

Attorney General Brad D. Schimel's Open Government Summit



Wednesday, July 29th, 2015
The Madison Concourse Hotel
Madison, Wisconsin

Wisconsin Attorney General Brad D. Schimel's Open Government Summit

July 29th, 2015 | 8:30 a.m. - 4:00 p.m.

Madison Concourse Hotel • 1 W. Dayton Street, Madison, WI • Madison Ballroom

8:30 AM

Welcome - Attorney General Brad Schimel

Early in his administration, Attorney General Brad Schimel promised to make reforming Wisconsin's outdated Open Government laws a priority and is excited to welcome participants and guests to the 2015 Open Government Summit. The Attorney General hopes this year's summit will provide recommendations to the Wisconsin Legislature that will provide clearer guidance to public officials and those who seek information from government without reducing rights to access.

8:45 AM

An Overview of Wisconsin's Public Records Law

The Office of Attorney General Brad D. Schimel has statutory and practical Public Records Law responsibilities. A brief history of the law, a summary of the law's components and the public policy balancing test, and a look forward will put in to context the discussion at the Open Government Summit.

Presenter

Anne M. Bensky - Assistant Attorney General, Wisconsin Department of Justice

9:00 AM

Protecting Open Government & Public Safety - Policing in the 21st Century

Changing technologies, like body cameras, increasing public scrutiny of policing practices, and evolving laws, such as officer involved shooting legislation, provide challenges to law enforcement in the 21st century. What best practices ensure Wisconsin's open government laws are upheld without hindering the ability of law enforcement to do their job and protect the community?

Moderator

Attorney General Brad D. Schimel

Panelists

James A. Friedman - Attorney, Godfrey & Kahn, S.C.

Samuel C. Hall Jr. - Attorney, Crivello Carlson S.C.

Jill Karofsky - Administrator, Wisconsin DOJ - Office of Crime Victim Services

Jeff Mayers - President, WisPolitics.com

10:30 AM

BREAK

10:45 AM

Public Records in the Modern Era

Procedures pertaining to records requests, including electronic communications, the balancing test, and retention rules, have been opened to interpretation recently in light of new technology. Do current statutes need to be updated to keep the system honest and effective, and if so, how can we alter old statutes to fit new mediums?

Moderator

Deputy Attorney General Andrew C. Cook

Panelists

Roger Allen - Assistant City Attorney, City of Madison

Robert J. Dreps - Attorney, Godfrey & Kahn, S.C.

Rick Esenberg - President, Wisconsin Institute for Law and Liberty

Raymond P. Taffora - Vice Chancellor for Legal Affairs, UW-Madison

12:15 PM

Lunch

1:15 PM	<p>The Cost of Open Government</p> <p>Open government can come at a significant financial cost to governmental entities charged with keeping and maintaining public records. How can government balance costs without compromising open government?</p> <p>Moderator Assistant Deputy Attorney General Delanie Breuer</p> <p>Panelists Jamie Aulik - County Clerk, Manitowoc County; Legislative Committee Chairman, Wisconsin County Clerks Association Staci M. Hoffman - Register of Deeds, Jefferson County; President, Wisconsin Register of Deeds Association Bill Lueders - President, Freedom of Information Council</p>
2:15 PM	<p>BREAK</p>
2:30 PM	<p>Wisconsin's Open Meetings Law - Overview and Discussion</p> <p>The goal of the Open Meetings Law has always been to keep the electorate informed, but are the current statutes in place doing their job to ensure governmental bodies are following correct procedures to make meetings accessible to the public, especially with technological innovations?</p> <p>Moderator David V. Meany - Administrator, Wisconsin DOJ - Division of Legal Services</p> <p>Panelists Chris Hardie - Former Executive Editor, La Crosse Tribune; Past President, Wisconsin Newspaper Association Andrew T. Phillips - Attorney, von Briesen & Roper, S.C. Cynthia Smith - General Counsel, Wisconsin Public Service Commission</p>
4:00 PM	<p>Summit Concludes</p> <p>Attorney General Brad Schimel thanks all attendees for their participation in the 2015 Open Government Summit and welcomes feedback to be considered for the planning of a follow-up meeting.</p>

Note: A request for CLE credits has been submitted to the Board of Bar Examiners



STATE OF WISCONSIN
DEPARTMENT OF JUSTICE

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ATTORNEY GENERAL

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July 29, 2015

Dear Open Government Summit attendees,

Thank you for joining the Wisconsin Department of Justice for a discussion about Wisconsin's public records and open meetings laws.

I have made open government a priority of my administration. I began by looking for ways to improve our own responsiveness and am proud to have announced the establishment of our Office of Open Government earlier this year. The Office of Open Government will centralize the records fulfillment process in one spot, instead of in individual divisions, as was previously done. We also have implemented a new work flow process through the use of software to track and fulfill public records requests (PRRs) in a timelier manner. Assistant Attorney General Paul Ferguson, who is in charge of the Office of Open Government, will serve as a resource to all those with questions about Wisconsin's Public Records and Open Government laws.

Since I took office on January 5, 2015, the Wisconsin Department of Justice has made substantial improvements in the time it takes for PRRs to be fulfilled:

- a. DOJ has closed 394 requests, including 73 from previous years, the oldest of which was from 1996.
- b. We have decreased average response time from 58 days in 2014 to 17 days in 2015 (we now respond over 5 times faster than we did in 2010).
- c. This is all in spite of the fact that the number of requests are increasing rapidly. We had a total of 486 requests in 2014 and have received 397 during the first half of 2015.

In addition, our office filed an amicus brief in the *New Richmond News v. City of New Richmond* case regarding the Drivers' Privacy Protection Act, supporting the concept of open government. We have also made high profile case records, such as officer use of force investigations, available online. In order to educate the public, the online compliance guides will be updated and overhauled and free webinar trainings will be made available this fall.

I hope today's summit will help both those on the requesting and fulfillment sides find common ground and identify areas where the Public Records and Open Meetings Laws can be amended. Technology has changed the way we do business. I hope together we can find ways to update our open government laws, which were enacted before the creation of technology that has become a part of our everyday life, without sacrificing transparency.

Thank you for your participation and help in making today's Open Government Summit a success.

Very truly yours,

Brad D. Schimel
Attorney General

Roger Allen

Assistant City Attorney, City of Madison

ROGER ALLEN has served as an Assistant City Attorney for the City of Madison, Wisconsin, for 20 years. He has litigated hundreds of municipal ordinance violations, including trials and appeals of intoxicated driving cases. He has also represented the City in many other areas including labor, government administration and general practice matters. He has represented the city in several administrative cases before various agencies, arbitrators and tribunals. Mr. Allen now represents the City in civil litigation involving public records, open meetings, labor and legislative matters.

For the last sixteen years Mr. Allen's practice has focused upon providing labor law, public records and open meetings legal advice and training to virtually every city agency and body. He has trained countless members of the public and attorneys in the principles of conducting public meetings and complying with open governance laws. He is the 2009 recipient of the Wisconsin Freedom of Information Council's "Political Openness Advocate of the Year" award.

Mr. Allen has served on active duty and reserves with the United States Army as both an enlisted person and as a commissioned officer, including service in the Judge Advocate General branch. Mr. Allen has also served as a Dallas, Texas Police Officer, as a Special Agent in the U.S. Drug Enforcement Administration and an Associate Attorney in a private law firm. Mr. Allen particularly enjoyed his brief tenure as a Dane County Circuit Court Judge.

Mr. Allen obtained his Bachelor's degree from the University of Wisconsin - Platteville. He majored in Criminal Justice and Psychology and graduated with honors. He obtained his law degree from the University of Wisconsin graduating with honors and awarded the Order of the Coif. Mr. Allen is married and resides in Madison with his wife, their family and their three dogs.

Jamie Aulik

County Clerk, Manitowoc County

Legislative Committee Chairman, Wisconsin County Clerks Association

JAMIE AULIK has served as the Manitowoc County Clerk for eight years, and he chairs the Legislative Committee and the Website and Publicity Committee for the Wisconsin County Clerks Association.

Jamie is married with four children, holds a B.A. in history, philosophy, and political science from Marquette University, and a Master's Degree in Public Affairs from the Robert M. La Follette School of Public Affairs at UW-Madison. He is also an Army Reservist with eighteen years of service, and teaches courses on leadership and weapons of mass destruction at the U.S. Army Chemical, Biological, Radiological, and Nuclear weapons defense school at Ft. Leonard Wood, MO. He currently holds the rank of Sergeant First Class, and is an Iraq War veteran.

Anne Bensky

Assistant Attorney General, Wisconsin Department of Justice

ANNE BENSKY is an assistant attorney general in the civil litigation unit, where she serves as the Deputy Unit Director for the Employment and Open Government Section. Prior to joining DOJ, Anne practiced law at Garvey McNeil & Associates, S.C. where she handled environmental and regulatory law, open government law, employment and civil rights litigation, general business litigation, and criminal defense. Before law school, Anne worked in New York for several years coordinating media licensing and intellectual property permissions for Condé Nast Publications and Corbis Motion. Anne holds a Bachelor of Fine Arts in Filmic Writing from the University of Southern California and earned her J.D. at the University of Wisconsin Law School.

Delanie Breuer

Assistant Deputy Attorney General

DELANIE BREUER was appointed Assistant Deputy Attorney General by Attorney General Brad Schimel in February 2015. Delanie joined the Wisconsin Department of Justice after serving four years as executive assistant to Public Service Commissioner Ellen Nowak, where she provided counsel on legal and policy matters relating to utility regulation cases and commission actions.

After earning her bachelor degree in Mechanical Engineering in 2005, Delanie went to work in the oil and gas industry in the Southern U.S. and internationally. She worked as a field engineer in the construction of refineries, LNG terminals, and pipelines before going offshore as a drilling engineer on a deep-water drilling rig in the Gulf of Mexico.

Delanie earned her Juris Doctor from the University of Wisconsin Law School, with a certificate in International and Comparative Law. She was a member of the Wisconsin International Law Journal and the Vis International Commercial Arbitration moot court team. She received her B.S. from the University of Wisconsin - Platteville.

Andrew C. Cook

Deputy Attorney General

ANDREW C. COOK was appointed Deputy Attorney General by Attorney General Brad Schimel on January 5th, 2015. As Deputy Attorney General, Cook is the chief operating officer of the Department of Justice. Immediately prior to his appointment, Cook was an attorney at Hamilton Consulting Group, LLC where he has represented a variety of clients before the Wisconsin Legislature and state agencies. Prior to that, Cook was in-house legal counsel for the Building Industry Association of Washington, where he worked on environmental, land use, and open government issues. Cook was also an attorney for the Pacific Legal Foundation in Seattle, WA, where he litigated land use and environmental law cases.

Cook earned his law degree (cum laude) from The John Marshall Law School in Chicago where he co-founded and served as president of the Habitat for Humanity Chapter. He earned his bachelor's degree (cum laude) from the University of Wisconsin-Eau Claire.

Robert J. Dreps

Attorney, Godfrey & Kahn, S.C.

ROBERT J. DREPS is a member of the Litigation and Media Practice Groups at Godfrey & Kahn, S.C. He is an experienced litigator whose practice emphasizes media law including defamation, privacy and access cases; health care litigation; political law; and insurance litigation including defense and coverage issues.

Bob graduated in 1984, first in his class, from the University of Wisconsin Law School where he was a member of the Order of the Coif and the Wisconsin Law Review. Following graduation, he served as law clerk to the Honorable John W. Reynolds, then Chief U.S. District Court Judge for the Eastern District of Wisconsin.

Rick Esenberg

President, Wisconsin Institute for Law and Liberty

RICK ESENBERG is the founder and current President and General Counsel of the Wisconsin Institute for Law & Liberty (WILL). Rick joined WILL after a four-year stint on the faculty at Marquette University Law School where his scholarship concentrated on law and religion, election law and religion, the regulation and nature of public discourse, and the Wisconsin Constitution. He continues to teach at Marquette as a member of the adjunct faculty.

Prior to joining the faculty at Marquette, Rick was Vice President and General Counsel of Rite Hite Holding Corporation in Milwaukee. At Rite Hite, he oversaw business expansions throughout Europe, Latin America, and Canada and served as lead trial counsel in major intellectual property and advertising litigation. From 1981 to 1997, he was an associate and then litigation partner at Foley & Lardner where he was trial and appellate counsel in numerous public-law cases.

Rick is a frequent columnist in the Milwaukee Journal Sentinel and commentator in both the local and national media. He publishes a political blog "Shark and Shepherd". His scholarship has appeared in such publications as the Harvard Journal of Law & Public Policy, Wake Forest Law Review, and William & Mary Bill of Rights Journal.

Rick holds a J.D., magna cum laude, from Harvard Law School, where he was an editor of the Harvard Law Review, and a B.A., summa cum laude, in political science from the University of Wisconsin-Milwaukee.

James A. Friedman

Attorney, Godfrey & Kahn, S.C.

JAMES A. FRIEDMAN is the leader of the Insurance & Reinsurance Working Group and a co-leader of the Litigation Team in the Madison office. He practices in the civil litigation area with an emphasis on insurance coverage, insurance liquidation and guaranty fund work, media law, appellate litigation, intellectual property and health care. James recently served as Wisconsin counsel for 14 multinational banks in the restructuring of Ambac Assurance Corporation.

Before joining the firm, James served as the law clerk to Wisconsin Supreme Court Justice Donald W. Steinmetz. He is the author of the chapter "Creative Strategies and Responses to Changes in Insurance Coverage Law" of the book "Inside the Minds: Recent Developments in Insurance Coverage Litigation" and the co-author of the chapter "Understanding Traditional and Non-Traditional Bad Faith Claims" of the book "Inside the Minds: Extracontractual Claims Against Insurers." He is also the co-author of the NCIGF Annotated Model Insurance Guaranty Act, five chapters in the Media Law Resource Center's "50-State Survey of Libel and Privacy Law," the Reporter's Committee for Freedom of the Press, 50-state Compendium of Shield Laws, and the article "State Constitutions: The Shopping Mall Cases," published in the 1998 Wisconsin Law Review.

James is admitted to practice before all Wisconsin courts, state and federal; the U.S. Court of Appeals for the Seventh Circuit; and the U.S. Supreme Court. He has successfully represented insurance, news media, and other business clients before administrative tribunals, through state and federal trial courts (including several jury trials), in intermediate appellate courts, and before the Wisconsin and United States Supreme Courts.

James earned his undergraduate degree with high honors from Georgia Tech in electrical engineering in 1988. He graduated with honors from the University of Wisconsin Law School, and he received a Master of Public Affairs from the University of Wisconsin, both in 1992.

Samuel C. Hall, Jr.

Attorney, Crivello Carlson, S.C.

SAMUEL C. HALL, JR. is a shareholder at Crivello Carlson, S.C. He received his bachelor's degree and law degree from Marquette University. During law school, Sam was a St. Thomas More Scholar for three years and was a member of the Marquette Sports Law Review. His principal practice focuses on civil rights litigation, municipal law and appellate practice.

Sam has successfully defended many government officials, law enforcement officers and municipalities in cases involving alleged civil rights violations. Sam is admitted to practice and has significant experience representing clients in Wisconsin, Illinois and New York state courts, the United States Supreme Court, the Third Circuit Court of Appeals, the Fifth Circuit Court of Appeals, the Seventh Circuit Court of Appeals and the federal district courts in Wisconsin, Illinois, New York, Texas and Pennsylvania.

Sam received "AV-Preeminent" peer and judicial ratings by Martindale-Hubbell (which is the highest possible rating) and has also been selected for the Wisconsin Super Lawyers Rising Stars list several times for his civil rights defense and appellate work. Based on his experience representing law enforcement officers, Sam has been a keynote speaker and lecturer for various law enforcement organizations and also served as an instructor for a graduate degree level course offered by the University of Wisconsin for law enforcement command staff.

Chris Hardie

Past President, Wisconsin Newspaper Association

Former Executive Editor, La Crosse Tribune

CHRIS HARDIE is the executive director of the Black River Area Chamber of Commerce, a position he took in March after more than 30 years as a journalist. He most recently worked as executive editor of the La Crosse Tribune and publisher of the River Valley Newspaper Group's weekly division, which includes the Tomah Journal and Jackson County Chronicle.

The recipient of nearly two dozen state and national journalism awards, Hardie was nominated for a Pulitzer Prize in 2001 for ground-breaking reporting and a civic journalism project on stray voltage. He is a former member of the Wisconsin Freedom of Information Council and Past President of the Wisconsin Newspaper Association.

Hardie lives in rural Jackson County, where he and his wife Sherry own and operate Bramleberry Bed and Breakfast and Bramleberry Winery, established on his great-grandparents' farm. The Hardies also raise Suffolk and Scottish Blackface sheep and Scottish Highland cattle.

Staci Hoffman

Register of Deeds, Jefferson County

President, Wisconsin Register of Deeds Association

STACI HOFFMAN was elected in 2006 and has been the Jefferson County Register of Deeds since January 2007. She was appointed by the Governor to the Wisconsin Electronic Recording Council for a three year term of office beginning October 2013; she currently serves as council chair.

Biography continued on the following page...

Staci received an Associate Degree in Accounting from Madison College and is currently enrolled in the Wisconsin Certified Public Mangers Program and will graduate in December 2015. She is currently the President of the Wisconsin Register of Deeds Association, past co-chair of the Legislative Committee, chair of eRecord Committee, a member of Archives & Backup Committee, WCA Liaison and Jefferson County Land Information Council. She has served as District Chair, chair of E-Directory and Audit Committees.

Staci was appointed to the Wisconsin Counties Association Board of Directors in 2014, is a member of the Wisconsin County Constitutional Officers, and is a member of the Wisconsin Presidents Council.

Staci has worked for Jefferson County for 17 years, two years as a Child Support accountant and eight years as Chief Deputy Treasurer before becoming Register.

Staci is an active member of the Optimist Club of Jefferson, serving as their treasurer and was awarded the Optimist of the Year in 2007 and 2014. She also volunteers at St. Vincent De Paul and helps with many community events and organizations including her grandsons Boy Scout troop.

Jill Karofsky

Administrator, Office of Crime Victim Services - Wisconsin Department of Justice

JILL KAROFSKY has been the Executive Director of the Wisconsin Department of Justice's Office of Crime Victim Services since 2011. Prior to her appointment, Jill was an Assistant Attorney General and Wisconsin's first Violence Against Women Resource Prosecutor. In that role, she provided training and support to Wisconsin prosecutors to enhance their prosecutions of sexual assault, domestic violence, stalking, and related offenses.

From 2001-2010 Jill was an attorney for the National Conference of Bar Examiners where she served as the Director of Human Resources and Counsel, and the Director of Education. Jill started her career in the Dane County District Attorney's Office as an Assistant District Attorney and then Deputy District Attorney where she specialized in prosecuting crimes involving women and child victims.

Jill is also an adjunct professor at the University of Wisconsin Law School. She has taught Trial Advocacy and is currently teaching a course she developed called Victims in the Criminal Justice System.

Jill is a graduate of the University of Wisconsin Law School (J.D.) and LaFollette School of Public Affairs (M.A.) Her undergraduate degree is from Duke University.

Bill Lueders

President, Freedom of Information Council

BILL LUEDERS is associate editor of *The Progressive* magazine, having previously worked at *Isthmus*, a Madison weekly, and the nonprofit Wisconsin Center for Investigative Journalism. He is also the elected president of the Wisconsin Freedom of Information Council, a nonprofit group that works to protect public access to meetings and records. He's written three books: *An Enemy of the State: The Life of Erwin Knoll*; *Cry Rape: The True Story of One Woman's Harrowing Quest for Justice*; and *Watchdog: 25 Years of Muckraking and Rabbleroising*.

Jeff Mayers

President, WisPolitics.com

JEFF MAYERS is President of WisPolitics.com, an online political and government news service in Madison that operates WisPolitics.com, WisBusiness.com, WisOpinion.com and other news services. WisPolitics.com, the flagship news service, launched in June 2000.

A former AP editor and reporter and political writer for the Wisconsin State Journal, Mayers has been in the news business since graduating from George Washington University in 1981. He also has a graduate degree from UW-Madison.

In addition, Mayers has been involved in several book projects, co-authoring Wisconsin Golf Getaways and Exploring Wisconsin Trout Streams and editing Catching Big Fish on Light Fly Tackle by Tom Wendelburg. He also has written articles and columns for a variety of state, regional and national publications.

David V. Meany

Administrator, Division of Legal Services – Wisconsin Department of Justice

DAVID V. MEANY has practiced law for more than 30 years in Wisconsin. He has served as Chief Legal Counsel at the Wisconsin Department of Agriculture, Trade and Consumer Protection since his appointment by Secretary Ben Brancel in November, 2011. Previously, David was a partner in two Wisconsin law firms, Michael, Best and Friedrich, and DeWitt, Ross & Stevens. Before and during law school, he was a research analyst in the Civil Rights Division at the United States Department of Justice. He received a BA from Antioch College, and his law degree, cum laude, from Georgetown University.

Andy Phillips

Attorney, von Briesen & Roper, S.C.

ANDY PHILLIPS has dedicated his career to assisting local governments, school districts and businesses with their most challenging legal problems. Andy brings innovative solutions to the organizational, operational and personnel problems facing local governments and has been a leader in creating consortiums efficiently in areas such as Medicaid programming, human services and long term care. Andy serves as General Counsel for the Wisconsin Counties Association, a position which he has held for the past decade.

Andy is also an experienced litigator with a background in complex commercial, employment and public sector litigation. He has extensive knowledge of state and federal employment laws and has represented public and private clients in administrative proceedings, arbitration, collective bargaining and employment litigation.

Andy is a member of the State Bar of Wisconsin, the American Bar Association, and Wisconsin's Eastern and Western District Bar Associations.

He serves on the Board of Directors for Angel on My Shoulder, Inc. He also previously served as a commissioner for the Cedarburg Police & Fire Commission.

Brad D. Schimel

Wisconsin Attorney General

BRAD D. SCHIMEL was elected Wisconsin Attorney General on November 4, 2014, and inaugurated January 5, 2015. A frontline prosecutor first elected Waukesha County District Attorney in 2006, Schimel has pledged as Attorney General to put public safety over politics and to continue the fight against heroin, human traffickers, domestic violence and Internet predators.

Attorney General Schimel earned his law degree from the University of Wisconsin-Madison. A graduate of Mukwonago High School, General Schimel holds a bachelor's degree in political science from the University of Wisconsin-Milwaukee. He began his career as a prosecutor in 1990 when he joined the Waukesha County District Attorney's office.

In the same year he was elected Waukesha County District Attorney, Schimel was awarded the 2006 Wisconsin Association of Victim and Witness Professionals "*Wisconsin Professional of the Year*" for his work on behalf of victims of sexual assault.

In 2011, Schimel was appointed to serve on the Wisconsin Judicial Council, and he was appointed to serve on the Wisconsin Crime Victim Council, where he also has served in a leadership capacity as the Secretary of Council. Schimel is a founding member of the Waukesha County Victim Impact Panel for intoxicated drivers, and he has served as President of the Preventing Alcohol-Related Crashes (PARC) Task Force from 2004-2011.

Schimel has been deeply involved in a variety of community and volunteer activities, including serving as a board member and Past President of the Board of Safe Babies/Healthy Families, which provides education, support and resources to families. He also has served as a lector for St. Anthony on the Lake Parish; as a board member for the Waukesha Food Pantry; and, as President and member of the Board of Directors for Interfaith Senior Programs.

Schimel and his wife, Sandi, have two daughters, a rescue dog and two rescue cats. In his leisure time, Schimel plays bass in a classic rock band and is a Harley Davidson enthusiast.

Anne E. Schwartz

Communications Director, Wisconsin Department of Justice

ANNE E. SCHWARTZ is a 26-year veteran print and broadcast journalist, author and a nationally recognized trainer on strategic communication for public safety professionals.

She joined Wells Fargo in 2013, where she managed communication strategies for the company's Midwest operations. She was appointed to the Milwaukee Police Department in 2004 where she served as communications director for eight years.

In 1991, as a reporter for the former Milwaukee Journal (now the Milwaukee Journal Sentinel), she broke the story of Milwaukee serial killer Jeffrey Dahmer and wrote a book on the case.

She is a founding member of the Public Affairs Committee for the Major Cities Chiefs Association, a committee formed in 2005 to advise the country's major city police chiefs on public affairs issues. She teaches executive messaging and strategic communication for public safety professionals around the country and for the state's law enforcement through the Wisconsin Department of Justice.

Cynthia Smith

General Counsel, Wisconsin Public Service Commission

CYNTHIA SMITH has been the Chief Legal Counsel for the Public Service Commission of Wisconsin since 2004. Prior to joining the Commission, Cindy was a partner at Michael Best & Friedrich where she spent 17 years practicing environmental law and litigation. Cindy is a 1993 graduate of Marquette University Law School and a graduate of Kenyon College.

Raymond P. Taffora

Vice Chancellor for Legal Affairs, University of Wisconsin-Madison

RAYMOND P. TAFFORA was appointed Vice Chancellor for Legal Affairs in September of 2013. In this role, Mr. Taffora serves as the general counsel of the University of Wisconsin-Madison and is a member of the Executive Committee. Prior to his appointment, Mr. Taffora was an attorney in private practice at the law firm of Michael Best & Friedrich for over 18 years, where he specialized in matters of governmental, administrative and regulatory law. Mr. Taffora has previously served as (Chief) Deputy Attorney General in the Wisconsin Department of Justice (2007-2011) and as Chief Legal Counsel to the Governor of Wisconsin (1987-1991). Mr. Taffora earned his Bachelor of Science degree from the University of Wisconsin-Madison in 1983 and his law degree from the University of Wisconsin Law School in 1986.

Wisconsin Department of Justice
Office of the Attorney General

PUBLIC RECORDS 101

July 29, 2015

1. Access is presumed.

- A. The public records statutes “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.” Wis. Stat. § 19.31.
- B. Although the presumption of access is strong, it is not absolute. *Hempel v. City of Baraboo*, 2005 WI 120, ¶ 28, 284 Wis. 2d 162, 699 N.W.2d 551.
- C. “Except as otherwise provided by law, any requester has a right to inspect any record.” Wis. Stat. § 19.35(1)(a).
 - 1. Exceptions may be created by state or federal statutes, or by case law.
 - 2. Access also may be denied pursuant to the public records balancing test when identified public interests favoring non-disclosure of specific records outweigh the public interest in disclosure of those records.
 - 3. Exemptions to the public records law are narrowly construed. *Chvala v. Bubolz*, 204 Wis. 2d 82, 88, 552 N.W.2d 892, 895 (Ct. App. 1996); *Hathaway v. Jt. Sch. Dist. No 1, Green Bay*, 116 Wis. 2d 388, 397, 342 N.W.2d 682, 686-87 (1984).

2. “Authorities” are subject to the public records law.

- A. An “authority” includes state and local governments, courts, elected officials, and their sub-units, departments, and employees. Wis. Stat. § 19.32(1).
- B. Each authority is legally responsible for responding to public records requests received by that authority.

3. A “record” is specifically defined, Wis. Stat. § 19.32(2).

- A. A “record” can be virtually anything that contains information created or kept by a government, but drafts, notes, preliminary computation and the like materials are not records if they are prepared for the originator’s personal use or prepared on behalf of the ultimate author.
 - 1. A “draft” generally is a document circulated only to persons over whom the person for whom the draft is prepared has authority. 77 Op. Att’y Gen. 100, 102-

03 (1988); Labeling documents as “drafts” is not controlling. *Fox v. Bock*, 149 Wis. 2d 403, 417, 438 N.W.2d 589, 594 (1989).

2. A document is not a “draft” if it is used for the purposes for which it was commissioned. *Fox*, 149 Wis. 2d at 414; *Journal/Sentinel, Inc. v. Sch. Bd. of Shorewood*, 186 Wis. 2d 443, 455-56, 521 N.W.2d 165, 171 Ct. App. 1994).
3. In general, sharing notes with other persons transforms them beyond “personal use.”

- B. Content determines whether something is a “record” for public records law purposes—not medium, format, or location. OAG I-06-09 (December 23, 2009), at 2.
- C. A “record” must be created or kept in connection with the official purpose or function of the authority. 72 Op. Att’y Gen. 99, 101 (1983); *State ex rel. Youmans v. Owens*, 28 Wis. 2d 672, 679, 137 N.W.2d 470, 473 (1965).
- D. “Records” do not include published material available for sale or at a library. Wis. Stat. § 19.32(2).
- E. “Records” do not include purely personal property of the custodian with no relation to his or her office. Wis. Stat. § 19.32(2).
 1. Email sent on personal email accounts but pertaining to official business is a record.
 2. Purely personal email sent on government email accounts also is a record, but is not subject to disclosure in response to a public records request if it does not evince any violation of law or policy. *Schill v. Wisconsin Rapids Sch. Dist.*, 2010 WI 86, ¶ 9 & n.4, 327 Wis. 2d 572, 786 N.W.2d 177 (Abrahamson, C.J., lead opinion); *Id.*, ¶ 148 & n.2 (Bradley, J., concurring); *Id.*, ¶ 173 & n.4 (Gableman, J., concurring).

4. The public records law applies to records that exist at the time a public records request is received.

- A. The public records law generally does not require creating new records in order to respond to a public records request, or obtaining records from another authority.
 1. An authority can offer to create a record (e.g., payroll data or other data that exists in numerous records, but a computer program can pull pertinent data from those records and create one short spreadsheet)
- B. The public records law does not require complying with “continuing” or prospective requests.
- C. The public records law does not require answering questions about a topic of interest to the requester.

- D. An authority may choose to provide information not required by the public records law.
- E. Alternate means of obtaining the same or similar information, such as subpoena or discovery, are governed by different rules.

5. Record preservation requirements apply.

- A. When a public records request is made, the authority must preserve potentially responsive records. Wis. Stat. §§ 19.35(5); 19.356(5).
- B. Don't confuse public records preservation with record retention laws.

6. Response is required “as soon as practicable and without delay.” Wis. Stat. § 19.35(4)(a).

- A. There is no mandatory time frame for response, such as 48 hours or ten days, required by statute.
- B. A reasonable time for responding to a specific request depends on the totality of circumstances, including the nature of the request, the extent of the request, and the staff and other resources available to process the request. *WIREData, Inc. v. Vill. of Sussex*, 2008 WI 69, ¶ 56, 310 Wis. 2d 397, 751 N.W.2d 736.

7. The requester’s identity and motive generally are not relevant.

- A. A requester need not identify the motive or purpose of his or her request. Wis. Stat. § 19.35(1)(h) and (i).
 - 1. If the requestor's identity or motive is known to the Authority, the Authority may consider that information in the balancing test under limited and compelling circumstances. *Ardell v. Milwaukee Bd. of Sch. Dir.*, 2014 WI App 66, ¶ 23, 354 Wis.2d 471, 849 N.W.2d 894.
- B. A requester generally need not identify himself or herself, or show identification. Wis. Stat. § 19.35(1)(i).
 - 1. Identification may be required when needed for security reasons.
 - 2. Identification may be requested when required by law for access to certain types of records (such as certain law enforcement records and patient health care records).
 - 3. To verify identity when documents are only available to the records subject under Wis. Stat. § 19.35(1)(am).
- C. A requester seeking records containing personally identifiable information about himself or herself has greater rights of access under Wis. Stat. § 19.35(1)(am).

8. A request need not be in writing, but must be reasonably specific.

- A. Public records requests need not be made in writing. Wis. Stat. § 19.35(1)(h).
- B. A request without a reasonable limitation as to time or subject matter of the requested records is not sufficient. Wis. Stat. § 19.35(1)(h); *Schopper v. Gehring*, 210 Wis. 2d 208, 212-13, 565 N.W.2d 187, 189-90 (Ct. App. 1997); *State ex rel. Gehl v. Connors*, 2007 WI App 238, ¶ 24, 306 Wis. 2d 247, 742 N.W.2d 530.
- C. A records custodian should not have to guess at what records a requester desires. *Seifert v. Sch. Dist. of Sheboygan Falls*, 2007 WI App 207, ¶ 42, 305 Wis. 2d 582, 740 N.W.2d 177.
- D. That a public records request may result in production of voluminous records is not—and of itself—a sufficient reason to deny a request. At some point, an overly broad request becomes sufficiently excessive to warrant rejection. There is no bright line test. The public records law will not be interpreted to impose such a burden on a records custodian that normal functioning of the office would be severely impaired. *Gehl*, 2007 WI App 238, ¶¶ 23-24, 306 Wis. 2d 247, 742 N.W.2d 530.
- E. It is fine for a custodian to contact a requester to try and clarify what records he or she wants.

9. Suggested framework for analyzing public records requests.

- A. Step One: Is there such a record?
- B. Step Two: Is the requester entitled to access the record pursuant to statute or court decision?
- C. Step Three: Is the requester prohibited from accessing the record pursuant to statute or court decision?
- D. Step Four: Does the balancing test compel access to the record?
 - 1. The balancing test requires the records custodian to balance the strong public interest in disclosure against identifiable public interests against disclosure.
 - a. Fact-intensive, case-by-case analysis is required. *Kroepelin v. Wis. Dep't of Natural Res.*, 2006 WI App 227, ¶ 37, 297 Wis. 2d 254, 725 N.W.2d 286.
 - b. The totality of circumstances must be considered. *Seifert*, 2007 WI App 207, ¶ 31, 305 Wis. 2d 582, 740 N.W.2d 177.
 - c. The identity of the requester and the purpose of the request generally are not part of the balancing test. See *Kraemer Bros., Inc. v. Dane County*, 229 Wis. 2d 86, 102, 599 N.W.2d 75, 83 (Ct. App. 1999). But whether the

requester's identity presents a safety concern properly considered in the balancing test is a fact-intensive inquiry determined on a case by case basis. *State ex rel. Ardell v. Milwaukee Bd. of Sch. Dir.*, 2014 WI App 66, ¶ 17, 354 Wis. 2d 471, 849 N.W. 2d 894.

- d. The private interest of a person mentioned or identified in the records is properly considered only indirectly in the balancing test – whether there is a public interest in protecting the person's privacy or reputational interest (such as encouraging quality applicants for government service positions). *Linzmeier v. Forcey*, 2002 WI 84, ¶ 31, 254 Wis. 2d 306, 646 N.W.2d 811.
 - e. Without more, potential embarrassment is not a sufficient reason for withholding a record. *Milwaukee Journal Sentinel v. Wisconsin Dep't of Admin.*, 2009 WI 79, ¶ 62, 319 Wis. 2d 439, 768 N.W.2d 700.
2. Some public policies that may be considered.
 - a. Policies expressed in exemptions to the open meetings law, such as discussion of personnel matters or rendition of legal advice as to pending or probable litigation, if the authority or custodian makes a specific demonstration that there is a need to restrict public access at the time that the request to inspect or copy the record is made. Wis. Stat. § 19.35(1)(a); *Beaver Dam Area Dev. Corp.*, 2008 WI 90, ¶ 82, 312 Wis. 2d 84, 752 N.W.2d 295; 73 Op. Att'y Gen. 20, 22 (1984).
 - b. Public policy interest supporting effective investigation and prosecution of crime. *Linzmeier*, 2002 WI 84, ¶ 30, 254 Wis. 2d 306, 646 N.W.2d 811.
 - c. Public policy interest in attracting quality candidates for public employment, which might be undermined if there is a perception that personnel files are regularly open for review. *Hempel*, 2005 WI 120, ¶ 75, 284 Wis. 2d 162, 699 N.W.2d 551.
 3. Note that there is no balancing test under Wis. Stat. § 19.35(1)(am). *Hempel*, 2005 WI 120, ¶¶ 3, 27, 56, 284 Wis. 2d 162, 699 N.W.2d 557.

10. There is no blanket rule exempting personnel records from disclosure.

- A. Exempt from disclosure, pursuant to the public records law: Information relating to one or more specific employees that is used for staff management planning, including performance evaluations, judgments, or recommendations concerning future salary adjustments or other wage treatments, promotions, job assignments, letters of reference, or other comments or ratings relating to employees. Wis. Stat. § 19.36(10)(d).
- B. Many personnel records must be reviewed page by page; the balancing test or other considerations may apply to certain records.

- 11. If part of the record is disclosable, that part must be disclosed.**
- A. Other parts of the record not subject to disclosure must be separated, or “redacted.” Wis. Stat. § 19.36(6). There is no mandatory method of making redactions.
- 12. A response denying some or all requested records must be legally sufficient and explained with sufficient specificity.**
- A. Reasons stated for denying a public records request, or redacting certain information, must be sufficient and specific—they must reasonably explain the denial or redaction. *Hempel*, 2005 WI 120, ¶¶ 25-26, 284 Wis. 2d 162, 699 N.W.2d 551; *Portage Daily Register v. Columbia County Sheriff's Dep't*, 2008 WI App 30, ¶ 14, 308 Wis. 2d 357, 746 N.W.2d 525.
- B. A written request requires a written response, if the request is denied in full or in part. It is fine to respond in writing to an oral request. Wis. Stat. § 19.35(4)(b).
- C. If denial of a request is challenged in a mandamus proceeding, the judge’s review usually is limited to the reasons stated in the response. If the response fails to state sufficient reasons for denying the request, the court will require disclosure of the requested records. *Osborn v. Bd. of Regents*, 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, 503 (1967); *but see Journal Times v. City of Racine Bd. of Police and Fire Comm'rs.*, 2015 WI 56, ¶ 69, 362 Wis. 2d 577, --- N.W.2d --- (court may consider statutory exemption not previously asserted).
- 13. Notice before releasing records is required only in limited circumstances, Wis. Stat. § 19.356**
- A. There are three circumstances when notice is required and the recipient is entitled to petition for a court order attempting to restrain release of the records: certain employee disciplinary records, records obtained through subpoena or search warrant, records prepared by an employer other than the authority. Wis. Stat. § 19.356(2)(a).
- B. A different kind of notice is required if an authority decides to permit access to records containing information relating to a record subject who is an officer or an employee of the authority holding a state or local public office. These notice recipients may supplement the records before release. Wis. Stat. § 19.356(9).
- 14. An authority may charge for “actual, necessary and direct” costs specified in Wis. Stat. § 19.35(3).**
- A. An authority may charge only for the specific tasks identified by the Legislature in Wis. Stat. § 19.35(3). *Milwaukee Journal Sentinel v. City of Milwaukee*, 2012 WI 65, ¶ 50, 341 Wis. 2d 607, 815 N.W.2d 367 (Abrahamson, C.J., lead opinion); *Id.*, ¶ 76 (Roggensack, J., concurring)
1. Reproduction costs incurred in the process of producing a counterpart, image, or copy. Wis. Stat. § 19.35(3)(a).
 2. Transcription costs. Wis. Stat. § 19.35(3)(a).

3. Location costs incurred in searching, examining, or experimenting to find a responsive record. Wis. Stat. § 19.35(3)(c).
 - a. Location costs usually consist of staff time, calculated at time x hourly rate (can include fringes).
 - b. Caveat: Costs of locating records may not be charged unless they total \$50.00 or more.
4. Photography and photographic reproduction charges. Wis. Stat. § 19.35(3)(b).
5. Mailing and shipping fees. Wis. Stat. § 19.35(3)(d).
- B. Costs of reviewing and redacting records may not be charged. *Milwaukee Journal Sentinel*, 2012 WI 65, ¶¶ 1 & n.4, 6, 58, 341 Wis. 2d 607, 815 N.W.2d 367, (Abrahamson, C.J., lead opinion); *Id.*, ¶ 76 (Roggensack, J., concurring).
- C. Prepayment may be required if the total cost exceeds \$5.00. Wis. Stat. § 19.35(3)(f).
- D. An authority may choose to provide records at reduced or no charge. Wis. Stat. § 19.35(3)(e).

15. Public records law resources.

- A. Review sources available on the Department of Justice website, *www.doj.state.wi.us*.
 1. *Wisconsin Public Records Law Compliance Outline*.
 - a. Available to view, download, or print free of charge on the DOJ website.
 2. Sample notice forms, letters, and other reference materials.
 3. Recording of November 6, 2014, public records webinar.
 4. Attorney General's opinions.
- B. Consult with a DOJ public records lawyer. Contact Connie Anderson at (608) 266-3952 to arrange a consultation.
- C. Write to Attorney General Brad D. Schimel, Wisconsin Department of Justice, Post Office Box 7857, Madison, WI 53707-7857. Include copies of request, response and other relevant correspondence.
- D. Review Melanie R. Swank, *The Wisconsin Public Records and Open Meetings Handbook* (5th ed. 2012)

E. Review resources available on the Wisconsin Freedom of Information Council website, *www.wisfoic.org*.

1. Statutes, case law, and Attorney General's opinions.
2. Frequently asked questions.
3. "Your Right to Know" columns.

Wisconsin Department of Justice

Office of the Attorney General

OPEN MEETINGS 101

July 29, 2015

Wisconsin's open meetings law, Wis. Stat. § 19.81 *et seq.*

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." Wis. Stat. § 19.81(2). There is thus a presumption that meetings of governmental bodies must be held in open session. *State ex rel. Newspapers v. Showers*, 135 Wis. 2d 77, 97, 398 N.W.2d 154 (1987).

1. When does the Open Meetings Law apply?

The open meetings law applies to every "meeting" of a "governmental body." Wis. Stat. § 19.83. The terms "meeting" and "governmental body" are defined in Wis. Stat. § 19.82(1) and (2).

A. Definition of "Governmental Body."

1. Entities that are governmental bodies.

- a. 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[.]" Wis. Stat. § 19.82(1). This definition is broad enough to include virtually any collective governmental entity, regardless of what it is labeled. It is important to note that a governmental body is defined primarily in terms of the manner in which it is created, rather than in terms of the type of authority it possesses. 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. *See State v. Swanson*, 92 Wis. 2d 310, 317, 284 N.W.2d 655 (1979).
- b. A "formally constituted subunit" of a governmental body is itself a "governmental body" within the definition in Wis. Stat. § 19.82(1). A subunit is a separate, smaller body created by a parent body and composed exclusively of members of the parent body. 74 Op. Att'y Gen. 38, 40 (1985).
- c. 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. Wis. Stat. § 19.87. The law does not apply to any partisan caucus of the senate or assembly. Wis. Stat. § 19.87(3). The open meetings law also does not apply where it conflicts with a rule of the

Legislature, senate, or assembly. Wis. Stat. § 19.87(2). Additional restrictions are set forth in Wis. Stat. § 19.87.

- d. Governmental or quasi-governmental corporations: The definition of “governmental body” also includes “a governmental or quasi-governmental corporation, except for the Bradley center sports and entertainment corporation.” Wis. Stat. § 19.82(1). 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. *See* 66 Op. Att’y Gen. 113, 115 (1977).

2. Entities that are not governmental bodies

- a. Governmental offices held by a single individual, *Plourde v. Habegger*, 2006 WI App 147, 294 Wis. 2d 746, 720 N.W.2d 130.
- b. Bodies meeting for collective bargaining. The collective bargaining exclusion does not permit any body to consider the final ratification or approval of a collective bargaining agreement in closed session. Wis. Stat. § 19.85(3).
- c. Bodies created by the Wisconsin Supreme Court, *State ex rel. Lynch v. Dancey*, 71 Wis. 2d 287, 238 N.W.2d 81 (1976); OAG 67-79 (July 31, 1979) (unpublished opinion).
- d. Ad hoc gatherings, e.g., 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. *See* Godlewski Correspondence, September 24, 1998.

B. Definition of “Meeting.”

Wis. Stat. § 19.82(2): A meeting is: “[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”

1. The *Showers* test: A meeting occurs when: members of a governmental body convene with (1) 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. *Showers*, 135 Wis. 2d at 102.
 - a. Members need not necessarily convene in person, and the *Showers* test applies to walking quorums. *See Open Meetings Compliance Guide* 7-9.

2. What is required if the Open Meetings Law applies?

The two most basic requirements of the open meetings law are that a governmental body:

- A. Give advance public notice of each of its meetings

1. 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.
 2. 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.” Wis. Stat. § 19.84(2). The information in the notice must be sufficient to alert the public to the importance of the meeting, so that they can make an informed decision whether to attend. *State ex rel. Olson v. City of Baraboo Joint Review Bd.*, 2002 WI App 64, ¶ 15, 252 Wis. 2d 628, 643 N.W.2d 796.
 3. Wisconsin Stat. § 19.84(3) requires that every public notice of a meeting be given at least twenty-four 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. Wis. Stat. § 19.84(3).
 4. Under Wis. Stat. § 19.84(2), the public must receive notice of a contemplated closed session.
 - a. Such notice “must contain enough information for the public to discern whether the subject matter is authorized for closed session under § 19.85(1).” *State ex rel. Buswell v. Tomah Area Sch. Dist.*, 2007 WI 71, ¶ 37 n.7, 301 Wis. 2d 178, 732 N.W.2d 804.
 - b. 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. 66 Op. Att’y Gen. 93, 98 (1977).
- B. Conduct all of its business in open session, unless an exemption to the open session requirement applies. Wis. Stat. § 19.83.
1. Meetings must be accessible to members of the public. Wis. Stat. §§ 19.81(2), 19.82(3).
 2. Every meeting of a governmental body must initially be convened in “open session.” See Wis. Stat. §§ 19.83 and 19.85(1). All business of any kind, formal or informal, must be initiated, discussed, and acted upon in “open session,” unless one of the exemptions set forth in Wis. Stat. § 19.85(1) applies. Wis. Stat. § 19.83.
 3. Citizens may tape record, videotape, or photograph open session meetings—but not closed-session portions—as long as doing so does not disrupt the meeting. Wis. Stat. § 19.90; 66 Op. Att’y Gen. 318, 325 (1977).
 4. The open meetings law does not require a governmental body to allow members of the public to speak or actively participate in the body’s meeting. 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. Wis. Stat. §§ 19.83(2), 19.84(2). Such a period must be included on the meeting notice.

C. Recording and voting requirements:

1. No secret ballot may be used to determine any election or decision of a governmental body, except the election of officers of a body. Wis. Stat. § 19.88(1). The open meetings law requires a governmental body to create and preserve a record of all motions and roll-call votes at its meetings. Wis. Stat. § 19.88(3). This requirement applies to both open and closed sessions. See Non-Party Brief of the Wisconsin Department of Justice (filed Feb. 24, 2015) https://acefiling.wicourts.gov/documents/show_any_doc?appId=wscca&docSource=EFile&p%5bcaseNo%5d=2013AP001715&p%5bdocId%5d=136359&p%5beventSeqNo%5d=69&p%5bsectionNo%5d=1, in *Journal Times v. City of Racine Bd. of Police & Fire Comm'rs*, No. 13-AP-1715.

D. Closed session

1. Notice of closed session must be provided. Wis. Stat. § 19.84(2).
2. 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. Wis. Stat. § 19.83.
3. Wisconsin Stat. § 19.85(1) requires that the governmental body pass a motion, by recorded majority vote, to convene in closed session.
4. 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. 66 Op. Att'y Gen. 93, 97-98 (1977). Stating only the statute section number of the applicable exemption is not sufficient because many exemptions contain more than one reason for authorizing closure.

E. Authorized closed sessions

1. 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. *State ex rel. Hodge v. Turtle Lake*, 180 Wis. 2d 62, 71, 508 N.W.2d 603 (1993); *State ex rel. Citizens for Responsible Dev. v. City of Milton*, 2007 WI App 114, ¶ 8, 300 Wis. 2d 649, 731 N.W.2d 640. 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. See 74 Op. Att'y Gen. 70, 73 (1985).
2. Most frequent closed session rationale:
 - a. "Deliberating concerning a case which was the subject of any judicial or quasi-judicial trial or hearing before that governmental body." Wis. Stat. § 19.85(1)(a).

- b. Consideration of dismissal, demotion, discipline, licensing, and tenure. Wis. Stat. § 19.85(1)(b).
 - c. Consideration of employment, promotion, compensation, and performance evaluations. Wis. Stat. § 19.85(1)(c).
1. The language of the exemption refers to a “public employee” rather than to positions of employment in general. The apparent purpose of the exemption is to protect individual employees from having their actions and abilities discussed in public and to protect governmental bodies “from potential lawsuits resulting from open discussion of sensitive information.” *Oshkosh Nw. Co. v. Oshkosh Library Bd.*, 125 Wis. 2d 480, 486, 373 N.W.2d 459 (Ct. App. 1985).
 - d. Conducting public business with competitive or bargaining implications. Wis. Stat. § 19.85(1)(e).
 - e. Consideration of financial, medical, social, or personal information. Wis. Stat. § 19.85(1)(f).
 - f. Conferring with legal counsel with respect to litigation. Wis. Stat. § 19.85(1)(g).
 3. Voting in closed session
 - a. 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. *Accord State ex rel. Epping v. City of Neillsville Common Council*, 218 Wis. 2d 516, 524 n.4, 581 N.W.2d 548 (Ct. App. 1998) (even if deliberations were conducted in an unlawful closed session, a subsequent vote taken in open session could not be voided); *State ex rel. Schaeve v. Van Lare*, 125 Wis. 2d 40, 53, 370 N.W.2d 271 (Ct. App. 1985).

3. Who enforces the Open Meetings Law and what are its penalties?

Both the Attorney General and the district attorneys have authority to enforce the open meetings law. Wis. Stat. § 19.97(1).

- A. 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. *See* Wis. Stat. § 19.97(1). Actions to enforce the open meetings law need not be preceded by a notice of claim. *State ex rel. Auchinleck v. Town of LaGrange*, 200 Wis. 2d 585, 594-97, 547 N.W.2d 587 (1996).
- B. The district attorney has broad discretion to determine whether a verified complaint should be prosecuted. *State v. Karpinski*, 92 Wis. 2d 599, 607, 285 N.W.2d 729 (1979). 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. *See* Wis. Stat. § 893.93(1)(a).
- C. 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. *State ex rel. Lawton v. Town of Barton*, 2005 WI App 16, ¶ 15, 278 Wis. 2d 388, 692 N.W.2d 304. 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).

- D. 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. 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.
- E. 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. Wis. Stat. § 19.97(4). 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. *Buswell*, 301 Wis. 2d 178, ¶ 54.
- F. 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. Wis. Stat. § 19.96. Any forfeiture obtained in an action brought by the district attorney is awarded to the county. Wis. Stat. § 19.97(1). Any forfeiture obtained in an action brought by the Attorney General or a private citizen is awarded to the state. Wis. Stat. § 19.97(1), (2), (4).
- G. 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.

Office of Open Government

Wisconsin Department of Justice

- Interpretation and application of Open Meetings Law, Public Records Law and other statutes and rules related to open government;
- Development of open government policies and protocols;
- Custodial services for DOJ records and effective and efficient response to public record requests; and
- Expert legal counsel to DOJ executive leaders and clients on open government issues and citizen complaints.

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