STATE OF WISCONSIN
DEPARTMENT OF JUSTICE

PEGGY A. LAUTENSCHLAGER
ATTORNEY GENERAL

Daniel P. Bach
Deputy Attorney General

114 East, State Capitol
P.O. Box 7857
Madison, WI 53707-7857

OAG-1-06

August 3, 2006

Mr. James R. Warren
Administrator
Division of Criminal Investigation
17 West Main Street
Madison, WI 53707

Dear Mr. Warren:

As Administrator of the Division of Criminal Investigation ("DCI"), you have been asked to respond to requests under the public records law for records related to investigations of the legislative caucuses and the Milwaukee County pension matter. Investigators interviewed public employees and public officials as part of both investigations. Section 19.356(2)(a) of the Wisconsin Statutes requires that authorities[1] provide notice to a "record subject" before releasing certain records. The record subject then has the right to challenge the decision to release those records in court. Sec. 19.356(4), Wis. Stats. Another section of the law provides that an authority must provide notice before releasing records of public officials. Sec. 19.356(9), Wis. Stats. A public official may augment the record to be released but does not have the right to challenge the release in court. *Id.* You ask to what extent the law requires that you give notice.

Section 19.356(1) provides:

> Except as authorized in this section or as otherwise provided by statute, no authority is required to notify a record subject prior to providing to a requester access to a record containing information pertaining to that record subject, and no

[1]Section 19.32(1) provides:

> "Authority" means any of the following having custody of a record: a state or local office, elected official, agency, board, commission, committee, council, department or public body corporate and politic created by constitution, law, ordinance, rule or order; a governmental or quasi-governmental corporation except for the Bradley center sports and entertainment corporation; a local exposition district under subch. II of ch. 229; a family care district under s. 46.2895; any court of law; the assembly or senate; a nonprofit corporation which receives more than 50% of its funds from a county or a municipality, as defined in s. 59.001(3), and which provides services related to public health or safety to the county or municipality; a nonprofit corporation operating the Olympic ice training center under s. 42.11(3); or a formally constituted subunit of any of the foregoing.

> person is entitled to judicial review of the decision of an authority to provide a requester with access to a record.

Section 19.356(2)(a) provides that if an authority decides to permit access to a record under the public records law, it must provide notice to any record subject "to whom the record pertains" but only for the following records:

> 1. A record containing information relating to an employee that is created or kept by the authority and that is the result of an investigation into a disciplinary matter involving the employee or possible employment-related violation by the employee of a statute, ordinance, rule, regulation, or policy of the employee's employer.
>
> 2. A record obtained by the authority through a subpoena or search warrant.
>
> 3. A record prepared by an employer other than an authority, if that record contains information relating to an employee of that employer, unless the employee authorizes the authority to provide access to that information.

Section 19.32(2g) defines "[r]ecord subject" as "an individual about whom personally identifiable information is contained in a record." Section 19.32(1bg) defines "[e]mployee" as "any individual who is employed by an authority, other than an individual holding local public office or a state public office, or any individual who is employed by an employer other than an authority." It is not necessary to consider the definitions of local public office and state public office in this opinion. Sec. 19.32(1dm) and (4), Wis. Stats.

The Wisconsin Supreme Court has summarized the general framework for statutory interpretation:

> We assume that the legislature's intent is expressed in the statutory language. . . . Thus . . . statutory interpretation begins with the language of the statute. If the meaning of the statute is plain, we ordinarily stop the inquiry. Statutory language is given its common, ordinary, and accepted meaning, except that technical or specially-defined words or phrases are given their technical or special definitional meaning. Context is important to meaning. So, too, is the structure of the statute in which the operative language appears. Therefore, statutory language is interpreted in the context in which it is used; not in isolation but as part of a whole; in relation to the language of surrounding or closely-related statutes; and reasonably, to avoid absurd or unreasonable results. Statutory language is read where possible to give reasonable effect to every word, in order to avoid surplusage. If this process of analysis yields a plain, clear statutory

> meaning, then there is no ambiguity, and the statute is applied according to this ascertainment of its meaning.

*State ex rel. Kalal v. Circuit Court,* 2004 WI 58, ¶¶ 44-46, 271 Wis. 2d 633, 681 N.W.2d 110 (citations, quotations marks and paragraph breaks omitted).

Applying these directions, it is clear that section 19.356(1) states the general rule: no record subject is entitled to notice or judicial review prior to release of a record pertaining to that record subject except as specifically provided. Subsections (2)(a)1., 2. and 3. require notification, but only when an authority proposes to release certain records.

Subsection (2)(a)2. is unambiguous. If DCI has obtained a record through a subpoena or a search warrant, DCI must provide the requisite notice before releasing the records. The duty to notify, however, does not require notice to every record subject who happens to be named in the subpoena or search warrant records. Under subsection (2)(a), DCI must serve written notice of the decision to release the record to "any record subject to whom the record pertains." Similarly, subsection (1) limits the duty to notify a record subject to situations when an authority is "providing to a requestor access to a record containing information pertaining to that record subject." The limiting phrases "pertaining to that record subject" and "to whom the record pertains" evidence a clear legislative intent to limit the universe of individuals who must be notified, because the general definition of record subject in section 19.32(2g), without the limiting phrases, would clearly require notification to any "individual about whom personally identifiable information is contained in a record." If the Legislature had intended that notice be given to any individual about whom the record contained personally identifiable information, it would not have limited the general definition of record subject by requiring that the record "pertain" to a record subject.

Making the notice provisions apply to any individual mentioned in records obtained by subpoena or search warrant would make the limiting language of section 19.356(1) and (2)(a) surplusage, a result to be avoided. The duty to notify requires notice only to the record subject to whom the record proposed to be released pertains, for example, the person named in a subpoena or the person whose residence is the object of a search warrant. A record may "pertain" to more than one individual, but the mere fact that the record contains personally identifiable information about an individual, for example, the individual's name, does not mean that individual is entitled to be notified that the record is proposed to be released.

Subsection (2)(a)3. requires that DCI provide notice if it is going to release a record prepared by an employer other than an authority, that is a private sector employer, if the record contains information relating to an employee of that employer, unless the employee authorizes access to the information. At first, subsection (2)(a)3. appears to be unambiguous; an authority may not release a record prepared by a private sector employer if the record contains information relating to an employee of that employer, unless the employee authorizes the release. The

subsection on its face allows the private sector employee to veto the release of the information. But subsection (2)(a)1. appears to authorize an authority to release information relating to employment related matters of both public and private sector employees after providing the requisite notice. Ambiguity can be created by the interaction of two statutes. *Marquardt v. Milwaukee County*, 2000 WI App 77, ¶ 12, 234 Wis. 2d 294, 610 N.W.2d 496. Subsections 19.356(2)(a)3., and (2)(a)1. are rendered ambiguous because of their interaction. Because the two subsections are ambiguous, the statute's legislative history, as well as its scope, context and purpose, may be consulted when attempting to properly interpret the statute. *Kalal*, 271 Wis. 2d 633, ¶¶ 47-48.

Section 19.356 was created by 2003 Wisconsin Act 47. That Act was recommended by the Joint Legislative Council's Special Committee on Review of the Open Records Law ("Committee"). A search of the Committee's materials on file at the Legislative Reference Bureau reveals that the exact language of subsection 19.356(2)(a)3. was inserted in the legislation at the request of the Wisconsin Manufacturers and Commerce Association ("Association") representative. (James Buchen letter of December 9, 2002.) In that letter, the Association expressed its concern that without the amendment, the legislation would treat private and public employees identically, despite the fact that public employees expect to be subject to greater public scrutiny. The letter also notes that the private employee's employment relationship is with a private employer, not the government. Furthermore, a company or contractor, not the individual private employee, enters into an employment relationship with the governmental entity. The letter also expressed concern that without the amendment, private employers were being asked to surrender the privacy rights of their employees whenever the employer chose to contract with a governmental entity.

The letter from the Association was presented to the Committee at the Committee's last meeting. The Committee subsequently voted to propose the legislation by mail ballot. The Staff Memorandum sent to the Committee with the mail ballot describes the legislation as providing that a private sector employee would be entitled to "notice and appeal rights regarding a record naming that employee, *except that the name and other personally identifiable information relating to an employee of a prevailing wage employer will be closed to public access.*" Wisconsin Legislative Council Staff Memo No. 2 (Jan. 15, 2003), at 2 (emphasis supplied).

There is no doubt that the Staff Memorandum does not accurately describe the effect of section 19.356(2)(a)3.; it also does not discuss the interaction between that subsection and subsection (2)(a)1. Because the language of subsection (2)(a)3. is on its face unambiguous, and because it was added for the specific and stated purpose of providing greater rights to private sector employees, I must conclude that to the extent there is any conflict between subsection (2)(a)3. and subsection (2)(a)1., subsection (2)(a)3. trumps subsection (2)(a)1. I realize this conclusion makes part of the private sector employee notification provisions of subsection (2)(a)1. surplusage, but the conclusion seems inescapable.

To the extent any of the requested records you propose to release are records prepared by a private employer and those records contain information pertaining to one of that employer's employees, you should not release the information without obtaining authorization from the individual employee.

Subsection 19.356(2)(a)1. requires an authority to provide notice if it proposes to release a record containing information relating to an employee that is created or kept by the authority and that is the result of an investigation into a disciplinary matter involving the employee or a possible employment-related violation by the employee of a statute, ordinance, rule, regulation or policy of the employee's employer. Because the subsection refers to records that are "created or kept" by the authority, the statute includes within its ambit not only an authority's records of its employees, but also the covered records of someone who is not an employee of the authority. Because section 19.32(1)(bg) includes within the definition of "employee" "any individual who is employed by an authority . . . or any individual who is employed by an employer other than an authority," an authority must provide whatever notice is required whenever it proposes to release records covered under this subsection of employees, public or private. As noted above, to the extent the records involve records prepared by a private sector employer and contain information relating to an employee of that private employer, the private employee may veto release of the records.

Subsection (2)(a)1. refers to records that are the result of an investigation into either a disciplinary matter involving the employee or possible employment-related violation by the employee of a statute, ordinance, rule, regulation or policy of the employee's employer. Although records of a disciplinary matter involving an employee would ordinarily be understood as records created by the employee's employer, the statute can be read as requiring the notice when there has been an investigation of possible employment-related violation by the employee and the investigation is conducted by some entity other than the employee's employer. To the extent subsection (2)(a)1. can be read as including records relating to an employee that are the result of an investigation by someone other than the employee's employer, the statute is ambiguous. *See Kalal*, 271 Wis. 2d 633, ¶ 47 (a statute is ambiguous if its language reasonably gives rise to different meanings).

As noted earlier, section 19.356 was created by 2003 Wisconsin Act 47. According to the Committee's prefatory note, the Committee was directed to review the Wisconsin Supreme Court decisions in *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). In *Woznicki*, the Wisconsin Supreme Court held that a school district employee had the right to judicial review of a district attorney's decision to release records concerning that employee and, consequently, the employee was entitled to notice of the district attorney's decision to release the records. In *Klein v. Wisconsin Resource Center*, 218 Wis. 2d 487, 582 N.W.2d 44 (Ct. App. 1998), the court of appeals expanded the holding in *Woznicki*, holding that when access is sought under the public records law to any records which pertain to an individual, the

individual has the right to notification if the record custodian agrees to release the information and the right to seek a circuit court review of that decision. *Klein*, 218 Wis. 2d at 494. In the *Milwaukee Teachers* case, the Supreme Court formally extended to any public employee the right to notice about, and judicial review of, a custodian's decision to release personnel information implicating the privacy or reputational interest of the individual public employee.

The Committee's prefatory note comments:

> Further, the logical extension of these opinions is that the right to notice and the right to judicial review may extend to any record subject, regardless of whether the record subject is a public employee.
>
> This bill partially codifies *Woznicki* and *Milwaukee Teachers'*. In general, the bill applies the rights afforded by *Woznicki* and *Milwaukee Teachers'* only to a defined set of records pertaining to employees residing in Wisconsin. As an overall construct, records relating to employees under the bill can be placed in the following three categories:
>
> . . . .
>
> 2. Employee-related records that may be released under the balancing test *only* after a notice of impending release and the right of judicial review have been provided to the employee record subject.

2003 Wisconsin Act 47, Joint Legislative Council Prefatory Note (underlining added).

The Committee's Report to the Legislature on the bill drafts is even more specific: it describes the bills as requiring notice when an authority decides to release a record containing information about:

- A public sector or private sector employee disciplinary matter, following an investigation.
- A private sector employee, unless the private sector employee authorizes the public body to provide access to that information.
- Any person, when the information is obtained through a subpoena or search.

Wisconsin Legislative Council Report to the Legislature, Special Committee on Review of the Open Records Law, RL 2003-01 (Mar. 25, 2003), at 3.

In its first substantive meeting, the Committee discussed an initial "draft" bill that was really a compilation of three different bills that had been considered but not passed during the previous Legislature. At that meeting, the Committee selected a version of subsection (2) that contained an exception to the notice provision of subsection (2)(a) that provided:

> (d) Paragraph (a) does not apply to an investigation by an authority who or which is charged with the responsibility to enforce a law, ordinance, rule, or regulation that is applicable to individuals other than officers or employees of the authority or persons under contract with the authority unless the investigation involves an officer or employee of the authority or a person under contract with the authority.

WLC: 0276/1, sec. 3, at 6; Committee Minutes (Sept. 23, 2002), at 2.

At the following Committee meeting, November 18, 2002, the Committee deleted the exception. One could conclude, therefore, that it was the Committee's intention that records of that kind of investigation, investigations by entities other than the employee's employer, be subject to the notice requirement. But the Committee minutes never explain or comment upon the deletion. If the Committee made a public policy choice, it did not explain that choice. Similarly, if the Committee thought the provision was unnecessary, it did not explain that reasoning. What was not included in the final legislation is of little assistance in interpreting the final legislation when the deletions are made without explanation or comment.

Interpreting subsection (2)(a)1. as requiring notification not only when an authority proposes to release employment-related records prepared by an employee's employer, but also records prepared by other entities, would be contrary to the Committee's stated goal of limiting the scope of required notification under *Woznicki* and its progeny. That interpretation would also lead to anomalous results: for example, if a law enforcement agency conducted an investigation into whether a private sector employee stole from his employer, the employee would be entitled to notice before the law enforcement agency released the records, but the law enforcement agency could release records of an investigation into whether the same individual committed a sexual assault without providing notice if the sexual assault was not employment related. Furthermore, that interpretation of the statute would mean that the law enforcement agency could not release records of an investigation for any job-related infraction alleged to have been committed by any public employee without first providing notice to the employee and allowing the employee to challenge the release of the records. Interpreting this subsection as requiring notification before releasing records of law enforcement investigation of employment-related violations would also mean that a municipal employee who stole from his employer would be entitled to notification and could challenge the release of the police records of that investigation but, if the same individual stole from an organization in which he was a volunteer, the police investigative records could be released without notification. An arrest record of a private sector employee arrested for an offense involving his or her employment could not be released without

notifying the individual. That result is directly contrary to the holding of *Newspapers, Inc. v. Breier*, 89 Wis. 2d 417, 279 N.W.2d 179 (1979), in which the Wisconsin Supreme Court held that arrest records are available to the press and public "at any time when the custodian's office is open for business and the 'arrest list' or the police 'blotter' is not actually being used for the making of entries therein." *Breier*, 89 Wis. 2d at 440.

I am unwilling to conclude that the Committee and the Legislature would so radically change not only Wisconsin's public records statutes, but also Wisconsin's common law involving police records, without any report of the discussion or reasons for the change. Subsection (2)(a)1. therefore must be interpreted as requiring notification when an authority proposes to release records in its possession that are the result of an investigation by an employer into a disciplinary or other employment matter involving an employee. This interpretation of subsection (2)(a)1. is consistent with section 19.36(10)(b) which prohibits an authority from releasing "[i]nformation relating to the current investigation of a possible criminal offense or possible misconduct connected with employment by an employee prior to disposition of the investigation." That statute clearly focuses on records connected with employment. Both sections 19.356(2)(a)1. and 19.36(10) were created by 2003 Wisconsin Act 47. Reading the statutes together leads to the conclusion that the required notice to a record subject under section 19.356(2)(a)1. is restricted to an authority proposing to release records that are the result of an investigation into disciplinary matters or possible misconduct connected with employment created by the employer. As noted earlier, the notification need only be provided to the record subject to whom the record pertains. That an individual merely is named in the record is not sufficient to trigger the notification requirement.

Section 19.356(9)(a) requires an authority to provide notice "to a record subject who is an officer or employee of the authority holding a local public office or a state public office[.]" Under subsection (9)(a), an authority need provide the requisite notice only to public officers who are employed by the authority releasing the records. Subsection (9)(a), however, does not restrict the duty to notify to the class of records listed in subsection (2)(a); it requires notice when any records are going to be released.[2]

---

[2]I note that 2003 Wisconsin Act 47 also amended section 19.34(1), the statute which requires an authority to post its public record information. The legislation added the sentence "The notice shall also separately identify each position of the authority that constitutes a local public office or a state public office." That language seems to be more restrictive than the language in section 19.356(9)(a) which on its face requires notification concerning the records of anyone who is an officer or employee of the authority holding a local public office or a state public office, without any limitation on whether the public or state office is a "position of the authority." Read together, these two statutes would seem to indicate that the duty to notify under subsection (9)(a) refers to officers who are officers of the authority itself, not also officers who happen to hold a public or state office unrelated to the authority. Resolution of that issue, however, is not necessary in this opinion.

To summarize, if you propose to release a record that contains information pertaining to a private sector employee and the record was prepared by the employee's employer, you must provide the employee notice of your intent to release the record and may not release the record unless the employee authorizes the release. If any of the records you propose to release are records obtained by DCI through a subpoena or search warrant, you must provide the requisite notice to the person to whom the record pertains. Finally, if any of the records you propose to release contain information relating to an investigation by an employer into a disciplinary matter or possible employment-related violation by an employee of that employer, you must provide the requisite notice to the record subject to whom the record pertains.

This analysis applies only to notice provisions of the public records law, as amended, and does not alleviate any obligation to conduct a balancing test or otherwise comply with additional provisions of the public records law.

Very truly yours,

Peggy A. Lautenschlager
Attorney General

PAL:AL:lkw

CAPTION: Section 19.356(1) and (2) of the Wisconsin Statutes discussed.

STATE OF WISCONSIN
DEPARTMENT OF JUSTICE

PEGGY A. LAUTENSCHLAGER
ATTORNEY GENERAL

Daniel P. Bach
Deputy Attorney General

114 East, State Capitol
P.O. Box 7857
Madison, WI 53707-7857

October 30, 2006

Eric O. Stanchfield
Secretary
Department of Employee Trust Funds
801 W. Badger Rd.
P.O. Box 7931
Madison, WI 53707-7931

OAG – 2 -06

David C. Mills
Executive Director
State of Wisconsin Investment Board
121 E. Wilson St.
P.O. Box 7842
Madison, WI 53707-7842

Dear Secretary Stanchfield and Director Mills:

You have asked for my opinion as to whether members of the State of Wisconsin Investment Board (SWIB) and of the Employee Trust Fund Board, the Teachers Retirement Board, the Wisconsin Retirement Board, the Group Insurance Board and the Deferred Compensation Board (collectively the "Employee Benefits Boards") are (a) subject to the limitations on damages set forth in Wis. Stat. § 893.82 and (b) entitled to the state's indemnification for liability pursuant to Wis. Stat. § 895.46.

In my opinion, individual members of SWIB and the Employee Benefits Boards are entitled to damage limitations, notice of claim, indemnity, and legal representation for actions taken within the scope of their board duties because they are state officers. I also respond to your specific questions below.

Statutes Applicable

> **893.82 Claims against state employees; notice of claim; limitation of damages.** . . . **(3)** Except as provided in sub. (5m) [medical malpractice], no civil action or civil proceeding may be brought against any state officer, employee or agent for or on account of any act growing out of or committed in the course of the discharge of the officer's, employee's or agent's duties, . . . unless within 120 days of the event causing the injury, damage or death giving rise to the civil action or civil proceeding, the claimant in the action or proceeding serves upon the attorney general written notice of a claim . . . .

. . .

> **(6)** The amount recoverable by any person or entity for any damages, injuries or death in any civil action or civil proceeding against a state officer, employee or agent . . ., including any such action or proceeding based on contribution or indemnification, shall not exceed $250,000. No punitive damages may be allowed or recoverable in any such action.
>
> **895.46 State and political subdivisions thereof to pay judgments taken against officers. (1)**(a) If the defendant in any action or special proceeding is a public officer or employee and is proceeded against in an official capacity or is proceeded against as an individual because of acts committed while carrying out duties as an officer or employee and the jury or the court finds that the defendant was acting in the scope of employment, the judgment as to damages and costs entered against the officer or employee in excess of any insurance applicable to the officer or employee shall be paid by the state or political subdivision of which the defendant is an officer or employee. . . . Regardless of the results of the litigation the governmental unit, if it does not provide legal counsel to the defendant officer or employee, shall pay reasonable attorney fees and costs of defending the action, unless it is found by the court or jury that the defendant officer or employee did not act within the scope of employment. . . .

Discussion

The statutes cited above operate *in pari materia* as a complementary whole. 81 Op. Att'y Gen. 17, 19 (1993). If members of SWIB and the Employee Benefits Boards are "state officers" – a subclass of "public officers" – within the meaning of Wis. Stat. § 895.46(1)(a), they are entitled to notice of claims and damage limitations under Wis. Stat. § 893.82(3) and (6). 81 Op. Att'y Gen. at 18-19. The essential characteristics of a public officer are that an officer exercises some portion of the sovereign power of the state by law, *Burton v. State Appeal Board*, 38 Wis. 2d 294, 300-01, 156 N.W.2d 386 (1968), and that an officer is not subordinate to any authority other than that of the law. *Martin v. Smith*, 239 Wis. 314, 332, 1 N.W.2d 163 (1941). *See also* 81 Op. Att'y Gen. at 19-20, and *Black's Law Dictionary* 1115, 1117 (8th ed. 2004), defining "office" and "officer." Longstanding and uninterrupted interpretation of Wisconsin law has accorded members of state boards the status of "state officer" even though they are traditionally uncompensated for their service. 81 Op. Att'y Gen. at 19.

SWIB is created by Wis. Stat. § 15.76. When the board is constituted, its members exercise the legislatively-delegated powers and duties described in Wis. Stats. §§ 25.01 through 25.187, subordinate only to the authority of law. SWIB's members are therefore state officers.

In *Bahr v. State Inv. Board*, 186 Wis. 2d 379, 521 N.W.2d 152 (Ct. App. 1994), the Wisconsin Court of Appeals held that SWIB was an "independent going concern" not protected by state sovereign immunity because the state had waived SWIB's sovereign immunity by granting it independent status with broad and independent propriety powers. *See Bahr*, 186 Wis. 2d 394. That decision, however, did not alter plaintiff Bahr's status as a state employee, and the chief holding of the decision was that Bahr retained his state employee civil service rights notwithstanding the Legislature's attempt to alter his status by statute. As such, *Bahr* cannot be read to alter SWIB members' status as state officers.

The Public Employee Trust Fund is created by Wis. Stat. § 40.01. When the Employee Benefits Boards are constituted, the members of each board exercise the powers legislatively delegated to them in Wis. Stat. § 40.03. In exercising those powers and duties, the members of each board are subordinate only to the authority of law. The members of the Employee Benefits Boards are therefore state officers. I am unaware of any limitations on the Employee Benefits Boards' sovereign immunity.

The members of SWIB and the Employee Benefits Boards are also required to comply with the Code of Ethics for State Public Officials. Wis. Stats. §§ 15.07(1), 15.16(1), 15.76(3), 19.42(13) and (14). As they are required to comply with the state code of ethics when performing acts in the course of their board duties, it follows that they are also entitled to state protections as state officers.

It must be noted that Wis. Stat. § 895.46 is an excess indemnity statute. That is to say that the State of Wisconsin provides for indemnification of employees, officers, and agents for judgments "in excess of any insurance applicable." Some board members may be covered by separate insurance. For example, one SWIB member must be a non-elected, representative of local government, Wis. Stat. § 15.76(1r) , and it is probable that individual's liability would first be covered by the insurance coverage maintained by his or her employer.

You have expressed a concern that Wis. Stats. §§ 895.46 and 893.82 specify indemnity coverage for certain boards of the state, but that neither lists SWIB or the Employee Benefits Boards. I assume that you are concerned because a principle of statutory construction holds that the express mention of one matter excludes other similar matters (*expressio unius est exclusio alterius*). *See C.A.K. v. State,* 154 Wis. 2d 612, 621, 453 N.W.2d 897 (1990). I do not share that concern in this instance. The principle applies only where there is some evidence that the Legislature intended it to apply. *See, e.g., State v. James P.,* 2005 WI 80, ¶ 26, 281 Wis. 2d 685, 698 N.W.2d 95.

Section 895.46 clearly indemnifies "public officers or employee[s]" acting in the scope of their duties. In neither § Wis. Stat. 895.46 nor § 893.82 is there an indication that the Legislature intended to provide an exclusive and exhaustive list by listing some examples. In subsections

(4), (5), and (8) the statute states that it "applies" to various persons or entities, but these appear to be individuals or groups that may not traditionally or under agency principles be considered to be state officers or employees such as certain volunteer health care providers or members of the board of governors on health care liability risk-sharing plans thus rendering it necessary that they be specifically included within the statutory protection. To construe the statute so as to exclude liability coverage for any state officer, employee or agent not specifically mentioned would lead to absurd results leaving virtually all state officers or employees without indemnification. Statutes are to be construed to avoid such absurdities. *See Reyes v. Greatway Ins. Co.*, 227 Wis. 2d 357, 376-77, 597 N.W.2d 687 (1999). This conclusion would also apply to an analysis of Wis. Stat. § 893.82.

Additionally, and as you have noted in your opinion request, my predecessors have previously opined that members of certain other public boards not expressly mentioned in the statutes are nevertheless covered by the statutory indemnification. *See*, 81 Op. Att'y Gen. 17 (1993) (State Emergency Response Board); 74 Op. Att'y Gen. 54 (1985) (Board of Curators of the Wisconsin Historical Society); and OAG 36-82 (unpublished opinions) (Higher Educational Arts Board). My opinion here is consistent with that rendered by my predecessors.

Responses to Specific Questions

I turn now to the specific questions you have set forth in your opinion request.

1. Is each Member of the Investment Board, the Employee Trust Funds Board, the Teachers Retirement Board, the Wisconsin Retirement Board, the Group Insurance Board, and the Deferred Compensation Board a "state officer" who is entitled to the limitation on liability provided by Wis. Stat. § 893.82(6)?

Answer: Yes. Assuming that the member in question is sued in his or her official capacity or for an act undertaken in the scope of his or her Board membership, each member is entitled to the limitation on liability provided by Wis. Stat. § 893.82(6).

2. Is each Member of the Investment Board, the Employee Trust Funds Board, the Teachers Retirement Board, the Wisconsin Retirement Board, the Group Insurance Board, and the Deferred Compensation Board a "public officer" who is entitled to the benefits provided by Wis. Stat. § 895.46?

Answer: Yes.

3. If a Member is a "public officer," as referred to in Wis. Stat. § 895.46, does the indemnity include a Member's breach of his or her fiduciary duty as a board member? That is, under what circumstances could a court find that a Member's breach of fiduciary duty was not

"acting within the scope of employment" and, thus, the Member would not be subject to the benefits of Wis. Stat. § 895.46?

Answer: A board member is entitled to indemnification under Wis. Stat. § 895.46(1)(a) if the board member is "proceeded against in an official capacity or is proceeded against as an individual because of acts committed while carrying out duties as an officer . . . and the jury of the court finds that the [board member] was acting in the scope of employment." Agents of any department of the state also are covered by Wis. Stat. § 895.45(1)(a) while acting within the scope of their agency. There is no express exception for a board member's breach of his or her fiduciary duty as a board member. Although there may be circumstances when the breach of a board member's fiduciary duty might be sufficient to take the acts of the board member outside the scope of his or her employment or agency, and therefore any damages or costs against the board member would not be subject to indemnification under the statute, not every breach of the fiduciary duty will take the acts of the board member outside the scope of his or her employment or agency. Since indemnification will depend upon the particular circumstances of each case, I decline to address under what circumstances generally a court could find that a board member's breach of his or her fiduciary duty would be outside the scope of the board member's employment or agency.

4. Would the benefits under Wis. Stat. § 895.46 apply where the action or special proceeding was brought by the federal government, other than the actions identified in Wis. Stat. § 895.46(6)?

Answer: Because Wisconsin has traditionally indemnified state employees, officers, and agents for settlements or judgments in civil enforcement actions brought by the federal government, that indemnity would extend to the members described in this opinion. You correctly note that a different approach may be taken if the federal or state government brings certain criminal proceedings against a board or member. Wis. Stat. § 895.46(6). It should also be noted that state law limitations such as those applicable to damages and notice, do not apply to federal civil proceedings. *See Felder v. Casey*, 487 U.S. 131, 146-47 (1988) and *Casteel v. Vaade*, 167 Wis. 2d 1, 10-11, 481 N.W.2d 476 (1992).

5. If a Member is entitled to the benefits of Wis. Stat. § 895.46, under what circumstances, and under what authority will legal representation of the Member be provided by the Department of Justice?

Answer: If a member is a defendant in a proceeding because of acts committed while carrying out duties as an officer on the board, then he or she will be provided with legal representation as set forth in Wis. Stat. § 895.46. Generally, that representation is provided by the Attorney General pursuant to Wis. Stat. § 165.25(6) which states that,

> At the request of the head of any department of state government, the attorney general may appear for and defend any . . . state officer . . . in any civil action or other matter brought before a court or an administrative agency which is brought against the state . . . officer . . . for or on account of any act growing out of or committed in the lawful course of an officer's . . . duties.

6. Under Wis. Stat. § 895.46, is a Member entitled to elect to be represented by outside counsel of the Member's choice and to have the reasonable expenses and costs of that counsel paid by the state?

Answer: No. "The attorney fees and expenses shall not be recoverable if the state or political subdivision offers the officer . . . legal counsel and the offer is refused by the defendant officer . . ." Wis. Stat. § 895.46(1)(a).

7. If the jury or the court finds that the Member was not acting within the scope of his or her employment duty, could the Member be required to pay or reimburse the state for any portion of the costs of legal representation in the proceeding?

Answer: Wis. Stat. § 895.46(1)(a) does not specifically address the question you pose. In theory, the attorney general could seek reimbursement for fees and costs expended in representing a member who is subsequently found to have acted outside the scope of his or her employment. In practice, this situation is unlikely to arise because the attorney general makes the determination as to scope early in the defense of the matter, and would have to demonstrate a significant change in circumstances to justify a suit for reimbursement. As such, and given that there is no particular fact scenario presented by your question, we are unable to provide a specific response.

For the reasons set forth, it is my opinion that, where the requirements of the statutes have been satisfied, the state would pay the judgment entered, in the course of their duties as officers, against a member of SWIB or the Employee Benefits Boards.

Very truly yours,

Peggy A. Lautenschlager
Attorney General

PAL:JSL:lkf

CAPTION: Individual members of the State of Wisconsin Investment Board and of the Employee Benefits Boards are entitled to damage limitations, notice of claim, indemnity, and legal representation for actions taken within the scope of their board duties because they are state officers.