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October 2, 2003

OAG 01-03

Mr. John Muench
Corporation Counsel
Barron County
330 East LaSalle Avenue, Room 207
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Dear Mr. Muench:

You have sought my opinion concerning the scope of the authority of county registers of deeds, with approval from their respective county boards, to negotiate contracts pursuant to Wis. Stat. § 59.43(2)(c) "to provide noncertified copies of the complete daily recordings and filings of documents pertaining to real property for a consideration to be determined by the board."

During the course of considering your request, we have had the benefit of additional information and legal argument from the Wisconsin Registers of Deeds Association, the Wisconsin Land Title Association, the County Corporation Counsel Association, from several individual registers of deeds and corporation counsel and from representatives of two private businesses interested in this matter. From the volume of material we have received, the questions that must be addressed can be distilled as follows:

First, do county registers have the statutory authority to insist that contracts pursuant to Wis. Stat. § 59.43(2)(c) include provisions prohibiting the contracting party from selling or disseminating copies of the records they receive pursuant to such contracts?

Second, if an entity requests electronic copies of records maintained pursuant to Wis. Stat. § 59.43(4) in lieu of entering into a contract for such copies pursuant to Wis. Stat. § 59.43(2)(c) or otherwise, what is the statutory fee that registers may charge for such electronic copies of recorded documents?

For the reasons discussed below, I conclude that registers may insist on provisions protecting the integrity and identity of records obtained pursuant to such contracts and protecting the public as well. Moreover, the authority to require provisions prohibiting the sale or dissemination of such records by the contractor is not prohibited and may reasonably be implied from the broad language of Wis. Stat. § 59.43(2)(c). Finally, I conclude, based on the language, context and legislative history of Wis. Stat. § 59.43 as a whole, that the fee requirements of Wis. Stat. § 59.43(2)(b), and not those of the general public records statute, Wis. Stat. § 19.35(3), apply to electronic copies of records obtained pursuant to Wis. Stat. § 59.43(4), unless the

requester has entered into a contract authorized by Wis. Stat. § 59.43(2)(c). Because the latter conclusion is contrary to informal views expressed in earlier correspondence by my staff, I will explain our reconsideration of this question in some detail.

Resolution of the questions stated above requires interpretation of both Wis. Stat. § 59.43, a lengthy statute defining the duties of registers of deeds and specifying the fees registers shall receive, and provisions of the public records statute, Wis. Stat. §§ 19.31-19.39. Statutes relating to the same subject are to be construed together and harmonized. *State v. Robinson*, 140 Wis. 2d 673, 677, 412 N.W.2d 535 (Ct. App. 1987). A statute "may not be considered in a vacuum, but must be considered in reference to the statute as a whole and in reference to statutes dealing with the same general subject matter." *Aero Auto Parts, Inc. v. Dept. of Transp.*, 78 Wis. 2d 235, 239, 253 N.W.2d 896 (1977). Nonetheless, the rules of statutory construction generally require that specific statutory provisions take precedence over general provisions. *In re Marriage of Meyer v. Meyer*, 2000 WI 132, 239 Wis. 2d 731, ¶ 26, 620 N.W.2d 382.

Your primary question concerns the scope of the county's and, in turn, the register's authority to enter into contracts pursuant to Wis. Stat. § 59.43(2)(c), which provides:

> Notwithstanding any other provision of law the register of deeds with the approval and consent of the board may enter into contracts with [specified entities] . . . to provide noncertified copies of the complete daily recordings and filings of documents pertaining to real property for a consideration to be determined by the board which in no event shall be less than cost of labor and material plus a reasonable allowance for plant and depreciation of equipment used.

In recent years, registers in various counties, including Barron County, have required that county-approved contracts for copies of complete daily recordings pursuant to Wis. Stat. § 59.43(2)(c) contain a condition that the contracting party must agree not to sell or disseminate copies of the duplicated records received under the contract. Various contractors have challenged the county registers' authority to insist on this particular provision in the contracts, thus prompting your inquiry. No one has cited any direct authority on this question nor has our research located any. Accordingly, I will analyze the issue based on general legal principles.

A county or a county officer has only such power as is conferred by statute, either expressly or by clear implication. *See Maier v. Racine County*, 1 Wis. 2d 384, 385, 84 N.W.2d 76 (1957); *St. ex rel. Teunas v. Kenosha County*, 142 Wis. 2d 498, 504, 418 N.W.2d 833 (1988). The state constitution of 1848 established the register of deeds as an office of county government in each county. *See generally* Wisconsin Register of Deeds Association's website home page, *www.wrdaonline.org*.

Under Wis. Stat. § 54.43, registers must perform a variety of significant duties related to recording interests in land and other vital records. These duties include, *inter alia*, recording all deeds, mortgages and a wide variety of instruments and writings authorized by law to be recorded, Wis. Stat. § 59.43(1)(a). Today, the actual recording of real property records may be done by means of photography, microfilming, recording on optical disks or in electronic format, Wis. Stat. § 59.43(4). Registers are required to "[k]eep safely and maintain the documents, images of recorded documents . . ." and the various indexes specified in Wis. Stat. §§ 59.43 and 84.095; to make and deliver copies, including certified copies, of recorded documents; to file documents related to security interests and to maintain them for public inspection, among other duties. *See* Wis. Stat. § 59.43(1)(d)-(t). A comprehensive schedule of fees the registers "shall receive" for performing their various statutory functions is set forth in Wis. Stat. § 59.43(2)(a), including recording fees and fees for copying and certification of records.

The ordinary fee "[e]very register of deeds shall receive . . ." for providing copies of records is set forth in Wis. Stat. § 59.43(2)(b): "For copies of any records or papers, $2 for the first page plus $1 for each additional page, plus $1 for the certificate of the register of deeds, except that the department of revenue is exempt from the fees under this paragraph." The statutory fee for providing uncertified copies of "the complete daily recordings and filings of documents pertaining to real property" may be modified by contracts authorized by the county board pursuant to Wis. Stat. § 59.43(2)(c). However, the statute specifies that the negotiated contract fee can "in no event" be less than the cost of labor and material plus a reasonable allowance for plant and depreciation. *Id.* In contrast, the fee provisions of the public records statute, which apply "unless a fee is otherwise established...by law," limit copying fees to "the actual, necessary and direct cost of reproduction and transcription." See Wis. Stat. § 19.35(3)(a).

For at least a century, the office of register of deeds has been what we now call a "program revenue" agency. *Cf. Verges v. Milwaukee Co.*, 116 Wis. 191, 193, 196-201, 93 N.W. 44 (1903). That is, the activities of the office, including payment of salaries and the purchase of expensive equipment required to maintain a growing volume of records, are funded by the revenue generated from recording and copying fees. Indeed, this funding mechanism has enabled most county registers to invest in the modern technology and equipment necessary to streamline their operations and to handle significant increases in recording and related activities, despite the fact that statutory recording and copying fees have remained the same for many years. *See* ch. 278, sec. 2, Laws of 1967.

In this context, you ask, first, whether county registers have the statutory authority to insist that contracts pursuant to Wis. Stat. § 59.43(2)(c) include provisions prohibiting the contracting party from "'sell[ing] or disseminat[ing]'" copies of the records they receive

pursuant to such contracts.[1] Because registers plainly lack express authority to insist on such a prohibition, the real question is whether such authority may be clearly or necessarily implied. *See Maier*, 1 Wis. 2d at 385; *Teunas,* 142 Wis. 2d at 504.

Given the scope of registers' duties relating to recording, indexing, copying and maintaining copies of documents relating to real property, I conclude that registers clearly have general authority to insist on contract provisions designed to protect the identity and integrity of copies of records sold under contracts pursuant to Wis. Stat. § 59.43(2(c). In addition, given the public purposes for which property records are maintained, registers may also require provisions that protect the public generally. For example, because copies of complete daily recordings are now frequently provided in electronic format and with relative ease may be altered, registers may reasonably insist that uncertified records provided under contract contain disclaimers concerning the identity and integrity of copies not provided directly by registers. In addition, because of the relative ease with which unscrupulous entrepreneurs may seek to market copies of such records, registers may want to insist on provisions requiring that contractors provide notice to potential customers that copies are available from county registers at nominal cost.[2]

The contract provision employed by Barron County goes further than the foregoing alternative devices and broadly prohibits the sale or dissemination of copies except in the limited circumstances you have defined relating to preparation of title opinions. This contract provision Barron and certain other counties employ is certainly not prohibited under the broad language of Wis. Stat. § 59.43(2)(c). In addition, the authority to insist on such a provision may arguably be implied from the registers' clear authority to require contract provisions protecting the integrity and identity of the original records. *Cf. State v. P.G. Miron Construction Company*, 181 Wis. 2d 1045, 1055-56, 512 N.W.2d 499 (1994) (statutory authority of state agency to enter into building contracts under Wis. Stat. § 16.85 includes implied authority to agree to arbitration provisions in such contracts).

I conclude, therefore, that registers likely have implied authority to insist that contracts pursuant to Wis. Stat. § 59.43(2)(c) include provisions binding the contractor not to sell or disseminate copies of the uncertified records received under such contracts. Under the

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[1] You agree that this language should not be interpreted to prohibit providing copies of records when used for purposes of a title opinion and that the contract language can be modified to state that the distribution of copies used in support of title opinions is not prohibited.

[2]One register provided us with an example of a marketing letter mailed to potential customers in Illinois offering to obtain certified copies of property deeds at the cost of $79.50 when the same document can be purchased directly from the appropriate office in Illinois for a fraction of the quoted price.

circumstances, however, I recommend that the Legislature consider clarifying the scope of registers' contracting authority in this respect.

Although you did not initially ask what fees registers are required to charge for electronic copies of records, it is clear from subsequent correspondence from you and from other interested parties that this question also requires resolution, either by this office or through clarifying legislation. The fee question arises inevitably when a requester seeks electronic copies of records relating to real property and the requester has not entered into a contract authorized by Wis. Stat. § 59.43(2)(c) for uncertified copies of complete daily recordings.

If a requester seeks paper copies of such records without the benefit of a contract under Wis. Stat. § 59.43(2)(c), the fee provisions of Wis. Stat. § 59.43(2)(b) clearly apply. That is, the requester must pay "$2 for the first page plus $1 for each additional page." Id. "Page" is defined in Wis. Stat. § 59.43(2)(a)1., as "one side of a single sheet of paper." See ch. 278, sec. 2, Laws of 1967. Alternatively, if electronic copies are provided pursuant to a contract under Wis. Stat. § 59.43(2)(c), the negotiated contract rate applies. Under that provision, the contract rate may be less than the statutory fee, but in no event less than the "cost of labor and material plus a reasonable allowance for plant and depreciation of equipment used."

When applied to electronic copies of recorded documents, however, the language of Wis. Stat. § 59.43(2)(b) becomes ambiguous. That is, reasonably well-informed persons may differ as to whether the statutory fee applies to electronic copies, or if not, whether the general limitation on copying fees contained in the public records statute, Wis. Stat. § 19.35(3)(a), applies by default.[3] The ambiguity is particularly acute because the fee provisions of Wis. Stat. § 59.43(2) are mandatory and have long been recognized as express exceptions to the significantly more limited copying charges required by Wis. Stat. § 19.35(3).

When a statute is ambiguous, statutory interpretation is required to discern the intent of the Legislature. *See State v. Sweat*, 208 Wis. 2d 409, 415-17, 561 N.W.2d 695 (1997). In order to ascertain legislative intent, one examines the subject matter, purpose, context, scope and history of the statute. *Id.* at 415. In determining the meaning of a single word or phrase, it is necessary to view the word or phrase in light of the entire statute. *Id.* at 416.

Wisconsin Stat. § 59.43(2), as a whole plainly evidences an intent to set forth a comprehensive, mandatory fee schedule for the fees registers "shall receive." Indeed, the subsection is entitled "REGISTER OF DEEDS; FEES." Although the title is not part of the statute and cannot prevail over its language, the title can be a persuasive indicator of legislative intent. *See Teunas*, 142 Wis. 2d at 509; *Pure Milk Products Coop. v. NFO*, 64 Wis. 2d 241, 253,

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[3]Wis. Stat. § 19.35(3)(a) provides: "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 . . . unless a fee is otherwise specifically established . . . by law.

219 N.W.2d 564 (1974). Moreover, the structure and language of the fee provisions of Wis. Stat. § 59.43(2) contain no reference to the much more restricted fee provision contained in the general public records statute.

In the context of Wis. Stat. § 59.43 as a whole, detailed page specifications are significant at the time the original document is *recorded.* Furthermore, the pagination of the original document is retained for purposes of access, storage and reproduction of copies, although the actual storage of documents now may include paper, microfilm or photography, optical disk and electronic storage formats. In fact, various provisions of Wis. Stat. § 59.43 expressly recognize the equivalency under the statute of the original paper document and the stored electronic or photographic *image. Cf.* Wis. Stat. § 59.43(1)(a) (authorizing substitution of electronic file names or microfilm image for the original volume and page designations for purposes of recording); 59.43(1)(d) (requiring registers to keep and safely maintain "documents, images of recorded documents and indexes").

As a result of this technological reformation, the source document itself is now frequently stored or maintained only in an electronic or photographic format. Even so, the pagination of the original document remains a basic unit by which the image of the recorded document is accessed, identified and reproduced.

Finally, the legislative history of the current Wis. Stat. § 59.54(2)(b) and (4) clearly supports the conclusion that, although several successive Legislatures have authorized storage of real property records by use of microfilm, optical disks and electronic media, the Legislature has never deviated from the directive that registers ordinarily must charge for copies by the page, regardless of whether those pages are reproduced on paper or in an electronic image.

The language of what is now Wis. Stat. § 59.43(2)(b) has remained remarkably stable for many decades except for occasional changes in the unit fee registers shall receive. For example, the reference to "copies of any records or papers" has appeared in the statutes since at least 1919, *see* Wis. Stat. § 59.57(4) (1919). From 1919 until 1968, the unit charge was "per folio," when the unit was changed to "per page" and "page" was defined. *See* ch. 278, sec. 2, Laws of 1967. The current charge for copying ($2 for the first page plus $1 for each additional page) was instituted at the same time, in 1968, and has not been changed since then (*see id*; *cf.* Wis. Stat. § 59.43(2)(b)).

Current Wis. Stat. § 59.43(4), entitled "REGISTER OF DEEDS; MICROFILMING AND OPTICAL DISK AND ELECTRONIC STORAGE," was created in 1969 and originally dealt only with microfilm storage. *See* ch. 440, Laws of 1969, creating Wis. Stat. § 59.512 (1969). In 1991, Wis. Stat. § 59.512 was amended to authorize storage of deeds, mortgages and other instruments relating to real property on optical disks. 1991 Wisconsin Act 39, sec. 1612j. At the same time, the fee statute (then Wis. Stat. § 59.57(4), now Wis. Stat. § 59.43(2)(b)) was amended expressly to exempt the Department of Revenue from payment of copying fees, although the fees

for copies of records stored on optical disk remained unchanged. 1991 Wisconsin Act 39, sec. 1615. The Legislative Fiscal Bureau note accompanying the drafting record for this provision indicates that the 1991 amendments were regarded as having no effect on the base budget.

The storage provisions were again amended in 1995, first by the substantive amendment authorizing electronic storage, 1993 Wisconsin Act 27, sec. 3294. As with the 1991 amendment, there is no indication in the legislative history of that session law that the Legislature anticipated any change in revenue or intended any change in the fees applicable to copies for electronically stored records. *See* Vol. 1, 1995-97 Wisconsin State Budget, Comparative Summary of Budget Provisions at 108 (Legislative Fiscal Bureau, December 1995). Finally, again in 1995, numerous separate statutory provisions relating to registers of deeds were consolidated and renumbered, resulting in the current comprehensive statute, Wis. Stat. § 59.43, including subsection (2)(b), the copying fee provision, and subsection (4), the record storage provision.

Thus, the legislative history of Wis. Stat. § 59.43(2)(b) reveals that the fee provisions themselves have remained the same for decades. At the same time, successive statutory amendments authorizing storage and, in turn, access and copying by means of electronic or photographic media have resulted in ambiguity concerning their application. In my opinion, had the Legislature intended to alter registers' fees and expected program revenues as a consequence of authorizing electronic or optical disk storage, such a major funding change would almost certainly have been reflected in the legislative history of those provisions. There is, however, no evidence whatever in the legislative history of Wis. Stat. § 59.43 that the Legislature intended to alter registers' statutory fees and to apply, by default, the much more limited fee provisions of the public records statute, Wis. Stat. § 19.35(3)(a). Based on the language, context, purpose and legislative history of Wis. Stat. § 59.43(2)(b) and (4), it is most reasonable to conclude that the fee provisions of Wis. Stat. § 59.43 are intended as an express exception to the general fee provisions of the public records statute.

Moreover, the contrary conclusion—that registers must provide electronic copies of real property records limited to the "actual, necessary and direct cost of reproduction" would substantially nullify the legislative directive in the contract provision of Wis. Stat. § 59.43(2)(c) that the negotiated contract price can be less than the regular statutory fee but "in no event . . . less than cost of labor and material plus a reasonable allowance for plant and depreciation of equipment used." Under Wis. Stat. § 59.43(2)(c), title companies and others having a commercial interest in obtaining the complete daily recordings and filings are given the opportunity to negotiate a "volume discount" contract price less than the statutory fee, yet significant enough for registers to be able to function based on the anticipated revenue. At present, many registers provide electronic copies of complete daily recordings to contractors. The incentive to seek a favorable contract price under Wis. Stat. § 59.43(2)(c) is eliminated if the charge for those electronic copies is already limited to the actual, necessary and direct cost of producing those electronic copies.

After careful examination of Wis. Stat. § 59.43 as a whole and Wis. Stat. § 59.43(2)(b) in particular, I conclude that Wis. Stat. § 59.43(2)(b) governs the fee registers of deeds must charge for electronic copies of mortgages, deeds or other instruments relating to real property, unless the requester has negotiated a different price pursuant to a contract authorized by Wis. Stat. § 59.43(2)(c). I emphasize, however, that the fee provisions of Wis. Stat. § 59.43(2) are an express statutory exception to fees permitted under the public records statute generally. Moveover, my conclusion is based on, and limited to, the language and clear legislative history of Wis. Stat. § 59.43 itself. Because the electronic storage provisions of Wis. Stat. § 59.43(4) have rendered the fee provisions of Wis. Stat. § 59.49(2)(b) ambiguous, the Legislature may wish to consider clarifying legislation.

Very truly yours,

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Summary: Registers of deeds entering into contracts pursuant to Wis. Stat. § 59.43(2)(c) may insist on provisions protecting the identity and integrity of records obtained pursuant to such contracts and protecting the public. Authority to require provisions directly prohibiting the contracting party from selling or disseminating copies of such records is not prohibited and may reasonably be implied from the general contracting authority of sec. 59.43(2)(c). The fee requirements of Wis. Stat. § 59.43(2)(b), not those of the public records statute, Wis. Stat. § 19.35(3), apply to electronic copies of records obtained pursuant to Wis. Stat. § 59.43(4), unless the requester has entered into a contract authorized by Wis. Stat. § 59.43(2)(c).

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October 14, 2003

The Honorable Mary Panzer
Chairperson
Senate Committee on Organization
211 South, State Capitol
Madison, WI 53702

OAG 2-03

Dear Senator Panzer:

The Senate Committee on Organization ("Committee") has requested my opinion concerning the application of two recent Wisconsin Supreme Court decisions[1] to requests under the Wisconsin public records statute, Wis. Stat. §§ 19.31-19.39, for mailing or distribution lists of physical or street addresses, e-mail addresses or phone numbers compiled and used by individual legislators for official business. Because lists of street addresses and phone numbers must ordinarily be coupled with an individual name in order to be meaningful or useful, I assume that the Committee's questions refer to the individual's name as well.[2]

The Committee poses a series of questions that may fairly be summarized as follows:

1. Wisconsin Stat. § 19.35(1)(a) provides in relevant part: "Except as otherwise provided by law, any requester has a right to inspect any record." Are legislators' mailing or distribution lists "records" which must be disclosed to the public if requested pursuant to Wis. Stat. § 19.35(1)(a)?

2. Assuming the record custodian determines that such lists are subject to disclosure, must the persons whose addresses or telephone numbers are contained on the list be provided with the notice required by the *Woznicki* and *Teachers' Ed. Ass'n* cases and given an opportunity to challenge the release in court prior to actual release of the record?

Under current law, the first question can only be answered by the courts after applying the common law balancing test articulated in *State ex rel. Youmans v. Owens,* 28 Wis. 2d 672,

[1]*See Woznicki v. Erickson*, 202 Wis. 2d 178, 549 N.W.2d 699 (1996) and *Teachers' Ed. Ass'n v. Bd. of Sch. Directors*, 227 Wis. 2d 779, 596 N.W.2d 403 (1999).

[2]Because an e-mail "address" is in fact the identifier for a particular computer "mailbox" rather than a particular person, it need not be associated with an individual name to be operative. Indeed, "'[a]n e-mail address provides no authoritative information about the addressee . . . .'" *See Reno v. American Civil Liberties Union*, 521 U.S. 844, 855 n.20 (1997).

137 N.W.2d 470, 139 N.W.2d 241 (1965) and succeeding cases. Based on current Wisconsin precedent, however, it is my opinion that the courts would conclude that the records must be disclosed, unless the custodian, applying the balancing test, articulates specific factual circumstances warranting a determination that the public interest in withholding the records outweighs the public interest in releasing them. With regard to the second question, in my opinion the answer is no because neither the Legislature nor the Wisconsin courts have extended the *Woznicki* notice procedure beyond the context of employee records.

The Committee's questions arise in the context of recent requests, directed to individual legislators, for copies of e-mail distribution lists compiled by those legislators for the purpose of distributing electronic newsletters to constituents and other private citizens. Accordingly, I limit my discussion and answers to the Committee's questions to the context of legislators' mailing or distribution lists containing addresses or phone numbers of private citizens.

Plainly, lists of names and street or e-mail addresses and phone numbers, compiled by individual legislators and used for official purposes, are "records" within the coverage of the public records statute. *See* Wis. Stat. § 19.32(2); *Hathaway v. Green Bay School Dist.*, 116 Wis. 2d 388, 393-94, 342 N.W.2d 682 (1984). The statute clearly states the general presumption that all public records are open to the public. *Wis. Newspress v. Sheboygan Falls Sch. Dist.*, 199 Wis. 2d 768, 776, 546 N.W.2d 143 (1996). There are no blanket exceptions to the presumption of openness, except for those created by statute or by the common law. *Id.* at 780.

Absent a statutory or common law exception, a balancing test must be applied in every case in order to determine whether a particular record should be released. *Id.*; *Woznicki*, 202 Wis. 2d at 183. Under the common law balancing test, the record custodian and, if necessary, the court must determine whether the public interest in disclosure is outweighed by the public interest in keeping the record confidential. *See Osborn v. Board of Regents*, 2002 WI 83, 254 Wis. 2d 266, ¶ 14, 647 N.W.2d 158.

There is no common law exception for lists of names, addresses and phone numbers, nor is there a general statutory exception in the public records statute limiting the release of such personal identifying information as names, street addresses, telephone numbers or e-mail addresses. In fact, at least one statute, Wis. Stat. § 19.71, clearly contemplates that lists of names and addresses *are* subject to disclosure under the public records statute. That statute, entitled "sale of names or addresses," provides: "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.*" The italicized language makes clear that disclosure of names and street addresses under the public records statute is *not* a "sale or rental" prohibited under Wis. Stat. § 19.71, clearly implying that such information is generally available under the public records law.

Moreover, the existence of specific statutes expressly limiting the release of "personal identifiers," including names, telephone numbers and street and e-mail addresses, in particular circumstances strongly supports the inference that there is no general statutory exception that would justify maintaining the confidentiality of legislators' mailing and distribution lists. For example, under a newly enacted statutory exception to the public records statute itself, home addresses, home telephone numbers and home e-mail addresses of state employees may not be disclosed by an agency authority unless the employee authorizes access to this personal information. *See* 2003 Wisconsin Act 47, sec. 7, creating Wis. Stat. § 19.36(10)(a) (effective August 26, 2003). A full interpretation of the newly created exceptions to disclosure set forth in Wis. Stat. § 19.36(10)(a) is beyond the scope of this opinion. However, statutory exceptions must be narrowly construed and this new exception is plainly limited to information compiled by an "employer" in relation to an "employee." *See id.* Accordingly, there is no basis for a claim that the new exception set forth in Wis. Stat. § 19.36(10)(a) covers information relating to private citizens compiled and maintained by legislators in their capacity as elected officials. *See also*, Wis. Stat. § 23.45, created by 1999 Wisconsin Act 88 (regulating disclosure of certain computer-generated lists by the Department of Natural Resources).

Furthermore, Wis. Stat. § 895.50, creating a statutory right of privacy in Wisconsin, provides no direct support for a claim that individual privacy interests foreclose release of legislators' mailing and distribution lists. Rather, Wis. Stat. § 895.50(2)(c) cautions that "[i]t is *not* an invasion of privacy to communicate any information available to the public as a matter of public record." Instead, the "protection of privacy and reputational interests . . . plays an integral role" in the application of the common law balancing test itself. *See Woznicki*, 202 Wis. 2d at 202 (Abrahamson, J., dissenting).

Thus, whether lists of street or e-mail addresses and phone numbers compiled by legislators must be disclosed under the Wisconsin public records statute depends on application of the balancing test. *See Youmans*, 28 Wis. 2d at 682; *Woznicki*, 202 Wis. 2d at 183-84. It is, therefore, incumbent upon the custodian of the records in the first instance to balance all interests of the public bearing on both sides of the calculus, both those favoring disclosure and those opposing disclosure. Nonetheless, current Wisconsin precedent offers some guidance on how the courts are likely to resolve the question whether legislators' mailing and distribution lists are public records that must be disclosed.

Street Addresses. In Wisconsin, there is considerable precedent requiring disclosure of lists of names and street addresses under the public records law, absent a statutory exception or a particularized demonstration of the need to maintain confidentiality in the specific case. In *Hathaway*, for example, the supreme court held that a computer-generated list of names and addresses of parents with children enrolled in the school district had to be disclosed to the requester because the custodian had failed to state specific, sufficient reasons to the contrary. *Id.*, 116 Wis. 2d at 404. *See also* 68 Op. Att'y Gen. 68 (1979) (mailing lists compiled by the Department of Natural Resources subject to inspection and copying); 61 Op. Att'y Gen. 297

(1972) (waiting lists for vocational school programs). *Cf. Atlas Transit, Inc. v. Korte,* 2001 WI App 286, 249 Wis. 2d 242, 638 N.W.2d 625 (public's right to know names and commercial driver's license numbers of all bus drivers transporting children for the Milwaukee School District outweighed "slight invasion" of drivers' privacy from release of that information).

Although some Wisconsin cases have upheld limitations on the release of home addresses of public employees even before the creation of Wis. Stat. § 19.36(10)(a), these cases illustrate the need for a particularized showing that the public interest supports withholding the records. *See, e.g., Morke v. Record Custodian*, 159 Wis. 2d 722, 465 N.W.2d 235 (Ct. App. 1990) (list of names, addresses and phone numbers of prison employees withheld from disclosure based on the institution's interest in ensuring safety inside and outside the prison boundaries and in encouraging persons to serve as prison employees); *State ex rel. Journal/Sentinel, Inc. v. Arreola*, 207 Wis. 2d 496, 558 N.W.2d 670 (Ct. App. 1996) (trial court order releasing records relating to the use of deadly force by police officers modified to require redaction of the individual officers' home addresses based on privacy interests and public safety concerns). *Cf. U.S. Dept. of State v. Ray*, 502 U.S. 164, 176 n.12 (1991) (emphasizing that disclosure of a list of names and other identifying information is not inherently or necessarily a significant threat to the privacy of the individuals on the list; the significance or insignificance of the threat to privacy depends upon the characteristics revealed by virtue of being on the particular list and the consequences likely to ensue).

Home Telephone Numbers. There is a less well-developed body of precedent on the question whether lists of home telephone numbers are subject to disclosure under the public records statute. However, *Morke* demonstrates that personal telephone numbers can be withheld under the balancing test based upon a particularized showing of possible harm to the public interest, including concern for safety and institutional security. *Id.*, 159 Wis. 2d at 726-27. *See generally State ex rel. Pflaum v. Psych. Examining Bd.*, 111 Wis. 2d 643, 646, 331 N.W.2d 614 (Ct. App. 1983) (in affirming discovery order requiring disclosure of names, addresses and phone numbers of particular individuals, the court observed that disclosure did not implicate those persons' constitutional right to privacy); *cf. Wisconsin Professional Police Ass'n v. PSC*, 205 Wis. 2d 60, 70 n.6, 555 N.W.2d 179 (Ct. App. 1996) (citing factual evidence to support commission finding that there is no general societal expectation or norm that a person placing a telephone call has the right to remain anonymous).

E-mail addresses. It is fair to say that courts and legislatures are currently struggling to apply existing statutes, including public records and freedom of information statutes, to the

exploding technology of the Internet.[3] At this juncture, there are no Wisconsin cases directly addressing whether a distribution list of e-mail addresses may be withheld from disclosure under the public records law based on concern for the privacy rights of those persons to whom the e-mail addresses belong, nor has our research discovered any cases from other jurisdictions that analyze the issue. *Cf.* n.2, above, citing *Reno*, 521 U.S. at 855 n.20.

Furthermore, courts in other jurisdictions appear to treat privacy concerns with differing degrees of respect, depending on whether the basis for the claimed right of privacy is statutory or constitutional. In Wisconsin, however, the statutory right of privacy does not directly affect the duties of record custodians based on Wis. Stat. § 895.50(3). Assuming the courts treat e-mail address lists consistently with the lists of names, street addresses and telephone numbers, it is likely that disclosure of e-mail distribution lists will be required, absent a specific statutory exception or a showing of particularized harm to the public interest from release of such records. *Cf. Morke*, 159 Wis. 2d at 726-27.

The Committee has also asked about the application of the *Woznicki* and *Teachers' Ed. Ass'n* cases to the mailing and distribution lists at issue here, assuming the record custodian determines that such lists are subject to disclosure in the first instance. In those cases, the Wisconsin Supreme Court has held that a public employee has the right to be notified and to seek judicial review of a custodian's decision to disclose information that may implicate the privacy or reputational interests of that employee. *See Woznicki*, 202 Wis. 2d at 192-95 (records held by the district attorney); *Teachers' Ed. Ass'n*, 227 Wis. 2d at 782, 798-99 (extending *Woznicki* remedy to all cases implicating the privacy or reputational interests of an individual public employee, "regardless of the identity of the record custodian").

As restated above, the Committee's second question is whether the *Woznicki* and *Teachers' Ed. Ass'n* remedy applies to release of mailing and distribution lists compiled by legislators for purposes of communicating with constituents and other private citizens. Based on 2003 Wisconsin Act 47, sec. 4, creating Wis. Stat. § 19.356, enacted since the Committee requested my opinion on this issue, the answer to this question is clearly no. Wisconsin Stat. § 19.356 represents the legislative response to the *Woznicki* and *Teachers' Ed. Ass'n* cases and is

[3]For cases illustrating judicial and legislative efforts to apply constitutional precedent and statutory initiatives to the Internet and other advanced electronic technology, *see generally Reno*, 521 U.S. 844 (constitutionality of provisions of the Communications Decency Act seeking to protect minors from harmful material on the Internet); *Bartnicki v. Vopper*, 532 U.S. 514 (2001) (application of wiretap acts' prohibitions against intentional disclosure of illegally intercepted cell phone conversations to media defendants violated First Amendment); *In re DoubleClick Inc. Privacy Litigation*, 154 F. Supp. 2d 497 (S.D.N.Y. 2001) (class action by Internet users against Internet advertising corporation alleging that storage of computer programs known as "cookies" on users' computer hard drives violated federal statutes and state law).

expressly intended to limit and clarify the scope of the remedy created in *Woznicki*. *See generally* Note of the Joint Legislative Council following 2003 Wisconsin Act 47, sec. 4.

Under newly created Wis. Stat. § 19.356(2)(a), an authority is required to provide "record subjects," *see* Wis. Stat. § 19.32(2g), created by 2003 Wisconsin Act 47, sec. 1, with written notice of a decision to release records in only three defined circumstances, two of which relate directly to the employment context. *See* Wis. Stat. § 19.356(2)(a)1. and 3. The remaining instance in which notice is now required is limited to records obtained by an authority pursuant to a subpoena or a search warrant. *See* Wis. Stat. § 19.356(2)(a)2. Moreover, the statute now expressly provides that notice is *not* required and that no person is entitled to judicial review of a decision to provide access to a record "[e]xcept as authorized in this section or as otherwise provided by statute." Wis. Stat. § 19.356(1). Plainly, therefore, the new statute does not require that a *Woznicki*-type notice be provided in the case of a legislator's decision to release mailing or distribution lists.

I note as well that the limitations in the new statute, Wis. Stat. § 19.356(2), are consistent with post-*Woznicki* precedent, which did not extend the notice requirement beyond the context of privacy or reputational interests of public employees or employees of public contractors. *See Kraemer Brothers, Inc. v. Dane County*, 229 Wis. 2d 86, 599 N.W.2d 75 (Ct. App. 1999); *Atlas Transit*, 249 Wis. 2d 242.

I conclude, therefore, that 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.

Very truly yours,

Peggy A. Lautenschlager
Attorney General

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Opinion Summary: Public Records. Disclosure of mailing and distribution lists discussed. 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. Assuming the custodian decides to release such distribution lists, addressees on the list are not entitled to prior notice and the opportunity to challenge the release under *Woznicki* and newly created Wis. Stat. § 19.356.