 1985 a. 236; 1991 a. 39, 269, 317; 1993 a. 93; 1995 a. 27; 2001 a. 16; 2003 a. 33, 47; 2005 a. 59, 253; 2007 a. 97; 2009 a. 28; 2011 a. 32; 2013 a. 171; 2015 a. 55.

NOTE: 2003 Wis. Act 47, which affects this section, contains extensive explanatory notes.

A settlement agreement containing a pledge of confidentiality and kept in the possession of a school district's attorney was a public record subject to public access under sub. (3). Journal/Sentinel v. School District of Shorewood, 186 Wis. 2d 443, 521 N.W.2d 165 (Ct. App. 1994).

Sub. (3) does not require providing access to payroll records of subcontractors of a prime contractor of a public construction project. Building and Construction Trades Council v. Waunakee Community School District, 221 Wis. 2d 575, 585 N.W.2d 726 (Ct. App. 1999), 97−3282.

Production of an analog audio tape was insufficient under sub. (4) when the requester asked for examination and copying of the original digital audio tape. State ex rel. Milwaukee Police Association v. Jones, 2000 WI App 146, 237 Wis. 2d 840, 615 N.W.2d 190, 98−3629.

The ultimate purchasers of municipal bonds from the bond's underwriter, whose only obligation was to purchase the bonds, were not contractor's records under sub. (3). Machotka v. Village of West Salem, 2000 WI App 43, 233 Wis. 2d 106, 607 N.W.2d 319, 99−1163.

Requests for university admissions records focusing on test scores, class rank, grade point average, race, gender, ethnicity, and socio−economic background was not a request for personally identifiable information and release was not barred by federal law or public policy. That the requests would require the university to redact information from thousands of documents under s. 19.36 (6) did not essentially require the university to create new records and, as such, did not provide grounds for denying the request under s. 19.35 (1) (L). Osborn v. Board of Regents of the University of Wisconsin System, 2002 WI 83, 254 Wis. 2d 266, 647 N.W.2d 158, 00−2861.

Misconduct investigation and disciplinary records are not excepted from public disclosure under sub. (10) (d). Sub. (10) (b) is the only exception to the open records law relating to investigations of possible employee misconduct. Kroeplin v. DNR, 2006 WI App 227, 297 Wis. 2d 254, 725 N.W.2d 286, 05−1093.

"Investigation" in sub. (10) (b) includes only that conducted by the public authority itself as a prelude to possible employee disciplinary action. An investigation achieves its "disposition" when the authority acts to impose discipline on an employee as a result of the investigation, regardless of whether the employee elects to pursue grievance arbitration or another review mechanism that may be available. Local 2489 v. Rock County, 2004 WI App 210, 277 Wis. 2d 208, 689 N.W.2d 644, 03−3101. See also, Zellner v. Cedarburg School District, 2007 WI 53, 300 Wis. 2d 290, 731 N.W.2d 240, 06−1143.

Municipalities may not avoid liability under the open records law by contracting with independent contractor assessors for the collection, maintenance, and custody of property assessment records, and then directing any requester of those records to the independent contractor assessors. WIREdata, Inc. v. Village of Sussex, 2008 WI 69, 310 Wis. 2d 397, 751 N.W.2d 736, 05−1473.

When requests to municipalities were for electronic/digital copies of assessment records, "PDF" files were "electronic/digital" files despite the fact that the files did not have all the characteristics that the requester wished. It is not required that requesters must be given access to an authority's electronic databases to examine them, extract information from them, or copy them. Allowing requesters such direct access to the electronic databases of an authority would pose substantial risks. WIREdata, Inc. v. Village of Sussex, 2008 WI 69, 310 Wis. 2d 397, 751 N.W.2d 736, 05−1473.

By procuring a liability insurance policy and allowing the insurance company to retain counsel for it, the county in effect contracted with the law firm and created an attorney−client relationship. Because the liability insurance policy is the basis for the tripartite relationship between the county, insurance company, and law firm and is the basis for an attorney−client relationship between the law firm and county, the invoices produced or collected during the course of the law firm's representation of the county come under the liability insurance policy and sub. (3) governs the accessibility of the invoices. Juneau County Star−Times v. Juneau County, 2013 WI 4, 345 Wis. 2d 122, 824 N.W.2d 457, 10−2313.

Separation costs must be borne by the agency. 72 Atty. Gen. 99.

A computerized compilation of bibliographic records is discussed in relation to copyright law; a requester is entitled to a copy of a computer tape or a printout of information on the tape. 75 Atty. Gen. 133 (1986).

An exemption to the federal Freedom of Information Act was not incorporated under sub. (1). 77 Atty. Gen. 20.

Sub. (7), 2011 stats., is an exception to the public records law and should be narrowly construed. In sub. (7), 2011 stats., "applicant" and "candidate" are synonymous. "Final candidates" are the five most qualified unless there are less than five applicants, in which case all are final candidates. 81 Atty. Gen. 37.

Public access to law enforcement records. Fitzgerald. 68 MLR 705 (1985).

19.37 Enforcement and penalties. (1) MANDAMUS. If an authority withholds a record or a part of a record or delays granting access to a record or part of a record after a written request for disclosure is made, the requester may pursue either, or both, of the alternatives under pars. (a) and (b).

(a) The requester may bring an action for mandamus asking a court to order release of the record. The court may permit the parties or their attorneys to have access to the requested record under restrictions or protective orders as the court deems appropriate.

(b) The requester may, in writing, request the district attorney of the county where the record is found, or request the attorney general, to bring an action for mandamus asking a court to order release of the record to the requester. The district attorney or attorney general may bring such an action.

(1m) TIME FOR COMMENCING ACTION. No action for mandamus under sub. (1) to challenge the denial of a request for access to a record or part of a record may be commenced by any committed or incarcerated person later than 90 days after the date that the request is denied by the authority having custody of the record or part of the record.

(1n) NOTICE OF CLAIM. Sections 893.80 and 893.82 do not apply to actions commenced under this section.

(2) COSTS, FEES AND DAMAGES. (a) Except as provided in this paragraph, the court shall award reasonable attorney fees, damages of not less than $100, and other actual costs to the requester if the requester prevails in whole or in substantial part in any action filed under sub. (1) relating to access to a record or part of a record under s. 19.35 (1) (a). If the requester is a committed or incarcerated person, the requester is not entitled to any minimum amount of damages, but the court may award damages. Costs and fees shall be paid by the authority affected or the unit of government of which it is a part, or by the unit of government by which the legal custodian under s. 19.33 is employed and may not become a personal liability of any public official.

(b) In any action filed under sub. (1) relating to access to a record or part of a record under s. 19.35 (1) (am), if the court finds that the authority acted in a willful or intentional manner, the court shall award the individual actual damages sustained by the individual as a consequence of the failure.

(3) PUNITIVE DAMAGES. If a court finds that an authority or legal custodian under s. 19.33 has arbitrarily and capriciously denied or delayed response to a request or charged excessive fees, the court may award punitive damages to the requester.

(4) PENALTY. Any authority which or legal custodian under s. 19.33 who arbitrarily and capriciously denies or delays response to a request or charges excessive fees may be required to forfeit not more than $1,000. Forfeitures under this section shall be enforced by action on behalf of the state by the attorney general or by the district attorney of any county where a violation occurs. In actions brought by the attorney general, the court shall award any forfeiture recovered together with reasonable costs to the state; and in actions brought by the district attorney, the court shall award any forfeiture recovered together with reasonable costs to the county.

History: 1981 c. 335, 391; 1991 a. 269 s. 43d; 1995 a. 158; 1997 a. 94.

A party seeking fees under sub. (2) must show that the prosecution of an action could reasonably be regarded as necessary to obtain the information and that a "causal nexus" exists between that action and the agency's surrender of the information. State ex rel. Vaughan v. Faust, 143 Wis. 2d 868, 422 N.W.2d 898 (Ct. App. 1988).

If an agency exercises due diligence but is unable to respond timely to a records request, the plaintiff must show that a mandamus action was necessary to secure the records release to qualify for award of fees and costs under sub. (2). Racine Education Association. v. Racine Board of Education, 145 Wis. 2d 518, 427 N.W.2d 414 (Ct. App. 1988).

Assuming sub. (1) (a) applies before mandamus is issued, the trial court retains discretion to refuse counsel's participation in an *in camera* inspection. Milwaukee Journal v. Call, 153 Wis. 2d 313, 450 N.W.2d 515 (Ct. App. 1989).

If the trial court has an incomplete knowledge of the contents of the public records sought, it must conduct an *in camera* inspection to determine what may be disclosed following a custodian's refusal. State ex rel. Morke v. Donnelly, 155 Wis. 2d 521, 455 N.W.2d 893 (1990).

A *pro se* litigant is not entitled to attorney fees. State ex rel. Young v. Shaw, 165 Wis. 2d 276, 477 N.W.2d 340 (Ct. App. 1991).

A favorable judgment or order is not a necessary condition precedent for finding that a party prevailed against an agency under sub. (2). A causal nexus must be shown between the prosecution of the mandamus action and the release of the requested information. Eau Claire Press Co. v. Gordon, 176 Wis. 2d 154, 499 N.W.2d 918 (Ct. App. 1993).

Actions brought under the open meetings and open records laws are exempt from the notice provisions of s. 893.80 (1), 1993 stats. Auchinleck v. Town of LaGrange, 200 Wis. 2d 585, 547 N.W.2d 587 (1996), 94−2809.

An inmate's right to mandamus under this section is subject to s. 801.02 (7), which requires exhaustion of administrative remedies before an action may be commenced. Moore v. Stahowiak, 212 Wis. 2d 744, 569 N.W.2d 711 (Ct. App. 1997), 96−2547.

When requests are complex, municipalities should be afforded reasonable latitude in time for their responses. An authority should not be subjected to the burden and expense of a premature public records lawsuit while it is attempting in good faith to respond, or to determine how to respond, to a request. What constitutes a reasonable time for a response by an authority 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. Village of Sussex, 2008 WI 69, 310 Wis. 2d 397, 751 N.W.2d 736, 05−1473.

The legislature did not intend to allow a record requester to control or appeal a mandamus action brought by the attorney general under sub. (1) (b). Sub. (1) outlines two distinct courses of action when a records request is denied, dictates distinct courses of action, and prescribes different remedies for each course. Nothing suggests that a requester is hiring the attorney general as a sort of private counsel to proceed with the case, or that the requester would be a named plaintiff in the case with the attorney general appearing as counsel of record when proceeding under sub. (1) (b). State v. Zien, 2008 WI App 153, 314 Wis. 2d 340, 761 N.W.2d 15, 07−1930.

This section unambiguously limits punitive damages claims under sub. (3) to mandamus actions. The mandamus court decides whether there is a violation and, if so, whether it caused actual damages. Then, the mandamus court may consider whether punitive damages should be awarded under sub. (3). The Capital Times Company v. Doyle, 2011 WI App 137, 337 Wis. 2d 544, 807 N.W.2d 666, 10−1687.

Under the broad terms of s. 51.30 (7), the confidentiality requirements created under s. 51.30 generally apply to "treatment records" in criminal not guilty by reason of insanity cases. All conditional release plans in NGI cases are, by statutory definition, treatment records. They are "created in the course of providing services to individuals for mental illness," and thus should be deemed confidential. An order of placement in an NGI case is not a "treatment record." La Crosse Tribune v. Circuit Court for La Crosse County, 2012 WI App 42, 340 Wis. 2d 663, 814 N.W.2d 867, 10−3120.

The plaintiff newspaper argued that s. 19.88 (3), of the open meetings law, which requires "the motions and roll call votes of each meeting of a governmental body shall be recorded, preserved and open to public inspection," in turn, required the defendant commission to record and disclose the information the newspaper requested under the open records law. The newspaper could not seek relief under the public records law for the commission's alleged violation of the open meetings law and could not recover reasonable attorney fees, damages, and other actual costs under sub. (2) for an alleged violation of the open meetings law. The Journal Times v. City of Racine Board of Police and Fire Commissioners, 2015 WI 56, ___ Wis. 2d ___, ___ N.W.2d ___, 13−1715.

A record custodian should not automatically be subject to potential liability under sub. (2) (a) for actively providing information, which it is not required to do in response to a public records request, to a requester when no record exists. While it might be a better course to inform a requester that no record exists, the language of the public records law does not specifically require such a response. The Journal

Times v. City of Racine Board of Police and Fire Commissioners, 2015 WI 56, ___ Wis. 2d ___, ___ N.W.2d ___, 13−1715.

Actual damages are the liability of the agency. Punitive damages and forfeitures can be the liability of either the agency or the legal custodian, or both. Section 895.46 (1) (a) probably provides indemnification for punitive damages assessed against a custodian, but not for forfeitures. 72 Atty. Gen. 99.

19.39 Interpretation by attorney general. Any person may request advice from the attorney general as to the applicability of this subchapter under any circumstances. The attorney general may respond to such a request.

History: 1981 c. 335.

SUBCHAPTER III

CODE OF ETHICS FOR PUBLIC OFFICIALS AND EMPLOYEES

19.41 Declaration of policy. (1) It is declared that high moral and ethical standards among state public officials and state employees are essential to the conduct of free government; that the legislature believes that a code of ethics for the guidance of state public officials and state employees will help them avoid conflicts between their personal interests and their public responsibilities, will improve standards of public service and will promote and strengthen the faith and confidence of the people of this state in their state public officials and state employees.

(2) It is the intent of the legislature that in its operations the board shall protect to the fullest extent possible the rights of individuals affected.

History: 1973 c. 90; Stats. 1973 s. 11.01; 1973 c. 334 s. 33; Stats. 1973 s. 19.41; 1977 c. 277.

19.42 Definitions. In this subchapter:

(1) "Anything of value" means any money or property, favor, service, payment, advance, forbearance, loan, or promise of future employment, but does not include compensation and expenses paid by the state, fees and expenses which are permitted and reported under s. 19.56, political contributions which are reported under ch. 11, or hospitality extended for a purpose unrelated to state business by a person other than an organization.

(2) "Associated", when used with reference to an organization, includes any organization in which an individual or a member of his or her immediate family is a director, officer or trustee, or owns or controls, directly or indirectly, and severally or in the aggregate, at least 10% of the outstanding equity or of which an individual or a member of his or her immediate family is an authorized representative or agent.

(3) "Board" means the government accountability board.

(3m) "Candidate," except as otherwise provided, has the meaning given in s. 11.01 (1).

(3s) "Candidate for local public office" means any individual who files nomination papers and a declaration of candidacy under s. 8.21 or who is nominated at a caucus under s. 8.05 (1) for the purpose of appearing on the ballot for election as a local public official or any individual who is nominated for the purpose of appearing on the ballot for election as a local public official through the write−in process or by appointment to fill a vacancy in nomination and who files a declaration of candidacy under s. 8.21.

(4) "Candidate for state public office" means any individual who files nomination papers and a declaration of candidacy under s. 8.21 or who is nominated at a caucus under s. 8.05 (1) for the purpose of appearing on the ballot for election as a state public official or any individual who is nominated for the purpose of appearing on the ballot for election as a state public official through the write−in process or by appointment to fill a vacancy in nomination and who files a declaration of candidacy under s. 8.21.

(4g) "Clearly identified," when used in reference to a communication containing a reference to a person, means one of the following:

(a) The person's name appears.

(b) A photograph or drawing of the person appears.

(c) The identity of the person is apparent by unambiguous reference.

(4r) "Communication" means a message transmitted by means of a printed advertisement, billboard, handbill, sample ballot, radio or television advertisement, telephone call, or any medium that may be utilized for the purpose of disseminating or broadcasting a message, but not including a poll conducted solely for the purpose of identifying or collecting data concerning the attitudes or preferences of electors.

(5) "Department" means the legislature, the University of Wisconsin System, any authority or public corporation created and regulated by an act of the legislature and any office, department, independent agency or legislative service agency created under ch. 13, 14 or 15, any technical college district or any constitutional office other than a judicial office. In the case of a district attorney, "department" means the department of administration unless the context otherwise requires.

(5m) "Elective office" means an office regularly filled by vote of the people.

(6) "Gift" means the payment or receipt of anything of value without valuable consideration.

(7) "Immediate family" means:

(a) An individual's spouse; and

(b) An individual's relative by marriage, lineal descent or adoption who receives, directly or indirectly, more than one−half of his or her support from the individual or from whom the individual receives, directly or indirectly, more than one−half of his or her support.

(7m) "Income" has the meaning given under section 61 of the internal revenue code.

(7s) "Internal revenue code" has the meanings given under s. 71.01 (6).

(7u) "Local governmental unit" means a political subdivision of this state, a special purpose district in this state, an instrumentality or corporation of such a political subdivision or special purpose district, a combination or subunit of any of the foregoing or an instrumentality of the state and any of the foregoing.

(7w) "Local public office" means any of the following offices, except an office specified in sub. (13):

(a) An elective office of a local governmental unit.

(b) A county administrator or administrative coordinator or a city or village manager.

(c) An appointive office or position of a local governmental unit in which an individual serves for a specified term, except a position limited to the exercise of ministerial action or a position filled by an independent contractor.

(cm) The position of member of the board of directors of a local exposition district under subch. II of ch. 229 not serving for a specified term.

(d) An appointive office or position of a local government which is filled by the governing body of the local government or the executive or administrative head of the local government and in which the incumbent serves at the pleasure of the appointing authority, except a clerical position, a position limited to the exercise of ministerial action or a position filled by an independent contractor.

(e) The position of member of the Milwaukee County mental health board as created under s. 51.41 (1d).

(7x) "Local public official" means an individual holding a local public office.

(8) "Ministerial action" means an action that an individual performs in a given state of facts in a prescribed manner in obedi-

November 2015

Wisconsin Open Meetings Law Compliance Guide

Wisconsin Department of Justice
Attorney General Brad D. Schimel

Attorney General's Message

By Attorney General Brad D. Schimel

It is imperative that we recognize that transparency is the cornerstone of democracy and that citizens cannot hold their elected officials accountable in a representative government unless government is performed in the open.

As Wisconsin Attorney General, I recognize the important role the Department of Justice has in ensuring that Wisconsin's open government laws are properly and faithfully executed by public officials. I will not hesitate to voice my objection to any law that would curtail the public's right to open government. That's why this year, we announced that the Attorney General's Office of Open Government was open for business. The creation of this new office was necessary to meet my goals for increasing openness and transparency and improving DOJ's service to clients and citizens in this important area.

This compliance guide may be accessed, downloaded or printed free of charge from the Wisconsin Department of Justice website, www.doj.state.wi.us and clicking on the "Office of Open Government" box toward the bottom of the page. I encourage you to share this guide with your constituencies and colleagues. Wisconsin's open government laws promote democracy by ensuring that all state, regional and local governments conduct their business with transparency. Wisconsin citizens have a right to know how their government is spending their tax dollars and exercising the powers granted by the people. This guide is a resource for all Wisconsinites to understand and exercise their right to access their government. I hope you do.

I am grateful to the records custodians and all those who perform public duties and I encourage them to contact the Office of Open Government if we can be of assistance. Additionally, I am grateful to those who continue to reach out to me and my staff to keep the conversation going on this important issue.

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Wisconsin Open Meetings Law Compliance Guide

(November 2015)

Wisconsin Department of Justice
Brad D. Schimel, Attorney General

Office of Open Government
Paul M. Ferguson, Assistant Attorney General

The 2015 edition of the *Wisconsin Open Meetings Law Compliance Guide* results from the efforts of the following Wisconsin Department of Justice (DOJ) personnel, all of whom are acknowledged and appreciated:

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POLICY OF THE OPEN MEETINGS LAW

The State of Wisconsin recognizes the importance of having a public informed about governmental affairs. The state's open meetings law declares that:

> In recognition of the fact that a representative government of the American type is dependent upon an informed electorate, it is declared to be the policy of this state that the public is entitled to the fullest and most complete information regarding the affairs of government as is compatible with the conduct of governmental business.[1]

In order to advance this policy, 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 unless otherwise expressly provided by law."[2] There is thus a presumption that meetings of governmental bodies must be held in open session.[3] Although there are some exemptions allowing closed sessions in specified circumstances, they are to be invoked sparingly and only where necessary to protect the public interest. The policy of the open meetings law dictates that governmental bodies convene in closed session only where 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."[4]

The open meetings law explicitly provides that all of its provisions must be liberally construed to achieve its purposes.[5] This rule of liberal construction applies in all situations, except enforcement actions in which forfeitures are sought.[6] Public officials must be ever mindful of the policy of openness and the rule of liberal construction in order to ensure compliance with both the letter and spirit of the law.[7]

WHEN DOES THE OPEN MEETINGS LAW APPLY?

The open meetings law applies to every "meeting" of a "governmental body."[8] The terms "meeting" and "governmental body" are defined in Wis. Stat. § 19.82(1) and (2).

Definition of "Governmental Body"

- **Entities That Are Governmental Bodies**

  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

[1] Wis. Stat. § 19.81(1).
[2] Wis. Stat. § 19.81(2).
[3] *State ex rel. Newspapers, Inc. v. Showers*, 135 Wis. 2d 77, 97, 398 N.W.2d 154 (1987).
[4] *State ex rel. Lynch v. Conta*, 71 Wis. 2d 662, 678, 239 N.W.2d 313 (1976).
[5] Wis. Stat. § 19.81(4); *State ex rel. Badke v. Vill. Bd. of Greendale*, 173 Wis. 2d 553, 570, 494 N.W.2d 408 (1993); *State ex rel. Lawton v. Town of Barton*, 2005 WI App 16, ¶ 19, 278 Wis. 2d 388, 692 N.W.2d 304 ("The legislature has issued a clear mandate that we are to vigorously and liberally enforce the policy behind the open meetings law").
[6] Wis. Stat. § 19.81(4).
[7] *State ex rel. Citizens for Responsible Dev. v. City of Milton*, 2007 WI App 114, ¶ 6, 300 Wis. 2d 649, 731 N.W.2d 640 ("The legislature has made the policy choice that, despite the efficiency advantages of secret government, a transparent process is favored").
[8] Wis. Stat. § 19.83.

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.[9]

This definition includes multiple parts, the most important of which are discussed below.

- **State or Local Agencies, Boards, and Commissions**

  The definition of "governmental body" includes a "state or local agency, board, commission, committee, council, department or public body corporate and politic created by constitution, statute, ordinance, rule or order[.]"[10] This list of entities is broad enough to include virtually any collective governmental entity, regardless of what it is labeled. It is important to note that these entities are defined primarily in terms of the manner in which they are created, rather than in terms of the type of authority they possess. Purely advisory bodies are therefore 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.[11]

  The words "constitution," "statute," and "ordinance," as used in the definition of "governmental body," refer to the constitution and statutes of the State of Wisconsin and to ordinances promulgated by a political subdivision of the state. The definition thus includes state and local bodies created by Wisconsin's constitution or statutes, including condemnation commissions created by Wis. Stat. § 32.08, as well as local bodies created by an ordinance of any Wisconsin municipality. It does not, however, include bodies created solely by federal law or by the law of some other sovereign.

  State and local bodies created by "rule or order" are also included in the definition. The term "rule or order" has been liberally construed to include any directive, formal or informal, creating a body and assigning it duties.[12] This includes directives from governmental bodies, presiding officers of governmental bodies, or certain governmental officials, such as county executives, mayors, or heads of a state or local agency, department or division.[13] A group organized by its own members pursuant to its own charter, however, is not created by any governmental directive and thus is not a governmental body, even if it is subject to governmental regulation and receives public funding and support. The relationship of affiliation between the University of Wisconsin Union and various student clubs thus is not sufficient to make the governing board of such a club a governmental body.[14]

  The Wisconsin Attorney General has concluded that the following entities are state or local bodies that are subject to the open meetings law by virtue of having been created by constitution, statute, ordinance, rule or order:

  - **State or Local Bodies Created by Constitution, Statute, or Ordinance**

    - A municipal public utility managing a city-owned public electrical utility.[15]

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[9] Wis. Stat. § 19.82(1).
[10] Wis. Stat. § 19.82(1).
[11] *See State v. Swanson*, 92 Wis. 2d 310, 317, 284 N.W.2d 655 (1979).
[12] 78 Op. Att'y Gen. 67, 68-69 (1989).
[13] *See* 78 Op. Att'y Gen. 67.
[14] Penkalski Correspondence (May 4, 2009).
[15] 65 Op. Att'y Gen. 243 (1976).

- Departments of formally constituted subunits of the University of Wisconsin system or campus.[16]

- A town board, but not an annual or special town meeting of town electors.[17]

- A county board of zoning adjustment authorized by Wis. Stat § 59.99(3) (1983) (now Wis. Stat. § 59.694(1)).[18]

- A public inland lake protection and rehabilitation district established by a county or municipality, pursuant to Wis. Stat. §§ 33.21 to 33.27.[19]

- **State or Local Bodies Created by Resolution, Rule, or Order**

  - A committee appointed by the school superintendent to consider school library materials.[20]

  - A citizen's advisory group appointed by the mayor.[21]

  - An advisory committee appointed by the Natural Resources Board, the Secretary of the Department of Natural Resources, or a District Director, Bureau Director or Property Manager of that department.[22]

  - A consortium of school districts created by a contract between districts; a resolution is the equivalent of an order.[23]

  - An industrial agency created by resolution of a county board under Wis. Stat. § 59.57(2).[24]

  - A deed restriction committee created by resolution of a common council.[25]

  - A school district's strategic-planning team whose creation was authorized and whose duties were assigned to it by the school board.[26]

  - A citizen's advisory committee appointed by a county executive.[27]

  - An already-existing numerically definable group of employees of a governmental entity, assigned by the entity's chief administrative officer to prepare

[16] 66 Op. Att'y Gen. 60 (1977).
[17] 66 Op. Att'y Gen. 237 (1977).
[18] Gaylord Correspondence (June 11, 1984).
[19] DuVall Correspondence (Nov. 6, 1986).
[20] Staples Correspondence (Feb. 10, 1981).
[21] Funkhouser Correspondence (Mar. 17, 1983).
[22] 78 Op. Att'y Gen. 67.
[23] I-10-93 (Oct. 15, 1993).
[24] I-22-90 (Apr. 4, 1990).
[25] I-34-90 (May 25, 1990).
[26] I-29-91 (Oct. 17, 1991).
[27] Jacques Correspondence (Jan. 26, 2004).

recommendations for the entity's policy-making board, when the group's meetings include the subject of the chief administrative officer's directive.[28]

- ◊ A Criminal Justice Study Commission created by the Wisconsin Department of Justice, the University of Wisconsin Law School, the State Bar of Wisconsin, and the Marquette University Law School.[29]

- ◊ Grant review panels created by a consortium which was established pursuant to an order of the Wisconsin Commissioner of Insurance.[30]

- ◊ A joint advisory task force established by a resolution of a Wisconsin town board and a resolution of the legislature of a sovereign Indian tribe.[31]

- ◊ A University of Wisconsin student government committee, council, representative assembly, or similar collective body that has been created and assigned governmental responsibilities pursuant to Wis. Stat. § 36.09(5).[32]

- **Governmental or Quasi-Governmental Corporations**

The definition of "governmental body" also includes a "governmental or quasi-governmental corporation," except for the Bradley sports center corporation.[33] The term "governmental corporation" is not defined in either the statutes or the case law interpreting the statutes. It is clear, however, that a "governmental corporation" must at least include a corporation established for some public purpose and created directly by the state legislature or by some other governmental body pursuant to specific statutory authorization or direction.[34]

The term "quasi-governmental corporation" also is not defined in the statutes, but its definition was recently discussed by the Wisconsin Supreme Court in *State v. Beaver Dam Area Development Corp.* (*"BDADC"*).[35] 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.[36] The Court further held that each case must be decided on its own particular facts, under the totality of the circumstances and 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.[37] 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

[28] Tylka Correspondence (June 8, 2005).
[29] Lichstein Correspondence (Sept. 20, 2005).
[30] Katayama Correspondence (Jan. 20, 2006).
[31] I-04-09 (Sept. 28, 2009).
[32] I-05-09 (Dec. 17, 2009).
[33] Wis. Stat. § 19.82(1).
[34] *See* 66 Op. Att'y Gen. 113, 115 (1977).
[35] *State v. Beaver Dam Area Dev. Corp.*, 2008 WI 90, 312 Wis. 2d 84, 752 N.W.2d 295.
[36] *Id.* ¶¶ 33-36.
[37] *Id.* ¶¶ 7-8, 63 n.14, and 79.

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.[38]

In adopting this case-specific, multi-factored "function, effect or status" standard, the Wisconsin Supreme Court followed a 1991 Attorney General opinion.[39] Prior to 1991, however, Attorney General opinions on this subject emphasized some of the more formal aspects of quasi-governmental corporations. Those opinions should now be read in light of the *BDADC* decision.[40]

In March 2009, the Attorney General issued an informal opinion which analyzed the *BDADC* decision in greater detail and expressed the view that, out of the numerous factors discussed in that decision, particular weight should be given to whether a corporation serves a public function and has any private functions.[41] When a private corporation contracts to perform certain services for a governmental body, the key considerations in determining whether the corporation becomes quasi-governmental are whether the corporation is performing a portion of the governmental body's public functions or whether the services provided by the corporation play an integral part in any stage—including the purely deliberative stage—of the governmental body's decision-making process.[42]

- **State Legislature**

Generally speaking, the open meetings law applies to the state legislature, including the senate, assembly, and any committees or subunits of those bodies.[43] The law does not apply to any partisan caucus of the senate or assembly.[44] The open meetings law also does not apply where it conflicts with a rule of the legislature, senate, or assembly.[45] Additional restrictions are set forth in Wis. Stat. § 19.87.

- **Subunits**

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.[46] If, for example, a fifteen member county board appoints a committee consisting of five members of the county board, that committee would be considered a "subunit" subject to the open meetings law. This is true despite the fact that the five-person committee would be smaller than a quorum of the county board.

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[38] *Id.* ¶ 62.

[39] *See* 80 Op. Att'y Gen. 129, 135 (1991) (Milwaukee Economic Development Corporation, a Wis. Stat. ch. 181 corporation organized by two private citizens and one city employee, is a quasi-governmental corporation); *see also* Kowalczyk Correspondence (Mar. 13, 2006) (non-stock, non-profit corporations established for the purpose of providing emergency medical or fire department services for participating municipalities are quasi-governmental corporations).

[40] *See* 66 Op. Att'y Gen. 113 (volunteer fire department organized under Wis. Stat. ch. 181 is not a quasi-governmental corporation); 73 Op. Att'y Gen. 53 (1984) (Historic Sites Foundation organized under Wis. Stat. ch. 181 is not a quasi-governmental corporation); 74 Op. Att'y Gen. 38 (corporation established to provide financial support to public broadcasting stations organized under Wis. Stat. ch. 181 is not a quasi-governmental corporation). Geyer Correspondence (Feb. 26, 1987) (Grant County Economic Development Corporation organized by private individuals under Wis. Stat. ch. 181 is not a quasi-governmental corporation, even though it serves a public purpose and receives more than fifty percent of its funding from public sources).

[41] I-02-09 (Mar. 19, 2009).

[42] *Id.*

[43] Wis. Stat. § 19.87.

[44] Wis. Stat. § 19.87(3).

[45] Wis. Stat. § 19.87(2).

[46] 74 Op. Att'y Gen. 38, 40 (1985).

Even a committee with only two members is considered a "subunit," as is a committee that is only advisory and that has no power to make binding decisions.[47]

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

Any entity that fits within the definition of "governmental body" must comply with the requirements of the open meetings law. In most cases, it is readily apparent whether a particular body fits within the definition. On occasion, there is some doubt. Any doubts as to the applicability of the open meetings law should be resolved in favor of complying with the law's requirements.

- **Entities That Are Not Governmental Bodies**

  - **Governmental Offices Held by a Single Individual**

    The open meetings law does not apply to a governmental department with only a single member.[48] Because the term "body" connotes a group of individuals, a governmental office held by a single individual likewise is not a "governmental body" within the meaning of the open meetings law. Thus, the open meetings law does not apply to the office of coroner or to inquests conducted by the coroner.[49] Similarly, the Attorney General has concluded that the open meetings law does not apply to an administrative hearing conducted by an individual hearing examiner.[50]

  - **Bodies Meeting for Collective Bargaining**

    The definition of "governmental body" explicitly excludes bodies that are formed for or meeting for the purpose of collective bargaining with municipal or state employees under subchapters I, IV, or V of Wis. Stat. ch. 111. A body formed exclusively for the purpose of collective bargaining is not subject to the open meetings law.[51] A body formed for other purposes, in addition to collective bargaining, is not subject to the open meetings law when conducting collective bargaining.[52] The Attorney General has, however, advised multi-purpose bodies to comply with the open meetings law, including the requirements for convening in closed session, when meeting for the purpose of forming negotiating strategies to be used in collective bargaining.[53] The collective bargaining exclusion does not permit any body to consider the final ratification or approval of a collective bargaining agreement under subchapters I, IV, or V of Wis. Stat. ch. 111 in closed session.[54]

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[47] Dziki Correspondence (Dec. 12, 2006).
[48] *Plourde v. Habhegger*, 2006 WI App 147, 294 Wis. 2d 746, 720 N.W.2d 130.
[49] 67 Op. Att'y Gen. 250 (1978).
[50] Clifford Correspondence (Dec. 2, 1980).
[51] Wis. Stat. § 19.82(1).
[52] Wis. Stat. § 19.82(1)
[53] 66 Op. Att'y Gen. 93, 96-97 (1977).
[54] Wis. Stat. § 19.85(3).

- **Bodies Created by the Wisconsin Supreme Court**

The Wisconsin Supreme Court has held that bodies created by the Court, pursuant to its superintending control over the administration of justice, are not governed by the open meetings law.[55] Thus, generally speaking, the open meetings law does not apply to the Court or bodies created by the Court. In the *Lynch* case, for example, the Court held that the former open meetings law, Wis. Stat. § 66.77(1) (1973), did not apply to the Wisconsin Judicial Commission, which is responsible for handling misconduct complaints against judges. Similarly, the Attorney General has indicated that the open meetings law does not apply to: the Board of Attorneys Professional Responsibility;[56] the Board of Bar Examiners;[57] or the monthly judicial administration meetings of circuit court judges, conducted under the authority of the Court's superintending power over the judiciary.[58]

- **Ad Hoc Gatherings**

Although the definition of a governmental body is broad, some gatherings are too loosely constituted to fit the definition. Thus, *Conta* holds that the directive that creates the body must also "confer[] collective power and define[] when it exists."[59] *Showers* adds the further requirement that a "meeting" of a governmental body takes place only if there are a sufficient number of members present to determine the governmental body's course of action.[60] In order to determine whether a sufficient number of members are present to determine a governmental body's course of action, the membership of the body must be numerically definable. The Attorney General's Office thus has concluded that a loosely constituted group of citizens and local officials instituted by the mayor to discuss various issues related to a dam closure was not a governmental body, because no rule or order defined the group's membership, and no provision existed for the group to exercise collective power.[61]

The definition of a "governmental body" is only rarely satisfied when groups of a governmental unit's employees gather on a subject within the unit's jurisdiction. Thus, for example, the Attorney General concluded that the predecessor of the current open meetings law did not apply when a department head met with some or even all of his or her staff.[62] Similarly, the Attorney General's Office has advised that the courts would be unlikely to conclude that meetings between the administrators of a governmental agency and the agency's employees, or between governmental employees and representatives of a governmental contractor were "governmental bodies" subject to the open meetings law.[63] However, where an already-existing numerically definable group of employees of a governmental entity are assigned by the entity's chief administrative officer to prepare recommendations for the entity's policy-making board, the group's meetings with respect to the subject of the directive are subject to the open meetings law.[64]

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[55] *State ex rel. Lynch v. Dancey*, 71 Wis. 2d 287, 238 N.W.2d 81 (1976).
[56] OAG 67-79 (July 31, 1979) (unpublished).
[57] Kosobucki Correspondence (Sept. 6, 2006).
[58] Constantine Correspondence (Feb. 28, 2000).
[59] *Conta*, 71 Wis. 2d at 681.
[60] *Showers*, 135 Wis. 2d at 102.
[61] Godlewski Correspondence (Sept. 24, 1998).
[62] 57 Op. Att'y Gen. 213, 216 (1968).
[63] Peplnjak Correspondence (June 8, 1998).
[64] Tylka Correspondence (June 8, 2005).

Definition of "Meeting"

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 . . . .[65]

The statute then excepts the following: an inspection of a public works project or highway by a town board; or inspection of a public works project by a town sanitary district; or the supervision, observation, or collection of information about any drain or structure related to a drain by any drainage board.[66]

- **The *Showers* Test**

  The Wisconsin Supreme Court has held that the above statutory definition of a "meeting" applies whenever a convening of members of a governmental body satisfies two requirements: (1) there is a purpose to engage in governmental business and (2) the number of members present is sufficient to determine the governmental body's course of action.[67]

  - **The Purpose Requirement**

    The first part of the *Showers* test focuses on the purpose for which the members of the governmental body are gathered. They must be gathered to conduct governmental business. *Showers* stressed that "governmental business" refers to any formal or informal action, including discussion, decision or information gathering, on matters within the governmental body's realm of authority.[68] Thus, in *Badke*,[69] the Wisconsin Supreme Court held that the village board conducted a "meeting," as defined in the open meetings law, when a quorum of the board regularly attended each plan commission meeting to observe the commission's proceedings on a development plan that was subject to the board's approval. The Court stressed that a governmental body is engaged in governmental business when its members gather to simply hear information on a matter within the body's realm of authority.[70] The members need not actually discuss the matter or otherwise interact with one another to be engaged in governmental business.[71] The Court also held that the gathering of town board members was not chance or social because a majority of town board members attended plan commission meetings with regularity.[72] In contrast, the Court of Appeals concluded in *Paulton v. Volkmann*,[73] that no meeting occurred where a quorum of school board members attended a gathering of town residents, but did not collect information on a subject the school board had the potential to decide.

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[65] Wis. Stat. § 19.82(2).
[66] Wis. Stat. § 19.82(2).
[67] *Showers*, 135 Wis. 2d at 102.
[68] *Id.* at 102-03.
[69] *Badke*, 173 Wis. 2d at 572-74.
[70] *Id.* at 573-74.
[71] *Id.* at 574-76.
[72] *Id.* at 576.
[73] *Paulton v. Volkmann*, 141 Wis. 2d 370, 375-77, 415 N.W.2d 528 (Ct. App. 1987).

- **The Numbers Requirement**

  The second part of the *Showers* test requires that the number of members present be sufficient to determine the governmental body's course of action on the business under consideration. People often assume that this means that the open meetings law applies only to gatherings of a majority of the members of a governmental body. That is not the case because the power to control a body's course of action can refer either to the affirmative power to pass a proposal or the negative power to defeat a proposal. Therefore, a gathering of one-half of the members of a body, or even fewer, may be enough to control a course of action if it is enough to block a proposal. This is called a "negative quorum."

  Typically, governmental bodies operate under a simple majority rule in which a margin of one vote is necessary for the body to pass a proposal. Under that approach, exactly one-half of the members of the body constitutes a "negative quorum" because that number against a proposal is enough to prevent the formation of a majority in its favor. Under simple majority rule, therefore, the open meetings law applies whenever one-half or more of the members of the governmental body gather to discuss or act on matters within the body's realm of authority.

  The size of a "negative quorum" may be smaller, however, when a governmental body operates under a super majority rule. For example, if a two-thirds majority is required for a body to pass a measure, then any gathering of more than one-third of the body's members would be enough to control the body's course of action by blocking the formation of a two-thirds majority. *Showers* made it clear that the open meetings law applies to such gatherings, as long as the purpose requirement is also satisfied (*i.e.*, the gathering is for the purpose of conducting governmental business).[74] If a three-fourths majority is required to pass a measure, then more than one-fourth of the members would constitute a "negative quorum," etc.

- **Convening of Members**

  When the members of a governmental body conduct official business while acting separately, without communicating with each other or engaging in other collective action, there is no meeting within the meaning of the open meetings law.[75] Nevertheless, 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.

  - **Written Correspondence**

    The circulation of a paper or hard copy memorandum among the members of a governmental body, for example, may involve a largely one-way flow of information, with any exchanges spread out over a considerable period of time and little or no conversation-like interaction among members. Accordingly, the Attorney General has long taken the position that such written communications generally do not constitute a "convening of members" for purposes of the open meetings law.[76] Although the rapid evolution of electronic media has made the distinction

[74] *Showers*, 135 Wis. 2d at 101-02.
[75] Katayama Correspondence (Jan. 20, 2006).
[76] Merkel Correspondence (Mar. 11, 1993).

between written and oral communication less sharp than it once appeared, it is still unlikely that a Wisconsin court would conclude that the circulation of a document through the postal service, or by other means of paper or hard-copy delivery, could be deemed a "convening" or "gathering" of the members of a governmental body for purposes of the open meetings law.

- **Telephone Conference Calls**

A telephone conference call, in contrast, is very similar to an in-person conversation and thus qualifies as a convening of members.[77] Under the *Showers* test, therefore, the open meetings law applies to any conference call that: (1) is for the purpose of conducting governmental business and (2) involves a sufficient number of members of the body to determine the body's course of action on the business under consideration. To comply with the law, a governmental body conducting a meeting by telephone conference call must provide the public with an effective means to monitor the conference. This may be accomplished by broadcasting the conference through speakers located at one or more sites open to the public.[78]

- **Electronic Communications**

Written communications transmitted by electronic means, such as email or instant messaging, also may constitute a "convening of members," depending on how the communication medium is used. Although no Wisconsin court has applied the open meetings law to these kinds of electronic communications, it is likely that the courts will try to determine whether the communications in question are more like an in-person discussion—*e.g.*, a rapid back-and-forth exchange of viewpoints among multiple members—or more like non-electronic written correspondence, which generally does not raise open meetings law concerns. If the communications closely resemble an in-person discussion, then they may constitute a meeting if they involve enough members to control an action by the body.[79] In addressing these questions, courts are likely to consider such factors as the following: (1) the number of participants involved in the communications; (2) the number of communications regarding the subject; (3) the time frame within which the electronic communications occurred; and (4) the extent of the conversation-like interactions reflected in the communications.

Because the applicability of the open meetings law to such electronic communications depends on the particular way in which a specific message technology is used, these technologies create special dangers for governmental officials trying to comply with the law. Although two members of a governmental body larger than four members may generally discuss the body's business without violating the open meetings law, features like "forward" and "reply to all" common in electronic mail programs deprive a sender of control over the number and identity of the recipients who eventually may have access to the sender's message. Moreover, it is quite possible that, through the use of electronic mail, a quorum of a governmental body may receive information on a subject within the body's jurisdiction in an almost real-time basis, just as they would receive it in a physical gathering of the members.

Inadvertent violations of the open meetings law through the use of electronic communications can be reduced if electronic mail is used principally to transmit information one-way to a body's membership; if the originator of the message reminds recipients to reply only to the originator, if at all; and if message recipients are scrupulous about minimizing the content and distribution of

[77] 69 Op. Att'y Gen. 143 (1980).
[78] *Id*. at 145.
[79] Krischan Correspondence (Oct. 3, 2000).

their replies. Nevertheless, because of the absence of judicial guidance on the subject, and because electronic mail creates the risk that it will be used to carry on private debate and discussion on matters that belong at public meetings subject to public scrutiny, the Attorney General's Office strongly discourages the members of every governmental body from using electronic mail to communicate about issues within the body's realm of authority.[80] Members of a governmental body may not decide matters by email voting, even if the result of the vote is later ratified at a properly noticed meeting.[81]

- **Walking Quorums**

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.[82] In *Conta*, the Court recognized the danger that a walking quorum may produce a predetermined outcome and thus render the publicly-held meeting a mere formality.[83] The Court commented that any attempt to avoid the appearance of a "meeting" through use of a walking quorum is subject to prosecution under the open meetings law.[84] The requirements of the open meetings law thus cannot be circumvented by using an agent or surrogate to poll the members of governmental bodies through a series of individual contacts. Such a circumvention "almost certainly" violates the open meetings law.[85]

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. The signing, by members of a body, of a document asking that a subject be placed on the agenda of an upcoming meeting thus 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.[86] In contrast, 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.[87]

- **Multiple Meetings**

When a quorum of the members of one governmental body attend a meeting of another governmental body under circumstances where their attendance is not chance or social, in order to gather information or otherwise engage in governmental business regarding a subject over which they have decision-making responsibility, two separate meetings occur, and notice must be given of both meetings.[88] The Attorney General has advised that, despite the "separate public notice" requirement of Wis. Stat. § 19.84(4), a single notice can be used, provided that the notice clearly and plainly indicates that a joint meeting will be held and gives the names of each of the bodies involved, and provided that the notice is published and/or

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[80] Krischan Correspondence (Oct. 3, 2000); Benson Correspondence (Mar. 12, 2004).
[81] I-01-10 (Jan. 25, 2010).
[82] *Showers*, 135 Wis. 2d at 92 (quoting *Conta*, 71 Wis. 2d at 687).
[83] *Conta*, 71 Wis. 2d at 685-88.
[84] *Id.* at 687.
[85] Clifford Correspondence (Apr. 28, 1986); *see also* Herbst Correspondence (July 16, 2008) (use of administrative staff to individually poll a quorum of members regarding how they would vote on a proposed motion at a future meeting is a prohibited walking quorum).
[86] Kay Correspondence (Apr. 25, 2007); Kittleson Correspondence (June 13, 2007).
[87] Huff Correspondence (Jan. 15, 2008); *see also* I-01-10 (Jan. 25, 2010) (use of email voting to decide matters fits the definition of a "walking quorum" violation of the open meetings law).
[88] *Badke*, 173 Wis. 2d at 577.

posted in each place where meeting notices are generally published or posted for each governmental body involved.[89]

The kinds of multiple meetings presented in the *Badke* case, and the separate meeting notices required there, must be distinguished from circumstances where a subunit of a parent body meets during a recess from or immediately following the parent body's meeting, to discuss or act on a matter that was the subject of the parent body's meeting. In such circumstances, Wis. Stat. § 19.84(6) allows the subunit to meet on that matter without prior public notice.

- **Burden of Proof As to Existence of a Meeting**

The presence of members of a governmental body does not, in itself, establish the existence of a "meeting" subject to the open meetings law. The law provides, however, that if one-half or more of the members of a body are present, the gathering is presumed to be a "meeting."[90] The law also exempts any "social or chance gathering" not intended to circumvent the requirements of the open meetings law.[91] Thus, where one-half or more of the members of a governmental body rode to a meeting in the same vehicle, the law presumes that the members conducted a "meeting" which was subject to all of the requirements of the open meetings law.[92] Similarly, where a majority of members of a common council gathered at a lounge immediately following a common council meeting, a violation of the open meetings law was presumed.[93] The members of the governmental body may overcome the presumption by proving that they did not discuss any subject that was within the realm of the body's authority.[94]

Where a person alleges that a gathering of less than one-half the members of a governmental body was held in violation of the open meetings law, that person has the burden of proving that the gathering constituted a "meeting" subject to the law.[95] That burden may be satisfied by proving: (1) that the members gathered to conduct governmental business and (2) that there was a sufficient number of members present to determine the body's course of action.

Again, it is important to remember that the overriding policy of the open meetings law is to ensure public access to information about governmental affairs. Under the rule of liberally construing the law to ensure this purpose, any doubts as to whether a particular gathering constitutes a "meeting" subject to the open meetings law should be resolved in favor of complying with the provisions of the law.

WHAT IS REQUIRED IF THE OPEN MEETINGS LAW APPLIES?

The two most basic requirements of the open meetings law are that a governmental body:

(1) give advance public notice of each of its meetings, and

(2) conduct all of its business in open session, unless an exemption to the open session requirement applies.[96]

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[89] Friedman Correspondence (Mar. 4, 2003).
[90] Wis. Stat. § 19.82(2).
[91] Wis. Stat. § 19.82(2).
[92] Karstens Correspondence (July 31, 2008).
[93] Dieck Correspondence (Sept. 12, 2007).
[94] *Id.*
[95] *Showers*, 135 Wis. 2d at 102.
[96] Wis. Stat. § 19.83.

Notice Requirements

Wisconsin Stat. § 19.84, which sets forth the public notice requirements, specifies when, how, and to whom notice must be given, as well as what information a notice must contain.

- **To Whom and How Notice Must Be Given**

  The chief presiding officer of a governmental body, or the officer's designee, must give notice of each meeting of the body to: (1) the public; (2) any members of the news media who have submitted a written request for notice; and (3) the official newspaper designated pursuant to state statute or, if none exists, a news medium likely to give notice in the area.[97]

  The chief presiding officer may give notice of a meeting to the public by posting the notice in one or more places likely to be seen by the general public.[98] As a general rule, the Attorney General has advised posting notices at three different locations within the jurisdiction that the governmental body serves.[99] Alternatively, the chief presiding officer may give notice to the public by paid publication in a news medium likely to give notice in the jurisdictional area the body serves.[100] If the presiding officer gives notice in this manner, he or she must ensure that the notice is actually published. Meeting notices may also be posted at a governmental body's website as a supplement to other public notices, but web posting should not be used as a substitute for other methods of notice.[101] Nothing in the open meetings law prevents a governmental body from determining that multiple notice methods are necessary to provide adequate public notice of the body's meetings.[102] If a meeting notice is posted on a governmental body's website, amendments to the notice should also be posted.[103]

  The chief presiding officer must also give notice of each meeting to members of the news media who have submitted a written request for notice.[104] Although this notice may be given in writing or by telephone,[105] it is preferable to give notice in writing to help ensure accuracy and so that a record of the notice exists.[106] Governmental bodies cannot charge the news media for providing statutorily required notices of public meetings.[107]

  In addition, the chief presiding officer must give notice to the officially designated newspaper or, if none exists, to a news medium likely to give notice in the area.[108] The governmental body is not required to pay for and the newspaper is not required to publish such notice.[109] Note, however, that the requirement to provide notice to the officially designated newspaper is distinct from the requirement to provide notice to the public. If the chief presiding officer chooses to provide notice to the public by paid publication in a news medium, the officer must ensure that the notice is in fact published.

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[97] Wis. Stat. § 19.84(1).
[98] 66 Op. Att'y Gen. 93, 95.
[99] *Id.*
[100] 63 Op. Att'y Gen. 509, 510-11 (1974).
[101] Peck Correspondence (Apr. 17, 2006).
[102] Skindrud Correspondence (Mar. 12, 2009).
[103] Eckert Correspondence (July 25, 2007).
[104] *Lawton*, 2005 WI App 16, ¶ 7.
[105] 65 Op. Att'y Gen. Preface, v-vi (1976).
[106] 65 Op. Att'y Gen. 250, 251 (1976).
[107] 77 Op. Att'y Gen. 312, 313 (1988).
[108] *Lawton*, 2005 WI App 16, ¶ 7.
[109] 66 Op. Att'y Gen. 230, 231 (1977).

When a specific statute prescribes the type of meeting notice a governmental body must give, the body must comply with the requirements of that statute as well as the notice requirements of the open meetings law.[110] However, violations of those other statutory requirements are not redressable under the open meetings law. For example, the open meetings law is not implicated by a municipality's alleged failure to comply with the public notice requirements of Wis. Stat. ch. 985 when providing published notice of public hearings on proposed tax incremental financing districts.[111] Where a class 1 notice under Wis. Stat. ch. 985 has been published, however, the public notice requirement of the open meetings law is also thereby satisfied.[112]

- **Contents of Notice**

  - **In General**

Every public notice of a meeting must give the "time, date, place and subject matter of the meeting, including that intended for consideration at any contemplated closed session, in such form as is reasonably likely to apprise members of the public and the news media thereof."[113] The chief presiding officer of the governmental body is responsible for providing notice, and when he or she is aware of matters which may come before the body, those matters must be included in the meeting notice.[114] The Attorney General's Office has advised that a chief presiding officer may not avoid liability for a legally deficient meeting notice by assigning to a non-member of the body the responsibility to create and provide a notice that complies with Wis. Stat. § 19.84(2).[115]

A frequently recurring question is how specific a subject-matter description in a meeting notice must be. Prior to June 13, 2007, this question was governed by the "bright-line" rule articulated in *State ex rel. H.D. Enterprises II, LLC v. City of Stoughton*.[116] Under that standard, a meeting notice adequately described a subject if it identified "the general topic of items to be discussed" and the simple heading "licenses," without more, was found sufficient to apprise the public that a city council would reconsider a previous decision to deny a liquor license to a particular local grocery store.[117]

On June 13, 2007, the Wisconsin Supreme Court overruled *H.D. Enterprises* and announced a new standard to be applied prospectively to all meeting notices issued after that date.[118] In *State ex rel. Buswell v. Tomah Area School District*, the Court held that a public notice for a closed session for the purpose of "consideration and/or action concerning employment/negotiations with district personnel pursuant to Wis. Stat. § 19.85(1)(c)" was vague, misleading and legally insufficient, where the school board tentatively approved a collective bargaining agreement between it and the teacher's union.[119] In reaching that conclusion, the Court determined that "the plain meaning of Wis. Stat. § 19.84(2) sets forth a reasonableness standard, and that such a standard strikes the proper balance contemplated in Wis. Stat. §§ 19.81(1) and (4) between the public's right to information and the government's need to efficiently conduct its business."[120] This

[110] Wis. Stat. § 19.84(1)(a).
[111] *See* Boyle Correspondence (May 4, 2005).
[112] Stalle Correspondence (Apr. 10, 2008).
[113] Wis. Stat. § 19.84(2).
[114] 66 Op. Att'y Gen. 68, 70 (1977).
[115] Schuh Correspondence (Oct. 17, 2001).
[116] *State ex rel. H.D. Enters. II, LLC v. City of Stoughton*, 230 Wis. 2d 480, 602 N.W.2d 72 (Ct. App. 1999).
[117] *Id.* at 486-87.
[118] *State ex rel. Buswell v. Tomah Area Sch. Dist.*, 2007 WI 71, 301 Wis. 2d 178, 732 N.W.2d 804.
[119] *Id.* ¶¶ 6-7, 37-38, 41.
[120] *Id.* ¶ 3.

reasonableness standard "requires a case-specific analysis" and "whether notice is sufficiently specific will depend upon what is reasonable under the circumstances."[121] In making that determination, the factors to be considered include: "[1] the burden of providing more detailed notice, [2] whether the subject is of particular public interest, and [3] whether it involves non-routine action that the public would be unlikely to anticipate."[122]

The first factor "balances the policy of providing greater information with the requirement that providing such information be 'compatible with the conduct of governmental affairs.' Wis. Stat. § 19.81(1)."[123] The determination must be made on a case-by-case basis.[124] "[T]he demands of specificity should not thwart the efficient administration of governmental business."[125]

The second factor takes into account "both the number of people interested and the intensity of that interest," though the level of interest is not dispositive, and must be balanced with other factors on a case-by-case basis.[126]

The third factor considers "whether the subject of the meeting is routine or novel."[127] There may be less need for specificity where a meeting subject occurs routinely, because members of the public are more likely to anticipate that the subject will be addressed.[128] "Novel issues may . . . require more specific notice."[129]

Whether a meeting notice is reasonable, according to the Court, "cannot be determined from the standpoint of when the meeting actually takes place," but rather must be "based upon what information is available to the officer noticing the meeting at the time the notice is provided, and based upon what it would be reasonable for the officer to know."[130] Once reasonable notice has been given, "meeting participants would be free to discuss any aspect of the noticed subject matter, as well as issues that are reasonably related to it."[131] However, "a meeting cannot address topics unrelated to the information in the notice."[132] The Attorney General has similarly advised, in an informal opinion, that if a meeting notice contains a general subject matter designation and a subject that was not specifically noticed comes up at the meeting, a governmental body should refrain from engaging in any information gathering or discussion or from taking any action that would deprive the public of information about the conduct of governmental business.[133]

Whether a meeting notice reasonably apprises the public of the meeting's subject matter may also depend in part on the surrounding circumstances. A notice that might be adequate, standing alone, may nonetheless fail to provide reasonable notice if it is accompanied by other statements or actions that expressly contradict it, or if the notice is misleading when considered in the light of long-standing policies of the governmental body.[134]

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[121] *Id.* ¶ 22.
[122] *Id.* ¶ 28.
[123] *Id.* ¶ 29.
[124] *Id.*
[125] *Id.*
[126] *Id.* ¶ 30.
[127] *Id.* ¶ 31.
[128] *Id.*
[129] *Id.*
[130] *Id.* ¶ 32.
[131] *Id.* ¶ 34.
[132] *Id.*
[133] I-05-93 (Apr. 26, 1993).
[134] Linde Correspondence (May 4, 2007); Koss Correspondence (May 30, 2007); Musolf Correspondence (July 13, 2007); Martinson Correspondence (Mar. 2, 2009).

In order to draft a meeting notice that complies with the reasonableness standard, a good rule of thumb will be to ask whether a person interested in a specific subject would be aware, upon reading the notice, that the subject might be discussed. In an unpublished, post-*Buswell* decision, the court of appeals determined that a meeting notice for a closed session of a school board under Wis. Stat. § 19.85(1)(c) for the purpose of "[d]iscussion of the role, duties, and responsibilities of the Library Director and evaluation of job performance and possible action" gave sufficient public notice of the board's discussion of the discipline and termination of the library director.[135] The court reasoned that, under *Buswell*, the "sufficiency of the notice will be based on the knowledge of the person posting notice at the time when it is posted."[136]

- **Generic Agenda Items**

Purely generic subject matter designations such as "old business," "new business," "miscellaneous business," "agenda revisions," or "such other matters as are authorized by law" are insufficient because, standing alone, they identify no particular subjects at all.[137] Similarly, the use of a notice heading that merely refers to an earlier meeting of the governmental body (or of some other body) without identifying any particular subject of discussion is so lacking in informational value that it almost certainly fails to give the public reasonable notice of what the governmental body intends to discuss.[138] If such a notice is meant to indicate an intent to simply receive and approve minutes of the designated meeting, it should so indicate and discussion should be limited to whether the minutes accurately reflect the substance of that meeting.[139]

Likewise, the Attorney General has advised that the practice of using such designations as "mayor comments," "alderman comments," or "staff comments" for the purpose of communicating information on matters within the scope of the governmental body's authority "is, at best, at the outer edge of lawful practice, and may well cross the line to become unlawful."[140] Because members and officials of governmental bodies have greater opportunities for input into the agenda-setting process than the public has, they should be held to a higher standard of specificity regarding the subjects they intend to address.[141]

- **Action Agenda Items**

The Wisconsin Court of Appeals has noted that "Wis. Stat. § 19.84(2) does not expressly require that the notice indicate whether a meeting will be purely deliberative or if action will be taken."[142] The *Buswell* decision inferred from this that "adequate notice . . . may not require information about whether a vote on a subject will occur, so long as the subject matter of the vote is adequately specified."[143] Both in *Olson* and in *Buswell*, however, the courts reiterated the principle—first recognized in *Badke*[144]—that the information in the notice must be sufficient to alert the public to the importance of the meeting, so that they can make an informed decision

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[135] *State ex rel. Wanninger v. City of Manitowoc Pub. Library Bd.*, No. 2011AP1059, 2012 WL 1192048, ¶¶ 19-21 (Wis. Ct. App. Apr. 11, 2012) (unpublished).
[136] *Id.* ¶ 21 (citing *Buswell*, 2007 WI 71, ¶ 32).
[137] Becker Correspondence (Nov. 30, 2004); Heupel Correspondence (Aug. 29, 2006).
[138] Erickson Correspondence (Apr. 22, 2009).
[139] *Id.*
[140] Rude Correspondence (Mar. 5, 2004).
[141] Thompson Correspondence (Sept. 3, 2004).
[142] *State ex rel. Olson v. City of Baraboo Jt. Review Bd.*, 2002 WI App 64, ¶ 15, 252 Wis. 2d 628, 643 N.W.2d 796.
[143] *Buswell*, 2007 WI 71, ¶ 37 n.7.
[144] *Badke*, 173 Wis. 2d at 573-74 and 577-78.

whether to attend.[145] The *Olson* decision thus acknowledged that, in some circumstances, a failure to expressly state whether action will be taken at a meeting could be a violation of the open meetings law.[146] Although the courts have not articulated the specific standard to apply to this question, it appears to follow from *Buswell* that the test would be whether, under the particular factual circumstances of the case, the notice reasonably alerts the public to the importance of the meeting.[147]

Another frequently asked question is whether a governmental body may act on a motion for reconsideration of a matter voted on at a previous meeting, if the motion is brought under a general subject matter designation. The Attorney General has advised that a member may move for reconsideration under a general subject matter designation, but that any discussion or action on the motion should be set over to a later meeting for which specific notice of the subject matter of the motion is given.[148]

- **Notice of Closed Sessions**

  The notice provision in Wis. Stat. § 19.84(2) requires that if the chief presiding officer or the officer's designee knows at the time he or she gives notice of a meeting that a closed session is contemplated, the notice must contain the subject matter to be considered in closed session. Such notice "must contain enough information for the public to discern whether the subject matter is authorized for closed session under § 19.85(1)."[149] The Attorney General has advised that notice of closed sessions must contain the specific nature of the business, as well as the exemption(s) under which the chief presiding officer believes a closed session is authorized.[150] Merely identifying and quoting from a statutory exemption does not reasonably identify any particular subject that might be taken up thereunder and thus is not adequate notice of a closed session.[151] In *State ex rel. Schaeve v. Van Lare*, the Court held that a notice to convene in closed session under Wis. Stat. § 19.85(1)(b) "to conduct a hearing to consider the possible discipline of a public employee" was sufficient.[152]

- **Time of Notice**

  The provision in Wis. Stat. § 19.84(3) requires that every public notice of a meeting be given at least 24 hours in advance of the meeting, unless "for good cause" such notice is "impossible or impractical." If "good cause" exists, the notice should be given as soon as possible and must be given at least two hours in advance of the meeting.[153]

  No Wisconsin court decisions or Attorney General opinions discuss what constitutes "good cause" to provide less than twenty-four-hour notice of a meeting. This provision, like all other provisions of the open meetings law, must be construed in favor of providing the public with the fullest and most complete information about governmental affairs as is compatible with the conduct of governmental

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[145] *Buswell*, 2007 WI 71, ¶ 26; *Olson*, 2002 WI App 64, ¶ 15.
[146] *Olson*, 2002 WI App 64, ¶ 15.
[147] Herbst Correspondence (July 16, 2008).
[148] Bukowski Correspondence (May 5, 1986).
[149] *Buswell*, 2007 WI 71, ¶ 37 n.7.
[150] 66 Op. Att'y Gen. 93, 98.
[151] Weinschenk Correspondence (Dec. 29, 2006); Anderson Correspondence (Feb. 13, 2007).
[152] *State ex rel. Schaeve v. Van Lare,* 125 Wis. 2d 40, 47, 370 N.W.2d 271 (Ct. App. 1985) (citation omitted).
[153] Wis. Stat. § 19.84(3).

business.[154] If there is any doubt whether "good cause" exists, the governmental body should provide the full twenty-four-hour notice.

When calculating the twenty-four hour notice period, Wis. Stat. § 990.001(4)(a) requires that Sundays and legal holidays shall be excluded. Posting notice of a Monday meeting on the preceding Sunday is, therefore, inadequate, but posting such notice on the preceding Saturday would suffice, as long as the posting location is open to the public on Saturdays.[155]

Wisconsin Stat. § 19.84(4) provides that separate notice for each meeting of a governmental body must be given at a date and time reasonably close to the meeting date. A single notice that lists all the meetings that a governmental body plans to hold over a given week, month, or year does not comply with the notice requirements of the open meetings law.[156] Similarly, a meeting notice that states that a quorum of various town governmental bodies may participate at the same time in a multi-month, on-line discussion of town issues fails to satisfy the "separate notice" requirement.[157]

University of Wisconsin departments and their subunits, as well as the Olympic ice training rink, are exempt from the specific notice requirements in Wis. Stat. § 19.84(1)-(4). Those bodies are simply required to provide notice "which is reasonably likely to apprise interested persons, and news media who have filed written requests for such notice."[158] Also exempt from the specific notice requirements are certain meetings of subunits of parent bodies held during or immediately before or after a meeting of the parent body.[159]

- **Compliance With Notice**

A governmental body, when conducting a meeting, is free to discuss any aspect of any subject identified in the public notice of that meeting, as well as issues reasonably related to that subject, but may not address any topics that are not reasonably related to the information in the notice.[160] There is no requirement, however, that a governmental body must follow the agenda in the order listed on the meeting notice, unless a particular agenda item has been noticed for a specific time.[161] Nor is a governmental body required to actually discuss every item contained in the public notice. It is reasonable, in appropriate circumstances, for a body to cancel a previously planned discussion or postpone it to a later date.[162]

Open Session Requirements

- **Accessibility**

In addition to requiring advance public notice of every meeting of a governmental body, the open meetings law also 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."[163] Similarly, an "open session" is defined in Wis. Stat. § 19.82(3) as "a meeting which is held in a

[154] Wis. Stat. § 19.81(1) and (4).
[155] Caylor Correspondence (Dec. 6, 2007).
[156] *See* 63 Op. Att'y Gen. 509, 513.
[157] Connors/Haag Correspondence (May 26, 2009).
[158] Wis. Stat. § 19.84(5).
[159] *See* Wis. Stat. § 19.84(6).
[160] *Buswell*, 2007 WI 71, ¶ 34.
[161] Stencil Correspondence (Mar. 6, 2008).
[162] Black Correspondence (Apr. 22, 2009).
[163] Wis. Stat. § 19.81(2).

place reasonably accessible to members of the public and open to all citizens at all times." Every meeting of a governmental body must initially be convened in "open session."[164] 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.[165]

The requirement that meeting locations be reasonably accessible to the public and open to all citizens at all times means that governmental bodies must hold their meetings in rooms that are reasonably calculated to be large enough to accommodate all citizens who wish to attend the meetings.[166] Absolute access is not, however, required.[167] In *Badke*, for instance, the Wisconsin Supreme Court concluded that a village board meeting that was held in a village hall capable of holding 55-75 people was reasonably accessible, although three members of the public were turned away due to overcrowding.[168] Whether a meeting place is reasonably accessible depends on the facts in each individual case. Any doubt as to whether a meeting facility is large enough to satisfy the requirement should be resolved in favor of holding the meeting in a larger facility.

The policy of openness and accessibility favors governmental bodies holding their meetings in public places, such as a municipal hall or school, rather than on private premises.[169] The law prohibits meetings on private premises that are not open and reasonably accessible to the public.[170] Generally speaking, places such as a private room in a restaurant or a dining room in a private club are not considered "reasonably accessible." A governmental body should meet on private premises only in exceptional cases, where the governmental body has a specific reason for doing so which does not compromise the public's right to information about governmental affairs.

The policy of openness and accessibility also requires that governmental bodies hold their meetings at locations near to the public they serve. Accordingly, the Attorney General has concluded that a school board meeting held forty miles from the district which the school board served was not "reasonably accessible" within the meaning of the open meetings law.[171] The Attorney General advises that, in order to comply with the "reasonably accessible" requirement, governmental bodies should conduct all their meetings at a location within the territory they serve, unless there are special circumstances that make it impossible or impractical to do so.[172]

Occasionally, a governmental body may need to leave the place where the meeting began in order to accomplish its business—*e.g.*, inspection of a property or construction projects. The Attorney General's Office has advised that such off-site business may be conducted consistently with the requirements of the open meetings law, as long as certain precautions are taken. First the public notice of the meeting must list all of the locations to be visited in the order in which they will be visited. This makes it possible for a member of the public to follow the governmental body to each location or to join the governmental body at any particular location. Second, each location at which government business is to be conducted must itself be reasonably accessible to the public at all times when such business is taking place. Third, care must be taken to ensure that government business is discussed only during those times when the members of the body are convened at one of the particular locations for which notice has been given. The members of the governmental body may travel together or separately, but if half or more of them travel

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[164] *See* Wis. Stat. §§ 19.83 and 19.85(1).
[165] Wis. Stat. § 19.83.
[166] *Badke*, 173 Wis. 2d at 580-81.
[167] *Id.*
[168] *Id.* at 561, 563, 581.
[169] *See* 67 Op. Att'y Gen. 125, 127 (1978).
[170] Wis. Stat. § 19.82(3).
[171] Miller Correspondence (May 25, 1977).
[172] I-29-91 (Oct. 17, 1991).

together, they may not discuss government business when their vehicle is in motion, because a moving vehicle is not accessible to the public.[173]

- **Access for Persons With Disabilities**

The public accessibility requirements of the open meetings law have long been interpreted by the Attorney General as meaning that every meeting subject to the law must be held in a location that is "reasonably accessible to all citizens, including those with disabilities."[174] In selecting a meeting facility that satisfies this requirement, a local governmental body has more leeway than does a state governmental body. For a state body, the facility must have physical characteristics that permit persons with functional limitations to enter, circulate, and leave the facility *without* assistance.[175] In the case of a local governmental body, however, a meeting facility must have physical characteristics that permit persons with functional limitations to enter, circulate, and leave the facility *with* assistance.[176] In order to optimally comply with the spirit of open government, however, local bodies should also, whenever possible, meet in buildings and rooms that are accessible without assistance.

The Americans with Disabilities Act and other federal laws governing the rights of persons with disabilities may additionally require governmental bodies to meet accessibility and reasonable accommodation requirements that exceed the requirements imposed by Wisconsin's open meetings law. For more detailed assistance regarding such matters, both government officials and members of the public are encouraged to consult with their own attorneys or to contact the appropriate federal enforcement authorities.

- **Tape Recording and Videotaping**

The open meetings law grants citizens the right to attend and observe meetings of governmental bodies that are held in open session. The open meetings law also grants citizens the right to tape record or videotape open session meetings, as long as doing so does not disrupt the meeting. The law explicitly states that a governmental body must make a reasonable effort to accommodate anyone who wants to record, film, or photograph an open session meeting, as long as the activity does not interfere with the meeting.[177]

In contrast, the open meetings law does not require a governmental body to permit recording of an authorized closed session.[178] If a governmental body wishes to record its own closed meetings, it should arrange for the security of the records to prevent their improper disclosure.[179]

- **Citizen Participation**

In general, the open meetings law grants citizens the right to attend and observe open session meetings of governmental bodies, but does not require a governmental body to allow members of the public to speak or actively participate in the body's meeting.[180] There are some other state statutes that require governmental bodies to hold public hearings on specified matters.[181] Unless such a statute specifically applies, however,

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[173] Rappert Correspondence (Apr. 8, 1993); Musolf Correspondence (July 13, 2007).
[174] 69 Op. Att'y Gen. 251, 252 (1980).
[175] *See* Wis. Stat. §§ 19.82(3) and 101.13(1); 69 Op. Att'y Gen. 251, 252.
[176] 69 Op. Att'y Gen. 251, 253.
[177] Wis. Stat. § 19.90.
[178] 66 Op. Att'y Gen. 318, 325 (1977); Maroney Correspondence (Oct. 31, 2006).
[179] 66 Op. Att'y Gen. 318, 325.
[180] Lundquist Correspondence (Oct. 25, 2005).
[181] *See* for example, Wis. Stat. § 65.90(4) (requiring public hearing before adoption of a municipal budget) and Wis. Stat. § 66.1105(4)(a)

a governmental body is free to determine for itself whether and to what extent it will allow citizen participation at its meetings.[182]

Although it is not required, the open meetings law does permit a governmental body to set aside a portion of an open meeting as a public comment period.[183] Such a period must be included on 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.

- **Ballots, Votes, and Records, Including Meeting Minutes**

No secret ballot may be used to determine any election or decision of a governmental body, except the election of officers of a body.[184] For example, a body cannot vote by secret ballot to fill a vacancy on a city council.[185] If a member of a governmental body requests that the vote of each member on a particular matter be recorded, a voice vote or a vote by a show of hands is not permissible unless the vote is unanimous and the minutes reflect who is present for the vote.[186] A governmental body may not use email ballots to decide matters, even if the result of the vote is later ratified at a properly noticed meeting.[187]

The open meetings law requires a governmental body to create and preserve a record of all motions and roll-call votes at its meetings.[188] This requirement applies to both open and closed sessions.[189] Written minutes are the most common method used to comply with the requirement, but they are not the only permissible method. It can also be satisfied if the motions and roll-call votes are recorded and preserved in some other way, such as on a tape recording.[190] As long as the body creates and preserves a record of all motions and roll-call votes, it is not required by the open meetings law to take more formal or detailed minutes of other aspects of the meeting. Other statutes outside the open meetings law, however, may prescribe particular minute-taking requirements for certain governmental bodies and officials that go beyond what is required by the open meetings law.[191]

The open meetings law does not specify a timeframe in which a body must create a record of all motions and roll-call votes. In the absence of a specific statutory timeframe, issues can arise. In *Journal Times v. City of Racine Board of Police and Fire Commissioners*,[192] the Racine Board of Police and Fire Commissioners voted on a motion in a closed session meeting, but did not contemporaneously create a record of the motion. Instead, the motion was included in the minutes of the meeting, which were not finished and approved by the Commission until three months after the meeting. In a non-party brief, DOJ argued that Wis. Stat. § 19.88(3) should be construed as requiring that a record of all motions must be made at the

(requiring public hearing before creation of a tax incremental finance district).

[182] Zwieg Correspondence (July 13, 2006); Chiaverotti Correspondence (Sept. 19, 2006).

[183] Wis. Stat. §§ 19.83(2) and 19.84(2).

[184] Wis. Stat. § 19.88(1).

[185] 65 Op. Att'y Gen. 131 (1976).

[186] I-95-89 (Nov. 13, 1989).

[187] I-01-10 (Jan. 25, 2010).

[188] Wis. Stat. § 19.88(3).

[189] De Moya Correspondence (June 17, 2009).

[190] I-95-89 (Nov. 13, 1989).

[191] I-20-89 (Mar. 8, 1989). *See, e.g.*, Wis. Stat. §§ 59.23(2)(a) (county clerk); 60.33(2)(a) (town clerk); 61.25(3) (village clerk); 62.09(11)(b) (city clerk); 62.13(5)(i) (police and fire commission); 66.1001(4)(b) (plan commission); 70.47(7)(bb) (board of review).

[192] *Journal Times v. City of Racine Bd. of Police & Fire Comm'rs*, 2015 WI 56, 362 Wis. 2d 577, 866 N.W.2d 563.

time of the meeting in question or as soon thereafter as practicable.[193] While the court resolved the case on other grounds without deciding this issue, as a best practice, it is advisable that the motions and roll call votes of a meeting of a governmental body be recorded at the time of the meeting or as soon thereafter as practicable.

Although Wis. Stat. § 19.88(3) does not indicate how detailed the record of motions and votes should be, the general legislative policy of the open meetings law is that "the public is entitled to the fullest and most complete information regarding the affairs of government as is compatible with the conduct of governmental business."[194] In light of that policy, it seems clear that a governmental body's records should provide the public with a reasonably intelligible description of the essential substantive elements of every motion made, who initiated and seconded the motion, the outcome of any vote on the motion, and, if a roll-call vote, how each member voted.[195]

Nothing in the open meetings law prohibits a body from making decisions by general consent, without a formal vote, but such informal procedures are typically only appropriate for routine procedural matters such as approving the minutes of prior meetings or adjourning. In any event, regardless of whether a decision is made by consensus or by some other method, Wis. Stat. § 19.88(3) still requires the body to create and preserve a meaningful record of that decision.[196] "Consent agendas," whereby a body discusses individual items of business under separate agenda headings, but takes action on all discussed items by adopting a single motion to approve all the items previously discussed, are likely insufficient to satisfy the recordkeeping requirements of Wis. Stat. § 19.88(3).[197]

Wisconsin Stat. § 19.88(3) also provides that meeting records created under that statute—whether for an open or a closed session—must be open to public inspection to the extent prescribed in the state public records law. Because the records law contains no general exemption for records created during a closed session, a custodian must release such items unless the particular record at issue is subject to a specific statutory exemption or the custodian concludes that the harm to the public from its release would outweigh the benefit to the public.[198] There is a strong presumption under the public records law that release of records is in the public interest. As long as the reasons for convening in closed session continue to exist, however, the custodian may be able to justify not disclosing any information that requires confidentiality. But the custodian still must separate information that can be made public from that which cannot and must disclose the former, even if the latter can be withheld. In addition, once the underlying purpose for the closed session ceases to exist, all records of the session must then be provided to any person requesting them.[199]

WHEN IS IT PERMISSIBLE TO CONVENE IN CLOSED SESSION?

Every meeting of a governmental body must initially be convened in open session. All business of any kind, formal or informal, must be initiated, discussed, and acted upon in open session unless one of the exemptions in Wis. Stat. § 19.85(1) applies.[200]

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[193] Non-party Brief of Wisconsin Department of Justice at 6, *Journal Times v. City of Racine Bd. of Police & Fire Comm'rs*, 2015 WI 56 (No. 2013AP1715).
[194] Wis. Stat. § 19.81(1).
[195] De Moya Correspondence (June 17, 2009).
[196] Huebscher Correspondence (May 23, 2008).
[197] Perlick Correspondence (May 12, 2005).
[198] De Moya Correspondence (June 17, 2009).
[199] *See* 67 Op. Att'y Gen. 117, 119 (1978).
[200] Wis. Stat. § 19.83.

Notice of Closed Session

The notice provision in Wis. Stat. § 19.84(2) requires that, if the chief presiding officer of a governmental body is aware that a closed session is contemplated at the time he or she gives public notice of the meeting, the notice must contain the subject matter of the closed session.

If the chief presiding officer was not aware of a contemplated closed session at the time he or she gave notice of the meeting, that does not foreclose a governmental body from going into closed session under Wis. Stat. § 19.85(1) to discuss an item contained in the notice for the open session.[201] In both cases, a governmental body must follow the procedure set forth in Wis. Stat. § 19.85(1) before going into closed session.

Procedure for Convening in Closed Session

Every meeting of a governmental body must initially be convened in open session.[202] Before convening in closed session, the governmental body must follow the procedure set forth in Wis. Stat. § 19.85(1) which requires that the governmental body pass a motion, by recorded majority vote, to convene in closed session. If a motion is unanimous, there is no requirement to record the votes individually.[203] Before the governmental body votes on the motion, the chief presiding officer must announce and record in open session the nature of the business to be discussed and the specific statutory exemption which is claimed to authorize the closed session.[204] Stating only the statute section number of the applicable exemption is not sufficient because many exemptions contain more than one reason for authorizing closure. For example, Wis. Stat. § 19.85(1)(c) allows governmental bodies to use closed sessions to interview candidates for positions of employment, to consider promotions of particular employees, to consider the compensation of particular employees, and to conduct employee evaluations—each of which is a different reason that should be identified in the meeting notice and in the motion to convene into closed session.[205] Similarly, merely identifying and quoting from a statutory exemption does not adequately announce what particular part of the governmental body's business is to be considered under that exemption.[206] Enough specificity is needed in describing the subject matter of the contemplated closed meeting to enable the members of the governmental body to intelligently vote on the motion to close the meeting.[207] If several exemptions are relied on to authorize a closed discussion of several subjects, the motion should make it clear which exemptions correspond to which subjects.[208] The governmental body must limit its discussion in closed session to the business specified in the announcement.[209]

Authorized Closed Sessions

Wisconsin Stat. § 19.85(1) contains eleven exemptions to the open session requirement which permit, but do not require, a governmental body to convene in closed session. Because the law is designed to provide the public with the most complete information possible regarding the affairs of government, exemptions should be strictly construed.[210] The policy of the open meetings law dictates that the exemptions be invoked sparingly and only where necessary to protect the public interest. If there is any doubt as to whether closure is permitted under a given exemption, the governmental body should hold the meeting in open session.[211]

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[201] 66 Op. Att'y Gen. 106, 108 (1977).
[202] Wis. Stat. §§ 19.83 and 19.85(1).
[203] *Schaeve*, 125 Wis. 2d at 51.
[204] 66 Op. Att'y Gen. 93, 97-98.
[205] Reynolds/Kreibich Correspondence (Oct. 23, 2003).
[206] Weinschenk Correspondence (Dec. 29, 2006); Anderson Correspondence (Feb. 13, 2007).
[207] Heule Correspondence (June 29, 1977); *see also Buswell*, 2007 WI 71, ¶ 37 n.7.
[208] Brisco Correspondence (Dec. 13, 2005).
[209] Wis. Stat. § 19.85(1).
[210] *State ex rel. Hodge v. Town of Turtle Lake*, 180 Wis. 2d 62, 71, 508 N.W.2d 603 (1993); *Citizens for Responsible Dev.*, 2007 WI App 114, ¶ 8.
[211] *See* 74 Op. Att'y Gen. 70, 73 (1985).

The following are some of the most frequently cited exemptions.

- **Judicial or Quasi-Judicial Hearings**

  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.[212] 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.[213] 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.[214] Bodies that consider zoning appeals, such as boards of zoning appeals and boards of adjustment, may not convene in closed session.[215] The meetings of town, village, and city boards of review regarding appeals of property tax assessments must also be conducted in open session.[216]

- **Employment and Licensing Matters**

  - **Consideration of Dismissal, Demotion, Discipline, Licensing, and Tenure**

    Two of the statutory exemptions to the open session requirement relate specifically to employment or licensing of an individual. The first, Wis. Stat. § 19.85(1)(b), authorizes a closed session for:

    > Considering 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, or considering the grant or denial of tenure for a university faculty member, 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 or licensee 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.[217] Such hearings may be required by statute, ordinance or rule, by collective bargaining agreement, or by circumstances in which the employee or licensee is the subject of charges that might damage the person's good name, reputation, honor or integrity, or where the governmental body's action might impose substantial stigma or disability upon the person.[218]

    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

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[212] *Hodge*, 180 Wis. 2d at 72; *cf. State ex rel. Cities Serv. Oil Co. v. Bd. of Appeals*, 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).
[213] *Hodge*, 180 Wis. 2d at 74.
[214] 68 Op. Att'y Gen. 171 (1979).
[215] Wis. Stat. §§ 59.694 (counties); 60.65(5) (towns); and 62.23(7)(e)3. (cities); White Correspondence (May 1, 2009).
[216] Wis. Stat. § 70.47(2m).
[217] 66 Op. Att'y Gen. 211, 214 (1977).
[218] *Id.*

action in closed session. The body may, however, convene in closed session under Wis. Stat. § 19.85(1)(b) for the purpose of deliberating about the dismissal, demotion, licensing, discipline, or investigation of charges. Following such closed deliberations, the body may reconvene in open session and take final action related to the person's employment or license.[219]

Nothing in Wis. Stat. § 19.85(1) permits a person who is not a member of the governmental body to demand that the body meet in closed session. The Wisconsin Court of Appeals held that a governmental body was not required to comply with a public employee's request that the body convene in closed session to vote on the employee's dismissal.[220]

- **Consideration of Employment, Promotion, Compensation, and Performance Evaluations**

The second exemption which relates to employment matters 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."[221]

The Attorney General's Office has interpreted this exemption to extend to public officers, such as a police chief, whom the governmental body has jurisdiction to employ.[222] The Attorney General's Office has also concluded that this exemption is sufficiently broad to authorize convening in closed session to interview and consider applicants for positions of employment.[223]

An elected official is not considered a "public employee over which the governmental body has jurisdiction or exercises responsibility."[224] Thus, Wis. Stat. § 19.85(1)(c) does not authorize a county board to convene in closed session to consider appointments of county board members to a county board committee.[225]

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."[226] 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.[227] 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.[228] The section authorizes closure to determine increases in compensation for specific employees.[229] Similarly, Wis. Stat. § 19.85(1)(c) authorizes closure to determine which

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[219] *See State ex rel. Epping v. City of Neillsville Common Council*, 218 Wis. 2d 516, 581 N.W.2d 548 (Ct. App. 1998); Johnson Correspondence (Feb. 27, 2009).
[220] *Schaeve*, 125 Wis. 2d at 40.
[221] Wis. Stat. § 19.85(1)(c).
[222] Caturia Correspondence (Sept. 20, 1982).
[223] *Id.*
[224] Wis. Stat. § 19.85(1)(c).
[225] 76 Op. Att'y Gen. 276 (1987).
[226] *Oshkosh Nw. Co. v. Oshkosh Library Bd.*, 125 Wis. 2d 480, 486, 373 N.W.2d 459 (Ct. App. 1985).
[227] *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").
[228] 80 Op. Att'y Gen. 176, 178-82.
[229] 67 Op. Att'y Gen. 117, 118.

employees to lay off, or whether to non-renew an employee's contract at the expiration of the contract term,[230] but not to determine whether to reduce or increase staffing, in general.

- **Consideration of Financial, Medical, Social, or Personal Information**

The exemption in Wis. Stat. § 19.85(1)(f) authorizes a closed session for:

> Considering financial, medical, social or personal histories or disciplinary data of specific persons, preliminary consideration of specific personnel problems or the investigation of charges against specific persons except where par. (b) applies which, if discussed in public, would be likely to have a substantial adverse effect upon the reputation of any person referred to in such histories or data, or involved in such problems or investigations.

An example is where a state employee was alleged to have violated a state law.[231] This exemption is not limited to considerations involving public employees. For example, the Attorney General concluded that, in an exceptional case, a school board could convene in closed session under the exemption to interview a candidate to fill a vacancy on the school board if information is expected to damage a reputation, however, the vote should be in open session.[232]

At the same time, the Attorney General cautioned that the exemption in Wis. Stat. § 19.85(1)(f) is extremely limited. It applies only where a member of a governmental body has actual knowledge of information that will have a substantial adverse effect on the person mentioned or involved. Moreover, the exemption authorizes closure only for the duration of the discussions about the information specified in Wis. Stat. § 19.85(1)(f). Thus, the exemption would not authorize a school board to actually appoint a new member to the board in closed session.[233]

- **Conducting Public Business With Competitive or Bargaining Implications**

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."[234] This exemption is not limited to deliberating or negotiating the purchase of public property or the investing of public funds. For example, the Attorney General has determined that the exemption authorized a school board to convene in closed session to develop negotiating strategies for collective bargaining.[235]

Governmental officials must keep in mind, however, that this exemption applies only when "competitive or bargaining reasons require a closed session."[236] The exemption is restrictive rather than expansive.[237] When a governmental body seeks to convene in closed session under Wis. Stat. § 19.85(1)(e), the burden is on the body to show that competitive or bargaining interests require closure.[238] An announcement of a contemplated closed session under Wis. Stat. § 19.85(1)(e) that provides only a conclusory assertion that the subject of the session will involve competitive or bargaining issues is inadequate because it does not reflect

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[230] *See* 66 Op. Att'y Gen. 211, 213.
[231] *See Wis. State Journal v. Univ. of Wis.-Platteville*, 160 Wis. 2d 31, 38, 465 N.W.2d 266 (Ct. App. 1990).
[232] 74 Op. Att'y Gen. 70, 72.
[233] *Id.*
[234] Wis. Stat. § 19.85(1)(e).
[235] 66 Op. Att'y Gen. 93, 96 (the opinion advised that governmental bodies that are not formed exclusively for collective bargaining comply with the open meetings law when meeting for the purpose of developing negotiating strategy).
[236] Wis. Stat. § 19.85(1)(e).
[237] *Citizens for Responsible Dev.*, 2007 WI App 114, ¶¶ 6-8.
[238] *Id.* ¶ 10.

how the proposed discussion would implicate the competitive or bargaining interests of the body or the body's basis for concluding that the subject falls within the exemption.[239]

The use of the word "require" in Wis. Stat. § 19.85(1)(e) limits that exemption to situations in which competitive or bargaining reasons leave a governmental body with no option other than to close the meeting.[240] On the facts as presented in *Citizens for Responsible Development*, the Court thus found that a desire or request for confidentiality by a private developer engaged in negotiations with a city was not sufficient to justify a closed session for competitive or bargaining reasons.[241] Nor did the fear that public statements might attract the attention of potential private competitors for the developer justify closure under this exemption, because the Court found that such competition would be likely to benefit, rather than harm, the city's competitive or bargaining interests.[242] Similarly, holding closed meetings about ongoing negotiations between the city and private parties would not prevent those parties from seeking a better deal elsewhere. The possibility of such competition, therefore, also did not justify closure under Wis. Stat. § 19.85(1)(e).[243] The exemption did, however, allow the city to close those *portions* of its meetings that would reveal its negotiation strategy or the price it planned to offer for a purchase of property, but it could not close other parts of the meetings.[244] The competitive or bargaining interests to be protected by a closed session under Wis. Stat. § 19.85(1)(e) do not have to be shared by every member of the body or by every municipality participating in an intergovernmental body.[245]

Consistent with the above emphasis on the word "require" in Wis. Stat. § 19.85(1)(e), the Attorney General has advised that mere inconvenience, delay, embarrassment, frustration, or even speculation as to the probability of success would be an insufficient basis to close a meeting.[246] Competitive or bargaining reasons permit a closed session where the discussion will directly and substantially affect negotiations with a third party, but not where the discussions might be one of several factors that indirectly influence the outcome of those negotiations.[247] The meetings of a governmental body also may not be closed in a blanket manner merely because they may at times involve competitive or bargaining issues, but rather may only be closed on those occasions when the particular meeting is going to involve discussion which, if held in open session, would harm the competitive or bargaining interests at issue.[248] Once a governmental body's bargaining team has reached a tentative agreement, the discussion whether the body should ratify the agreement should be conducted in open session.[249]

- **Conferring With Legal Counsel With Respect to Litigation**

The exemption in Wis. Stat. § 19.85(1)(g) authorizes a closed session for "[c]onferring with legal counsel for the governmental body who is rendering oral or written advice concerning strategy to be adopted by the body with respect to litigation in which it is or is likely to become involved."

The presence of the governmental body's legal counsel is not, in itself, sufficient reason to authorize closure under this exemption. The exemption applies only if the legal counsel is rendering advice on strategy to adopt for litigation in which the governmental body is or is likely to become involved.

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[239] Wirth/Lamoreaux Correspondence (May 30, 2007).
[240] *Citizens for Responsible Dev.*, 2007 WI App 114, ¶ 14.
[241] *Id.* ¶¶ 13-14.
[242] *Id.* ¶ 14 n.6.
[243] *Id.* ¶¶ 15-16.
[244] *Id.* ¶ 19.
[245] *State ex rel. Herro v. Vill. of McFarland*, 2007 WI App 172, ¶¶ 16-19, 303 Wis. 2d 749, 737 N.W.2d 55.
[246] Gempeler Correspondence (Feb. 12, 1979).
[247] Henderson Correspondence (Mar. 24, 1992).
[248] I-04-09 (Sept. 28, 2009).
[249] 81 Op. Att'y Gen. 139, 141 (1994).

There is no clear-cut standard for determining whether a governmental body is "likely" to become involved in litigation. Members of a governmental body should rely on the body's legal counsel for advice on whether litigation is sufficiently "likely" to authorize a closed session under Wis. Stat. § 19.85(1)(g).

- **Remaining Exemptions**

The remaining exemptions in Wis. Stat. § 19.85(1) authorize closure for:

1. Considering applications for probation or parole, or considering strategy for crime detection or prevention.[250]

2. Specified deliberations by the state council on unemployment insurance and the state council on worker's compensation.[251]

3. Specified deliberations involving the location of a burial site.[252]

4. Consideration of requests for confidential written advice from the government accountability board or from any county or municipal ethics board.[253]

Who May Attend a Closed Session

A frequently asked question concerns who may attend the closed session meetings of a governmental body. In general, the open meetings law gives wide discretion to a governmental body to admit into a closed session anyone whose presence the body determines is necessary for the consideration of the matter that is the subject of the meeting.[254] If the governmental body is a subunit of a parent body, the subunit must allow members of the parent body to attend its open session and closed session meetings, unless the rules of the parent body or subunit provide otherwise.[255] Where enough non-members of a subunit attend the subunit's meetings that a quorum of the parent body is present, a meeting of the parent body occurs, and the notice requirements of Wis. Stat. § 19.84 apply.[256]

Voting in an Authorized Closed Session

The Wisconsin Supreme Court has held that Wis. Stat. § 14.90 (1959), a predecessor to the current open meetings law, authorized a governmental body to vote in closed session on matters that were the legitimate subject of deliberation in closed session.[257] The court reasoned that "voting is an integral part of deliberating and merely formalizes the result reached in the deliberating process."[258]

In *Schaeve*,[259] the Wisconsin Court of Appeals commented on the propriety of voting in closed session under the current open meetings law. The court indicated that a governmental body must vote in open session unless an

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[250] Wis. Stat. § 19.85(1)(d).
[251] Wis. Stat. § 19.85(1)(ee) and (eg).
[252] Wis. Stat. § 19.85(1)(em).
[253] Wis. Stat. § 19.85(1)(h).
[254] Schuh Correspondence (Dec. 15, 1988).
[255] Wis. Stat. § 19.89.
[256] *Badke*, 173 Wis. 2d at 579.
[257] *Cities Serv. Oil Co.*, 21 Wis. 2d at 538.
[258] *Id.* at 539.
[259] *Schaeve*, 125 Wis. 2d at 53.

exemption in Wis. Stat. § 19.85(1) expressly authorizes voting in closed session.[260] The court's statement was not essential to its holding and it is unclear whether the supreme court would adopt a similar interpretation of the current open meetings law.

Given this uncertainty, the Attorney General advises that a governmental body vote in open session, unless the vote is clearly an integral part of deliberations authorized to be conducted in closed session under Wis. Stat. § 19.85(1). Stated another way, a governmental body should vote in open session, unless doing so would compromise the need for the closed session.[261]

None of the exemptions in Wis. Stat. § 19.85(1) authorize a governmental body to consider in closed session the ratification or final approval of a collective bargaining agreement negotiated by or for the body.[262]

Reconvening in Open Session

A governmental body may not commence a meeting, convene in closed session, and subsequently reconvene in open session within twelve hours after completion of a closed session, unless public notice of the subsequent open session is given "at the same time and in the same manner" as the public notice of the prior open session.[263] The notice need not specify the time the governmental body expects to reconvene in open session if the body plans to reconvene immediately following the closed session. If the notice does specify the time, the body must wait until that time to reconvene in open session. When a governmental body reconvenes in open session following a closed session, the presiding officer has a duty to open the door of the meeting room and inform any members of the public present that the session is open.[264]

WHO ENFORCES THE OPEN MEETINGS LAW AND WHAT ARE ITS PENALTIES?

Enforcement

Both the Attorney General and the district attorneys have authority to enforce the open meetings law.[265] In most cases, enforcement at the local level has the greatest chance of success due to the need for intensive factual investigation, the district attorneys' familiarity with the local rules of procedure, and the need to assemble witnesses and material evidence.[266] Under certain circumstances, the Attorney General may elect to prosecute complaints involving a matter of statewide concern.

A district attorney has authority to enforce the open meetings law only after an individual files a verified open meetings law complaint with the district attorney.[267] Actions to enforce the open meetings law are exempt from the notice of claim requirements of Wis. Stat. § 893.80.[268] The verified complaint must be signed by the individual and notarized and should include available information that will be helpful to investigators, such as: identifying the governmental body and any members thereof alleged to have violated the law; describing the factual circumstances of the alleged violations; identifying witnesses with relevant evidence; and identifying any

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[260] *Id.*
[261] *Accord Epping*, 218 Wis. 2d at 524 n.4 (even if deliberations were conducted in an unlawful closed session, a subsequent vote taken in open session could not be voided).
[262] Wis. Stat. § 19.85(3); 81 Op. Att'y Gen. 139.
[263] Wis. Stat. § 19.85(2).
[264] Claybaugh Correspondence (Feb. 16, 2006).
[265] Wis. Stat. § 19.97(1).
[266] 65 Op. Att'y Gen. Preface, ii.
[267] *See* Wis. Stat. § 19.97(1).
[268] *E-Z Roll Off, LLC v. Cnty. of Oneida*, 2011 WI 71, ¶ 21, 335 Wis. 2d 720, 800 N.W.2d 421 (citing *State ex rel. Auchinleck v. Town of LaGrange*, 200 Wis. 2d 585, 597, 547 N.W.2d 587 (1996)).

relevant documentary evidence. The district attorney has broad discretion to determine whether a verified complaint should be prosecuted.[269] An enforcement action brought by a district attorney or by the Attorney General must be commenced within six years after the cause of action accrues or be barred.[270]

Proceedings to enforce the open meetings law are civil actions subject to the rules of civil procedure, rather than criminal procedure, and governed by the ordinary civil standard of proof, rather than a heightened standard of proof such as would apply in a criminal or quasi-criminal proceeding. Accordingly, enforcement of the open meetings law does not involve such practices as arrest, posting bond, entering criminal-type pleas, or any other aspects of criminal procedure. Rather, an open meetings law enforcement action is commenced like any civil action by filing and serving a summons and complaint. In addition, the open meetings law cannot be enforced by the issuance of a citation, in the way that other civil forfeitures are often enforced, because citation procedures are inconsistent with the statutorily-mandated verified complaint procedure.[271]

If the district attorney refuses to commence an open meetings law enforcement action or otherwise fails to act within twenty days of receiving a complaint, the individual who filed the complaint has a right to bring an action, in the name of the state, to enforce the open meetings law.[272] Although an individual may not bring a private enforcement action prior to the expiration of the district attorney's twenty-day review period, the district attorney may still commence an action even though more than twenty days have passed. It is not uncommon for the review and investigation of open meetings complaints to take longer than twenty days.

Court proceedings brought by private relators to enforce the open meetings law must be commenced within two years after the cause of action accrues, or the proceedings will be barred.[273] If a private relator brings an enforcement action and prevails, the court is authorized to grant broad relief, including a declaration that the law was violated, civil forfeitures where appropriate, and the award of the actual and necessary costs of prosecution, including reasonable attorney fees.[274] Attorney fees will be awarded under this provision where such an award will provide an incentive to other private parties to similarly vindicate the public's rights to open government and will deter governmental bodies from skirting the open meetings law.[275]

Relief for alleged violations of the open meetings law cannot be sought under the public records law. In *Journal Times*,[276] the plaintiff newspaper brought a mandamus action under Wis. Stat. § 19.37(2)(a), claiming, in part, that the defendant Commission, by not contemporaneously creating a record of a motion at a closed-session meeting, had violated the requirement in Wis. Stat. § 19.88(3) of the open meetings law that all motions and roll call votes must be recorded, preserved, and open to public inspection to the extent required by the public records law. The court held, in part, that the newspaper could not seek relief under the public records law for the alleged violation of the open meetings law.[277]

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[269] *State v. Karpinski*, 92 Wis. 2d 599, 607, 285 N.W.2d 729 (1979).
[270] *See* Wis. Stat. § 893.93(1)(a).
[271] Zwieg Correspondence (Mar. 10, 2005).
[272] *Lawton*, 2005 WI App 16, ¶ 15. Wis. Stat. § 19.97(4). *See also Fabyan v. Achtenhagen*, 2002 WI App 214, ¶¶ 10-13, 257 Wis. 2d 310, 652 N.W.2d 649 (complaint under Wis. Stat. § 19.97 must be brought in the name of and on behalf of the state; *i.e.*, the caption must bear the title "State ex rel." or the court lacks competency to proceed).
[273] Wis. Stat. § 893.93(2)(a); *State ex rel. Leung v. City of Lake Geneva*, 2003 WI App 129, ¶ 6, 265 Wis. 2d 674, 666 N.W.2d 104.
[274] Wis. Stat. § 19.97(4).
[275] *Buswell*, 2007 WI 71, ¶ 54.
[276] *Journal Times*, 2015 WI 56.
[277] *Id.* ¶ 51.

Penalties

Any member of a governmental body who "knowingly" attends a meeting held in violation of the open meetings law, or otherwise violates the law, is subject to a forfeiture of between $25 and $300 for each violation.[278] Any forfeiture obtained in an action brought by the district attorney is awarded to the county.[279] Any forfeiture obtained in an action brought by the Attorney General or a private citizen is awarded to the state.[280]

The Wisconsin Supreme Court has defined "knowingly" as not only positive knowledge of the illegality of a meeting, but also awareness of the high probability of the meeting's illegality or conscious avoidance of awareness of the illegality.[281] The Court also held that knowledge is not required to impose forfeitures on an individual for violating the open meetings law by means other than attending a meeting held in violation of the law. Examples of "other violations" are failing to give the required public notice of a meeting or failing to follow the procedure for closing a session.[282]

A member of a governmental body who is charged with knowingly attending a meeting held in violation of the law may raise one of two defenses: (1) that the member made or voted in favor of a motion to prevent the violation or (2) that the member's votes on all relevant motions prior to the violation were inconsistent with the cause of the violation.[283]

A member who is charged with a violation other than knowingly attending a meeting held in violation of the law may be permitted to raise the additional statutory defense that the member did not act in his or her official capacity. In addition, in *Swanson*,[284] and *Hodge*,[285] the Wisconsin Supreme Court intimated that a member of a governmental body can avoid liability if he or she can factually prove that he or she relied, in good faith and in an open and unconcealed manner, on the advice of counsel whose statutory duties include the rendering of legal opinions as to the actions of the body.[286]

A governmental body may not reimburse a member for a forfeiture incurred as a result of a violation of the law, unless the enforcement action involved a real issue as to the constitutionality of the open meetings law.[287] Although it is not required to do so, a governmental body may reimburse a member for his or her reasonable attorney fees in defending against an enforcement action and for any plaintiff's attorney fees that the member is ordered to pay. The city attorney may represent city officials in open meetings law enforcement actions.[288]

In addition to the forfeiture penalty, Wis. Stat. § 19.97(3) provides that a court may void any action taken at a meeting held in violation of the open meetings law if the court finds that the interest in enforcing the law outweighs any interest in maintaining the validity of the action. Thus, in *Hodge*,[289] the court voided the town board's denial of a permit, taken after an unauthorized closed session deliberation about whether to grant or

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[278] Wis. Stat. § 19.96.
[279] Wis. Stat. § 19.97(1).
[280] Wis. Stat. § 19.97(1), (2), and (4).
[281] *Swanson*, 92 Wis. 2d at 319.
[282] *Id.* at 321.
[283] Wis. Stat. § 19.96.
[284] *Swanson*, 92 Wis. 2d at 319.
[285] *Hodge*, 180 Wis. 2d at 80.
[286] *See State v. Tereschko*, No. 00-3290, 2001 WL 537491, ¶¶ 9-10 (Wis. Ct. App. May 22, 2001) (unpublished) (declining to find a knowing violation where school board members relied on the advice of counsel in going into closed session); *State v. Davis*, 63 Wis. 2d 75, 82, 216 N.W.2d 31 (1974) (interpreting Wis. Stat. § 946.13(1) (private interest in public contract)). *Cf. Journal/Sentinel, Inc. v. Shorewood Sch. Bd.*, 186 Wis. 2d 443, 452-55, 521 N.W.2d 165 (Ct. App. 1994) (school board may not avoid duty to provide public records by delegating the creation and custody of the record to its attorneys).
[287] 66 Op. Att'y Gen. 226 (1977).
[288] 77 Op. Att'y Gen. 177, 180 (1988).
[289] *Hodge*, 180 Wis. 2d at 75-76.

deny the permit.[290] A court may award any other appropriate legal or equitable relief, including declaratory and injunctive relief.[291]

In enforcement actions seeking forfeitures, the provisions of the open meetings law must be narrowly construed due to the penal nature of forfeiture. In all other actions, the provisions of the law must be liberally construed to ensure the public's right to "the fullest and most complete information regarding the affairs of government as is compatible with the conduct of governmental business."[292] Thus, it is advisable to prosecute forfeiture actions separately from actions seeking other types of relief under the open meetings law.

Interpretation by Attorney General

In addition to the methods of enforcement discussed above, the Attorney General also has express statutory authority to respond to requests for advice from any person as to the applicability of the open meetings and public records laws.[293] This differs from other areas of law, in which the Attorney General is only authorized to give legal opinions or advice to specified governmental officials and agencies. Because the Legislature has expressly authorized the Attorney General to interpret the open meetings law, the Supreme Court has acknowledged that the Attorney General's opinions in this area should be given substantial weight.[294]

Citizens with questions about matters outside the scope of the open meetings and public records laws, should seek assistance from a private attorney. Citizens and public officials with questions about the open meetings law or the public records law are advised to first consult the applicable statutes, the corresponding discussions in this Compliance Guide and in the Department of Justice's Public Records Law Compliance Outline, court decisions, and prior Attorney General opinions and to confer with their own private or governmental attorneys. In the rare instances where a question cannot be resolved in this manner, a written request for advice may be made to the Wisconsin Department of Justice. In submitting such requests, it should be remembered that the Department of Justice cannot conduct factual investigations, resolve disputed issues of fact, or make definitive determinations on fact-specific issues. Any response will thus be based solely on the information provided.

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[290] *Cf. State ex rel. Ozanne v. Fitzgerald*, 2011 WI 43, ¶ 13, 334 Wis. 2d 70, 798 N.W.2d 436 (supreme court did not void a statute adopted by the legislature because a legislative committee did not comply with notice requirements of the open meetings law); *Epping*, 218 Wis. 2d at 524 n.4 (arguably unlawful closed session deliberation does not provide basis for voiding subsequent open session vote); *State ex rel. Ward v. Town of Nashville*, No. 00-0973, 2001 WL 881704, ¶ 30 (Wis. Ct. App. Aug. 7, 2001) (unpublished) (declining to void an agreement made in open session, where the agreement was the product of three years of unlawfully closed meetings).

[291] Wis. Stat. § 19.97(2).

[292] Wis. Stat. § 19.81(1) and (4).

[293] Wis. Stat. §§ 19.39 and 19.98.

[294] *BDADC*, 312 Wis. 2d 84, ¶¶ 37, 44-45.

Appendix A

Open Meetings Law

Wis. Stat. §§ 19.81 - 19.98

(2) This section does not apply to any of the following records:

(a) Any record transferred to an archival depository under s. 16.61 (13).

(b) Any record pertaining to an individual if a specific state statute or federal law governs challenges to the accuracy of the record.

History: 1991 a. 269 ss. 27d, 27e, 35am, 37am, 39am; 2013 a. 171 s. 16; Stats. 2013 s. 19.70.

19.71 Sale of names or addresses. An authority may not sell or rent a record containing an individual's name or address of residence, unless specifically authorized by state law. The collection of fees under s. 19.35 (3) is not a sale or rental under this section.

History: 1991 a. 39.

19.77 Summary of case law and attorney general opinions. Annually, the attorney general shall summarize case law and attorney general opinions relating to due process and other legal issues involving the collection, maintenance, use, provision of access to, sharing or archiving of personally identifiable information by authorities. The attorney general shall provide the summary, at no charge, to interested persons.

History: 1991 a. 39.

19.80 Penalties. (2) EMPLOYEE DISCIPLINE. Any person employed by an authority who violates this subchapter may be discharged or suspended without pay.

(3) PENALTIES. (a) Any person who willfully collects, discloses or maintains personally identifiable information in violation of federal or state law may be required to forfeit not more than $500 for each violation.

(b) Any person who willfully requests or obtains personally identifiable information from an authority under false pretenses may be required to forfeit not more than $500 for each violation.

History: 1991 a. 39, 269.

SUBCHAPTER V

OPEN MEETINGS OF GOVERNMENTAL BODIES

19.81 Declaration of policy. (1) In recognition of the fact that a representative government of the American type is dependent upon an informed electorate, it is declared to be the policy of this state that the public is entitled to the fullest and most complete information regarding the affairs of government as is compatible with the conduct of governmental business.

(2) To implement and ensure the public policy herein expressed, 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 unless otherwise expressly provided by law.

(3) In conformance with article IV, section 10, of the constitution, which states that the doors of each house shall remain open, except when the public welfare requires secrecy, it is declared to be the intent of the legislature to comply to the fullest extent with this subchapter.

(4) This subchapter shall be liberally construed to achieve the purposes set forth in this section, and the rule that penal statutes must be strictly construed shall be limited to the enforcement of forfeitures and shall not otherwise apply to actions brought under this subchapter or to interpretations thereof.

History: 1975 c. 426; 1983 a. 192.

NOTE: The following annotations relate to s. 66.77, repealed by Chapter 426, laws of 1975.

Subsequent to the presentation of evidence by the taxpayer, a board of review's consideration of testimony by the village assessor at an executive session was contrary to the open meeting law. Although it was permissible for the board to convene a closed session for the purpose of deliberating after a quasi−judicial hearing, the proceedings did not constitute mere deliberations but were a continuation of the quasi−judicial hearing without the presence of or notice to the objecting taxpayer. Dolphin v. Butler Board of Review, 70 Wis. 2d 403, 234 N.W.2d 277 (1975).

The open meeting law is not applicable to the judicial commission. State ex rel. Lynch v. Dancey, 71 Wis. 2d 287, 238 N.W.2d 81 (1976).

A regular open meeting, held subsequent to a closed meeting on another subject, does not constitute a reconvened open meeting when there was no prior open meeting on that day. 58 Atty. Gen. 41.

Consideration of a resolution is a formal action of an administrative or minor governing body and when taken in proper closed session, the resolution and result of the vote must be made available for public inspection, pursuant to 19.21, absent a specific showing that the public interest would be adversely affected. 60 Atty. Gen. 9.

Joint apprenticeship committees, appointed pursuant to Wis. Adm. Code provisions, are governmental bodies and subject to the requirements of the open meeting law. 63 Atty. Gen. 363.

Voting procedures employed by worker's compensation and unemployment advisory councils that utilized adjournment of public meeting for purposes of having members representing employers and members representing employees or workers to separately meet in closed caucuses and to vote as a block on reconvening was contrary to the open records law. 63 Atty. Gen. 414.

A governmental body can call closed sessions for proper purposes without giving notice to members of the news media who have filed written requests. 63 Atty. Gen. 470.

The meaning of "communication" is discussed with reference to giving the public and news media members adequate notice. 63 Atty. Gen. 509.

The posting in the governor's office of agenda of future investment board meetings is not sufficient communication to the public or the news media who have filed a written request for notice. 63 Atty. Gen. 549.

A county board may not utilize an unidentified paper ballot in voting to appoint a county highway commissioner, but may vote by ayes and nays or show of hands at an open session if some member does not require the vote to be taken in such manner that the vote of each member may be ascertained and recorded. 63 Atty. Gen. 569.

NOTE: The following annotations refer to ss. 19.81 to 19.98.

When the city of Milwaukee and a private non−profit festival organization incorporated the open meetings law into a contract, the contract allowed public enforcement of the contractual provisions concerning open meetings. Journal/Sentinel, Inc. v. Pleva, 155 Wis. 2d 704, 456 N.W.2d 359 (1990).

Sub. (2) requires that a meeting be held in a facility that gives reasonable public access, not total access. No person may be systematically excluded or arbitrarily refused admittance. State ex rel. Badke v. Greendale Village Bd. 173 Wis. 2d 553, 494 N.W.2d 408 (1993).

This subchapter is discussed. 65 Atty. Gen. preface.

Public notice requirements for meetings of a city district school board under this subchapter and s. 120.48, 1983 stats., are discussed. 66 Atty. Gen. 93.

A volunteer fire department organized as a nonprofit corporation under s. 213.05 is not subject to the open meeting law. 66 Atty. Gen. 113.

Anyone has the right to tape−record an open meeting of a governmental body provided the meeting is not thereby physically disrupted. 66 Atty. Gen. 318.

The open meeting law does not apply to a coroner's inquest. 67 Atty. Gen. 250.

The open meeting law does not apply if the common council hears a grievance under a collective bargaining agreement. 67 Atty. Gen. 276.

The application of the open meeting law to the duties of WERC is discussed. 68 Atty. Gen. 171.

A senate committee meeting was probably held in violation of the open meetings law although there was never any intention prior to the gathering to attempt to debate any matter of policy, to reach agreement on differences, to make any decisions on any bill or part thereof, to take any votes, or to resolve substantive differences. Quorum gatherings should be presumed to be in violation of the law, due to a quorum's ability to thereafter call, compose and control by vote a formal meeting of a governmental body. 71 Atty. Gen. 63.

Nonstock corporations created by statute as bodies politic clearly fall within the term "governmental body" as defined in the open meetings law and are subject to the provisions of the open meetings law. Nonstock corporations that were not created by the legislature or by rule, but were created by private citizens are not bodies politic and not governmental bodies. 73 Atty. Gen. 53.

Understanding Wisconsin's open meeting law. Harvey, WBB September 1980.

Getting the Best of Both Worlds: Open Government and Economic Development. Westerberg. Wis. Law. Feb. 2009.

19.82 Definitions. As used in this subchapter:

(1) "Governmental body" means a state or local agency, board, commission, committee, 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, or V of ch. 111.

(2) "Meeting" means the 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, any gathering of the members of a town board for the purpose specified in s. 60.50 (6), any gathering of the commissioners of a town sanitary district for the purpose specified in s. 60.77 (5) (k), or any gathering of the members of a drainage board created under s. 88.16, 1991 stats., or under s. 88.17, for a purpose specified in s. 88.065 (5) (a).

(3) "Open session" means a meeting which is held in a place reasonably accessible to members of the public and open to all citizens at all times. In the case of a state governmental body, it means a meeting which is held in a building and room thereof which enables access by persons with functional limitations, as defined in s. 101.13 (1).

History: 1975 c. 426; 1977 c. 364, 447; 1985 a. 26, 29, 332; 1987 a. 305; 1993 a. 215, 263, 456, 491; 1995 a. 27, 185; 1997 a. 79; 1999 a. 9; 2007 a. 20, 96; 2009 a. 28; 2011 a. 10.

A "meeting" under sub. (2) was found although the governmental body was not empowered to exercise the final powers of its parent body. State v. Swanson, 92 Wis. 2d 310, 284 N.W.2d 655 (1979).

A "meeting" under sub. (2) was found when members met with a purpose to engage in government business and the number of members present was sufficient to determine the parent body's course of action regarding the proposal discussed. State ex rel. Newspapers v. Showers, 135 Wis. 2d 77, 398 N.W.2d 154 (1987).

The open meetings law is not meant to apply to single−member governmental bodies. Sub. (2) speaks of a meeting of the members, plural, implying there must be at least two members of a governmental body. Plourde v. Berends, 2006 WI App 147, 294 Wis. 2d 746, 720 N.W.2d 130, 05−2106.

When a quorum of a governmental body attends the meeting of another governmental body when any one of the members is not also a member of the second body, the gathering is a "meeting," unless the gathering is social or by chance. State ex rel. Badke v. Greendale Village Board, 173 Wis. 2d 553, 494 N.W.2d 408 (1993).

A corporation is quasi−governmental if, based on the totality of circumstances, it resembles a governmental corporation in function, effect, or status, requiring a case−by−case analysis. Here, a primary consideration was that the body was funded exclusively by public tax dollars or interest thereon. Additionally, its office was located in the municipal building, it was listed on the city Web site, the city provided it with clerical support and office supplies, all its assets revert to the city if it ceases to exist, its books are open for city inspection, the mayor and another city official are directors, and it had no clients other than the city. State v. Beaver Dam Area Development Corporation, 2008 WI 90, 312 Wis. 2d 84, 752 N.W.2d 295, 06−0662.

A municipal public utility commission managing a city owned public electric utility is a governmental body under sub. (1). 65 Atty. Gen. 243.

A "private conference" under s. 118.22 (3), on nonrenewal of a teacher's contract is a "meeting" within s. 19.82 (2). 66 Atty. Gen. 211.

A private home may qualify as a meeting place under sub. (3). 67 Atty. Gen. 125.

A telephone conference call involving members of governmental body is a "meeting" that must be reasonably accessible to the public and public notice must be given. 69 Atty. Gen. 143.

A "quasi−governmental corporation" in sub. (1) includes private corporations that closely resemble governmental corporations in function, effect, or status. 80 Atty. Gen. 129.

Election canvassing boards operating under ss. 7.51, 7.53, and 7.60 are governmental bodies subject to the open meetings law — including the public notice, open session, and reasonable public access requirements — when they convene for the purpose of carrying out their statutory canvassing activities, but not when they are gathered only as individual inspectors fulfilling administrative duties. OAG 5−14.

19.83 Meetings of governmental bodies. (1) Every meeting of a governmental body shall be preceded by public notice as provided in s. 19.84, and shall be held in open session. At any meeting of a governmental body, all discussion shall be held and all action of any kind, formal or informal, shall be initiated, deliberated upon and acted upon only in open session except as provided in s. 19.85.

(2) During a period of public comment under s. 19.84 (2), a governmental body may discuss any matter raised by the public.

History: 1975 c. 426; 1997 a. 123.

When a quorum of a governmental body attends the meeting of another governmental body when any one of the members is not also a member of the second body, the gathering is a "meeting," unless the gathering is social or by chance. State ex rel. Badke v. Greendale Village Board, 173 Wis. 2d 553, 494 N.W.2d 408 (1993).

19.84 Public notice. (1) Public notice of all meetings of a governmental body shall be given in the following manner:

(a) As required by any other statutes; and

(b) By communication from the chief presiding officer of a governmental body or such person's designee to the public, to those news media who have filed a written request for such notice, and to the official newspaper designated under ss. 985.04, 985.05 and 985.06 or, if none exists, to a news medium likely to give notice in the area.

(2) Every public notice of a meeting of a governmental body shall set forth the time, date, place and subject matter of the meeting, including that intended for consideration at any contemplated closed session, in such form as is reasonably likely to apprise members of the public and the news media thereof. The public notice of a meeting of a governmental body may provide for a period of public comment, during which the body may receive information from members of the public.

(3) Public notice of every meeting of a governmental body shall be given at least 24 hours prior to the commencement of such meeting unless for good cause such notice is impossible or impractical, in which case shorter notice may be given, but in no case may the notice be provided less than 2 hours in advance of the meeting.

(4) Separate public notice shall be given for each meeting of a governmental body at a time and date reasonably proximate to the time and date of the meeting.

(5) Departments and their subunits in any University of Wisconsin System institution or campus are exempt from the requirements of subs. (1) to (4) but shall provide meeting notice which is reasonably likely to apprise interested persons, and news media who have filed written requests for such notice.

(6) Notwithstanding the requirements of s. 19.83 and the requirements of this section, a governmental body which is a formally constituted subunit of a parent governmental body may conduct a meeting without public notice as required by this section during a lawful meeting of the parent governmental body, during a recess in such meeting or immediately after such meeting for the purpose of discussing or acting upon a matter which was the subject of that meeting of the parent governmental body. The presiding officer of the parent governmental body shall publicly announce the time, place and subject matter of the meeting of the subunit in advance at the meeting of the parent body.

History: 1975 c. 426; 1987 a. 305; 1993 a. 215; 1997 a. 123; 2007 a. 20.

There is no requirement in this section that the notice provided be exactly correct in every detail. State ex rel. Olson v. City of Baraboo Joint Review Board, 2002 WI App 64, 252 Wis. 2d 628, 643 N.W.2d 796, 01−0201.

Sub. (2) does not expressly require that the notice indicate whether a meeting will be purely deliberative or if action will be taken. The notice must alert the public of the importance of the meeting. Although a failure to expressly state whether action will be taken could be a violation, the importance of knowing whether a vote would be taken is diminished when no input from the audience is allowed or required. State ex rel. Olson v. City of Baraboo Joint Review Board, 2002 WI App 64, 252 Wis. 2d 628, 643 N.W.2d 796, 01−0201.

Sub. (2) sets forth a reasonableness standard for determining whether notice of a meeting is sufficient that strikes the proper balance between the public's right to information and the government's need to efficiently conduct its business. The standard requires taking into account the circumstances of the case, which 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. Buswell v. Tomah Area School District, 2007 WI 71, 301 Wis. 2d 178, 732 N.W.2d 804, 05−2998.

The supreme court declined to review the validity of the procedure used to give notice of a joint legislative committee on conference alleged to violate the sub. (3) 24−hour notice requirement. The court will not determine whether internal operating rules or procedural statutes have been complied with by the legislature in the course of its enactments and will not intermeddle in what it views, in the absence of constitutional directives to the contrary, to be purely legislative concerns. Ozanne v. Fitzgerald, 2011 WI 43, 334 Wis. 2d 70, 798 N.W.2d 436, 11−0613.

Under sub. (1) (b), a written request for notice of meetings of a governmental body should be filed with the chief presiding officer or designee and a separate written request should be filed with each specific governmental body. 65 Atty. Gen. 166.

The method of giving notice pursuant to sub. (1) is discussed. 65 Atty. Gen. 250.

The specificity of notice required by a governmental body is discussed. 66 Atty. Gen. 143, 195.

The requirements of notice given to newspapers under this section is discussed. 66 Atty. Gen. 230.

A town board, but not an annual town meeting, is a "governmental body" within the meaning of the open meetings law. 66 Atty. Gen. 237.

News media who have filed written requests for notices of public meetings cannot be charged fees by governmental bodies for communication of the notices. 77 Atty. Gen. 312.

A newspaper is not obligated to print a notice received under sub. (1) (b), nor is governmental body obligated to pay for publication. Martin v. Wray, 473 F. Supp. 1131 (1979).

19.85 Exemptions. (1) Any meeting of a governmental body, upon motion duly made and carried, may be convened in closed session under one or more of the exemptions provided in this section. The motion shall be carried by a majority vote in such

manner that the vote of each member is ascertained and recorded in the minutes. No motion to convene in closed session may be adopted unless the chief presiding officer announces to those present at the meeting at which such motion is made, the nature of the business to be considered at such closed session, and the specific exemption or exemptions under this subsection by which such closed session is claimed to be authorized. Such announcement shall become part of the record of the meeting. No business may be taken up at any closed session except that which relates to matters contained in the chief presiding officer's announcement of the closed session. A closed session may be held for any of the following purposes:

(a) Deliberating concerning a case which was the subject of any judicial or quasi−judicial trial or hearing before that governmental body.

(b) Considering 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, or considering the grant or denial of tenure for a university faculty member, and the taking of formal action on any such matter; provided that the faculty member or other public employee or person licensed is given actual notice of any evidentiary hearing which may be held prior to final action being taken and of any meeting at which final action may be taken. The notice shall contain a statement that the person has the right to demand that the evidentiary hearing or meeting be held in open session. This paragraph and par. (f) do not apply to any such evidentiary hearing or meeting where the employee or person licensed requests that an open session be held.

(c) Considering employment, promotion, compensation or performance evaluation data of any public employee over which the governmental body has jurisdiction or exercises responsibility.

(d) Except as provided in s. 304.06 (1) (eg) and by rule promulgated under s. 304.06 (1) (em), considering specific applications of probation, extended supervision or parole, or considering strategy for crime detection or prevention.

(e) Deliberating 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.

(ee) Deliberating by the council on unemployment insurance in a meeting at which all employer members of the council or all employee members of the council are excluded.

(eg) Deliberating by the council on worker's compensation in a meeting at which all employer members of the council or all employee members of the council are excluded.

(em) Deliberating under s. 157.70 if the location of a burial site, as defined in s. 157.70 (1) (b), is a subject of the deliberation and if discussing the location in public would be likely to result in disturbance of the burial site.

(f) Considering financial, medical, social or personal histories or disciplinary data of specific persons, preliminary consideration of specific personnel problems or the investigation of charges against specific persons except where par. (b) applies which, if discussed in public, would be likely to have a substantial adverse effect upon the reputation of any person referred to in such histories or data, or involved in such problems or investigations.

(g) Conferring with legal counsel for the governmental body who is rendering oral or written advice concerning strategy to be adopted by the body with respect to litigation in which it is or is likely to become involved.

(h) Consideration of requests for confidential written advice from the government accountability board under s. 5.05 (6a), or from any county or municipal ethics board under s. 19.59 (5).

(2) No governmental body may commence a meeting, subsequently convene in closed session and thereafter reconvene again in open session within 12 hours after completion of the closed session, unless public notice of such subsequent open session was given at the same time and in the same manner as the public notice of the meeting convened prior to the closed session.

(3) Nothing in this subchapter shall be construed to authorize a governmental body to consider at a meeting in closed session the final ratification or approval of a collective bargaining agreement under subch. I, IV, or V of ch. 111 which has been negotiated by such body or on its behalf.

History: 1975 c. 426; 1977 c. 260; 1983 a. 84; 1985 a. 316; 1987 a. 38, 305; 1989 a. 64; 1991 a. 39; 1993 a. 97, 215; 1995 a. 27; 1997 a. 39, 237, 283; 1999 a. 32; 2007 a. 1, 20; 2009 a. 28; 2011 a. 10, 32.

Although a meeting was properly closed, in order to refuse inspection of records of the meeting, the custodian was required by s. 19.35 (1) (a) to state specific and sufficient public policy reasons why the public interest in nondisclosure outweighed the public's right of inspection. Oshkosh Northwestern Co. v. Oshkosh Library Board, 125 Wis. 2d 480, 373 N.W.2d 459 (Ct. App. 1985).

The balance between protection of reputation under sub. (1) (f) and the public interest in openness is discussed. Wis. State Journal v. UW−Platteville, 160 Wis. 2d 31, 465 N.W.2d 266 (Ct. App. 1990). See also Pangman v. Stigler, 161 Wis. 2d 828, 468 N.W.2d 784 (Ct. App. 1991).

A "case" under sub. (1) (a) contemplates an adversarial proceeding. It does not connote the mere application for and granting of a permit. Hodge v. Turtle Lake, 180 Wis. 2d 62, 508 N.W.2d 603 (1993).

A closed session to discuss an employee's dismissal was properly held under sub. (1) (b) and did not require notice to the employee under sub. (1) (b) when no evidentiary hearing or final action took place in the closed session. State ex rel. Epping v. City of Neillsville, 218 Wis. 2d 516, 581 N.W.2d 548 (Ct. App. 1998), 97−0403.

The exception under sub. (1) (e) must be strictly construed. A private entity's desire for confidentiality does not permit a closed meeting. A governing body's belief that secret meetings will produce cost savings does not justify closing the door to public scrutiny. Providing contingencies allowing for future public input was insufficient. Because legitimate concerns were present for portions of some of the meetings does not mean the entirety of the meetings fell within the narrow exception under sub. (1) (e). Citizens for Responsible Development v. City of Milton, 2007 WI App 114, 300 Wis. 2d 649, 731 N.W.2d 640, 06−0427.

Section 19.35 (1) (a) does not mandate that, when a meeting is closed under this section, all records created for or presented at the meeting are exempt from disclosure. The court must still apply the balancing test articulated in *Linzmeyer*, 2002 WI 84, 254 Wis. 2d 306. Zellner v. Cedarburg School District, 2007 WI 53, 300 Wis. 2d 290, 731 N.W.2d 240, 06−1143.

Nothing in sub. (1) (e) suggests that a reason for going into closed session must be shared by each municipality participating in an intergovernmental body. It is not inconsistent with the open meetings law for a body to move into closed session under sub. (1) (e) when the bargaining position to be protected is not shared by every member of the body. Once a vote passes to go into closed session, the reason for requesting the vote becomes the reason of the entire body. Herro v. Village of McFarland, 2007 WI App 172, 303 Wis. 2d 749, 737 N.W.2d 55, 06−1929.

In allowing governmental bodies to conduct closed sessions in limited circumstances, this section does not create a blanket privilege shielding closed session contents from discovery. There is no implicit or explicit confidentiality mandate. A closed meeting is not synonymous with a meeting that, by definition, entails a privilege exempting its contents from discovery. Sands v. The Whitnall School District, 2008 WI 89, 312 Wis. 2d 1, 754 N.W.2d 439, 05−1026.

Boards of review cannot rely on the exemptions in sub. (1) to close any meeting in view of the explicit requirements in s. 70.47 (2m). 65 Atty. Gen. 162.

A university subunit may discuss promotions not relating to tenure, merit increases, and property purchase recommendations in closed session. 66 Atty. Gen. 60.

Neither sub. (1) (c) nor (f) authorizes a school board to make actual appointments of a new member in closed session. 74 Atty. Gen. 70.

A county board chairperson and committee are not authorized by sub. (1) (c) to meet in closed session to discuss appointments to county board committees. In appropriate circumstances, sub. (1) (f) would authorize closed sessions. 76 Atty. Gen. 276.

Sub. (1) (c) does not permit closed sessions to consider employment, compensation, promotion, or performance evaluation policies to be applied to a position of employment in general. 80 Atty. Gen. 176.

A governmental body may convene in closed session to formulate collective bargaining strategy, but sub. (3) requires that deliberations leading to ratification of a tentative agreement with a bargaining unit, as well as the ratification vote, must be held in open session. 81 Atty. Gen. 139.

"Evidentiary hearing" as used in sub. (1) (b), means a formal examination of accusations by receiving testimony or other forms of evidence that may be relevant to the dismissal, demotion, licensing, or discipline of any public employee or person covered by that section. A council that considered a mayor's accusations against an employee in closed session without giving the employee prior notice violated the requirement of actual notice to the employee. Campana v. City of Greenfield, 38 F. Supp. 2d 1043 (1999).

Closed Session, Open Book: Sifting the *Sands* Case. Bach. Wis. Law. Oct. 2009.

19.851 Closed sessions by government accountability board. The government accountability board shall hold each meeting of the board for the purpose of deliberating concerning an investigation of any violation of the law under the jurisdiction of the ethics and accountability division of the board in closed session under this section. Prior to convening under this section, the government accountability board shall vote to convene in closed session in the manner provided in s. 19.85 (1). No business may be conducted by the government accountability board at any

closed session under this section except that which relates to the purposes of the session as authorized in this section or as authorized in s. 19.85 (1).

History: 2007 a. 1.

19.86 Notice of collective bargaining negotiations. Notwithstanding s. 19.82 (1), where notice has been given by either party to a collective bargaining agreement under subch. I, IV, or V of ch. 111 to reopen such agreement at its expiration date, the employer shall give notice of such contract reopening as provided in s. 19.84 (1) (b). If the employer is not a governmental body, notice shall be given by the employer's chief officer or such person's designee.

History: 1975 c. 426; 1987 a. 305; 1993 a. 215; 1995 a. 27; 2007 a. 20; 2009 a. 28; 2011 a. 10.

19.87 Legislative meetings. This subchapter shall apply to all meetings of the senate and assembly and the committees, subcommittees and other subunits thereof, except that:

(1) Section 19.84 shall not apply to any meeting of the legislature or a subunit thereof called solely for the purpose of scheduling business before the legislative body; or adopting resolutions of which the sole purpose is scheduling business before the senate or the assembly.

(2) No provision of this subchapter which conflicts with a rule of the senate or assembly or joint rule of the legislature shall apply to a meeting conducted in compliance with such rule.

(3) No provision of this subchapter shall apply to any partisan caucus of the senate or any partisan caucus of the assembly, except as provided by legislative rule.

(4) Meetings of the senate or assembly committee on organization under s. 71.78 (4) (c) or 77.61 (5) (b) 3. shall be closed to the public.

History: 1975 c. 426; 1977 c. 418; 1987 a. 312 s. 17.

Former open meetings law, s. 66.74 (4) (g), 1973 stats., that excepted "partisan caucuses of the members" of the state legislature from coverage of the law applied to a closed meeting of the members of one political party on a legislative committee to discuss a bill. The contention that this exception was only intended to apply to the partisan caucuses of the whole houses would have been supportable if the exception were simply for "partisan caucuses of the state legislature" rather than partisan caucuses of members of the state legislature. State ex rel. Lynch v. Conta, 71 Wis. 2d 662, 239 N.W.2d 313 (1976).

In contrast to former s. 66.74 (4) (g), 1973 stats., sub. (3) applies to partisan caucuses of the houses, rather than to caucuses of members of the houses. State ex rel. Newspapers v. Showers, 135 Wis. 2d 77, 398 N.W.2d 154 (1987).

19.88 Ballots, votes and records. (1) Unless otherwise specifically provided by statute, no secret ballot may be utilized to determine any election or other decision of a governmental body except the election of the officers of such body in any meeting.

(2) Except as provided in sub. (1) in the case of officers, any member of a governmental body may require that a vote be taken at any meeting in such manner that the vote of each member is ascertained and recorded.

(3) The motions and roll call votes of each meeting of a governmental body shall be recorded, preserved and open to public inspection to the extent prescribed in subch. II of ch. 19.

History: 1975 c. 426; 1981 c. 335 s. 26.

The plaintiff newspaper argued that sub. (3), which requires "the motions and roll call votes of each meeting of a governmental body shall be recorded, preserved and open to public inspection," in turn, required the defendant commission to record and disclose the information the newspaper requested under the open records law. The newspaper could not seek relief under the public records law for the commission's alleged violation of the open meetings law and could not recover reasonable attorney fees, damages, and other actual costs under s. 19.37 (2) for an alleged violation of the open meetings law. The Journal Times v. City of Racine Board of Police and Fire Commissioners, 2015 WI 56, ___ Wis. 2d ___, ___ N.W.2d ___, 13−1715.

Under sub. (1), a common council may not vote to fill a vacancy on the common council by secret ballot. 65 Atty. Gen. 131.

19.89 Exclusion of members. No duly elected or appointed member of a governmental body may be excluded from any meeting of such body. 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.

History: 1975 c. 426.

19.90 Use of equipment in open session. Whenever a governmental body holds a meeting in open session, the body shall make a reasonable effort to accommodate any person desiring to record, film or photograph the meeting. This section 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.

History: 1977 c. 322.

19.96 Penalty. Any member of a governmental body who knowingly attends a meeting of such body held in violation of this subchapter, or who, in his or her official capacity, otherwise violates this subchapter by some act or omission shall forfeit without reimbursement not less than $25 nor more than $300 for each such violation. No member of a governmental body is liable under this subchapter on account of his or her attendance at a meeting held in violation of this subchapter if he or she makes or votes in favor of a motion to prevent the violation from occurring, or if, before the violation occurs, his or her votes on all relevant motions were inconsistent with all those circumstances which cause the violation.

History: 1975 c. 426.

The state need not prove specific intent to violate the Open Meetings Law. State v. Swanson, 92 Wis. 2d 310, 284 N.W.2d 655 (1979).

19.97 Enforcement. (1) This subchapter shall be enforced in the name and on behalf of the state by the attorney general or, upon the verified complaint of any person, by the district attorney of any county wherein a violation may occur. In actions brought by the attorney general, the court shall award any forfeiture recovered together with reasonable costs to the state; and in actions brought by the district attorney, the court shall award any forfeiture recovered together with reasonable costs to the county.

(2) In addition and supplementary to the remedy provided in s. 19.96, the attorney general or the district attorney may commence an action, separately or in conjunction with an action brought under s. 19.96, to obtain such other legal or equitable relief, including but not limited to mandamus, injunction or declaratory judgment, as may be appropriate under the circumstances.

(3) Any action taken at a meeting of a governmental body held in violation of this subchapter is voidable, upon action brought by the attorney general or the district attorney of the county wherein the violation occurred. However, any judgment declaring such action void shall not be entered unless the court finds, under the facts of the particular case, that the public interest in the enforcement of this subchapter outweighs any public interest which there may be in sustaining the validity of the action taken.

(4) If the district attorney refuses or otherwise fails to commence an action to enforce this subchapter within 20 days after receiving a verified complaint, the person making such complaint may bring an action under subs. (1) to (3) on his or her relation in the name, and on behalf, of the state. In such actions, the court may award actual and necessary costs of prosecution, including reasonable attorney fees to the relator if he or she prevails, but any forfeiture recovered shall be paid to the state.

(5) Sections 893.80 and 893.82 do not apply to actions commenced under this section.

History: 1975 c. 426; 1981 c. 289; 1995 a. 158.

Judicial Council Note, 1981: Reference in sub. (2) to a "writ" of mandamus has been removed because that remedy is now available in an ordinary action. See s. 781.01, stats., and the note thereto. [Bill 613−A]

Awards of attorney fees are to be at a rate applicable to private attorneys. A court may review the reasonableness of the hours and hourly rate charged, including the rates for similar services in the area, and may in addition consider the peculiar facts of the case and the responsible party's ability to pay. Hodge v. Town of Turtle Lake, 190 Wis. 2d 181, 526 N.W.2d 784 (Ct. App. 1994).

Actions brought under the open meetings and open records laws are exempt form the notice provisions of s. 893.80. Auchinleck v. Town of LaGrange, 200 Wis. 2d 585, 547 N.W.2d 587 (1996), 94−2809.

Failure to bring an action under this section on behalf of the state is fatal and deprives the court of competency to proceed. Fabyan v. Achtenhagen, 2002 WI App 214, 257 Wis. 2d. 310, 652 N.W.2d 649, 01−3298.

Complaints under the open meetings law are not brought in the individual capacity of the plaintiff but on behalf of the state, subject to the 2−year statue of limitations under s. 893.93 (2). Leung v. City of Lake Geneva, 2003 WI App 129, 265 Wis. 2d 674, 666 N.W.2d 104, 02−2747.

When a town board's action was voided by the court due to lack of statutory authority, an action for enforcement under sub. (4) by an individual as a private attorney general on behalf of the state against individual board members for a violation of the open meetings law that would subject the individual board members to civil forfeitures was not rendered moot. Lawton v. Town of Barton, 2005 WI App 16, 278 Wis. 2d 388, 692 N.W.2d 304, 04−0659

19.98 Interpretation by attorney general. Any person may request advice from the attorney general as to the applicability of this subchapter under any circumstances.

History: 1975 c. 426.

Appendix B

Open Meetings Law Complaint Form–SAMPLE

VERIFIED OPEN MEETINGS LAW COMPLAINT

Now comes the complainant _____and as and for a verified complaint pursuant to Wis. Stat. §§ 19.96 and 19.97, alleges and complains as follows:

1. That _he is a resident of the _____ [town, village, city] of _____, Wisconsin, and that his or her Post Office Address is _____[street, avenue, etc.] ____, Wisconsin ___ [zip].

2. That _____[name of member or chief presiding officer] whose Post Office Address is _____ [street, avenue, etc.], _____ [city], Wisconsin, was on the _____day of 20__, a _____[member or chief presiding officer] of _____ designate official title of governmental body] and that such _____ [board, council, commission or committee] is a governmental body within the meaning of Wis. Stat. § 19.82(1).

3. That _____[name of member or chief presiding officer] on the _____ day of _____, 20__, at _____ County of _____, Wisconsin, knowingly attended a meeting of said governmental body held in violation of Wis. Stat. § 19.96 and _____ [cite other applicable section(s)], or otherwise violated those sections in that [set out every act or omission constituting the offense charged]:

4. That _____ [name of member or chief presiding officer] is thereby subject to the penalties prescribed in Wis. Stat. § 19.96.

5. That the following witnesses can testify to said acts or omissions:

Name	Address	Telephone
_____	_____	_____
_____	_____	_____
_____	_____	_____
_____	_____	_____
_____	_____	_____

6. That the following documentary evidence of said acts or omissions is available:

7. That this complaint is made to the District Attorney for _____ County under the provisions of Wis. Stat. § 19.97, and that the district attorney may bring an action to recover the forfeiture provided in Wis. Stat. § 19.96.

WHEREFORE, complainant prays that the District Attorney for _____ County, Wisconsin, timely institute an action against _____[name of member or chief presiding officer] to recover the forfeiture provided in Wis. Stat. § 19.96, together with reasonable costs and disbursements as provided by law.

STATE OF WISCONSIN)
) ss.
COUNTY OF ___)

_____being first duly sworn on oath deposes and says that _he is the above-named complainant, that he has read the foregoing complaint and that, based on his or her knowledge, the contents of the complaint are true.

_____
COMPLAINANT

Subscribed and sworn to before me
this ____ day of _____, 20__.

_____
Notary Public, State of Wisconsin
My Commission: _____

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State v. Beaver Dam Area Dev. Corp.,
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Wisconsin Government Accountability Board

For local officials and citizens

Citizens' guide to standards of conduct for local government officials

Wisconsin Statutes establish standards of conduct for all of our state's governmental officials, including local officials. These legal requirements apply to elected and key appointed officials of our state's counties, cities, villages, towns, school boards, and sewerage and other special districts.[1]

Standards of conduct. In general, a local public official should not:

- ***ACT OFFICIALLY IN A MATTER IN WHICH THE OFFICIAL IS PRIVATELY INTERESTED***
- ***USE GOVERNMENT POSITION FOR PRIVATE FINANCIAL BENEFIT***
- ***ACCEPT TRANSPORTATION, LODGING, FOOD, BEVERAGES, OR ANYTHING ELSE OF MORE THAN TOKEN VALUE OFFERED BECAUSE THE OFFICIAL HOLDS A GOVERNMENT POSITION***
- ***SOLICIT OR ACCEPT REWARDS OR ITEMS OR SERVICES LIKELY TO INFLUENCE THE OFFICIAL***
- ***OFFER OR PROVIDE INFLUENCE IN EXCHANGE FOR CAMPAIGN CONTRIBUTIONS***
- ***BE FINANCIALLY INTERESTED IN A GOVERNMENT CONTRACT THE VALUE OF WHICH EXCEEDS $15,000 AND FOR WHICH THE OFFICIAL IS AUTHORIZED TO TAKE SOME DISCRETIONARY ACTION (EVEN IF THE OFFICIAL ABSTAINS)***[2]

Financial disclosure. Some local governments make available a list of the employers and financial interests of their government's officials.[3] Most do not. The decision to collect this information is one that the legislature has left to each unit of government. To learn if your county, municipality, or town provides this information, ask your county, municipal, or town clerk.

Addressing issues before they become problems. To deal with a conflict between a private interest and governmental responsibilities before an official takes a vote or enters into discussions on a matter, the official can either resolve the matter by relinquishing the private interest or mitigate the problem by temporarily withdrawing from exercise of governmental responsibilities. By seeking advice beforehand, an official can determine whether statutory restrictions permit the official to participate in a matter or to accept items or services of value.

Ordinarily, the legal advisor for the unit of government of which the official's position is a part is in the best position to advise the government official about a matter involving ethical standards of conduct. Sometimes, a statewide association of local governments will advise an official.[4]

See other side ☞

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[1] §19.59, *Wisconsin Statutes.*

[2] §946.13, *Wisconsin Statutes.* See text of statutes for exceptions to general rule.

[3] Among the local governments requiring their officials to identify information about their sources of income and investments are the cities of Madison and Milwaukee and the counties of Dane, Milwaukee, and Wood.

[4] Examples include Wisconsin Counties Association, League of Wisconsin Municipalities, Wisconsin Towns Association, Wisconsin Association of School Boards.

This is a guide. For authoritative information consult Wisconsin Statutes.

Prepared by the Wisconsin Government Accountability Board. 212 E. Washington Ave, 3rd Floor, Madison, WI 53703 (608) 266-8005
Website: http://gab.wi.gov Created January 2006. Rev. 9/09. .

GAB 1202

If, after studying the legal standards and gathering the pertinent facts, the legal counsel is uncertain about what advice to offer, the lawyer may direct a letter to the Wisconsin Government Accountability Board stating the pertinent facts and law, tentative conclusion, and basis for it, and ask that the Wisconsin Government Accountability Board issue an opinion concerning the interpretation of §19.59, the Code of Ethics for Local Government Officials, Employees and Candidates. Written requests for advice are confidential. No member or employee of the Government Accountability Board may make public the identity of anyone requesting an advisory opinion or of persons mentioned in an opinion. Periodically, the Board publishes summaries of its opinions after making sufficient alterations to prevent the identification of the requestor and persons mentioned in the opinions. The *Statutes* do not authorize the Board to issue an opinion to a citizen or to an official or representative of a local government other than the local government's legal counsel.

Complaints. If you believe that an official of a county, city, village, town, school board, or special purpose district has violated a standard of conduct that state law requires the official to observe, you may file a complaint with the district attorney for the county in which the activity occurred.

Your complaint should describe the pertinent facts succinctly. State that you swear or affirm that the information you are providing is true to the best of your knowledge, information, and belief. Have a notary or other person authorized to administer an oath witness your signature to the complaint. Deliver the complaint to the district attorney, in person, or by mail, or other appropriate way you find convenient.

Allow the district attorney a reasonable length of time to look into the matter. The district attorney may need several weeks to look into the facts and law in order to make a good decision about how to proceed.

In any event, if the district attorney has not filed a complaint or replied to you within 20 days of your filing a complaint with that office, you may send a copy of your complaint to the Attorney General's Public Integrity Unit[5], explaining that the district attorney, after considering your complaint for 20 days or more, has not begun an action against the person you complained about, and ask the Attorney General to enforce the complaint. If the Attorney General also declines to prosecute the matter, you will at least have the satisfaction that two law enforcement agencies have had the opportunity to review your complaint and act upon it. The Government Accountability Board cannot overturn the decisions of the district attorney or Attorney General or, independent of them, enforce standards of conduct for local government officials.

See other side ☞

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[5] You may file a complaint with the Public Integrity Unit by downloading a form from the Department of Justice's website and mailing it to Administrator Michael Bauer, Wisconsin Department of Justice, Division of Legal Services, 17 West Main Street, P.O. Box 7857, Madison, WI 53707-7857.

Wisconsin Government Accountability Board

For county, city, village, town, school district and other local officials

Restraints on local officials' receipt of food, drink, favors, services, etc.

STATUTORY RESTRAINTS

Except as noted on the other side of the page, ***local public officials should not accept:***

1. **ITEMS OR SERVICES OFFERED BECAUSE OF PUBLIC POSITION.**
   Any item or service, including food, drink, and travel, of more than nominal value offered because of the person's holding a public office [§ 19.59(1)(a)];
2. **ITEMS THAT COULD INFLUENCE JUDGMENT.**
   Any item or service that could reasonably be expected to influence an official's vote, official actions or judgment [§19.59(1)(b)];
3. **REWARDS FOR OFFICIAL ACTION.**
   Any item or service that could reasonably be considered a reward for any official action or inaction [§19.59(1)(b)]; and
4. **TRANSPORTATION OR TRAVELING ACCOMMODATIONS.**
   Discounted transportation, traveling accommodations, or communication services for which the supplier would usually charge [§946.11; Art. 13, §11].

To analyze a situation in which you are offered items or services, ask yourself these questions:

1. With respect to the item or service offered:
   a. Is it being offered because of my public position?
   b. Is it of more than nominal or insignificant value?
   c. Is it primarily for my personal benefit rather than for the benefit of my local unit of government?

If you answer **"yes"** to all three questions, you may not accept the item or service.

2. Would it be reasonable for someone to believe that the item or service is likely to influence my judgment or actions or that it is a reward for past action?

If you answer **"yes,"** you may not accept the item or service.

If you have any doubts about a situation, seek advice from your local governmental attorney.

See other side

Wisconsin Government Accountability Board

For county, city, village, town, school district and other local officials

Local officials' receipt of food, drink, favors, services, etc.

Wisconsin law forbids a public official to use free or discounted transportation, traveling accommodation, or communication services for which the supplier would usually charge [§946.11, Wisconsin Statutes; Art. 13, §11, Wisconsin Constitution],[1] otherwise–

Consistent with the statutes administered by the Government Accountability Board, ***local public officials***[2] ***may accept and retain:***

a. **ITEMS AND SERVICES UNRELATED TO PUBLIC POSITION.**
Food, drink, transportation, lodging, items, and services which are offered for a reason unrelated to the recipient's holding a public position [§ 19.59(1)(a)] and which could not reasonably be expected to influence an official's vote, official actions or judgment, nor reasonably be considered a reward for any official action or inaction;

b. **EXPENSES PROVIDED BY OR FOR THE BENEFIT OF THE LOCAL GOVERNMENTAL UNIT.**
Food, drink, transportation, lodging, or payment or reimbursement of costs that are provided by or for the benefit of the local governmental unit, not for a private benefit; and

c. **ITEMS OF INSUBSTANTIAL VALUE.**
Mere tokens and items or services of only nominal, insignificant, or trivial value.

See other side

1 Consult local ordinances and other state law not administered by the Government Accountability Board for any additional restrictions.

2 "Local public officials" include: (a) elected officers of political subdivisions and special purpose districts of the state; (b) county administrators or administrative coordinators; (c) city or village managers; (d) individuals appointed to a position in a political subdivision or special purpose district for a specified term; and (e) individuals appointed to a position by the governing body, executive, or administrative head of a political subdivision or special purpose district and serving at the pleasure of the appointing authority.

2008 GAB 03
LOCAL OFFICIALS

The Government Accountability Board advises that ¶19.59, *Wisconsin Statutes*, does not prohibit a county board from hosting an appreciation dinner for county employees nor county employees from accepting the dinner. Section 19.45 (3) prohibits a district attorney and circuit court judge from accepting the meal without paying for it.

Facts

¶1 You are a County Corporation Counsel and write on the county's behalf. The county board wants to hold an employee recognition dinner for county employees. The county would pay the cost of the dinner, estimated at less than $15.00 for each meal, from county funds, although not from tax-generated revenues.

Questions

¶2 You have asked two questions: (1) whether the County Board may, consistent with laws administered by the Government Accountability Board, use county funds to pay for the employee recognition dinner and (2) whether county officials and employees as well as the district attorney and a circuit court judge may, consistent with those laws, attend that dinner.

Discussion

Local officials

¶3 Two provisions of Wisconsin's Code of Ethics for Local Public Officials, §19.59, *Wisconsin Statutes*, apply to your question as it pertains to local officials.[1] Section 19.59 (1) (a), *Wisconsin Statutes*, reduced to its elements, provides that:

- No local public official
- May use his or her public position or office
- To obtain financial gain or anything of substantial value
- For the private benefit

[1] The circumstances about which you have asked also raise the question whether the county has the authority to use public funds for a county employee appreciation dinner. We understand that the Attorney General's office has informally opined that a county has the authority to host such a dinner under §59.03 (1), *Wisconsin Statutes*.

In addition, the public purpose doctrine requires that public monies be used only for a public purpose. The Attorney General's office has stated:

> The public certainly benefits from a county work force whose contributions to the betterment of the county and its citizens are appreciated and recognized. The county board has the general authority to provide benefits to county employees. The county board can decide, in the exercises of its discretion, that one of those benefits would be to host an employee recognition dinner.

- Of the official, a member of the official's immediate family, or an organization with which the official is associated.[2]

¶4 Section 19.59 (1) (b), *Wisconsin Statutes*, reduced to its elements, provides that:

- No person may give to a local public official
- And no local public official may accept
- Anything of value
- If it could reasonably be expected to influence the official
- Or could reasonably be considered a reward for any official action on the part of the official.[3]

¶5 A local public official subject to these provisions includes an elected official, a county administrator, an official appointed to serve for a specified term, and an official who serves at the pleasure of the county board or executive head of the county. §19.42 (7w), *Wisconsin Statutes*. County civil service employees are unlikely to be subject to the restrictions of the Ethics Code.

Section 19.59 (1) (a)

¶6 For a local official who is subject to §19.59, accepting a meal offered because the individual holds a government position would be a use of office.[4] "Substantial value" is anything of more than token or inconsequential value.[5] We think it is likely that an appreciation dinner, even if the cost of a meal does not exceed $15 is of more than token or inconsequential value.

¶7 The key issue, then, is whether the employee appreciation dinner is for "private benefit." The Ethics Board long recognized that receipt of an item may result in both a public as well as a private benefit. The test the Ethics Board developed, which we adopt, is whether the benefit conveyed is primarily a private or a public benefit.[6] In our view, a county employee appreciation dinner hosted

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[2] Section 19.59 (1) (a), *Wisconsin Statutes*, provides, in relevant part:

> **19.59 (1) (a)** No local public official may use his or her public position or office to obtain financial gain or anything of substantial value for the private benefit of himself or herself or his or her immediate family, or for an organization with which he or she is associated.

[3] Section 19.59 (1) (b), *Wisconsin Statutes*, provides:

> **19.59 (1) (b)** No person may offer or give to a local public official, directly or indirectly, and no local public official may solicit or accept from any person, directly or indirectly, anything of value if it could reasonably be expected to influence the local public official's vote, official actions or judgment, or could reasonably be considered as a reward for any official action or inaction on the part of the local public official. This paragraph does not prohibit a local public official from engaging in outside employment.

[4] *See* 1993 Wis Eth Bd 11, ¶5; 1991 Wis Eth Bd 5; 9 Op. Eth. Bd. 17 (1986); 5 Op. Eth. Bd. 71 (1981).

[5] *See, e.g.,* 2007 Wis Eth Bd 05; 7 Op. Eth. Bd. 2 (1983); 5 Op. Eth. Bd. 99 (1982); 5 Op. Eth. Bd. 73 (1981).

[6] 2007 Wis Eth Bd 14, n. 5; 2007 Wis Eth Bd 07, n. 5. Even if acceptance of an item or service is of private benefit to a state official, the official may still accept an item or service if the public, rather than the official, is the primary beneficiary. 1997 Wis Eth Bd 13 ¶5. Even if there is a private benefit associated with an act, it is consistent with the Ethics Code if the private benefit is merely incidental to the public benefit. 8 Op. Eth. Bd. 50 (1985); 6 Op. Eth. Bd. 12 (1982). The test is not whether there is any personal benefit; the issue is whether the benefit conveyed is primarily a personal benefit. 2003 Wis Eth Bd 1 ¶6 citing 1996 Wis Eth Bd 15, ¶5; 1996 Wis Eth Bd 02, ¶6. The statutory restriction does not apply when an

by county supervisors has a public benefit. Such a dinner can enhance employee morale, boost employee retention, and lead to a more motivated work force. When weighed against the rather modest value of the dinner, we think the public benefit of the dinner outweighs the private benefit to the few individual employees who are subject to the statute.

Section 19.59 (1) (b)

¶8 The prohibition in §19.59 (1) (b) applies both to donors and recipients. Setting aside the question whether any recipients of the dinner will be local public officials, we think it is unreasonable to expect a dinner whose value is under $15 and that is being offered by the county itself, not by private persons that might be seeking a contract, grant, license, or other decision from the county, to influence any employee's official actions. Nor do we believe a county dinner that recognizes employees' overall work could reasonably be considered a reward for "any official action." We understand that language to refer to a specific action, not to general accomplishments.[7]

State officials

¶9 A district attorney and a circuit court judge are state public officials subject to the restriction in 19.45 (3m), *Wisconsin Statutes*, that they not accept a meal unless a specific exception applies under §19.56 (3), *Wisconsin Statutes*..[8] There is no exception that we believe applies. The officials are not presenting a talk, the meal is not being offered for a reason unrelated to their holding public office, and acceptance of the meal does not benefit the State of Wisconsin.

Advice

¶10 The Government Accountability Board advises that ¶19.59, *Wisconsin Statutes*, does not prohibit the county board from hosting an appreciation dinner for county employees nor county employees from accepting the dinner. Section 19.45 (3) prohibits a district attorney and circuit court judge from accepting the meal without paying for it.

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item or service is primarily for public benefit, and not primarily for private benefit. 2001 Wis Eth Bd 01; 1997 Wis Eth Bd 13, ¶5; 2 Op. Eth. Bd. 47 (1978).

[7] Moreover, the prohibition should not be read to include expenses paid by the county for its officials and employees. Section 19.42 (1), *Wisconsin Statutes*, provides:

> **19.42 (1)** *"Anything of value"* means any money or property, favor, service, payment, advance, forbearance, loan or promise of future employment, but *does not include compensation and expenses paid by the state*, fees and expenses which are permitted and reported under s. 19.56, political contributions which are reported under ch. 11, or hospitality extended for a purpose unrelated to state business by a person other than an organization.

(Emphasis added). Although the statute refers to expenses paid by the state, we think the reason for the exclusion applies equally to a local government's payment of expenses and compensation to its officials.

[8] Section 19.45 (3), *Wisconsin Statutes*, provides:

> **19.45 (3)** No state public official may accept or retain any transportation, lodging, meals, food or beverage, or reimbursement therefore, except in accordance with s. 19.56 (3).

2007 Wis Eth Bd 9
LOCAL OFFICIALS -- DISQUALIFICATION

The Ethics Board advises:

(1) If a matter before a town board, is reasonably likely to have more than a trivial, insignificant, or insubstantial financial effect on a supervisor, then the supervisor SHOULD ABSTAIN from discussion, deliberation, and votes on that matter.

(2) If a matter before a town board will have no effect or only a trivial, insignificant, or insubstantial financial effect on a supervisor, then the supervisor SHOULD PARTICIPATE; and

(3) If reasonable people cannot reasonably foresee the effect of a board of supervisors' action on a supervisor's financial interests or disagree about whether the effect will be positive or negative or will be substantial or insignificant then the supervisor's financial interest is too speculative to deny the supervisor's participation in related discussion, deliberation, and votes, and the supervisor SHOULD PARTICIPATE UNLESS, in the supervisor's judgment, to do so would undermine public confidence in the decision or in government.

Facts

¶1 We base this opinion upon these understandings:

a. You are a town's attorney.

b. A supervisor on the town board owns and resides on a parcel of land adjacent to a town-owned park.

d. The board of supervisors may have, in future meetings, occasions to consider improvements or alterations to the park.

Question

¶2 The Ethics Board understands your question to be:

Does the supervisor's ownership of property proximate to the town park limit the supervisor's involvement in the board of supervisors' future discussions, deliberations, and votes concerning improvements to and alterations of the park?

Discussion

¶3 Reduced to its elements, section 19.59(1) (a), Wisconsin Statutes, provides:

No local public official
May use his or her public position or office

To obtain financial gain or anything of substantial value
For the private benefit of himself or herself or his or her immediate family, or for an organization with which he or she is associated.[1]

¶4 Reduced to its elements, section 19.59(1) (c) 1. and 2., *Wisconsin Statutes*, provides:

Except for taking official action concerning the lawful payment of salaries or employee benefits or reimbursement of actual and necessary expenses or taking official action with respect to a proposal to modify a municipal ordinance,

No local public official may:
Take any official action
Substantially affecting a matter
In which the official, a member of his or her immediate family, or an organization with which the official is associated or has a substantial financial interest.

AND

No local public official
May use his or her office or position
In a way that produces or assists in the production of a substantial benefit
For the official, one or more members of the official's immediate family either separately or together, or an organization with which the official is associated.[2]

¶5 The supervisor is a local public official.[3] This opinion addresses those instances in which the supervisor uses the office or position of supervisor or takes official action including the discussion, deliberation, or vote on matters before the town board of supervisors.

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1 Section 19.59(1)(a) and (c), *Wisconsin Statutes*, provides:

19.59 Codes of ethics for local government officials, employees and candidates. (1)(a) No local public official may use his or her public position or office to obtain financial gain or anything of substantial value for the private benefit of himself or herself or his or her immediate family, or for an organization with which he or she is associated.

2 Section 19.59(1)(a) and (c), *Wisconsin Statutes*, provides:

19.59 Codes of ethics for local government officials, employees and candidates. (1) (c) Except as otherwise provided in par. (d), no local public official may:
1. Take any official action substantially affecting a matter in which the official, a member of his or her immediate family, or an organization with which the official is associated has a substantial financial interest.
2. Use his or her office or position in a way that produces or assists in the production of a substantial benefit, direct or indirect, for the official, one or more members of the official's immediate family either separately or together, or an organization with which the official is associated.

3 *See* 1997 Wis Eth Bd 6, ¶6; 1999 Wis Eth Bd 01, ¶4.

¶6 Whether the foregoing statute prevents a supervisor's discussion, deliberation, and vote on a matter before the town board depends upon whether the supervisor has a personal substantial financial interest in a matter. "Substantial" contrasts with "nominal value" and may be synonymous with "merchantable value"[4] Substantial value is something more than token or inconsequential value.[5] The Ethics Board has never found it necessary to establish the least value that may be quantified as substantial.[6]

¶7 The issue is one of fact. Public policy supports a government official's exercise of official duties when the financial effect of an official decision on the official's personal interests is uncertain and conjectural.[7] In 1998, the question was whether a member of a city council could properly vote on whether to extend public utilities to an area in which the member owned a house. The Board said:

> It is not clear that extension of service to the affected area or retention of the status quo will result in a private benefit of substantial value. You have indicated that the municipality is likely to require a substantial payment from the owner of each property to which water and sewer service is extended. On the other hand, these households may avoid the cost of maintaining wells and septic systems. Property values may be affected. The private benefits and costs are several and, in part, offsetting. In contrast, the public benefits from the provision of public water and sewer service may include added groundwater protection and improved public health. *If a public official's participation or action on government policy is neither forbidden nor antagonistic to public policy, then public policy favors a public official's exercise of his or her official duties.*[8]

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4 A wholesale quantity of brochures had substantial value; 1997 Wis Eth Bd 13 ¶4. 7 Op. Eth. Bd. 2 (1983); 5 Op. Eth. Bd. 99 (1982), 73 (1981).

5 2005 Wis Eth Bd 5 ¶7; 1998 Wis Eth Bd 2 ¶8; 1995 Wis Eth Bd 5 ¶6; 7 Op. Eth. Bd. 22 (1983)

6 7 Op. Eth. Bd. 2 (1983); 5 Op. Eth. Bd. 99 (1982), 58 (1981).

7 *See* 2002 Wis Eth Bd 05.

8 *See, e.g.*, 1995 Wis Eth Bd 3, ¶12; 8 Op. Eth. Bd. 33 (1985). We also note the expression of the legislature's intent set out in §19.45(1), *Wisconsin Statutes*. Although that portion of the Ethics Code is addressed to state officials, we believe it has relevance to local officials as well. In that section, the legislature has stated:

> **19.45 (1)** The legislature hereby reaffirms that a state public official holds his or her position as a public trust, and any effort to realize substantial personal gain through official conduct is a violation of that trust. This subchapter does not prevent any state public official from accepting other employment or following any pursuit which in no way interferes with the full and faithful discharge of his or her duties to this state. The legislature further recognizes that in a representative democracy, the representatives are drawn from society and, therefore, cannot and should not be without all personal and economic interest in the decisions and policies of government; that citizens who serve as state public officials retain their rights as citizens to interests of a personal or economic nature; that standards of ethical conduct for state public officials need to distinguish between those minor and inconsequential conflicts that are unavoidable in a free society, and those conflicts which are substantial and material; and that state public officials may need to engage in employment, professional or business activities, other than official duties, in order to support themselves or their families and to maintain a continuity of professional or

1998 Wis Eth Bd 1, ¶10 (emphasis added).

Advice

¶8 The Ethics Board advises:

(1) If a matter before the town board, is reasonably likely to have more than a trivial, insignificant, or insubstantial financial effect on the supervisor, then the supervisor SHOULD ABSTAIN from discussion, deliberation, and votes on that matter.

(2) If a matter before the town board will have no effect or only a trivial, insignificant, or insubstantial financial effect on the supervisor, then the supervisor SHOULD PARTICIPATE; and

(3) If reasonable people cannot reasonably foresee the effect of the board of supervisors' action on the supervisor's financial interests or disagree about whether the effect will be positive or negative or will be substantial or insignificant then the supervisor's financial interest is too speculative to deny the supervisor participation in related discussion, deliberation, and votes, and the supervisor SHOULD PARTICIPATE UNLESS, in the supervisor's judgment, to do so would undermine public confidence in the decision or in government.

WR1269

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business activity, or may need to maintain investments, which activities or investments do not conflict with the specific provisions of this subchapter.

Section 19.45(1), *Wisconsin Statutes*.

2003 Wis Eth Bd 17
LOCAL CODE - DISQUALIFICATION

The Ethics Board advises that a member of the Village's governing board may participate in the consideration or decision about improvements the village will make to the village's sewage system and the financing of those improvements as follows:

1. If the sewer improvement does not personally and substantially benefit the property interest of a village trustee, the trustee is disqualified neither from participating in the designation of the sewer improvement nor from determining how the improvement's cost will be met.

2. If the sewer improvement personally and substantially benefits the property interest of a village trustee, but the improvement also confers a substantial benefit on all or a sizeable portion of the village's property owners, the trustee is disqualified neither from participating in the designation of the sewer improvement nor from determining how the improvement's cost will be met.

3. If the sewer improvement produces a substantial or personal benefit to the trustee's property interest that is not common to all or a sizeable portion of the village's property owners, but the village assesses the improvements' costs to the property owners who are the beneficiaries of the improvement, the trustee is disqualified neither from participating in the designation of the sewer improvement nor from determining how the improvement's cost will be met.

4. If the sewer improvement produces a substantial or personal benefit to the trustee's property interest that is not common to all or at least to a sizeable portion of the village's property owners, and the village assesses the improvements' costs to all of the village's property owners or at least to property owners who do not benefit from the improvements ordered, the trustee should not participate in discussions and actions that have as their goal the transfer of the costs of the sewer improvements to the trustee's property to others in the village.

Facts

This opinion is based upon these understandings:

a. You are a village attorney and write on behalf of the village board.

b. The Village has a wastewater treatment system that serves several hundred customers; one-half of the properties in the

Village use private systems that are not connected to the public sewer system.

c. Approximately one-fifth of the customers of the public system use private pumps to bring their sewage into the public sewer main. The pumps are owned, operated, and maintained by the customers and are not part of the public sewer system. Approximately 20 of these users deposit their waste into a force main, rather than into a gravity main.

d. The Village has been experiencing sewage backup from the force main.

e. In the interest of environmental protection, the Village hired a consultant that has developed several alternatives for improving the sewage system.

f. For each alternative, there are a number of different financing schemes available. Depending on which improvement proposal is selected and its method of financing, owners of the properties using pumps could pay more than others or costs could be spread more evenly among all sewage system users.

g. The village board comprises five members. Two members of the village board, one of whom is also a member of the board's Wastewater Committee, own property that use pumps delivering sewage into the force main. Neither is currently experiencing sewage problems.

Questions

¶1 The Ethics Board understands your question to be:

How, if at all, does §19.59, *Wisconsin Statutes*, affect the ability of a member of the village board to participate in decisions concerning improvements to the sewage system and the payment of the costs of those improvements?

Discussion

Statutory elements

¶2 Section 19.59 (1) (a), *Wisconsin Statutes*, reduced to its elements, provides:

No local public official
May use his or her public position or office

To obtain financial gain or anything of substantial value
For private benefit of the official, the official's immediate family, or an organization with which the official is associated.[1]

¶3 A member of the village board is a local public official.[2] Participating in official debate, discussions, or votes is a use of office.[3] Sewage system improvements and their financing may provide a service or benefit of substantial value for the official and the official's immediate family. Section 19.42 (1), *Wisconsin Statutes*, provides that "anything of value" includes any money, favor, service, or payment.[4] Obtaining something of value may include an avoidance of financial loss.[5]

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[1] Section 19.59 (1) (a), *Wisconsin Statutes*, provides:

> **19.59 (1) (a)** No local public official may use his or her public position or office to obtain financial gain or anything of substantial value for the private benefit of himself or herself or his or her immediate family, or for an organization with which he or she is associated. A violation of this paragraph includes the acceptance of free or discounted admissions to a professional baseball game by a member of the district board of a local professional baseball park district created under subch. III of ch. 229. This paragraph does not prohibit a local public official from using the title or prestige of his or her office to obtain campaign contributions that are permitted and reported as required by ch. 11.

[2] Section 19.42 (7u), *Wisconsin Statutes*, provides:

> **19.42 (7u)** "Local governmental unit" means a political subdivision of this state, a special purpose district in this state, an instrumentality or corporation of such a political subdivision or special purpose district, a combination or subunit of any of the foregoing or an instrumentality of the state and any of the foregoing.
> * * *

Section 19.42 (7w) (a), *Wisconsin Statutes*, provides:

> **19.42 (7w)** "Local public office" means any of the following offices, except an office specified in sub. (13):
>
> (a) An elective office of a local governmental unit.

Section 19.42 (7x), *Wisconsin Statutes*, provides:

> **(7x)** "Local public official" means an individual holding a local public office.

[3] 1997 Wis Eth Bd 1 ¶3; 1995 Wis Eth Bd 6 ¶4; 1995 Wis Eth Bd 3 ¶4.

[4] Section 19.42 (1), *Wisconsin Statutes*, provides:

> **19.42 Definitions.** In this subchapter:
> **(1)** "Anything of value" means any money or property, favor, service, payment, advance, forbearance, loan, or promise of future employment, but does not include compensation and expenses paid by the state, fees and expenses which are permit-

¶4 "Substantial value" is contrasted with mere token or inconsequential value.[6] Whether a village board member's voting for or against a particular proposal or financing scheme will result in the member's obtaining something of substantial value for the official's private benefit is a question of fact.[7]

¶5 Your letter of inquiry informed us that the village board will make and implement its decisions by adoption of one or more ordinances. Without any independent inquiry, we accept that assertion as a given. Accordingly, we have omitted all discussion of the limitations of §19.59 (1) (c) that would otherwise pertain. [8]

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ted and reported under s. 19.56, political contributions which are reported under ch. 11, or hospitality extended for a purpose unrelated to state business by a person other than an organization.

[5] 1995 Wis Eth Bd 3 ¶9 (legislator should not vote to retain his or her salaried position on the governing board of a governmental entity); 1995 Wis Eth Bd 1 ¶6 (an agency official should not participate in a rulemaking proceeding that allocates business opportunities, if the official would receive an allocation, even if the official would be no better off under an allocation system than under the current unregulated approach).

[6] 1997 Wis Eth Bd 2 ¶4; 1995 Wis Eth Bd 5 ¶6; 1993 Wis Eth Bd 8 ¶6; 7 Op Eth Bd 1 (1983); 5 Op Eth Bd 97 (1982).

[7] 1998 Wis Eth Bd 1 ¶9 ("Whether a member of the governing body of the municipality's voting for or against the extension of water and sewer will result in something of value for private benefit for the official is a question of fact. For an individual with a failing septic system, voting for the extension may lead to substantial financial savings and the receipt of a valuable service. For others, voting against the extension may result in the avoidance of a substantial assessment not offset by any savings.").

[8] Section 19.59 (1) (d), *Wisconsin Statutes*, provides:

> **19.59 (1) (d)** Paragraph (c) does not prohibit a local public official from taking any action concerning the lawful payment of salaries or employee benefits or reimbursement of actual and necessary expenses, or prohibit a local public official from taking official action with respect to any proposal to modify a county or municipal ordinance.

The paragraph referred to provides:

> **19.59 (1) (c)** Except as otherwise provided in par. (d), no local public official may:
>
> 1. Take any official action substantially affecting a matter in which the official, a member of his or her immediate family, or an organization with which the official is associated has a substantial financial interest.
>
> 2. Use his or her office or position in a way that produces or assists in the production of a substantial benefit, direct or indirect, for the official, one or more members of the official's immediate family either separately or together, or an organization with which the official is associated.

Determination of the village board's action's effect on a trustee's private interests

¶6 To the extent that the village's decision on the type of sewer improvements it will make will personally and substantially benefit a village board member two questions must be asked: Who else will benefit? and Does the allocation of costs to board member fairly account for the benefit to that property owner?

¶7 Four situations merit consideration.

ONE. The sewer improvement does not personally and substantially affect the property interest of a village trustee. The trustee is disqualified neither from participating in the designation of the sewer improvement nor from determining how the improvement's cost will be met. This is because the situation is not one which a member has a personal or private interest.

TWO. The sewer improvement personally and substantially affects the property interest of a village trustee, but the improvement also confers a substantial benefit on all or a sizeable portion of the village's property owners. The trustee is disqualified neither from participating in the designation of the sewer improvement nor from determining how the improvement's cost will be met. This is because the situation is one in which the member's interest is in common with all or at least a great number of the trustee's fellow citizens so that there is no special advantage to the trustee.

THREE. The sewer improvement produces a substantial personal benefit to the trustee's property interest that is not common to all or a sizeable portion of the village's property owners, but the village assesses the improvements' costs to the property owners who are the beneficiaries of the improvement. The trustee is disqualified neither from participating in the designation of the sewer improvement nor from determining how the improvement's cost will be met. This is because each beneficiary pays for the improvement to his or her property so that there is no special advantage to the trustee.

On many occasions the Ethics Board has said that, even if a local official has a substantial financial interest in a legislative matter, the official may still participate in the matter's consideration, as long as:

A. The official's action affects a whole class of similarly-situated interests;

B. The official's interest is insignificant when compared to all affected interests in the class; and

C. The official's action's effect on the official's private interests is neither significantly greater nor less than upon other members of the class.[9]

The Ethics Board developed this test in recognition that the law favors an official's exercise of the official's public duties. As the Attorney General has put it, "A pecuniary interest sufficient to disqualify exists . . . where it is one which is personal or private to the member, not such interest as he has in common with all other citizens or owners of property, nor such as arises out of the power of the [government] to tax his property in a lawful manner."[10]

FOUR. The sewer improvement produces a substantial personal benefit to the trustee's property interest that is not common to all or at least to a sizeable portion of the village's property owners, and the village assesses the improvements' to all of the village's property owners or at least to property owners who do not benefit from the improvements ordered. The trustee should not participate in discussions and actions that have as their goal the transfer of the costs of the sewer improvements to the trustee's property to others in the village.

¶8 The issue here is whether the class of individuals affected by the village board's decision is large enough so that the interests of an affected board member can be considered insignificant when compared to the all affected interests in the class. This is not a question that can be answered with mathematical precision. The effects, their magnitude, and the identification of their beneficiaries are matters of fact. In the first instance, it is the members of the village board who must determine those facts.

¶9 When determining whether the benefit of altering the sewer system is limited to the twenty property owners who deposit waste into a force main or a benefit for the entire village, you may account for these considerations: To what extent is a sewer backup a public safety issue? To what extent is a

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[9] 1992 Wis Eth Bd 22 ¶6-8; 1990 Wis Eth Bd 20 ¶4.

[10] 36 Op Att'y Gen 45 (1947). *See also The Board of Supervisors of Oconto County v. Hall*, 47 Wis. 208 (1879).

sewer backup likely to contaminate ground water? To what extent is publicity concerning a sewer backup likely to affect the village's interest in tourism? The overwhelming majority of the sewer system's customers do not have to purchase and maintain pumps and backflow valves, to what extent, if any, should the deposit of waste into a force main be considered an initial design error that the village should rectify? In the case of a sewer backup onto the property from which waste is deposited into a force main, is the cost of clean up borne entirely by the property owner or is the cost of clean up borne by the village, in which case the village would benefit from a new engineering solution?

If the village board's action's effect on a trustee's interest is speculative

¶10 We have also previously recognized that public policy supports a public official's exercise of official duties when the financial effect of an official decision on the official's personal interests is uncertain and speculative. In 1998, the question was whether a member of a city council could properly vote on whether to extend public utilities to an area in which the member owned a house. The Board said:

> It is not clear that extension of service to the affected area or retention of the status quo will result in a private benefit of substantial value. You have indicated that the municipality is likely to require a substantial payment from the owner of each property to which water and sewer service is extended. On the other hand, these households may avoid the cost of maintaining wells and septic systems. Property values may be affected. The private benefits and costs are several and, in part, offsetting. In contrast, the public benefits from the provision of public water and sewer service may include added groundwater protection and improved public health. *If a public official's participation or action on government policy is neither forbidden nor antagonistic to public policy, then public policy favors a public official's exercise of his or her official duties.*

98 Wis Eth Bd 01 ¶10 (emphasis added). [11]

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[11] *See, e.g.*, 1995 Wis Eth Bd 3 ¶12; 8 Op Eth Bd 33 (1985). We also note the expression of the legislature's intent set out in §19.45 (1), *Wisconsin Statutes*. Although that portion of the Ethics Code is addressed to state officials, we believe it has relevance to local officials as well. In that section, the legislature has stated:

> **19.45 (1)** The legislature hereby reaffirms that a state public official holds his or her position as a public trust, and any effort to realize substantial personal gain through official conduct is a violation of that trust. This subchapter does not prevent any state public official from accepting other employment or following any pursuit which in no way interferes with the full and faithful dis-

Advice

¶11 A member of the Village's governing board may participate in the consideration or decision about improvements the village will make to the village's sewage system and the financing of those improvements as follows:

1. If the sewer improvement does not personally and substantially benefit the property interest of a village trustee, the trustee is disqualified neither from participating in the designation of the sewer improvement nor from determining how the improvement's cost will be met.

2. If the sewer improvement personally and substantially benefits the property interest of a village trustee, but the improvement also confers a substantial benefit on all or a sizeable portion of the village's property owners, the trustee is disqualified neither from participating in the designation of the sewer improvement nor from determining how the improvement's cost will be met.

3. If the sewer improvement produces a substantial or personal benefit to the trustee's property interest that is not common to all or a sizeable portion of the village's property owners, but the village assesses the improvements' costs to the property owners who are the beneficiaries of the improvement, the trustee is disqualified neither from participating in the designation of the sewer improvement nor from determining how the improvement's cost will be met.

4. If the sewer improvement produces a substantial or personal benefit to the trustee's property interest that is not common to all or at least to a sizeable portion of the village's property owners, and the village assesses the improvements' costs to all of the village's property owners or at least to property owners who do not benefit from the

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charge of his or her duties to this state. The legislature further recognizes that in a representative democracy, the representatives are drawn from society and, therefore, cannot and should not be without all personal and economic interest in the decisions and policies of government; that citizens who serve as state public officials retain their rights as citizens to interests of a personal or economic nature; that standards of ethical conduct for state public officials need to distinguish between those minor and inconsequential conflicts that are unavoidable in a free society, and those conflicts which are substantial and material; and that state public officials may need to engage in employment, professional or business activities, other than official duties, in order to support themselves or their families and to maintain a continuity of professional or business activity, or may need to maintain investments, which activities or investments do not conflict with the specific provisions of this subchapter.

Section 19.45 (1), *Wisconsin Statutes*.

improvements ordered, the trustee should not participate in discussions and actions that have as their goal the transfer of the costs of the sewer improvements to the trustee's property to others in the village.

WR1158

Office of the Mayor

5520 Lacy Road
Fitchburg, WI 53711-5318
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Fax: (608) 270-4212
www.fitchburgwi.gov

THE CITY OF
Fitchburg
OFFICE OF THE MAYOR

MEMORANDUM

VIA EMAIL

TO: City Attorney, Mark Sewell

FROM: Mayor Shawn Pfaff

DATE: October 16, 2013

RE: Police and Fire Commission Ethics Opinion

CC: Common Council, Tony Roach, Police and Fire Commission, Randy Pickering, Thomas Blatter and Lisa Sigurslid

I have reviewed the letter dated October 3, 2013 from Jonathan Becker, Administrator Division of Ethics and Accountability, Wisconsin Government Accountability Board in response to your letter to him dated September 4, 2013. In his letter, Mr. Becker states that the Government Accountability Board does not provide opinions or advice about whether past conduct may have violated state statute. In order to fully and completely resolve the issue concerning actions taken by the PFC, I hereby request that you provide the Mayor and Council with a legal opinion in this matter.

EXHIBIT
6

THE CITY OF
Fitchburg
OFFICE OF THE CITY ATTORNEY

Office of the City Attorney

5520 Lacy Road
Fitchburg, WI 53711-5318
Phone: (608) 270-4207
Fax: (608) 270-4212
Mark.sewell@fitchburgwi.gov

October 23, 2013

TO: Mayor Pfaff

FROM: Mark Sewell, City Attorney

RE: Opinion regarding Ethics Violation by PFC Members

You have requested an opinion from me pursuant to Wis. Stats., 19.59(5)(a) regarding whether some members of the PFC may have violated Wis. Stats. 19.59(1), the State ethics code for local government officials. This request comes after receipt of a letter from the Government Accountability Board ("GAB") staff member Johnathan Becker dated October 3, 2013, ("Becker Letter") where GAB declines my request for an opinion on the matter but attempts to give some limited guidance.

As you are generally aware, the issue involves the receipt of shirts and jackets by several PFC members. One PFC member has resigned. Three PFC members have submitted letters defending their positions to GAB. Given the numerous letters by PFC members and statements by others regarding the facts of the situation I will not recite them again.

Wisconsin Statutes 19.59 is the code of ethics for local government officials. PFC members are local officials. Two sections of Wis. Stats 19.59 are implicated in the current situation. Those sections are recited below.

EXHIBIT
H

19.59 Codes of ethics for local government officials, employees and candidates.

(1)(a) No local public official may use his or her public position or office to obtain financial gain or anything of substantial value for the private benefit of himself or herself or his or her immediate family, or for an organization with which he or she is associated. This paragraph does not prohibit a local public official from using the title or prestige of his or her office to obtain campaign contributions that are permitted and reported as required by Ch. 11.

(1)(b) No person may offer or give to a local public official, directly or indirectly, and no local public official may solicit or accept from any person, directly or indirectly, anything of value if it could reasonably be expected to influence the local public official's vote, official actions or judgment, or could reasonably be considered as a reward for any official action or inaction on the part of the local public official. This paragraph does not prohibit a local public official from engaging in outside employment.

GAB has issued Guideline 1219 which creates a test for compliance with these sections.

Regarding Wis. Stats. 19.59(1)(a) the GAB test is as follows:

With respect to the item offered:

A. Is it being offered because of my public position?

B. Is it of more than nominal or insignificant value?

C. Is it primarily for my personal benefit rather than for the benefit of my local unit of government?

If you answer "**yes,**" to all three questions, you may not accept the item or service.

Regarding Wis. Stats. 19.59(1)(b) the test is as follows:

Would it be reasonable for someone to believe that the item or service is likely to influence my judgment or actions or that it is a reward for past action?

If you answer "**yes,**" you may not accept the item or service.

OPINION REGARDING VIOLATION OF WIS. STATS. 19.59(1)(a)

Financial Gain for Private Benefit

Question A: Were the shirts and jackets given to PFC members because of their official position?

Opinion: Yes. The shirts and jackets were clearly given to PFC members because of their position as members of the PFC. The shirts and jackets in fact identify members of the PFC.

Question B: Are the shirts and jackets are more than of nominal or insignificant value?

Opinion: Yes. GAB in formal opinions has found and advised that the term "substantial value" means anything of more than inconsequential or token value. GAB has found that items such as free beer, wine, liquor, buffets, and the like clearly have more than token value. See 1993 Wis. Eth Bd 8 attached as Exhibit A. The jackets and shirts totaling approximately $100.00 are clearly of substantial value.

Question C: Are the shirts and jackets primarily for a public benefit or for primarily a private benefit?

Opinion: The shirts and jackets are primarily a private benefit. GAB formal opinions as well as the Becker letter indicate that the local government decides whether an item is for the public benefit. The larger question is who within the local government decides?

1993 Wis. Eth Bd 8 (Attached in full as Exhibit A) in regards to food at a conference states:

> "Normally, a Wisconsin public official who is attending a conference at the behest of his or her governmental unit may, consistent with statutes administered by the Ethics Board, accept meals, refreshment, and the like that are provided, sponsored, or sanctioned by the event's organizer and authorized by the chief executive or governing body of the unit of government of which the official is a part. When a governmental unit authorizes an official's attendance at a conference, it is usually fair to presume that the official's attendance is in furtherance of a public purpose or benefit and that the local government contemplates that the official will partake fully of all the conference has to offer, including forums and receptions that are sponsored or sanctioned by the organization putting on the conference and that are intended for and conducive to discussion of issues and activities pertinent to the conference's purposes. These types of incidental events often are an integral part of the educational and learning experience that comes from attending a conference by affording an opportunity for the informal exchange of ideas among officials.
>
> In contrast, the presumption of a public purpose or benefit does not exist with respect to social events that are not provided, sponsored, or sanctioned by the conference organizer and not authorized by the official's local governmental unit. Indeed, food and drink offered at such events appear generally to be primarily of private benefit to the official and should not be accepted."

1992 Wis. Eth Bd 31 (Attached in full as Exhibit B) states:

> "Normally, a Wisconsin public official who is attending a conference at the behest of his or her governmental unit may, consistent with statutes administered by the Ethics Board, accept meals, refreshment, and the like that are provided, sponsored, or sanctioned by the event's organizer and authorized by the chief executive or governing body of the unit of government of which the official is a part. When a governmental unit authorizes an official's attendance at a conference, it is usually fair to presume that the official's attendance is in furtherance of a public purpose or benefit and that the local government contemplates that the official will partake fully of all the conference has to offer, including forums and receptions that are sponsored or sanctioned by the organization putting on the conference and that are intended for and conducive to discussion of issues and activities pertinent to the conference's purposes. These types of incidental events often are an integral part of the educational and learning experience that

> comes from attending a conference by affording an opportunity for the informal exchange of ideas among officials"

Both of these formal opinions require either the approval of the chief executive or the governing body of the unit of government. It is my opinion that to constitute a public benefit the City through its council or mayor must have authorized the purchase of shirts and jackets for PFC members.

Several PFC members argue that the City did authorize the shirts and jackets as Chief Pickering was given the authority by the City unilaterally to approve up to $2500 in expenditures. The PFC members contend the City in fact authorized Chief Pickering to purchase the shirts and jackets.

City ordinance 10-307 allows a department head to sign purchase orders up to $2500, but only for goods and services authorized by the adopted City budget. The City never budgeted for PFC clothing. Chief Pickering took funds from the unauthorized Jefferson account and funds budgeted for the Chief's personal clothing to purchase the shirts and jackets.

OPINION REGARDING VIOLATION OF WIS. STATS. 19.59(1)(b)
Influence Judgement

With regard to Wis. Stats. 19.59(1)(b) the GAB guideline asks:

> " Would it be reasonable for someone to believe that the item or service is likely to influence my judgment or actions or that it is a reward for past action?"

GAB analyses Section 19.59(1)(b) in the context of a vendor offering of a river boat cruise to local government officials who have decision making power over purchasing from said vendor.

1992 Wis Eth Bd 31 states:

> "...another concern arises in the circumstances you have described because the organization paying for the river cruise is a vendor to local governmental units. As a result, §19.59(1)(b), which prohibits an official from accepting anything of value if it could be reasonably expected to influence an official's vote, actions, or judgment, also is pertinent. We note that it is likely that a vendor is willing to pay for an event like the river cruise specifically in order to influence official judgment in purchasing decisions by creating good will and thus enhance business opportunities. We do not possess enough facts to offer a concrete opinion as to how this provision might apply in the present case. Important factors to consider include the cost of the cruise, whether the vendor is currently seeking business from the official's local unit of government and the official's decision-making role in awarding bids to the vendor. On the whole, absent a showing that only an insignificant number of officials attending the event are not responsible for making or approving purchasing decisions that could involve the vendor's goods, we advise that a vendor not sponsor an event associated with your convention."

Conflicting facts prevent me from making an opinion as to whether Chief Pickering and PFC members are in violation of Wis. Stats. 19.59(1)(b). In the current situation it is up to a trier of fact to determine whether, given that PFC members can fire and discipline Chief Pickering and review his disciplinary decisions, a reasonable person could assume that the Chief was willing to pay for shirts out of an unauthorized account and out of his own clothing allowance to create good will with PFC members. If the trier of fact so concludes, then both the Chief and PFC members may be in violation of Wis. Stats. 19.59(1)(b).

OPINION REGARDING THE ISSUE OF KNOWLEDGE

PFC members raise an additional issue not contained within the GAB guideline. PFC members allege they had no knowledge the shirts and jackets were unauthorized by the City. The PFC members point to the Police Chief in providing the Police Department logo, the Human

Resources Director obtaining sizes, as well as the actions of the Fire Chief. PFC members claim that they relied on City staff to advise them there was a problem in receiving the shirts and jackets. The PFC members contend given the involvement of multiple members of City staff, PFC members were reasonable in assuming the shirts and jackets were authorized by the City.

The Becker letter shines no light on the question of knowledge, nor can I find a GAB opinion on the matter. Looking to Wis. Stats. 19.59(1), the statute itself seems to impose an absolute duty on public officials not to accept unauthorized items. At the same time, Wis. Stats. 19.59(5)(a) provides a method wherein local government officials may request an opinion by either a local ethics board or by the City Attorney prior to acting on a matter. Doing so creates a presumption that the requesting official intended to comply with the statute. It is my opinion that the statute does require local government officials to make reasonable inquiry before accepting an item but that if the official makes reasonable inquiry, such intent to comply with the statute is a defense to a charge of ethics code violation.

I am of the opinion that the level of inquiry is dependent on the facts of the case. It seems illogical to interpret the law to require local officials to consult the City Attorney every time they receive an item connected with their duties. For example, when local officials receive per diem checks, the mere fact that the checks are from the City of Fitchburg and are signed by the mayor, finance director and clerk should be sufficient inquiry.

On the other hand, items that are ordinarily a private benefit such as food, clothing, tickets, travel or trips, should require a higher level of inquiry prior to acceptance. The level of inquiry should also be dependent upon the relationship between the local official and the individual or group offering the item. Whether the local official oversees the offerer, or votes on contracts affecting

the offerer, also affects the level of inquiry a local official should make prior to accepting an item.

Conflicting statements by PFC members, the Fire Chief, the Human Resources Director and others create questions of fact. I cannot therefore opine as to whether PFC members made reasonable inquiry. Such a determination would have to be made by the Council in a removal proceeding or by a jury in a State prosecution. In this case, it is up to a trier of fact to determine whether or not the PFC members conducted a reasonable inquiry prior to accepting shirts and jackets.

CONCLUSION

According the GAB test for compliance with Wis. Stats. 19.59(1)(a), PFC members should not have accepted shirts and jackets. Whether the Fire Chief and PFC members who accepted shirts and jackets violated Wis. Stats. 19.59(1)(b) depends on whether it could be reasonable for someone to believe that the Fire Chief was attempting to create good by providing PFC members with shirts and jackets, using funds from the Chief's personal clothing account or from the unauthorized Jefferson account.

However, under either Wis. Stat. 19.59(1)(a) or (b), if PFC members made reasonable inquiry before accepting the shirts and jackets, and upon reasonable inquiry assumed the shirts and jackets were authorized by the City, then those PFC members by attempting to comply with the ethics code should not be found to have violated the code.

Because of the facts involved, to determine whether the State ethics code for local government officials was violated, the matter would have to be heard in some venue where the involved

individuals are heard and their testimony weighed. The primary questions to be reviewed would be whether PFC members made reasonable inquiry under the circumstances prior to accepting the shirts and jackets, and whether a reasonable person could believe that Chief Pickering in providing of shirts and jackets to PFC members attempted in some way to influence the judgment of those members.

EXHIBIT A

1993 Wis Eth Bd 8
LOCAL CODE -- MEALS, LODGING, TRAVEL AND ENTERTAINMENT

A law firm should not sponsor a dinner or hospitality suite at a conference of local government officials if more than an insignificant number of the officials attending are responsible for making or approving purchasing decisions that could involve the firm. OEB 93-8 (November 3, 1993)

Facts

[1] This opinion is based upon these understandings:

a. You write on behalf of a law firm that represents a number of local governmental units.

b. Each year a statewide association whose membership comprises officials of the local governmental units holds a convention attended by local public officials.

Questions

[2] The Ethics Board understands your questions to be:

1. To what extent, if at all, does the Code of Ethics for Local Officials restrict vendors' sponsoring of hospitality suites offering food and drink without charge to local public officials attending the convention?

2. To what extent, if at all, does the Code of Ethics for Local Officials restrict vendors' sponsoring or offering a dinner to local public officials in connection with the convention?

Discussion

[3] Although the statutory provisions that are pertinent to discussion of your questions are clear, their application to any given situation will be dependent on specific facts and circumstances. Your questions are broad in nature. In this circumstance, the Ethics Board can provide general guidance as to what the law means, but cannot provide advice on every situation that could arise.

[4] Section 19.59, *Wisconsin Statutes*, establishes a code of ethics for local government officials. The elected officials of the local governmental units your firm represents are covered by this code. *See* §19.42(7u), (7w), (7x), *Wisconsin Statutes*.[1] Section 19.59 contains two provisions pertinent to the questions you have asked. Section 19.59(1)(a), *Wisconsin Statutes*, provides:

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1 Section 19.42(7u), (7w), and (7x) provide:

19.59 Codes of ethics for local government officials, employes and candidates. (1)(a) No local public official may use his or her public position or office to obtain financial gain or anything of substantial value for the private benefit of himself or herself or his or her immediate family, or for an organization with which he or she is associated. This paragraph does not prohibit a local public official from using the title or prestige of his or her office to obtain campaign contributions that are permitted and reported as required by Ch. 11.

[5] Section 19.59(1)(b), *Wisconsin Statutes*, provides:

19.59(1)(b) No person may offer or give to a local public official, directly or indirectly, and no local public official may solicit or accept from any person, directly or indirectly, anything of value if it could reasonably be expected to influence the local public official's vote, official actions or judgment, or could reasonably be considered as a reward for any official action or inaction on the part of the local public official. This paragraph does not prohibit a local public official from engaging in outside employment.

Section 19.59(1)(a) 's prohibitions apply only to local officials. Section 19.59(1)(b) 's prohibitions apply both to local officials as well as to any persons offering or providing items to an official.

[6] Hospitality suites and dinners underwritten by non-vendors
For twelve or more years the Ethics Board has found, and so advised, that the term "substantial value" means anything of more than inconsequential or token value.[2] Free beer, wine, liquor, buffets, and the like clearly have more than token value.

19.42(7u) "Local governmental unit" means a political subdivision of this state, a special purpose district in this state, an instrumentality or corporation of such a political subdivision or special purpose district, a combination or subunit of any of the foregoing or an instrumentality of the state and any of the foregoing.

(7w) "Local public office" means any of the following offices, except an office specified in sub. (13):

(a) An elective office of a local governmental unit.

(b) A county administrator or administrative coordinator or a city or village manager.

(c) An appointive office or position of a local government in which an individual serves for a specified term, except a position limited to the exercise of ministerial action or a position filled by an independent contractor.

(d) An appointive office or position of a local government which is filled by the governing body of the local government or the executive or administrative head of the local government and in which the incumbent serves at the pleasure of the appointing authority, except a clerical position, a position limited to the exercise of ministerial action or a position filled by an independent contractor.

(7x) "Local public official" means an individual holding a local public office.

2 *See, e.g.*, 7 Op. Eth. Bd. 2 (1983); 5 Op. Eth. Bd. 99 (1982), 73, 58 (1981).

Normally, a Wisconsin public official who is attending a conference at the behest of his or her governmental unit may, consistent with statutes administered by the Ethics Board, accept meals, refreshment, and the like that are provided, sponsored, or sanctioned by the event's organizer and authorized by the chief executive or governing body of the unit of government of which the official is a part.[3] When a governmental unit authorizes an official's attendance at a conference, it is usually fair to presume that the official's attendance is in furtherance of a public purpose or benefit and that the local government contemplates that the official will partake fully of all the conference has to offer, including forums and receptions that are sponsored or sanctioned by the organization putting on the conference and that are intended for and conducive to discussion of issues and activities pertinent to the conference's purposes. These types of incidental events often are an integral part of the educational and learning experience that comes from attending a conference by affording an opportunity for the informal exchange of ideas among officials.

In contrast, the presumption of a public purpose or benefit does not exist with respect to social events that are not provided, sponsored, or sanctioned by the conference organizer and not authorized by the official's local governmental unit. Indeed, food and drink offered at such events appear generally to be primarily of private benefit to the official and should not be accepted.

[7] Hospitality suites and dinners sponsored by vendors

Although the above analysis is generally applicable, an additional concern arises in the circumstances you have described because your law firm is a vendor of legal services to local governmental units.[4] As a result, §19.59(1)(b), which prohibits an official from accepting anything of value if it could be reasonably expected to influence an official's vote, actions, or judgment, also is pertinent. We note that it is likely that a vendor is willing to pay for an event like a hospitality suite or dinner specifically in order to influence official judgment in purchasing decisions by creating good will and thus enhance business opportunities. We do not possess enough facts to offer a concrete opinion as to how this provision might apply in a particular case. Important factors to consider include the cost of the event, whether the vendor is currently seeking business from the official's local unit of government and the official's decision-making role in awarding bids to the vendor.[5]

On the whole, if a significant number of officials attending an event are responsible for making or approving purchasing decisions that could involve the vendor's goods, we advise that a vendor not sponsor an event associated

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3 *See* Ethics Board Guideline Eth 222. *See also* 1992 Wis Eth Bd 17; 1992 Wis Eth Bd 09.

4 Because your letter asks about local, and not state, officials, the lobbying law, Ch. 13, subch. III, *Wisconsin Statutes*, does not come into play.

5 *See* 1992 Wis Eth Bd 31.

with a convention even if the event is sanctioned by the convention. In any event, an individual official should not accept food and drink of exceptional value from a vendor if the official is in a position to influence the purchase of goods or services from the vendor.

Advice

[8] The Ethics Board advises that a law firm should not sponsor a dinner or hospitality suite at a conference of local government officials if more than an insignificant number of the officials attending are responsible for making or approving purchasing decisions that could involve the firm.

1992 Wis Eth Bd 31

LOCAL CODE - INFLUENCING OFFICIAL JUDGMENT; LOCAL CODE - MEALS, LODGING, TRAVEL & ENTERTAINMENT

A vendor should not sponsor a river cruise for local public officials attending a convention if more than an insignificant number of the officials attending are responsible for making or approving purchasing decisions that could involve the vendor's goods. OEB 92-31 (November 25, 1992)

Facts

[1] This opinion is based upon these understandings:

a. You write on behalf of an association whose members are local public officials.

b. The association will be holding its convention at a future date.

c. The association wants to sponsor a river cruise on the first night of the convention with a bar and entertainment.

d. A private business, which is a vendor to a number of local governmental units, has offered to pay the cost of the river cruise for all members of the association attending the convention as well as the members' spouses.

Question

[2] The Ethics Board understands your question to be:

Does the Ethics Code place any restrictions on a vendor's providing a river cruise to local public officials attending your association's convention?

Discussion

[3] The two provisions of the Ethics Code for local officials most pertinent to your question are §19.59(1)(a) and (b), *Wisconsin Statutes.* Section 19.59(1)(a) provides that no local public official may use his or her public position or office to obtain financial gain or anything of substantial value for private benefit.[1] Section 19.59(1)(b), *Wisconsin Statutes*, provides that no

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[1] §19.59(1)(a), *Wisconsin Statutes*, provides:

19.59 Codes of ethics for local government officials, employes and candidates. (1)(a) No local public official may use his or her public position or office to obtain financial gain or anything of substantial value for the private benefit of himself or herself or his or her immediate family, or for an organization with which he or she is associated. This paragraph does not

person may give to a local public official, and no local public official may accept, anything of value if it could be reasonably expected to influence the local public official's vote, official actions or judgment or reasonably be considered as a reward for any official action or inaction on the part of the local official.[2]

[4] Section 19.59(1)(a)
Your question presumes that the individuals about whom you ask are local public officials. It appears that the officials attending the association's convention would be in attendance and receiving the river cruise as a result of their holding local public office. It also appears that the river cruise has substantial value. The question then is whether the benefit realized from the payment of the cruise expense is of private benefit to the officials or of public benefit.

[5] Normally, a Wisconsin public official who is attending a conference at the behest of his or her governmental unit may, consistent with statutes administered by the Ethics Board, accept meals, refreshment, and the like that are provided, sponsored, or sanctioned by the event's organizer and authorized by the chief executive or governing body of the unit of government of which the official is a part.[3] When a governmental unit authorizes an official's attendance at a conference, it is usually fair to presume that the official's attendance is in furtherance of a public purpose or benefit and that the local government contemplates that the official will partake fully of all the conference has to offer, including forums and receptions that are sponsored or sanctioned by the organization putting on the conference and that are intended for and conducive to discussion of issues and activities pertinent to the conference's purposes. These types of incidental events often are an integral part of the educational and learning experience that comes from attending a conference by affording an opportunity for the informal exchange of ideas among officials.

[6] In contrast, payment of an expense for an official's spouse is unlikely in these circumstance to be of public rather than private benefit, and we advise that this not be done.

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prohibit a local public official from using the title or prestige of his or her office to obtain campaign contributions that are permitted and reported as required by ch. 11.

2 §19.59(1)(b), *Wisconsin Statutes*, provides:

> (b) No person may offer or give to a local public official, directly or indirectly, and no local public official may solicit or accept from any person, directly or indirectly, anything of value if it could reasonably be expected to influence the local public official's vote, official actions or judgment, or could reasonably be considered as a reward for any official action or inaction on the part of the local public official. This paragraph does not prohibit a local public official from engaging in outside employment.

3 *See* Ethics Board Guideline Eth 222. *See also* 1992 Wis Eth Bd 17; 1992 Wis Eth Bd 09.

[7] Section 19.59(1)(b)

Although the above analysis is generally applicable, another concern arises in the circumstances you have described because the organization paying for the river cruise is a vendor to local governmental units.[4] As a result, §19.59(1)(b), which prohibits an official from accepting anything of value if it could be reasonably expected to influence an official's vote, actions, or judgment, also is pertinent. We note that it is likely that a vendor is willing to pay for an event like the river cruise specifically in order to influence official judgment in purchasing decisions by creating good will and thus enhance business opportunities. We do not possess enough facts to offer a concrete opinion as to how this provision might apply in the present case. Important factors to consider include the cost of the cruise, whether the vendor is currently seeking business from the official's local unit of government and the official's decision-making role in awarding bids to the vendor. On the whole, absent a showing that only an insignificant number of officials attending the event are not responsible for making or approving purchasing decisions that could involve the vendor's goods, we advise that a vendor not sponsor an event associated with your convention.

Advice

[8] A vendor should not sponsor a river cruise for local public officials attending a convention if more than an insignificant number of the officials attending are responsible for making or approving purchasing decisions that could involve the vendor's goods.

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4 Because your letter asks about local, and not state, officials, the lobbying law, Ch. 13, subch. III, *Wisconsin Statutes*, does not come into play.

THE CITY OF Fitchburg
OFFICE OF THE CITY ATTORNEY

MEMORANDUM

TO: City of Fitchburg

FROM: Mark Sewell, City Attorney

DATE: April 6, 2017

RE: Absences, Abstentions, Quorums, Vacancies, Voting

ENTITY	NUMBER OF MEMBERS	QUORUM (regardless of absence or vacancy)	VOTES NECESSARY TO PASS A MEASURE
Common Council	8 (plus mayor)	6 (2/3) (Not including Mayor) (less may compel attendance)	- Confirmation: 5 (majority of all the members) - Amendments to Mayor's Proposed Budget: 5 (majority of all the members) - Adoption of the Budget: 5 (majority of all) - Budget Veto Override: 6 (2/3) - Modify Total Budget: 6 (2/3) - Adoption of Tax Levy: 6 (2/3) - Approve Zoning: 3/4 (of members present and voting) - Condemn Land: 7 (4/5 of all) - Other Unspecified Matters: majority (of members present and voting) *Note: other voting provisions exist *Mayor may vote to cause/break a tie or to effect result (to defeat/attain a result)
Agriculture and Rural Affairs	7	4	Majority of members present and voting
Architectural Control Commission	7	4 (voting or non-voting)	Majority of the 7 voting members
Police and Fire Commissioners	5	3	Majority of members present and voting
Board of Review	5	3	Majority of members present (an

MEMORANDUM

			abstention is counted as a negative vote)
Board of Public Works	5	3	Majority of members present and voting
Broadband Telecommunications Commission	7	4	Majority of members present and voting
Civil Service Commission	3	2	Majority of the members present (if 2 are present and 1 abstains, 1 votes in the affirmative, the motion passes)
Commission on Aging	7	4	Majority of the members are present and voting
Community Development Authority	7	4	Majority of those present (an abstention would result in a negative vote
Finance Committee	3 (at least)	2 (majority)	Majority of the members present and voting (if 2 are present and 1 abstains, 1 vote in the affirmative, the motion passes)
Landmarks Preservation Commission	5	3	Majority of members present and voting
Park Commission	7	4	Majority of members present and voting
Personnel Committee	3 (at least)	2 (majority)	Majority of members present and voting (if 2 are present and 1 abstains, 1 votes in the affirmative, the motion passes)
Plan Commission	7	4 (voting or non-voting)	4 of the members who have voting power
Resource Conservation Commission	7	4	Majority of the members present and voting
Public Safety and Human Services Committee	3 (at least)	2 (majority)	Majority of members present and voting (if 2 are present and 1 abstains, 1 votes in the affirmative, the motion passes)
Special Committees	As set	Majority of members	Majority of members present and voting
Transportation and Transit Commission	7	4	4 of the members who have voting power

MEMORANDUM

Zoning Board of Appeals	5 (and 2 alternates)	3	Concurring vote of 4 members to reverse any order, requirement, decision, or determination of any administrative official, or to decide in favor of applicant if required to act under an ordinance or to effect any variation in an ordinance

Fractions: Votes of a single member cannot be split; therefore, when applying fractional voting requirements to the number of members of a group, all resulting fractions must be raised to the next highest whole number.

Vacancies: Quorums are not affected by vacancies or absences.

"Entire Group": When an ordinance / statute requires that the number of votes necessary to pass a measure is a specific number of the entire group, that number of votes necessary remains unchanged despite an individual member's absence, abstention or vacancy.

"Members Present": When an ordinance / statute requires that the number of votes necessary to pass a measure is a specific number of the members present, then a member's absence or vacancy could reduce that number of votes necessary. An abstention would not change the number of votes necessary to pass a measure, but, an abstention could negatively affect that outcome.

"Members Present and Voting": When an ordinance / statute does not specifically provide whether the number of votes needed to pass a measure requires a certain number of the entire group, or of those present, then the number of votes necessary is the specific number of those members present and voting. Therefore, an abstention, absence or vacancy could reduce the number of votes necessary to pass the measure.