January 28, 2010

Mr. Dennis E. Kenealy
Corporation Counsel
Ozaukee County
Post Office Box 994
Port Washington, WI 53074-0994

Dear Mr. Kenealy:

1. You indicate that the Ozaukee County Administrator currently appoints all prospective members of the boards and commissions of Ozaukee County. All such appointments are confirmed by the Ozaukee County Board. A proposed county board resolution would require that all county board members who are prospective appointees to county boards and commissions be appointed by the chairperson of the county board rather than by the county administrator. Such appointments would remain subject to confirmation by the county board. You advise that the county administrator supports the proposed resolution out of concern that “his naming of county board members will alienate some board members who may have applied for the position[s], thus jeopardizing his effectiveness and potentially his job.” You note that the proposed resolution may be in conflict with Wis. Stat. § 59.18(2)(c), which provides that the county administrator “[a]ppoint[s] the members of all boards and commissions where the statutes provide that such appointments shall be made by the county board or by the chairperson of the county board.” A similar provision, Wis. Stat. § 59.17(2)(c), applies to appointments to boards and commissions by elected county executives.

QUESTION PRESENTED AND BRIEF ANSWER

2. You ask whether a county board in a county with a county administrator or a county executive can exercise its home rule authority so as to enact a resolution requiring that all county board members who are prospective appointees to all county boards and commissions be appointed by the chairperson of the county board rather than by the county administrator.

3. In my opinion, a county board in a county with a county administrator or a county executive cannot reassign the power of appointment that is statutorily granted to a county executive or a county administrator in cases where the statutes provide that appointments to a particular board or commission are to be made by the county board, by the chairperson of the county board, or by the county administrator or county executive.
ANALYSIS

¶ 4. Wisconsin Const. art. IV, § 22 provides that “[t]he legislature may confer upon the boards of supervisors of the several counties of the state such powers of a local, legislative and administrative character as they shall from time to time prescribe.”

¶ 5. In Jackson County v. State, 2006 WI 96, ¶ 16, 293 Wis. 2d 497, 717 N.W.2d 713, the court delineated the nature of the authority possessed by counties:

A county is a creature of the legislature and as such, it has only those powers that the legislature by statute provided. Wis. Const, art. IV, § 22. For more than a century, Wisconsin courts consistently have interpreted counties’ powers as arising solely from the statutes.

¶ 6. As a direct consequence of the fact that all county powers must be derived from a statutory source, “[a] county’s home rule power is more limited than the home rule power that is afforded to cities . . . .” Jackson County, 293 Wis. 2d 497, ¶ 17.

¶ 7. Selecting or appointing an individual to perform a particular task or function in this context is an organizational or administrative power. See Harbick v. Marinette County, 138 Wis. 2d 172, 176-77, 405 N.W.2d 724 (Ct. App. 1987). Wisconsin Stat. § 59.51(1), which speaks directly to a county board’s administrative and organizational powers, provides:

The board of each county shall have the authority to exercise any organizational or administrative power, subject only to the constitution and any enactment of the legislature which grants the organizational or administrative power to a county executive or county administrator or to a person supervised by a county executive or county administrator or any enactment which is of statewide concern and which uniformly affects every county. Any organizational or administrative power conferred under this subchapter shall be in addition to all other grants. A county board may exercise any organizational or administrative power under this subchapter without limitation because of enumeration, and these powers shall be broadly and liberally construed and limited only by express language.

¶ 8. Among the legislative enactments granting organizational or administrative powers to a county administrator is the power to “[a]ppoint the members of all boards and commissions where the statutes provide that such appointment shall be made by the county board or by the chairperson of the county board.” Wis. Stat. § 59.18(2)(c). A county administrator’s appointments under this provision are subject to the county board’s approval. Id.

¶ 9. In a county that has elected to create the office of county administrator, the appointment power conferred upon a county administrator is exclusive. Wis. Stat. § 59.18(2)
(providing that the "duties and powers of the county administrator shall be . . . to" appoint such members of boards and commissions as provided in Wis. Stat. § 59.18(2)(c)).1 The word "shall" is presumed to be mandatory. See Fond du Lac County v. Elizabeth M.P., 2003 WI App 232, ¶ 21, 267 Wis. 2d 739, 672 N.W.2d 88. Nothing in the language or context of the relevant statutes indicates a reason to depart from this presumption. The statutory scheme involves a mandatory or exclusive power to appoint, as the appointment power conferred on a county administrator by Wis. Stat. § 59.18(2)(c) expressly involves appointments that the laws would otherwise vest in the county board or county board chairperson.

¶ 10. Moreover, the interpretation that a county administrator’s power to appoint is mandatory and exclusive in this context is strengthened by the fact that the Legislature has provided counties of populations under 500,000 with the option of creating the position of administrative coordinator in lieu of having a county administrator. Wis. Stat. § 59.19. Like county administrators, administrative coordinators are responsible for “coordinating all administrative and management functions of the county government not otherwise vested by law in boards or commissions, or in other elected officers.” Id. Administrative coordinators are not, however, provided by statute with appointment powers. Compare Wis. Stat. § 59.19 (enumerating administrative coordinator duties) with Wis. Stat. § 59.18(2) (enumerating county administrator duties).

¶ 11. Because the “[s]tatutory powers and duties conferred upon a county officer cannot be narrowed, enlarged, or taken away by a county board . . .,” Harbick, 138 Wis. 2d at 179, a county board in a county with a county administrator cannot reassign a county administrator’s statutory appointment duties to the chairperson of the county board.

¶ 12. The county home rule statute, Wis. Stat. § 59.03, does not change this analysis. Wisconsin Stat. § 59.03(1) provides in part that “[e]very county may exercise any organizational or administrative power, subject only to the constitution and to any enactment of the legislature which is of statewide concern and which uniformly affects every county.” The Legislature directed that this statutory administrative home rule provision be “liberally construed in favor of the rights, powers and privileges of counties to exercise any organizational or administrative power.” Wis. Stat. § 59.04. Your request suggests that a possible conflict between Wis. Stat. § 59.18(2)(c) and Wis. Stat. § 59.03 exists if a county administrator’s power to appoint is not a matter of uniform statewide concern, presumably because not every county has an office of county administrator.

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1In addition, the word “shall” is also used in Wis. Stat. § 59.17(2), which grants similar powers of appointment to county executives. Statutes other than Wis. Stat. §§ 59.17(2) and 59.18(2) also grant county administrators and county executives the power to appoint certain local officials. See, e.g., Wis. Stat. § 27.02(2) (members of certain county park commissions).
13. In answering your question, it is not necessary for me to resolve whether the statutory scheme granting powers to county administrators are enactments "of statewide concern which uniformly affect[] every county."  

14. The relevant provisions of what are now Wis. Stat. §§ 59.03(1) and 59.51(1) were enacted at the same time. See 1985 Wisconsin Act 29, secs. 1147, 1148, and 1169. Each contains provisions making a county’s organizational and administrative powers subject to the constitution and legislative enactments of statewide concern which uniformly affect every county. Wisconsin Stat. § 59.51(1) provides additional limitations upon a county board’s authority to exercise organizational and administrative powers. One of these additional limitations expressly makes a county board’s exercise of such powers “subject only to the constitution and any enactment of the legislature which grants the organizational or administrative power to a county executive or county administrator[.]” Wis. Stat. § 59.51. The Legislature acknowledged the possibility that some organizational or administrative powers granted by statute to a county administrator might not be of statewide significance uniformly affecting every county, but provided that those laws would still prevail over a county’s statutory home rule authority. The language providing additional limitations in Wis. Stat. § 59.51(1) must be given effect. See State ex rel. Kalal v. Circuit Court, 2004 WI 58, ¶ 46, 271 Wis. 2d 633, 681 N.W.2d 110 (“Statutory language is read where possible to give reasonable effect to every word, in order to avoid surplusage.”). To conclude otherwise would render meaningless the limitations on a county’s organizational and administrative powers contained in Wis. Stat. § 59.51(1).

15. This interpretation is also supported by another cannon of statutory construction: Where statutes provide detailed statutory directives, the more specific statutory directives presumptively are intended to prevail over statutes of general application. 77 Op. Atty Gen. at 116 (citing Schlosser v. Allis-Chalmers Corp., 65 Wis. 2d 153, 161, 222 N.W.2d 156 (1974)). With respect to a county’s organizational or administrative power to appoint, the specific and detailed provisions are contained in Wis. Stat. § 59.18 in cases where a county has chosen to have a county administrator. Wisconsin Stat. § 59.03 is a less specific directive with respect to a county’s organizational and administrative power. It is a provision that authorizes counties to “expand upon and ‘fill the gaps’ in the organizational and administrative structure which is already in place[.]” 77 Op. Atty Gen. at 116. When the Legislature enacted the provisions relating to a county’s organizational and administrative home rule powers, the specific statutory

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2I note that a prior opinion of the Attorney General held that “legislative enactments ‘of statewide concern and which uniformly affects every county’” included the statutory scheme for elective county officers. 77 Op. Atty Gen. 113, 115 (1988).
directives that are now contained in Wis. Stat. § 59.18(2)(c) were already in place and were left

¶ 16. In sum, Wis. Stat. § 59.51(1) is an express statutory limitation upon the administrative
home rule authority granted by Wis. Stat. § 59.03(1). Wisconsin Stat. § 59.51(1) forbids county
boards from utilizing their statutory administrative home rule authority to alter or remove the
powers of appointment granted to county administrators and county executives by Wis. Stat.
§§ 59.17(2) and 59.18(2) or by other statutes.4

CONCLUSION

¶ 17. I therefore conclude that a county board in a county with a county administrator or a
county executive cannot exercise its home rule authority so as to enact a resolution requiring that
all county board members who are prospective appointees to county boards and commissions be
appointed by the county board chair rather than by the county administrator. A county board
cannot reassign the appointment powers granted to a county administrator or county executive in

3Nor would my conclusion change if the powers granted to the office of county administrator in
Wis. Stat. § 59.18(2)(c) were promulgated after the enactment of 1985 Wisconsin Act 29. As a practical
matter, one legislature cannot, by statute, place limitations or conditions upon a future legislature’s power
to alter or limit a county’s organizational or administrative powers. See Flynn v. Department of
Administration, 216 Wis. 2d 521, 539, 543, 576 N.W.2d 245 (1998). Cf. State ex rel. La Follette v. Stitt,
114 Wis. 2d 358, 365, 338 N.W.2d 684 (1983). Consequently, the Legislature can create an infinite
number of statutory exceptions to the “statewide concern” and “uniform[]” provisions in Wis. Stat.
§ 59.03(1).

4In rare situations, there may be no statutory requirement that appointments to a particular board
or commission that is not the head of a county department be made by the county board, by the
chairperson of the county board, or by the county administrator or county executive. See
situations, subject to the restrictions in Wis. Stat. § 59.03(1), a county board in a county with a county
administrator or county executive could enact an ordinance or resolution requiring that county board
members who are prospective appointees to such a board or commission be nominated by the chairperson
of the county board and confirmed by the entire county board.

Further, the statutory compatibility of office provisions applicable to county supervisors that were
discussed in 67 Op. Att’y Gen. at 234-35 have been changed. Wisconsin Stat. § 59.10(4) provides in part
that “a supervisor may also be a member of a committee, board or commission appointed by the county
executive or county administrator or appointed or created by the county board[.]”
cases where the statutes provide that appointments to the particular board or commission are to be made by the county board, by the chairperson of the county board, or by the county administrator or county executive.

Sincerely,

J.B. Van Hollen
Attorney General

JBVH:FTC:KMS:cla
Mr. A. John Voelker  
Director of State Courts  
16 East, State Capitol  
Madison, WI 53702  

Dear Mr. Voelker:

¶ 1. You have requested my opinion regarding electronic transmission of certain confidential case information among clerks of circuit court, county sheriff’s offices, and the Department of Justice ("DOJ") TIME System through two new electronic interfaces involving the Wisconsin Department of Administration’s Office of Justice Assistance ("OJA") Wisconsin Justice Information Sharing Program ("WIJIS") as a secondary transport system. In my opinion, applicable law permits these electronic transmissions through the new interfaces.

¶ 2. I understand that one of the new interfaces will transmit arrest warrant information to the county sheriff’s office as an arrest warrant is issued by a circuit court using the Consolidated Court Automation Programs system ("CCAP"). The sheriff’s office will add certain information, then transmit the warrant to the TIME System for purposes of notifying law enforcement statewide. When the warrant is executed, the sheriff’s office will use the same interface to transmit service information back to the circuit court. In this opinion, I will refer to this as the “warrant interface.”

¶ 3. The other new interface will perform the same functions for temporary restraining orders and injunctions issued pursuant to Wis. Stat. ch. 813. In this opinion, I will refer to this as the “protection order interface.”

¶ 4. You indicate that the court system transmits other confidential case information through various electronic interfaces with other agencies, but that the warrant interface and the protection order interface differ in one critical aspect from those other interfaces. In addition to transmitting information through CCAP, the warrant interface and the protection order interface also utilize the secondary data transport system operated by WIJIS. Your questions arise because WIJIS does not have express statutory authority to independently obtain certain confidential data that would be transmitted through the warrant interface and the protection order interface.

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4The Transaction Information for Management of Enforcement System, universally known as the TIME System, is a computer-based communications control center managed by the Crime Information Bureau at the Wisconsin Department of Justice. Its mission is to implement rapid and effective exchange of factual information between law enforcement agencies.
FACTUAL BACKGROUND

¶ 5. Understanding how the warrant and protection order interfaces work is necessary to frame my answers to your questions. CCAP Chief Information Officer Jean Bousquet ("Ms. Bousquet"), CCAP Customer Services Manager Andrea Olson ("Ms. Olson"), and WIJIS Program Manager Jeff Sartin ("Mr. Sartin") provided the following technical information, upon which my answers are based.

¶ 6. **CCAP Electronic Interfaces Generally.** According to Ms. Bousquet and Ms. Olson, CCAP’s typical data exchanges with a justice system partner through an electronic interface start by establishing the data elements to be shared in incoming and outgoing messages: what information the courts will share electronically with the justice system partner, and what information the justice system partner will share with the courts. CCAP and the justice system partner then create a “schema” describing the structure of the electronic messages that will be used to exchange data. The schema is an organizational plan defining the data elements and attributes that can be included in an electronic message and providing for data verification. A data element is a particular category of information, like a person’s surname. The attributes of a data element describe how the data element will be expressed in an electronic message, such as whether letters or numbers will be used. Extensible Markup Language ("XML") is used to structure the data elements and attributes in a specific electronic message, consistent with the plan established by the schema.

¶ 7. An electronic interface generally operates by transmitting XML electronic messages through CCAP’s Simple Transport Exchange Protocol ("STEP") Server,² which is part of the court’s secure wide area network. The STEP Server is an automated delivery service for electronic data exchanges; it accommodates the messaging services for all electronic data exchanges between the court system and its justice partners. A useful way to conceptualize the STEP Server is as a post office for electronic data messages.

¶ 8. An electronic data message transmitted through the STEP Server starts with preparation of the message at a sending agency by a computer program called a Publishing Client. The Publishing Client prepares the electronic data message in XML and then sends the message to the STEP Server. The Publishing Client creates and sends electronic data messages automatically when a triggering event occurs in the sending agency’s database, such as issuance of a warrant by a judge. Message queues on the STEP Server hold and route messages for the various receiving agencies.

¶ 9. A receiving agency uses another computer program called a Subscribing Client to acquire the electronic data message from the STEP Server. After acquiring the message from the STEP Server, the Subscribing Client then updates the receiving agency’s database with the information contained in the electronic data message.

²Ms. Bousquet indicates that the STEP Server actually consists of a cluster of servers performing messaging services for data transports. For clarity, this cluster of servers is referred to as the “STEP Server” in this opinion.
¶ 10. CCAP staff support and maintain the STEP Server hardware and its custom software. CCAP staff also troubleshoot transmission problems that arise as electronic data messages move through the data transport system. All CCAP staff and contractors are required to sign CCAP’s Data Access Policy which, among other things, prohibits: (1) viewing any confidential or restricted information stored on any court system database for non-work purposes, or (2) discussing or disclosing any confidential or restricted information except as required for work.

¶ 11. **Electronic Interfaces for Arrest Warrants and Protection Orders.** The new warrant and protection order interfaces add another component to the typical information flow described above. In addition to routing the electronic data message through CCAP’s STEP Server, it also is routed through WIJIS’ workflow engine (the “WIJIS Workflow Engine”). One way to think of the WIJIS Workflow Engine is as an initial collection point for mail from law enforcement headed to the post office.

¶ 12. According to Mr. Sartin, the WIJIS Workflow Engine is a computer application housed on a dedicated server. The server is physically housed in DOJ’s secure server area. Only a small number of WIJIS computer programmers are authorized to access the server that houses the WIJIS Workflow Engine, Mr. Sartin indicates, and must log in with passwords. These WIJIS personnel must pass the same stringent DOJ background checks as DOJ’s computer services personnel.

¶ 13. Mr. Sartin indicates that the WIJIS Workflow Engine provides a uniform interface for the diverse records management systems used at various law enforcement agencies, and ensures that electronic data messages are sent securely. In the warrant and protection order interfaces, according to Ms. Bousquet, the electronic data message created by a law enforcement agency when a triggering event occurs is routed to the WIJIS Workflow Engine. The WIJIS Workflow Engine forwards the electronic data message to the message queue on CCAP’s STEP Server for delivery to the court. Conversely, an electronic data message from a court to a law enforcement agency is transmitted to the STEP Server message queue. The WIJIS Workflow Engine retrieves the electronic data message from the STEP Server queue and then queues the message for pick up by the receiving law enforcement agency.

¶ 14. Ms. Olson advises that transmission of the actual warrant or protection order that triggered the electronic data message moving through an interface will vary by county. Some counties will scan the warrant or protection order and attach a scanned copy to the electronic data message moving through the interface. Other counties will continue to use existing physical transmission practices such as hand-carrying or faxing copies, which the receiving agency then will match up with the companion electronic data messages received through the interface.

¶ 15. As currently programmed, according to Ms. Olson, the XML electronic data messages that will travel through the warrant and protection order interfaces do not include an indicator that a particular document or the underlying action has been sealed. If the court orders the underlying action to be sealed after an electronic data message about a warrant or a protection order has been
transmitted, she advises, a second XML electronic data message would be sent to update the information transmitted in the first message; that second message would correct information in the receiving agency's database, not replace or erase the initial message.

¶ 16. The WIJIS Workflow Engine therefore operates like a mailbox, according to Mr. Sartin. A message is received, temporarily stored while queued on the secure system, then delivered to the authorized partner to which it is addressed. Because WIJIS processes data only for purposes of transmission, not for search or analysis, electronic data will be retained only temporarily on the WIJIS server for purposes of troubleshooting and delivery verification.

¶ 17. Troubleshooting WIJIS Work Engine Problems. Troubleshooting transmission problems that occur as electronic data messages move through the WIJIS Work Engine will be handled by WIJIS staff. In some cases, according to Mr. Sartin, that may involve opening and reviewing portions of a message to determine if the message has been corrupted or has other technical problems. Samples of the electronic data messages that will be transmitted through the warrant and protection order interfaces, provided by Ms. Olson, indicate that the messages are sufficiently comprehensible to be generally understood by a reader unfamiliar with the underlying legal action but knowledgeable about the applicable schema. WIJIS troubleshooting should not require opening the scanned warrant or protection order that might be attached to a particular XML electronic data message, according to Ms. Bousquet.

¶ 18. Confidentiality Issues. Your letter indicates that the vast majority of electronic data messages travelling through the warrant and protection order interfaces will not involve confidential information. Your inquiry instead is prompted by the relatively small number of warrants and protection orders involving legally confidential information.

¶ 19. Regarding the warrant interface, arrest warrants issued in juvenile cases are subject to the Wis. Stat. § 938.396(2) general rule of confidentiality for juvenile cases. Arrest warrants issued in criminal cases sometimes are ordered sealed; although rare, a criminal case itself may be ordered sealed. John Doe cases also may be sealed by court order pursuant to Wis. Stat. § 968.26. Between 2005 and 2008, your letter indicates, arrest warrants were issued in four criminal cases before those cases were sealed; no arrest warrants were issued in criminal cases after the underlying cases were sealed; and no arrest warrants were issued in John Doe cases that had been ordered sealed. With respect to some of your questions about the warrant interface, I also note that a small number of criminal cases are formally expunged from court records each year. Cf. Wis. Stat. § 973.015(2).

¶ 20. Regarding the protection order interface, you again indicate that orders to seal are not common. For the period 2005-2008, there was 1 order to seal domestic abuse protection order proceedings pursuant to Wis. Stat. § 813.12; 1 order to seal harassment protection order proceedings pursuant to Wis. Stat. § 813.125; and no orders to seal individual at risk protection order proceedings pursuant to Wis. Stat. § 813.123(3)(c). You note that orders to seal child abuse protection order
proceedings pursuant to Wis. Stat. § 813.122(3)(b) occur somewhat more frequently; during 2005-2008, orders to seal were issued in 30 of the 2,741 cases filed.

¶ 21. According to Ms. Olson, transmitting warrant and protection order information through the new interfaces is expected to be faster and more efficient than existing paper exchanges. Resulting database entries at the sending and receiving agencies also are expected to be more accurate because information no longer will need to be re-entered manually.

¶ 22. If the confidential information cannot be transmitted through the warrant and protection order interfaces, your letter indicates, that information will continue to be transmitted via paper copies. According to Ms. Olson, delivery mechanisms for paper copies currently vary by county but include facsimile transmission and personal delivery. Ms. Olson indicates that those existing mechanisms would continue to be used for confidential information if routing through the warrant and protection order interfaces is not legally permissible. Ms. Bousquet indicates that CCAP could connect directly to a small number of larger counties, but that incorporation of the WIJIS Workflow Engine also offers the benefits of electronic data transmission capacity to other smaller counties and provides a standardized law enforcement interface.

ANALYSIS

¶ 23. You ask a number of specific questions about transmission of information through the warrant and protection order interfaces. I have reorganized and restated your questions, as set forth below with my responsive answers.

¶ 24. All of my answers share two common premises, however.

¶ 25. First, an absolute right of examination applies to Wisconsin circuit court records required to be kept in the office of the clerk of circuit court. Wis. Stat. § 59.20(3); State ex rel. Bildert v. Delavan Tp., 112 Wis. 2d 539, 551-54, 334 N.W.2d 252 (1983). The clerk must file and keep all papers properly deposited with him or her in every action or proceeding. Wis. Stat. § 59.40(2)(a); Bildert, 112 Wis. 2d at 554.

¶ 26. There are three exceptions to the “absolute right of examination” rule. First, documents may be closed to public inspection when a statute authorizes the sealing of otherwise public records. Second, documents may be closed to public inspection if disclosure would infringe on a constitutional right. Third, when required by the administration of justice, a circuit court may order documents or cases sealed pursuant to the court’s inherent authority to preserve and protect the

3 Wisconsin Stat. § 59.14 was renumbered as Wis. Stat. § 59.20(3) in 1995 Wisconsin Act 201, sec. 251. For clarity, the current statute number is used consistently in this opinion.

4 Papers “required to be kept” are those that the custodian “is obliged by law to maintain or engender[.]” State ex rel. Schultz v. Bruendl, 168 Wis. 2d 101, 111, 483 N.W.2d 238 (Ct. App. 1992).
exercise of its judicial function. Bilder, 112 Wis. 2d at 554-56; Madison v. Madison Human Serv. Comm'n, 122 Wis. 2d 488, 491-92, 361 N.W.2d 734 (Ct. App. 1984) (statutory exception prohibiting disclosure of general relief applicants and recipients for purposes not connected with administration of relief programs). Your various questions implicate the first and third exceptions.

¶ 27. Second, the WIJIS Workflow Engine is just a conduit for electronic data messages passing through the warrant or protection order interfaces. Unless a transmission problem occurs at the WIJIS Workflow Engine, WIJIS staff have no need or reason to open any electronic data message, view the contents of any individual message, or generally browse the contents of messages passing through the interfaces. The troubleshooting role of WIJIS staff with respect to the interfaces therefore is the same as any other technician or contractor who might be called upon to deal with a problem in existing transmission mechanisms—such as fixing a malfunctioning FAX machine.

¶ 28. In an analogous situation, a particular non-confidential employee’s technical ability to access sensitive collective bargaining documents stored on a public employer’s computer was determined not to compromise the employer’s proper expectation of confidence in collective bargaining matters. Mineral Point Unified Sch. Dist. v. WERC, 2002 WI App 48, ¶ 27, 251 Wis. 2d 325, 641 N.W.2d 701. Underlying that determination was the rationale that de minimus exposure to confidential information by a designated assistant in the proper course of official duties did not compromise confidentiality of the sensitive information. Lack of need, reason, or opportunity for support personnel to “browse” at will through confidential substantive information similarly characterizes the limited technical support role of WIJIS staff with respect to electronic data messages passing through the interfaces.

¶ 29. For any record-keeping system to function properly, information handlers such as technical consultants or clerical assistants must be able to see enough of the system to operate it properly. Information technology staff and contractors now function in logistical support roles previously occupied by secretaries and file clerks. Assuming other appropriate security measures, that limited technical access in the course of supporting official business is materially and permissibly different from impermissible, unrestrained access to confidential substantive information stored in restricted sections of CCAP’s databases or other confidential court records.

1. May electronic data messages about arrest warrants issued in juvenile cases that are confidential pursuant to Wis. Stat. § 938.396(2) be transmitted through the warrant interface?

¶ 30. As your letter indicates, the Wisconsin Children’s Code and Juvenile Code restrict access to court records of children and juveniles who are the subject of Wis. Stat. chs. 48 and 938 proceedings. Wis. Stat. §§ 48.396(2) and 938.396(2). Court records of Wis. Stat. ch. 938 proceedings “shall not be open to inspection or their contents disclosed except by order of the court
assigned” or as allowed by designated exceptions. Wis. Stat. § 938.396(2). “Confidentiality is essential to the goal of rehabilitation, which is in turn the major purpose of the separate juvenile justice system.” State ex rel. Herget v. Circuit Court, 84 Wis. 2d 435, 451, 267 N.W.2d 309 (1978). See also Wis. Stat. § 938.01(2).

¶ 31. CCAP therefore provides electronic information about these cases in restricted areas accessible only by authorized persons. Attorneys and others who would qualify under statutory exceptions to access information about some of these cases, but not others, cannot be allowed access to these restricted areas under existing provisions of Wis. Stat. §§ 48.396(2) and 938.396(2). The problem is that allowing such access would not prevent browsing—even inadvertently—through comprehensible information about confidential cases that a particular CCAP user was not entitled to access.

¶ 32. Conversely, authorized WIJIS technical personnel would not have unfettered substantive access to data moving through the warrant and protection order interfaces. Any such access, as described above, would occur only when required to troubleshoot electronic data transmissions necessary to effectuate court orders and facilitate court operations. WIJIS personnel who might incidentally see juvenile case information while troubleshooting a related electronic data message would not be browsing for substantive information. They instead would be functioning in a limited contractor-like technical capacity, essentially as court personnel, no different from a file clerk who makes photocopies of confidential court orders for mailing to counsel. Any incidental contact with confidential case information while serving the court is far different from opening a juvenile case file to the general public, and would further—by bringing the warrant subject into juvenile court—rather than undermine the rehabilitative purposes of the juvenile justice system.

¶ 33. Substantive content limitations cannot be applied to prevent necessary personnel from executing court functions. Juvenile case confidentiality restrictions, for example, must give way to other statutory provisions authorizing counsel to access court records of his or her clients. State ex rel. S.M.O. v. Resheske, 110 Wis. 2d 447, 329 N.W.2d 275 (Ct. App. 1982) (despite limited access provisions of Wis. Stat. § 48.396(2), it cannot be seriously argued that an attorney should not have access to a client’s record in fashion not inconsistent with juvenile case confidentiality provisions).

¶ 34. Similarly, Wis. Stat. § 751.02 authorizes the supreme court to authorize employees it deems necessary for executing court system functions. See also In re Janitor of Supreme Court, 35 Wis. 410, 419 (1874) (“It is a power inherent in every court of record . . . to appoint such assistants; and the court itself is to judge of the necessity.”); SCR 70.01(2)(a) and (d), 70.04 (responsibility and authority of the Director of State Courts for personnel and court information systems). Necessary personnel sometimes will be vendors or independent contractors,

\[^{3}\text{In fact, Wis. Stat. } \S 48.981(7)(f) \text{ imposes strict criminal liability for unauthorized release of certain information related to information contained in reports and records made under Wis. Stat. } \S 48.981. \text{ State v. Polashek, 2002 WI 74, } \P 35, 253 \text{ Wis. 2d 527, 646 N.W.2d 330.}\]
analogous to WIJIS’ role with respect to the warrant and protection order interfaces. There is a difference between disclosing sealed or confidential records to the world at large, and disclosing them in an incidental, limited fashion to a professionally-interested and necessary person. Cf. State v. Gilmore, 201 Wis. 2d 820, 833, 549 N.W.2d 401 (1996). WIJIS technical personnel who might need to troubleshoot data transmissions along the warrant interface are professionally-interested persons necessary to sharing juvenile warrant information that effectuates operation of the juvenile courts.

¶ 35. The nature of any access by WIJIS technical personnel to juvenile warrant data transmissions travelling through the warrant interface therefore is qualitatively different from other impermissible access to confidential court records or information, such as allowing attorneys unrestricted access to CCAP areas containing confidential juvenile case information. In my opinion, this very limited access by WIJIS technical personnel would not violate Wis. Stat. § 938.396 confidentiality requirements.

2. May electronic data messages about adult arrest warrants be transmitted through the warrant interface if either the warrant or the case in which it was issued has been ordered sealed by the court?

¶ 36. The purpose of sealing an arrest warrant or a criminal case is to preserve secrecy and prevent disclosure to the public. Cf. State v. Doe, 2005 WI App 68, ¶ 11, 280 Wis. 2d 731, 697 N.W.2d 101. “[T]he more common meaning of disclosure involves making known or public that which has previously been held close or secret.” Gilmore, 201 Wis. 2d at 833; see also State v. Polashek, 2002 WI 74, ¶ 19, 253 Wis. 2d 527, 646 N.W.2d 330. An arrest warrant might be sealed, for example, to prevent flight by the named person or to avoid alerting confederates of the named person.

¶ 37. In my opinion, sending transient electronic data messages about an adult arrest warrant through the warrant interface does not constitute making known or public the content of those data messages. The vast majority of messages will pass through the WIJIS Workflow Engine unopened and unviewed. To the extent that a specific transmission problem might require WIJIS’ information technology personnel to examine a particular message in order to facilitate transmission of the message to its intended recipient, those information technology personnel are functioning only as professionally interested strangers with a very specific and limited role unrelated to substantive content of the message. Any incidental viewing of substantive content by WIJIS technical staff does not constitute making public the content of the electronic data message. The underlying purpose of sealing a particular warrant or case—to prevent disclosure to the public for an identifiable and significant reason—is not compromised by permitting WIJIS technical staff to troubleshoot transmission of the message. Access and disclosure restrictions imposed on WIJIS technical staff through a confidentiality agreement, as discussed in response to Question No. 7 below, would help insure that any WIJIS technical staff authorized to access messages flowing through the warrant
interface understand and follow appropriate procedural parameters for opening and reading messages moving through the interface.

3. May electronic data messages about an arrest warrant be transmitted through the warrant interface if the warrant was issued in John Doe proceedings that have been sealed pursuant to Wis. Stat. § 968.26?

¶ 38. Yes, for the same reasons explained above in answer to Question Nos. 1 and 2.

¶ 39. I also note that secrecy may be an important aspect of a John Doe proceeding, of assistance to the fact-finding process, because:

[i]t keeps information from a target who might consider fleeing; prevents a suspect from collecting perjured testimony for the trial; prevents those interested in thwarting the inquiry from tampering with testimony or secreting evidence; and renders witnesses more free in their disclosures.

State ex rel. Individual Subpoenaed v. Davis, 2005 WI 70, ¶ 20, 281 Wis. 2d 431, 697 N.W.2d 803 (footnote omitted). If a John Doe proceeding is secret, Wis. Stat. § 968.26 provides that “the record of the proceeding and the testimony taken shall not be open to inspection by anyone except the district attorney” unless and to the extent that it is used by the prosecution at preliminary examination or trial of the accused person. A proper secrecy order consequently covers questions asked, witnesses’ answers, transcripts, exhibits, and other matters observed or heard at a secret John Doe proceeding. Individual Subpoenaed, 281 Wis. 2d 431, ¶21.

¶ 40. In my opinion, the reasons for keeping John Doe proceedings secret would not be compromised by allowing electronic data messages regarding sealed arrest warrants or sealed John Doe cases to travel through the warrant interface. Access to confidential substantive content would be strictly limited, as discussed above, and could be reinforced through an appropriate confidentiality agreement. Any such access would not amount to opening the matter for public inspection and would not threaten creating the premature disclosure problems that a John Doe proceeding is sealed to prevent. Moreover, electronic data messages travelling through the warrant interface would not include the types of information properly covered by a secrecy order: questions asked, witnesses’ answers, transcripts, exhibits, and other matters observed or heard at a secret John Doe proceeding. The electronic data message instead would consist of a simple directive to arrest and produce a particular individual.

4. May electronic data messages be transmitted through the protection order interface regarding a child abuse protection order in an action in which the court has ordered, pursuant to Wis. Stat. § 813.122(3)(b)3., that access to any record of the action be available only to the parties, their attorneys, any guardian ad litem, court
personnel and any applicable appellate court? Similarly, may electronic data messages be transmitted through the protection order interface regarding an individual at risk protection order in an action in which the court has ordered, pursuant to Wis. Stat. § 813.123(3)(c)2., that access to any record of the case be available only to the individual at risk, parties, their attorneys, any guardian or guardian ad litem, court personnel and any applicable appellate court?

¶ 41. Yes, for the same reasons explained above in answer to Question Nos. 1 and 2. In this context, WIJIS technology staff function as an extension of the court personnel effectuating orders rendered by the court.

5. May electronic data messages be transmitted through the protection order interface regarding a domestic abuse protection order issued pursuant to Wis. Stat. § 813.12 in an action which the court has ordered sealed? May electronic data messages be transmitted through the protection order interface regarding a harassment protection order issued pursuant to Wis. Stat. § 813.125 in an action which the court has ordered sealed?

¶ 42. Yes, for the same reasons explained above in answer to Question Nos. 1, 2, and 4.

¶ 43. In addition, the domestic abuse protection order statute and the harassment protection order statute lack express provisions like Wis. Stat. §§ 813.122(3)(b)3. and 813.123(3)(c)2. that authorize a court to limit access to any record of the case. Both the domestic abuse protection order statute, in Wis. Stat. § 813.12(5m), and the harassment protection order statute, in Wis. Stat. § 813.125(5m) do provide that any petition or court order shall not disclose the address of the victim. Limiting the information contained in two specific documents does not amount to general sealing of the underlying action.

6. For criminal, John Doe, or protection order cases that are sealed or expunged after issuance of a warrant or protection order about which an electronic data message has been transmitted through the warrant interface, should the court system require that WIJIS seal or expunge the case on the WIJIS Workflow Engine?

¶ 44. Based on the technical information provided by Ms. Bousquet, Ms. Olson, and Mr. Sattin, it is my understanding that WIJIS will not retain any copy of a transient electronic data message passing through the warrant interface via the WIJIS Workflow Engine once delivery of the electronic data message has been verified. Therefore, nothing will remain at WIJIS to be sealed or expunged if a case is sealed or expunged after an arrest warrant is issued.

¶ 45. Furthermore, based on the same technical information, it is my understanding that correction of a previous electronic data message will be accomplished by sending another electronic data message to update the receiving agency’s database—not by replacing or erasing the first
message. Lack of any retained information at WIJIS accordingly distinguishes transfer of transient electronic information through the WIJIS Workflow Engine from CCAP's other data-sharing arrangements with justice partners who retain case information received from CCAP in the partners' own databases to be updated or expunged as subsequent events might dictate.

7. Should CCAP enter into written agreements with WIJIS governing access by WIJIS personnel to case information contained in electronic data messages transmitted through the warrant and protection order interfaces. If so, what kind of provisions should these agreements include?

¶46. Although not legally required, it would be a good business practice to execute written agreements with WIJIS clarifying and memorializing the limited purposes for which WIJIS personnel would be permitted to access case information in the electronic data messages transmitted through the warrant and protection order interfaces. Although the information that has been the primary subject of this opinion is confidential by law or court order, many other warrants and protection orders also implicate serious confidentiality concerns. Moreover, it is my understanding that the electronic data messages themselves would not indicate whether they involved a sealed warrant, sealed case, or other sealed matter. While a written agreement between CCAP and WIJIS regarding legally confidential or sealed information travelling through each interface would be beneficial, therefore, I also recommend that the access, use, and disclosure provisions of those agreements apply to all case information moving through the interfaces regardless of whether it derives from a sealed or otherwise legally confidential matter.

¶47. Provisions similar to the CCAP Data Access Policy dated April 23, 2008, tailored to the nature of the information to which WIJIS personnel will have access and the reasons why WIJIS personnel may need to open electronic data messages for troubleshooting purposes, would be appropriate. Any confidentiality agreement also should specify the WIJIS personnel, by job classification or similar identification, who will be permitted to open and examine electronic data messages moving through the interface; how supervisory oversight of those personnel will be accomplished; and the availability of sanctions or discipline for violation of applicable confidentiality policies.

¶48. I hope you find this information helpful as these beneficial new criminal justice interfaces are finalized.

Sincerely,

J.B. VAN HOLLEN
Attorney General

JBVH:MEB:ajw:lkw
Mr. Brian J. Desmond  
Corporation Counsel  
Oneida County  
Post Office Box 400  
Rhinelander, WI 54501-0400

Dear Mr. Desmond:

¶ 1. You advise that Oneida County has contracted with the North Central Wisconsin Regional Plan Commission to assist in developing a comprehensive plan for the county. You state that the county board has adopted a resolution that requires the county’s comprehensive plan to adopt and incorporate the comprehensive plans that have been adopted by the towns within the county.

BACKGROUND

¶ 2. You indicate that instead of adopting a comprehensive plan, three towns have sent a document entitled “Notice of Coordination” to the county. Each notice states that the town “has invoked its authority to coordinate with federal, state, and local governments, and agencies regarding planning to benefit the citizens within its jurisdiction.” A resolution adopted by each town cites various federal and state statutes, including Wis. Stat. §§ 1.13, 16.023(1)(c), 16.965, 16.967, and 560.04, as well as other legal authority. Each resolution then states that the town is “invoking ... [its] legal standing and authority to coordinate with, and insist on coordination by, all State and federal agencies and units of government claiming jurisdiction over lands and/or resources located within the jurisdiction of the [town ... pursuant to the federal and state acts recited above].” Each resolution concludes that “the land use plan adopted pursuant to this Resolution shall be a dynamic, continuously evolving plan requiring periodic review, assessment, and amendment in coordination with all agencies and units of federal and State government in relation to which the Town invokes coordination pursuant to this Resolution ... and the federal and state statutes recited herein.”

¶ 3. The resolutions adopted by these towns were apparently the product or result of a February 2, 2009, written solicitation, which states in part as follows:

You have indicated interest in the coordination method of land use planning as an alternative to creating a “comprehensive” plan as outlined in Wisconsin statute 66.1001.
After extensive study of the issues it has been determined that a coordination plan can be created that offers compliance with the goals of that statute with strong emphasis on Intergovernmental relations while maintaining local control.

A major component in adopting coordination is the ability to engage and control the creation, adoption, and implementation of your planning process. Under the existing federal and state statutes, after proper adoption, your municipality will have the on going [sic] authority to:

1. Require early notification (prior to public notice) to the local government of all actions or plans of the federal or state agencies that will affect local units of government, its [sic] economy, or environment.

2. Grant an opportunity for meaningful input by the local government, which means input that has substance and given [sic] weight and meaning by the agency.

3. Require agencies of all levels of government to be apprised of any local government policy or plan.

4. Those agencies/governments are required to consider the local government policy or plan when working on a municipal county, state, or federal policy or plan or management action.

5. And, most importantly, the agency or level of government is required to make all practicable effort to make their [sic] policy, plan, or action consistent with your local policy or plan.[1]

It is the "consistency" requirement that gives teeth to coordination. Other levels of government and their agencies cannot listen and then ignore the position of the local government. It [sic] must make every practicable effort to make its action, policy, or plan "consistent" with that of local government.

We will be using the consulting services of . . . [a] legal consultant to local governments which have adopted the process which he researched and developed [sic] the strategy.

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[1] When this opinion describes a power of "coordination" or obligations imposed by "coordination," I am referring to the assertion of these five powers described in this solicitation.
In order for us to consult in guiding you through the first three steps of the adoption and implementation of your resolution process the costs are a fee of $1500 plus mileage at the current government rate and any out of pocket expense. If you wish for us to consult on the additional steps, four through eight, we will be happy to provide service for any or all those steps at a rate of $50.00 per hour plus mileage and out of pocket expenses.

If you wish to proceed we have provided an Indemnification and Hold Harmless Agreement.

QUESTIONS PRESENTED AND BRIEF ANSWERS

¶ 4. You ask two questions with subparts, which I have renumbered and reworded as follows:

1. Does the use of the word “coordination” in various Wisconsin statutes dealing with municipal planning by itself impose affirmative duties upon certain municipalities that are in addition to any other affirmative obligations that are imposed under those statutes?

¶ 5. In my opinion, the answer is no. Towns have only those powers delegated by statute, and the Wisconsin municipal planning statutes do not contain a “coordination” power that would allow a town to ignore its own statutory obligations or impose non-statutory obligations on other municipalities or units of government. Other statutes cited in the coordination resolutions described in your correspondence do not give rise to a “coordination” power.

1(a). If the use of the word “coordination” in various municipal planning statutes can by itself result in the imposition of additional affirmative duties upon certain municipalities, does a town need to take some form of action in order to compel other municipalities to perform those additional duties, what are those additional duties, and are those additional duties similar to the duties imposed upon the Secretary of the Interior by the Federal Land Policy and Management Act of 1976 § 202, 43 U.S.C. § 1712(c)(9) (2006)?

¶ 6. Because of my answer to your first question, it is unnecessary for me to directly address this question.

1(b). If the use of the word “coordination” in municipal planning statutes can by itself result in the imposition of additional affirmative duties upon certain municipalities, which municipal duties must be coordinated with a town that has invoked its authority to compel other municipalities to perform such additional duties?
¶ 7. Because of my answer to your first question, it is unnecessary for me to address this question.

2. If “coordination” is a power that can be invoked by a municipality, can that power be used to create a “coordination plan” instead of a comprehensive plan for that town as specified in Wis. Stat. § 66.1001? If a “coordination” plan can be adopted, does a town lose or gain any particular privileges with a “coordination” plan?

¶ 8. Because “coordination” is not a power that can be invoked by a municipality, it is unnecessary to address this question.

ANALYSIS

¶ 9. While you ask multiple questions in your correspondence, all are contingent upon answering the specific concern you articulate in the introduction to your letter, which I have rephrased as follows:

1. Is “coordination” a legal doctrine that can be invoked by towns to impose on other governmental units additional obligations that are not required by the municipal planning statutes?

¶ 10. In my opinion, the answer is no.

¶ 11. “[T]owns have no home rule powers but only those powers specifically delegated to them by the legislature or necessarily implied therefrom[.]” Danielson v. City of Sun Prairie, 2000 WI App 227, ¶ 13, 239 Wis. 2d 178, 619 N.W.2d 108. It follows that for a town to invoke a “coordination” power, it must either appear in the statutes or be necessarily implied from the statutes.

¶ 12. The powers granted by the Legislature to towns are enumerated primarily in Wis. Stat. ch. 60. The word “coordination” does not appear in Wis. Stat. ch. 60. Moreover, Wisconsin’s municipal planning statutes do not use other terminology to require “coordination” as described in your correspondence.

¶ 13. The resolutions that the towns were persuaded to adopt make no reference to Wis. Stat. ch. 60. Those resolutions do cite the following state statutes relating to municipal planning that contain the word “coordination”: Wis. Stat. §§ 1.13, 16.023(1)(c), 16.965, 16.967,

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2Wisconsin Stat. 60.23(4)(c) does authorize a town industrial development agency, which is a nonprofit corporation, to “[c]oordinate its activities with the county planning commission, the department of commerce and private credit development organizations.”
and 560.04. An examination of these statutes, however, does not indicate a generally applicable "coordination" power that could be invoked by towns in the municipal planning context.

¶ 14. Wisconsin Stat. § 1.13 provides in part:

(2) Each state agency, where applicable and consistent with other laws, is encouraged to design its programs, policies, infrastructure and investments of the agency to reflect a balance between the mission of the agency and following local, comprehensive planning goals:

......

(g) Encouragement of coordination and cooperation among nearby units of government.

......

(3) Consistently with other laws, each state agency, whenever it administers a law under which a local governmental unit prepares a plan, is encouraged to design its planning requirements in a manner that makes it practical for local governmental units to incorporate these plans into local comprehensive plans prepared under s. 66.1001.

Wisconsin Stat. § 1.13(2) and (3), which apply to state agencies and not to local units of government, use the words "encouraged" and "encouragement." The statutory term "encourage" does not have a technical meaning. State ex rel. Wisconsin Dev. Authority v. Dammann, 228 Wis. 147, 190, 277 N.W. 278, 280 N.W. 698 (1938). The word "encourage" means "1...b: to attempt to persuade: URGE <they encouraged him to go back to school>.

http://www.merriam-webster.com/dictionary/encourage. This is far different from the meaning of "coordination" as described in your correspondence or the common definition of the term. The transitive verb "coordinate" means "2: to bring into a common action, movement, or condition: HARMONIZE <we need to coordinate our schedules>.

http://www.merriam-webster.com/dictionary/coordinate. The intransitive verb "coordinate" means "1: to be or become coordinate especially so as to act together in a smooth concerted way."


¶ 15. "If the statute is merely a guide for the conduct of business and for orderly procedure rather than a limitation of power, it will be construed as directory." 1A Singer, Sutherland Statutory Construction § 25:3 (6th ed. 2002) (footnote omitted). By their very nature, words such as "encouraged" and "encouragement" are directory. See Cross v. Soderbeck, 94 Wis. 2d 331, 340-41, 288 N.W.2d 779 (1980); Manninen v. Liss, 265 Wis. 355, 357, 61 N.W.2d 336 (1953). See also Mews v. Department of Commerce, 2004 WI App 24, ¶ 17-24, 269 Wis. 2d 641,
676 N.W.2d 160 (Even though Wis. Stat. § 101.143(2m), entitled “INTERDEPARTMENTAL COORDINATION,” stated that an interdepartmental meeting was to occur under specified circumstances, that portion of the statute was directory). Because Wis. Stat. § 1.13(2) and (3) are directory provisions, they accord no substantive rights to towns.

¶ 16. Wisconsin Stat. § 16.023(1)(c) provides that the Wisconsin Land Council (“Council”) shall “[s]tudy areas of cooperation and coordination in the state’s land use statutes and recommend to the governor legislation to harmonize these statutes to further the state’s land use goals.” The Council is a state agency. Wis. Stat. § 15.107(16). Wisconsin Stat. § 16.023(1)(c) directs the Council to study certain items so that it can recommend legislation. Any “areas of cooperation and coordination” studied or identified by the Council pursuant to Wis. Stat. § 16.023(1)(c) must subsequently be adopted as legislation in order to be accorded the force of law. Wisconsin Stat. § 16.023(1)(c) accords no rights to towns or other local units of government.

¶ 17. Wisconsin Stat. § 16.965(4) provides in part:

In determining whether to approve a proposed grant, preference shall be accorded [by the department of administration] to applications of local governmental units that contain all of the following elements:

....

(b) Planning efforts that contain a specific description of the means by which all of the following local, comprehensive planning goals will be achieved:

....

7. Encouragement of coordination and cooperation among nearby units of government.

Wisconsin Stat. § 16.965(4) contains certain criteria to be applied by the Department of Administration (“DOA”) in awarding grants to local units of government. Wisconsin Stat. § 16.965(4) has no application to towns or other local units of government in any area other than the award of certain grants by DOA.

¶ 18. Wisconsin Stat. § 16.967 provides in part:

(3) DUTIES OF DEPARTMENT. The department [of administration] shall direct and supervise the land information program and serve as the state clearinghouse for access to land information....
(8) ADVICE; COOPERATION. In carrying out its duties under this section, the department may seek advice and assistance from the board of regents of the University of Wisconsin System and other agencies, local governmental units, and other experts involved in collecting and managing land information. Agencies shall cooperate with the department in the coordination of land information collection.

The first sentence of Wis. Stat. § 16.967(8) authorizes DOA to “seek advice and assistance from . . . agencies, [or] local governmental units” if DOA chooses to do so. The second sentence of Wis. Stat. § 16.967(8) requires “[a]gencies . . .” to “cooperate” with DOA “in the coordination of land information collection.” The “[a]gencies . . .” referred to in the second sentence of Wis. Stat. § 16.967(8) are state agencies. See Wis. Stat. § 16.967(1)(a), which cross references the definition of “agency” contained in Wis. Stat. § 16.70(1)(e). Although the first sentence of Wis. Stat. § 16.967(8) does permit DOA to seek advice and assistance from town governments, there is no language in Wis. Stat. § 16.967(8) that accords any rights or authority to towns or other local units of government.

¶19. Wisconsin Stat. § 560.04 provides in part:

Community development. (1) PURPOSE. The legislature determines that a pattern of state-local relations shall be established that will facilitate closer coordination and cooperation between state and local governments. The department [of commerce] shall recommend methods for achieving such closer coordination and cooperation in order to meet citizen needs, provide a balanced economy and facilitate economic and community development.

Wisconsin Stat. § 560.04(1) is a statement of legislative purpose. The first sentence of Wis. Stat. § 560.04(1) explains that the Legislature’s goal is to establish “a pattern of state-local relations . . . that will facilitate closer coordination and cooperation between state and local governments.” The second sentence of Wis. Stat. § 560.04(1) describes the first step in achieving that goal: the issuance of recommendations by the Department of Commerce (“Commerce”). The only obligation imposed upon Commerce by the second sentence of Wis. Stat. § 560.04(1) is to make recommendations that do not have the force of law. The obligation to make those recommendations falls solely upon Commerce. The statement of legislative purpose in Wis. Stat. § 560.04(1) therefore accords no legal rights to towns or other local units of government.

¶20. Statutory interpretation “begins with the language of the statute.” State ex rel. Kalal v. Circuit Court, 2004 WI 58, ¶ 45, 271 Wis. 2d 633, 681 N.W.2d 110 (citation omitted). Statutory language must be construed 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.
Kalal, 271 Wis. 2d 633, ¶ 46. The extent to which the word “coordination” imposes an affirmative obligation upon a particular unit of government can only be determined by examining the specific language contained in the statute involved. As I have explained, municipal planning statutes such as Wis. Stat. §§ 1.13, 16.023(1)(c), 16.965, 16.967, and 560.04 do not accord any local municipalities any right to compel other units of government to act in a particular way.

¶ 21. Nor is the power of “coordination” necessarily implied from any of the statutes governing municipal planning. With respect to comprehensive planning, which appears to be the primary area of concern motivating the adoption of these resolutions, municipalities may develop and adopt comprehensive plans required by law by simply following the statutory requirements of Wis. Stat. § 66.1001. Exercise of a “coordination” power is not necessary for covered governmental units to accomplish the statute’s directives.

¶ 22. In sum, Wisconsin statutes do not grant towns a “coordination” power that would compel other municipalities (much less the state or its agencies or officers) to coordinate their municipal planning activities with the municipal planning activities of towns.

¶ 23. This is not to say that towns are without a role to play in comprehensive planning or with the more specific elements of zoning. For example, with respect to comprehensive planning, public notice and participation provisions are specifically addressed in statute. Wis. Stat. § 66.1001(4). A town must follow those provisions and follow public participation procedures when adopting or amending a town’s comprehensive plan and presumably may participate in another governmental unit’s public participation proceedings when the other governmental unit is adopting or amending its plan. Towns located within another governmental body’s boundaries (for example, a county) are to be provided a copy with the other governmental body’s comprehensive plan. Wis. Stat. § 66.1001(4)(b)1. Towns may have a role to play with respect to the creation of regional planning commissions. Wis. Stat. § 66.0309(2). With respect to zoning ordinances, county ordinances are not effective in a town until the town board approves the ordinance. Wis. Stat. § 59.69(4). More generally with respect to coordinating governmental activities, towns may “cooperate” with other municipalities by entering into voluntary intergovernmental agreements to furnish or receive services, or jointly exercise any power or duty required or authorized by law, subject to specific statutory exceptions or limitations. Wis. Stat. § 60.23(1).

¶ 24. But these statutory duties and rights, which relate to governments working together or having overlapping responsibilities, are far different in nature than the “coordination” power described in your correspondence. They have one other critical difference: they are contained in Wisconsin statutes.
CONCLUSION

¶ 25. I therefore conclude that the use of the word “coordination” in various Wisconsin statutes dealing with municipal planning does not by itself authorize towns to invoke a power of “coordination” that would impose affirmative duties upon certain municipalities that are in addition to any other obligations that are imposed under those statutes. With respect to the development of and amendment of comprehensive plans, Wis. Stat. § 66.1001 is to be followed by the local governmental units and political subdivisions identified in that section.

Sincerely,

J.B. VAN HOLLEN
Attorney General

JBVH:FTC:KMS:cla
Dear Mr. Stowe:

§ 1. You request a legal opinion as to whether the corporation counsel has discretion to refuse to commence an involuntary civil commitment proceeding under Wis. Stat. § 51.20(1) after receiving signed statements under oath from three adults that meet the requirements of that statute. To the extent that such discretion exists, you ask whether its exercise is subject to legal challenge.

§ 2. It is my opinion that a corporation counsel has discretion to refuse to file a petition for examination after receiving signed statements under oath that meet the requirements contained in Wis. Stat. § 51.20(1) if the corporation counsel determines that it is not in the interests of the public to file the petition. A good faith discretionary determination on the part of the corporation counsel that the filing of a petition for examination would not be in the interests of the public is not susceptible to challenge in a mandamus action.

ANALYSIS

§ 3. Wisconsin Stat. § 51.20 governs the procedures to involuntary commit individuals for treatment. Court proceedings are initiated when a petition for examination is filed. Wis. Stat. § 51.20(2). Except as otherwise noted in the statutory language, Wis. Stat. § 51.20(1)(a) sets forth the grounds that must be alleged in a petition; Wis. Stat. § 51.20(1)(b) requires that each petition be “signed by 3 adult persons, at least one of whom has personal knowledge of the conduct of the subject individual”; and Wis. Stat. § 51.20(1)(c) sets forth other pleading requirements. Wisconsin Stat. § 51.20(1)(c) also authorizes the petition to be filed in the court assigned to exercise probate jurisdiction for the county in which individual is present or resides. If the judge or circuit court commissioner who handles probate matters is unavailable, Wis. Stat. § 51.20(c) allows the petition to be filed with a judge or court commissioner of any circuit court for the county.

§ 4. While Wis. Stat. § 51.20(1) provides significant detail about what is to be contained in a petition for examination and Wis. Stat. § 51.20(2) makes clear court proceedings for an
involuntary commitment are initiated with the filing of a petition, the statutes do not expressly state who is to file the petition. Statutory context, enhanced by court decisions, provides the answer.

¶ 5. Wisconsin Stat. § 51.20(4), which defines the role of corporation counsel in involuntary commitment proceedings, states:

(4) PUBLIC REPRESENTATION. Except as provided in ss. 51.42(3)(ar)1. and 51.437(4m)(f), the corporation counsel shall represent the interests of the public in the conduct of all proceedings under this chapter, including the drafting of all necessary papers related to the action.

In In Matter of D.S., 142 Wis. 2d 129, 136-37, 416 N.W.2d 292 (1987), the Wisconsin Supreme Court interpreted this language, under a prior version of the statute, to mean only those officials designated in Wis. Stat. § 51.20(4)—today, only corporation counsel—are authorized to prepare the initial petition to commence court proceedings.¹

¶ 6. Your principal concern appears to be whether the corporation counsel must file a petition for examination after receiving statements under oath from three persons that meet the formal or literal requirements contained in Wis. Stat. § 51.20(1)(a)1. and 2. While the corporation counsel’s discretion in involuntary civil commitment proceedings was extensively discussed in 79 Op. Att’y Gen. 129 (1990), that opinion did not specifically determine whether the corporation counsel has discretion to refuse to file a petition for examination. See 79 Op. Att’y Gen. at 132-33. The answer to this question turns on a proper interpretation of Wis. Stat. § 51.20(4), which is quoted above.


¹Though the Matter of D.S. Court did not expressly analyze whether Wis. Stat. § 51.20(1)(b) authorized three adult persons to file an involuntary commitment petition independent of the corporation counsel, the Court’s opinion appears to reject any such interpretation. The Court stated that Wis. Stat. § 51.20(4) “require[s] the district attorney or corporation counsel to prepare involuntary commitment papers” and used its superintending authority to instruct circuit judges to “refuse to accept petitions drafted by persons not authorized to do so under sec. 51.20(4), Stats.” Matter of D.S., 142 Wis. 2d at 132, 136-37. Subsequent to Matter of D.S., Wis. Stat. § 51.20(4) was amended into its current form by 1989 Wisconsin Act 31, sec. 1575. The Act retained the statutory structure considered by the Court in Matter of D.S., but it eliminated the prior statutory designation of the district attorney as an officer (in addition to the corporation counsel) who had a duty to represent the public and draft papers in chapter 51 proceedings.
court] is to be distinguished from prosecution of a petition"). Second, Wis. Stat. § 51.20(4) requires corporation counsel to draft “all necessary papers related to the action.” Notably, Wis. Stat. § 51.20(4) does not direct corporation counsel to initiate an involuntary commitment action.

¶ 8. The filing of a petition for examination commences proceedings and is thus part of the proceedings. The corporation counsel therefore must make an initial determination whether it is in the interests of the public that a petition for examination be filed. If the corporation counsel determines that it is in the interests of the public that a petition be filed, then the corporation counsel should proceed to do so even if there is a probability that the court will ultimately dismiss the petition at the conclusion of the proceedings pursuant to Wis. Stat. § 51.20(13)(a)1. See 79 Op. Att’y Gen. at 130 (quoting 25 Op. Att’y Gen. 549, 553 (1936)).

¶ 9. Even after receiving the statutorily-required three statements under oath, there may be situations in which the corporation counsel determines that it is not in the interests of the public to file a petition for examination. For example, the corporation counsel may conclude that one or more of the affiants is not truthful or reliable or lacks sufficient understanding of the facts or the law. The corporation counsel may conclude that the quantum of factual information presented is insufficient to warrant the commencement of an involuntary commitment proceeding. The corporation counsel may determine that it is essential to present expert testimony and discover that such testimony cannot be obtained. The corporation counsel may conclude for various reasons that it would not be a productive use of the time of the court, the corporation counsel, county staff, and potential witnesses to commence and conduct an involuntary civil commitment proceeding. Because there is no statutory language expressly mandating that the corporation counsel file a petition for examination under any specified set of circumstances, it is my opinion that the corporation counsel has discretion to refuse to file a petition for examination if the corporation counsel determines that it is not in the interests of the public to do so.


[I]t is of public interest that all the facts in the case be presented and considered by someone who is not prejudiced. If the district attorney, after investigation into the matter, believes that it would be error to find the individual insane, he should present these facts to the court. On the other hand, if he believes from the facts that commitment of the individual is better for the general public it is his duty to so inform the court.

This quotation does not mean that corporation counsel lack discretion to refuse to file a petition for examination. In 25 Op. Att’y Gen. 549, my predecessor was addressing the various powers of district attorneys. When the opinion was issued, involuntary civil commitment proceedings could be commenced by persons other than the district attorney. See Wis. Stat. § 51.01 (1935);
25 Op. Att’y Gen. 614 (1936). It also apparently was the practice of the courts at that time to request the assistance of the district attorney in certain involuntary civil commitment proceedings. See 68 Op. Att’y Gen. 97, 98 (1979) (noting subsequent statutory codification of that practice: “The duties are similar to those required under former sec. 51.02(3), Stats., which in 1968 provided that '[i]f requested by the judge, the district attorney shall assist in conducting proceedings under this chapter.’”). The conclusion reached in 25 Op. Att’y Gen. at 553 was that “it is the duty of the district attorney, upon request of the county court, to appear at hearings for the determination of insanity, sec. 51.02.” Although 25 Op. Att’y Gen. at 553 goes on to state that “it is of public interest that all the facts in the case be presented and considered by someone who is not prejudiced,” that statement appears to refer to involuntary civil commitment proceedings that have already been commenced. The opinion did not address or analyze the district attorney’s discretionary authority to decline to commence an involuntary civil commitment proceeding. That opinion thus does not upset my opinion that under the current statutory scheme, corporation counsel does possess discretion to decline to commence an involuntary commitment proceeding.

¶ 11. You also ask whether the exercise of the corporation counsel’s discretionary authority to decline to file a petition for examination is subject to legal challenge. You are particularly concerned about mandamus actions attempting to compel the corporation counsel to commence an involuntary civil commitment proceeding. The requirements for obtaining a writ of mandamus were enumerated in State ex rel. Greer v. Stahowiak, 2005 WI App 219, ¶ 6, 287 Wis. 2d 795, 706 N.W.2d 161:

Mandamus is an extraordinary writ that may be used to compel a public officer to perform a duty that he or she is legally bound to perform. See Karow v. Milwaukee County Civil Serv. Comm’n, 82 Wis. 2d 565, 568 n.2, 263 N.W.2d 214 (1978). In order for a writ of mandamus to be issued, there must be a clear legal right, a positive and plain duty, substantial damages, and no other adequate remedy at law. Pasko v. City of Milwaukee, 2002 WI 33, ¶ 24, 252 Wis. 2d 1, 643 N.W.2d 72.

¶ 13. Kurkierewicz was a mandamus action attempting to compel the district attorney to order the coroner to hold an inquest. Describing the powers of the district attorney in great detail, the court held:

It is clear that in his functions as a prosecutor he has great discretion in determining whether or not to prosecute. There is no obligation or duty upon a district attorney to prosecute all complaints that may be filed with him. While it is his duty to prosecute criminals, it is obvious that a great portion of the power of the state has been placed in his hands for him to use in the furtherance of justice, and this does not per se require prosecution in all cases where there appears to be a violation of the law no matter how trivial. . . .

The district attorney's function, in general, is of a discretionary type, the performance of which is not compellable in mandamus.

Kurkierewicz, 42 Wis. 2d at 378.

¶ 14. The discretionary authority of the corporation counsel in involuntary civil commitment proceedings is similar to the discretionary authority of the district attorney in criminal matters. See 79 Op. Att'y Gen. at 132-33. Although the corporation counsel plainly has a duty to make a good faith discretionary determination as to whether the filing of a petition for examination would be in the interests of the public, that duty requires the exercise of legal judgment. Consequently, the exercise of that duty is not susceptible to challenge in a mandamus action.

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2Unlike district attorneys, who are elected, corporation counsel are employed by, and subject to the supervision and control of, the county board or other authorized authority. See, e.g., Wis. Stat. § 59.42(1); see also 79 Op. Att'y Gen. at 131 (county board must supervise “policy-making functions” of corporation counsel). My opinion is only intended to address the corporation counsel’s discretion, vis-à-vis, the public, and is not intended to address any issues relating to supervision or control over corporation counsel by other authorities.
CONCLUSION

¶15. I therefore conclude that the corporation counsel has discretion to refuse to commence an involuntary civil commitment proceeding by filing a petition for examination under Wis. Stat. § 51.20(1) after receiving signed statements under oath from three adults that meet the requirements of that statute. A good faith discretionary determination on the part of the corporation counsel that the filing of a petition for examination would not be in the interests of the public is not susceptible to challenge in a mandamus action.

Sincerely,

J.B. VAN HOLLEN
Attorney General

JBVH:KMS:cla
August 9, 2010

Mr. Kevin J. Kennedy
Director and General Counsel
Government Accountability Board
212 East Washington Avenue, 3rd Fl.
Madison, WI 53703

Dear Mr. Kennedy:

Questions Presented

¶1. In light of the recent United States Supreme Court decision in *Citizens United v. FEC*, ___ U.S. ___, 130 S. Ct. 876 (2010), and on behalf of the Government Accountability Board, you have requested my opinion concerning the enforceability of Wis. Stat. ch. 11 generally, and the constitutionality of Wis. Stat. § 11.38(1)(a)1., specifically. In *Citizens United*, the United States Supreme Court invalidated a federal ban on corporate independent expenditures under the First Amendment to the United States Constitution.

Short Answer

¶2. Having carefully reviewed the *Citizens United* decision and having compared the federal statute at issue in that case with Wis. Stat. § 11.38(1)(a)1., it is my opinion that the reasoning and conclusion of *Citizens United* are clearly applicable and that any ban on corporate independent expenditures under Wisconsin law violates the guarantees of freedom of speech and association under the First Amendment to the United States Constitution, as made applicable to the states by the Fourteenth Amendment. The *Citizens United* decision, however, does not appear to have any direct and immediate impact on the validity of those portions of Wis. Stat. § 11.38 which do not involve corporate independent expenditures. In addition, I conclude that no other statutory provision bars corporate independent expenditures because corporations are not prevented by statute from registering and reporting information required by Wis. Stat. ch. 11. Finally, I conclude *Citizens United* does not directly invalidate Wisconsin’s registration, reporting, and disclaimer requirements.

The Role Of Attorney General Opinions In Addressing Constitutional Issues

¶3. In 65 Op. Att’y Gen. 145 (1976), this office was asked to determine the extent to which provisions of Wis. Stat. ch. 11 had been invalidated by *Buckley v. Valeo*, 424 U.S. 1 (1976), in which the U.S. Supreme Court had held that certain provisions of the Federal Election
Campaign Act were unconstitutional. My predecessor concluded that, although most of Wis. Stat. ch. 11 was unaffected, some portions of that chapter—in particular, the limits on candidate expenditures—were unconstitutional under the *Buckley* decision, while other provisions required a narrow interpretation in order to avoid unconstitutionality. 65 Op. Att’y Gen. at 146.

¶4. In issuing that 1976 opinion, this office considered the alternative of awaiting (or even commencing) court litigation to specifically test the constitutionality of the various provisions in Wis. Stat. ch. 11 that had been thrown into doubt by *Buckley*. My predecessor rejected that option as unduly time-consuming, costly, and burdensome—both for persons subject to the state laws in question and for those charged with enforcing those laws. *Id.* at 146-47. I agree with my predecessor that where, as here, a decision of the U.S. Supreme Court directly impacts the validity of a state law, an opinion from this office on the scope of that impact is appropriate. *See also* 67 Op. Att’y Gen. 211 (1978) (concluding Wis. Stat. § 11.38 ban on corporate spending on referendum questions is unconstitutional in light of *First Nat. Bank of Boston v. Bellotti*, 435 U.S. 765 (1978)); OAG 4-07 (concluding Wis. Stat. § 118.51(7)(a) prohibition on school transfers that would increase racial imbalance is unconstitutional in light of *Parents Inv. in Comm. Sch. v. Seattle School*, 551 U.S. 701 (2007)).

¶5. In addressing the constitutional validity of the state campaign financing law in light of *Citizens United*, I apply the standard used in my predecessor’s prior opinion, which focused on whether “the reasoning and the conclusions reached” in the Supreme Court decision “are clearly applicable” to state law. 67 Op. Att’y Gen. at 214. This standard is demanding and narrow. In addition to its holding, *Citizens United* provides direction on, but ultimately leaves unanswered, significant questions regarding the appropriate scope of acceptable governmental regulation, through campaign financing regulations, of the exercise of fundamental First Amendment freedoms. It is beyond the scope of this opinion to answer each of these unanswered questions as applied to Wisconsin law. That *Citizens United* may not directly apply to portions of Wisconsin’s campaign financing law is not to say that they are free of constitutional doubt. Regulations in this area, by their nature, affect First Amendment interests. *See Buckley*, 424 U.S. at 23 ("[C]ontribution and expenditure limitations both implicate fundamental First Amendment interests"). In a free society, these interests should not be disregarded in the lawmaking and regulatory process.

The Impact of *Citizens United* on Wis. Stat. § 11.38

¶6. The *Citizens United* case involved a non-profit corporation that had produced and sought to distribute a 90-minute film about then-Senator Hillary Clinton at a time when she was a candidate in the Democratic Party’s 2008 Presidential primary elections. *Citizens United*, 130 S. Ct. at 887. A question arose as to whether the corporation’s plan to distribute the film through a video-on-demand system was prohibited by 2 U.S.C. § 441b which, among other things, made it unlawful for any corporation to make expenditures: (1) for communications expressly advocating the election or defeat of a candidate for federal office; or (2) for “electioneering communications,” defined as “‘any broadcast, cable, or satellite communication’ that ‘refers to a clearly identified candidate for Federal office’ and is made within 30 days of a
primary or 60 days of a general election." *Citizens United*, 130 S. Ct. at 887 (quoting 2 U.S.C. § 434(f)(3)(A)). The corporation sought declaratory and injunctive relief against the Federal Election Commission on that question. *Id.* at 888.


1 The *Citizens United* Court determined that the film was the functional equivalent of express advocacy and that the case, therefore, could not be resolved without examining the constitutionality of the prohibitions on corporate expenditures contained in 2 U.S.C. § 441b. *Citizens United*, 130 S. Ct. at 890-92.

¶8. The United States Supreme Court determined that the federal prohibition on corporate independent expenditures was a ban on core political speech protected by the First Amendment and, as such, subject to strict constitutional scrutiny. *Id.* at 898. The Court then considered and rejected each of the various governmental interests that had been offered in support of the ban, concluding that no sufficient interest justified the prohibition of political speech on the basis of the speaker's corporate identity. *Id.* at 913. Accordingly the Court held that the restrictions on corporate independent expenditures in 2 U.S.C. § 441b were invalid and could not be applied to the film in question. *Citizens United*, 130 S. Ct. at 913.

¶9. You have asked what impact the *Citizens United* holding has on the validity of Wis. Stat. § 11.38(1)(a)1. which provides:

No foreign or domestic corporation, or association organized under ch. 185 or 193, may make any contribution or disbursement, directly or indirectly, either independently or through any political party, committee, group, candidate or individual for any purpose other than to promote or defeat a referendum.

¶10. That provision, on its face, sets forth a general prohibition against any independent "disbursement" by a foreign corporation, a domestic corporation (normally organized as a business corporation under Wis. Stat. ch. 180 or as a nonstock corporation under Wis. Stat. ch. 181), or an association organized as a cooperative under Wis. Stat. ch. 185 or 193. The term "disbursement" in turn, has been given a broad statutory definition that includes:

A purchase, payment, distribution, loan, advance, deposit, or gift of money or anything of value, except a loan of money by a commercial lending institution made by the institution in accordance with applicable laws and regulations in the

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1 In *Wisconsin Right to Life*, it was undisputed that a corporation's advertisements, which clearly identified a candidate and were targeted to the relevant electorate during the pertinent time period, were within the scope of a federal statutory ban on certain electioneering communications. *Wisconsin Right to Life*, 551 U.S. at 464. The controlling opinion of the Court held that the First Amendment did not allow the ads to be banned because the ads were not "express advocacy" or its functional equivalent and the government had not identified any interest sufficiently compelling to justify burdening that speech. *Wisconsin Right to Life*, 551 U.S. at 481.
ordinary course of business, made for political purposes. In this subdivision, "anything of value" means a thing of merchantable value.

Wis. Stat. § 11.01(7)(a)1. In addition, the phrase "for political purposes," is statutorily defined, in part, as follows:

An act is for "political purposes" when it is done for the purpose of influencing the election or nomination for election of any individual to state or local office, for the purpose of influencing the recall from or retention in office of an individual holding a state or local office, for the purpose of payment of expenses incurred as a result of a recount at an election, or for the purpose of influencing a particular vote at a referendum.

Wis. Stat. § 11.01(16).

¶11. Under the above definitions, it is clear that Wis. Stat. § 11.38(1)(a)1., prohibits, among other things, any monetary expenditure by a corporation that is made for the purpose of influencing the election or nomination of a candidate for state or local office.

¶12. Wisconsin’s prohibition on corporate expenditures for political purposes thus appears to be closely analogous, in legally material respects, to the federal prohibition on corporate independent expenditures that was invalidated in Citizens United. First, the two provisions are substantively similar in the types of speech to which they apply. The Wisconsin law prohibits corporate expenditures for the purpose of influencing the election or nomination of a political candidate, while the federal law prohibited corporate expenditures for communications expressly advocating the election or defeat of a political candidate or for certain communications that refer to a clearly identified candidate and are made within specified time periods. Any differences in the substantive scope of the two prohibitions are not of a sort that would shield the Wisconsin law from the impact of Citizens United.

¶13. Second, the Wisconsin and federal provisions both share the particular feature that was found to be constitutionally objectionable in Citizens United. The Citizens United Court expressly and strongly reaffirmed its holding in many earlier cases that corporate speech is protected by the First Amendment. Citizens United, 130 S. Ct. at 899-900. The Court derived that holding from the general principle that the First Amendment prohibits “restrictions distinguishing among different speakers, allowing speech by some but not others.” Id. at 898. The Court was clear that government may not take the right to speak away from some speakers and give it to others, thereby depriving the public of the opportunity to determine for itself which speakers and which speech are worthy of consideration. Id. at 899. This principle, the Court reasoned, applies not only to individual speakers, but also to associations of individuals, including corporations. Id. at 899-900.

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²This office has also in the past found the prohibition on corporate disbursements under Wis. Stat. § 11.38 to be similar to the prohibition on corporate expenditures under 18 U.S.C. § 610 (which was the predecessor version of 2 U.S.C. § 441b). See 65 Op. Att’y Gen. 10, 12 n.5 and 13 (1976); 65 Op. Att’y Gen. at 158.
¶14. From these principles, the Court reached the broad conclusion that "the Government may not suppress political speech on the basis of the speaker's corporate identity." Id. at 913. What the Supreme Court found to be constitutionally objectionable in 2 U.S.C. § 441b was the fact that it purported to prohibit political speech by certain speakers based on their corporate identity. Applying the Court's reasoning here, it is clear that Wis. Stat. § 11.38(1)(a)1., similarly prohibits political speech based on the corporate identity of the speaker. The Wisconsin prohibition is thus squarely within the scope of the holding in Citizens United.

¶15. This conclusion is consistent with the previous opinion of this office in 67 Op. Att'y Gen. 211. At that time, Wis. Stat. § 11.38(1)(a)1., included a prohibition on corporate spending in referendum elections. My predecessor found that prohibition to be unconstitutional under First Nat. Bank of Boston v. Bellotti, 435 U.S. 765 (1978), in which the U.S. Supreme Court had held that a Massachusetts law limiting corporate expenditures aimed at influencing referendum votes violated the First and Fourteenth Amendments to the United States Constitution. In reaching that conclusion, my predecessor found that Wis. Stat. § 11.38 was similar to the Massachusetts law at issue in Bellotti which, among other things, broadly prohibited corporations from making expenditures for the purpose of promoting or preventing the election of a candidate or influencing the vote on a question submitted to the electorate. 67 Op. Att'y Gen. at 212-13. Accordingly, my predecessor concluded that the reasoning and conclusions in Bellotti with regard to the Massachusetts prohibition were "clearly applicable" to the comparable prohibition in Wis. Stat. § 11.38(1)(a)1.

¶16. In Citizens United, the United States Supreme Court extended the reasoning and conclusions of Bellotti to broadly invalidate prohibitions on any independent political expenditures by corporations. See, e.g., Citizens United, 130 S. Ct. at 898-900, 902-03, 913. It follows, under the same logic that this office applied in 67 Op. Att'y Gen. 211, that the reasoning and conclusions in Citizens United are likewise clearly applicable to the general prohibition on corporate independent expenditures in Wis. Stat. § 11.38(1)(a)1.

¶17. It does not follow, however, that Citizens United has invalidated Wis. Stat. § 11.38(1)(a)1., in its entirety. On the contrary, the federal law at issue in Citizens United, like the state law at issue here, included a ban on corporate political contributions, in addition to the ban on corporate political expenditures. See 2 U.S.C. § 441b(a). The Supreme Court, however, did not strike down, or even question, the ban to the extent it applied to direct contributions. Rather, the Court emphasized that the Citizens United case was about expenditures, not about contributions, and made it clear that it was not disturbing the principle, recognized in Buckley, that political expenditures receive greater protection under the First Amendment than do political contributions. See Citizens United, 130 S. Ct. at 908-10. Ultimately, the Court invalidated the prohibition on corporate independent expenditures without affecting other aspects of 2 U.S.C. § 441b. Citizens United thus provides no direct or immediate basis for questioning the validity of any part of Wis. Stat. § 11.38(1)(a)1., other than the corporate expenditure prohibition.

¶18. Principles of severability support the same conclusion. Under Wisconsin law, statutory provisions are presumed to be severable and, if a particular provision is found to be
invalid, "such invalidity shall not affect other provisions or applications which can be given effect without the invalid provision or application." Wis. Stat. § 990.001(11). In applying that mandate, the Wisconsin Supreme Court has held that an invalid provision must be severed unless doing so "would produce a result inconsistent with the manifest intent of the legislature." *Burlington Northern v. Superior*, 131 Wis. 2d 564, 580, 388 N.W.2d 916 (1986) (quoting Wis. Stat. § 990.001). This office has, in the past, taken the position that the legislative purpose of the contribution restrictions in Wis. Stat. ch. 11 "is largely capable of being achieved by the contribution limits alone, without concurrent expenditure limits." 65 Op. Att’y Gen. 237, 241, (1976). I find no reason to depart from that view. Accordingly, it is my opinion that it would be consistent with legislative intent to invalidate Wis. Stat. § 11.38(1)(a)1. only to the extent it prohibits corporate political expenditures, without affecting the contribution restrictions also contained in that provision. Any prohibition on corporate independent expenditures is thus severable from the remainder of Wis. Stat. § 11.38(1)(a)1.

¶19. Your letter of inquiry suggests that the corporate expenditure prohibition in Wis. Stat. § 11.38(1)(a)1., can be severed from the remainder of that provision by the simple expedient of interpreting and applying the provision as if the terms "or disbursement" and "independently" had been stricken from it. I respectfully disagree with that suggestion. The practical impact of Wis. Stat. § 11.38(1)(a)1., is determined not only by the specific words of that provision, but also by the way in which those words interact with other, related statutory provisions.

¶20. For example, the definition of "contribution" in Wis. Stat. § 11.01(6) includes a gift, subscription, loan, advance, or deposit of money or anything of value made for the purpose of influencing the election or nomination of a political candidate, without reference to the identity of the recipient of the gift, subscription, loan, advance, or deposit of money or thing of value. Under the federal provisions at issue in *Citizens United*, however, an "expenditure" includes a purchase, payment, distribution, loan, advance, deposit, or gift of money or anything of value made for the purpose of influencing an election. See 2 U.S.C. §§ 431(9)(A)(i) and 441b(2). Under these overlapping state and federal definitions, it is possible that a corporation could make a gift, loan, advance or deposit of money or some other thing of value that might be considered both a "contribution," within the meaning of Wis. Stat. § 11.01(6), and an "expenditure," within the meaning of 2 U.S.C. §§ 431(9)(A)(i) and 441b(2).

¶21. The significance of this overlap between Wisconsin's definition of "contribution" and federal law's definition of "expenditure" is more than statutory. It is of constitutional significance. As most recently reiterated in the *Citizens United* decision, *Buckley* and its progeny make clear that expenditures are entitled to the highest degree of constitutional protection. *Citizens United*, 130 S. Ct. at 908-10. This is because "[a] restriction on the amount of money a person or group can spend on political communication during a campaign necessarily reduces the quantity of expression by restricting the number of issues discussed, the depth of their exploration, and the size of the audience reached." *Buckley*, 424 U.S. at 19. In contrast, *Buckley* held that contributions deserve a somewhat lower degree of constitutional protection because "a limitation upon the amount that any one person or group may contribute to a candidate or political committee entails only a marginal restriction upon the contributor's ability to engage in free communication." *Buckley*, 424 U.S. at 20 (emphasis added). In other words, the
constitutional difference between a transfer of value that is an expenditure and a transfer of value that is a contribution is determined by the identity of the recipient of that transfer.

¶22. Because Wis. Stat. § 11.01(6) defines “contribution” without reference to the identity of the recipient, that definition does not reflect the constitutional distinction between a contribution and an expenditure. Put differently, some “contributions” as defined in Wisconsin law could also be “expenditures” within the meaning of Buckley and Citizens United and, as such, are entitled to a higher degree of constitutional protection than Buckley and progeny afford to “contributions” made to a candidate or a political committee.3

¶23. Therefore, even if the terms “or disbursement” and “independently” were stricken from Wis. Stat. § 11.38(1)(a)1., as you suggest, the remaining prohibition on corporate “contributions”—as that term is defined in Wis. Stat. § 11.01(6)—still could apply to some corporate actions that would be constitutionally protected “expenditures” under Citizens United. The impact of Citizens United on Wis. Stat. § 11.38(1)(a)1., thus cannot be fully captured simply by striking certain words or phrases from that provision.4

¶24. The constitutionality of a restriction on an “expenditure” or a “contribution” thus depends on the nature of the conduct restricted, not on the particular statutory language used to describe that conduct. Accordingly, the United States Supreme Court, in Citizens United, invalidated the restrictions on corporate independent expenditures contained in 2 U.S.C. § 441b without specifying any particular words or phrases to be excised from that statute. See Citizens United, 130 S. Ct. at 913. Here, similarly, I conclude that, under the reasoning of Citizens United, the prohibition on corporate independent expenditures contained in Wis. Stat.

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3Precision in the use of terminology is important with respect to the term “political committee” as well. In Buckley, political committees were discussed with reference to the permissibility of limits on their direct contributions to candidates. 424 U.S. at 35. As underscored in Citizens United, such direct contributions to a candidate by a political committee are subject to a lesser degree of constitutional scrutiny than would be applied to other political expenditures by the committee. 130 S. Ct. at 909 (distinguishing contribution cases from expenditure cases, stating that Federal Election Com’n v. Nat. Right to Work Comm., 459 U.S. 197 (1982) “decided no more than that a restriction on a corporation’s ability to solicit funds for its segregated PAC, which made direct contributions to candidates, did not violate the First Amendment. NRWC thus involved contribution limits, which, unlike limits on independent expenditures, have been an accepted means to prevent quid pro quo corruption.”)(internal citations omitted).

4Unlike the statutory definition of “contribution” in Wis. Stat. § 11.01(6), Wis. Admin. Code § GAB 1.28(1)(c) (2010) defines “contributions for political purposes” in terms of the identity of the recipient. This regulatory definition, however, does not avoid the potential constitutional difficulty discussed above because “contributions for political purposes” are not limited to direct contributions to candidates and their committees. For example, a contribution to an individual who does not contribute to candidates but who engages in independent political speech would qualify under the rule’s definition of “contributions for political purposes.” See Wis. Admin. Code § GAB 1.28(1)(c). Such a contribution could be an “expenditure” within the meaning of Buckley and Citizens United, while also falling within the definition of “contributions for political purposes” in Wis. Admin. Code § GAB 1.28(1)(c).
§ 11.38(1)(a)1., is invalid, without need to interpret that provision as if any particular words or phrases had been stricken from it.

¶25. Finally, I note that Wis. Stat. § 11.38(1)(b) provides that “[n]o political party, committee, group, candidate or individual may accept any contribution or disbursement made to or on behalf of such individual or entity which is prohibited by this section.” For the reasons discussed above, the prohibition contained in Wis. Stat. § 11.38(1)(a) on corporate political expenditures—as that concept is discussed in Citizens United and in the present opinion—is constitutionally invalid. The prohibition contained in Wis. Stat. § 11.38(1)(b) on the acceptance of such corporate independent expenditures is thus similarly invalid. As previously noted, however, Citizens United did not address the constitutionality of statutory prohibitions on corporate contributions, as distinguished from corporate expenditures. Accordingly, nothing in Citizens United precludes Wis. Stat. § 11.38(1)(a) and (b) from continuing to be enforced with respect to both making and accepting of corporate political “contributions”—not as the term is defined in Wis. Stat. § 11.01(6), but as it is understood in the sense that the Supreme Court used when it approved contribution limits in Buckley. See 424 U.S. at 20-22; see also Citizens United, 130 S.Ct. at 908-10 (distinguishing precedent upholding limits on contributions from precedents finding limits on expenditures unconstitutional).

The Impact of Citizens United on Wis. Stat. § 11.12(1)(a)

¶26. While your inquiry is principally directed at the constitutionality of Wis. Stat. § 11.38, your letter also seeks guidance on the implications of Citizens United on the constitutional enforcement of Wis. Stat. ch. 11.

¶27. The fatal feature of the federal campaign finance law challenged in Citizens United is that it prohibited corporations and unions from making independent expenditures from their general treasuries. Notably, however, it is not the only statutory subsection that potentially prohibits expenditures protected by the First Amendment.

¶28. Wisconsin Stat. § 11.12(1)(a) provides:

No contribution may be made or received and no disbursement may be made or obligation incurred by a person or committee, except within the amount authorized under s. 11.05 (1) and (2), in support of or in opposition to any specific candidate or candidates in an election, other than through the campaign treasurer of the candidate or the candidate's opponent, or by or through an individual or committee registered under s. 11.05 and filing a statement under s. 11.06 (7).

5In 65 Op. Atty. Gen. 10 (1976) and 65 Op. Att’y Gen. 145, my predecessor issued opinions construing the scope of permissible prohibitions on corporate contributions and disbursements under Wis. Stat. § 11.38. These opinions were modified by 67 Op. Att’y Gen. at 214. Citizens United supersedes any contrary statements in earlier opinions of this office, and those opinions are further modified to the extent they are inconsistent with this opinion.
§29. Among other things, this subsection bans a corporation from engaging in independent expenditures unless those expenditures are by or through a registered committee who has filed the appropriate statement. *Citizens United* makes clear these expenditures may come from a corporation’s general treasury. 130 S. Ct. at 913. Thus, Wisconsin statutes must provide a mechanism by which a corporation may register under Wis. Stat. § 11.05 and file a statement under Wis. Stat. § 11.06(7) or the registration and filing requirements would be, for all practical purposes, a ban. In that case, Wis. Stat. § 11.12(1)(a) could not be constitutionally applied because application would ban First Amendment activities. However, such a mechanism for corporate registration and filing exists.

§30. “Committees” or “political committees” are defined to include “any person other than an individual and any combination of 2 or more persons, permanent or temporary, which makes or accepts contributions or makes disbursements, whether or not engaged in activities which are exclusively political, except that a ‘committee’ does not include a political ‘group . . . .’” Wis. Stat. § 11.01(4). Absent an indication of contrary legislative intent, the word “person,” as used in Wisconsin law, “includes all partnerships, associations and bodies politic or corporate.” Wis. Stat. § 990.01(26). A corporation is, therefore, a “person” within the meaning of Wis. Stat. § 11.12(1)(a). Because a corporation is a person by virtue of Wis. Stat. § 990.01(26), it also, therefore, meets the statutory definition of a committee. Thus, it is my opinion that Wis. Stat. § 11.12(1)(a) applies to corporations.

§31. Because Wis. Stat. § 11.12(1)(a) applies to corporations, Wisconsin law must also permit corporations to register and file under Wis. Stat. §§ 11.05 and 11.06(7), so that they may exercise their constitutional right to engage in political speech. The registration requirements in Wis. Stat. § 11.05(1) expressly apply, among other things, to “every committee other than a personal campaign committee which . . . makes disbursements in a calendar year in an aggregate amount in excess of $25 . . . .” Other provisions in Wis. Stat. ch. 11 provide how registration is to occur and what must be reported. Likewise, the filing requirements in Wis. Stat. § 11.06(7) expressly apply, among other things, to “[e]very committee, other than a personal campaign committee, which . . . desires to make disbursements during any calendar year, which are to be used to advocate the election or defeat of any clearly identified candidate or candidates in any election . . . .” Because, as already discussed, a corporation is within the statutory definition of a committee, it follows that, like other committees, corporations may register and file under Wis. Stat. §§ 11.05 and 11.06(7). Thus, there is a statutory mechanism for corporate registration and reporting. Put another way, Wisconsin statutes are not constructed in a fashion that prevents a corporation from registering.

§32. In addition to this plain reading of the statutes, the Government Accountability Board has issued an emergency rule to “ensure the proper administration of the campaign finance statutes and properly address the application of *Citizens United* v. *FEC*.” Notice of Order of the Government Accountability Board, EmR 1016, ¶ 3 of Analysis (May 20, 2010) (available at http://www.legis.state.wi.us/erules/gab001_EmR1016.pdf) (last visited, July 30, 2010). The Rule

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6 Any corporation may also be a “group” as defined by Wis. Stat. § 11.01(10), and required to register by Wis. Stat. § 11.23. See also Wis. Stat. § 11.05(1)(a).
interprets Wis. Stat. §§ 11.05, 11.06 and other relevant sections to facilitate a corporation’s registration and filing requirements under Wis. Stat. §§ 11.05 and 11.06. See Wis. Admin. Code §§ GAB 1.91(3) - (8).

¶33. Thus, both the statutes and the administrative code provide a mechanism for corporate reporting. Therefore, Wis. Stat. § 11.12(1)(a) is not a ban on a corporation’s constitutionally protected political advocacy unless the underlying reporting and disclosure rules are themselves unconstitutional. Cf. Citizens United, 130 S. Ct. at 897-98 (prohibition on corporate “electioneering communications” not alleviated by ability of corporation to create federal political action committee, given that the political action committee is a separate entity and is subject to onerous registration and reporting requirements that have the effect of chilling speech).

Direct Impact of Citizens United on Reporting, Disclaimer, and Disclosure Provisions

¶34. In Citizens United, the Court specifically upheld the application of federal disclosure and disclaimer requirements to the “Hillary” movie and three advertisements for the movie. 130 S. Ct. at 913-16. Those disclosure provisions mandate that a person file a statement with the Federal Elections Commission within 24 hours of making a disbursement “for the direct costs of producing and airing electioneering communications in an aggregate amount in excess of $10,000 during any calendar year . . . .” 2 U.S.C. § 434(f)(1). Disbursements in excess of $200 are required to be itemized, and individual contributors to the communication must be listed with a name and address only if the individual contributed over $1,000 during the year. 2 U.S.C. § 434(f)(2). Moreover, the communication must be “publicly distributed,” 11 C.F.R. § 100.29(a), defined as “broadcast, cable, or satellite communication” that can be received by 50,000 people in the relevant district or state. See 2 U.S.C. § 434(f)(3)(A)(i); 11 C.F.R. § 100.29(3). Compare with Citizens United, 130 S. Ct. at 897-98 (discussing federal PAC requirements); Federal Election Com’n v. Mass. Citizens for Life, 479 U.S. 238, 253-56 (1986) (discussing same, holding requirements may not be applied to certain incorporated groups); Wis. Stat. §§ 11.05, 11.06, 11.12, 11.14, 11.19, 11.20, 11.513 (setting forth Wisconsin’s disclosure requirements).

¶35. In upholding those disclosure requirements as constitutional, the Court rejected the argument that disclosure and disclaimer “must be confined to speech that is the functional equivalent of express advocacy.” Citizens United, 130 S. Ct. at 915. This holding in Citizens United supersedes any contrary statements in earlier opinions of this office, including the discussion in 65 Op. Att’y Gen. 145 of the scope of activities that may be constitutionally regulated under Wis. Stat. ch. 11.

¶36. After Citizens United, therefore, the distinction between express advocacy and issue advocacy, standing alone, is not constitutionally determinative. Accordingly, to the extent that Wis. Admin. Code § GAB 1.28 or Wis. Admin. Code § GAB 1.91 impose registration, reporting, or disclaimer requirements on independent expenditures that are not express advocacy
or its functional equivalent, *Citizens United* does not clearly indicate the rules are unconstitutional. To the contrary, *Citizens United* recognizes that the Constitution does not categorically limit disclosure and disclaimer regulations to only express advocacy or its functional equivalent. Any potential conflict created by the rules are with the statutes,\(^7\) not the Constitution. While this is no less of a serious concern for those who may be subject to the new rules, examining the statutory validity of these rules is beyond the scope of this opinion.

|37. | It does not follow, however, that every disclosure or disclaimer regulation (whether applied to express advocacy or issue advocacy) is constitutional. The *Citizens United* Court acknowledged that “as-applied challenges [to disclosure regulations] would be available if a group could show a reasonable probability that disclose[ure] of its contributors’ names [will] subject them to threats, harassment, or reprisals from either Government officials or private parties.” 130 S. Ct. at 914 (internal quotations omitted).

|38. | More generally, the *Citizens United* Court acknowledged that disclaimer and disclosure requirements “may burden the ability to speak,” and thus such requirements are subjected “to ‘exact[ing] scrutiny,’ which requires a ‘substantial relation’ between the disclosure requirement and a ‘sufficiently important’ governmental interest.” 130 S. Ct. at 914 (quoting *Buckley*, 424 U.S. at 64, 66). Finally, because intentionally violating the campaign financing law is subject to criminal penalties, see Wis. Stat. §§ 11.61(1)(a)-(c), consideration must be given to whether a statutory provision is unconstitutionally vague. *Buckley*, 424 U.S. at 40-41; cf. *Citizens United*, 130 S. Ct. at 895-96 (noting that complex speech regulations backed by criminal penalties force speakers to seek governmental permission before speaking, and analogizing the process to prior restraints).

|39. | Nonetheless, because *Citizens United* did not address the constitutionality of disclosure and disclaimer provisions similar to Wisconsin’s provisions, the “reasoning and conclusions” of the decision are not “clearly applicable” to those provisions. 67 Op. Att’y Gen. at 214. Any further discussion of the constitutionality of the Wisconsin disclosure and disclaimer requirements is thus beyond the scope of this opinion.

\(^7\)The term “expressly advocate” is used in the definition of “political purposes,” Wis. Stat. § 11.01(16)(a)1. “Expressly advocate” is also used or incorporated independently of the definition of “political purposes” in statutes limiting who must register, what disbursements must be reported, and what communications are subject to disclaimer rules. See, e.g., Wis. Stat. §§ 11.05(11), 11.06(2), 11.30(2).
¶40. Finally, it should be mentioned, particularly in light of mixed messages that accompanied post-Citizens United rulemaking,8 that Citizens United does not change Wisconsin law. While a United States Supreme Court opinion may provide guidance as to the constitutionally permissible scope of regulation, a United States Supreme Court opinion does not authorize regulatory activity. Only the Wisconsin Legislature, through its lawmaking powers, can change Wisconsin law or expand the scope of an agency's regulatory authority.

Conclusion

¶41. In 65 Op. Att'y Gen. 145, this office determined that the State Elections Board (the predecessor agency of the Government Accountability Board) had the authority to decline to enforce those portions of Wis. Stat. ch. 11 that were unconstitutional and to interpret and apply other parts of Wis. Stat. ch. 11 so as to avoid unconstitutionality. Id. at 156-58. In addition, this office urged that Wis. Stat. ch. 11 be amended to make it consistent with the Buckley decision. Id. at 147.

¶42. In the present situation, it is my understanding that the Government Accountability Board has already suspended its enforcement of the corporate expenditure prohibition in Wis. Stat. § 11.38(1)(a)1. I agree with that enforcement decision and would advise all district attorneys, in exercising their concurrent enforcement powers under Wis. Stat. ch. 11, to likewise interpret and apply Wis. Stat. § 11.38(1)(a)1. and (b) in a manner consistent with the views set forth in this opinion. I would also encourage the Wisconsin Legislature to amend Wis. Stat. § 11.38 to make it consistent with the Citizens United decision.

¶43. No other aspect of Wisconsin law is directly affected by the clear application of Citizens United.

Sincerely,

J.B. VAN HOLLEN
Attorney General

JBVH:RPT:KMS:TCB:rk

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8Compare Notice of Order of the Government Accountability Board, EmR 1016, ¶ 3 of Analysis (May 20, 2010), ¶ 3 of Analysis ("Citizens United ... strengthened the ability of the government to require disclosure and disclaimer of independent expenditures.") with id. ¶ 5 of Analysis ("[T]his proposed rule requires organizations to disclose only those donations 'made for' political purposes."). Nothing in the text of Wis. Admin. Code § GAB 1.91 directly contradicts the conclusions stated above.
Mr. Mark B. Hazelbaker  
Corporation Counsel  
Juneau County  
3555 University Avenue  
Madison, WI 53705

Dear Mr. Hazelbaker:

¶ 1. You indicate that during the course of Juneau County’s comprehensive planning process questions have arisen as to whether local units of government can require local licensure of contractors who obtain building permits to perform work on one and two family dwellings in which they have no legal or equitable interest. You note that in Wis. Stat. § 101.654 the Legislature has prescribed detailed financial responsibility requirements for dwelling contractors. You also note that 2005 Wisconsin Act 200 added a six-hour minimum annual continuing education requirement for dwelling contractor qualifiers to Wis. Stat. § 101.654 and that the minimum continuing education requirement was changed to twelve hours biennially in 2007 Wisconsin Act 14.

BACKGROUND

¶ 2. You indicate that you have become aware of cities in Wisconsin outside of Juneau County that require local licensure of dwelling contractors. One such city ordinance requires a “general contractor” to have either four years of apprenticeship plus four years as a journeyman, eight years working for a general contractor in the construction industry, or four years of architectural or engineering education and one year of on-the-job training. Passage of an examination is required in order to obtain a local “general contractor” license. The same ordinance requires a “carpentry contractor” to have four years of apprenticeship, plus two years working as a journeyman in the residential trade, or six years experience in the construction industry. Passage of an examination is required in order to obtain a local “carpentry contractor” license. In order to obtain a building permit to perform work on one and two family dwellings, the ordinance appears to require that a dwelling contractor have at least one locally-licensed “general contractor” or “carpentry contractor” on staff. An ordinance enacted by another city seems to require a minimum of four years of experience and passage of an examination in order

1Hereafter, the term “dwelling contractors” refers to persons who obtain building permits to perform work on one and two family dwellings in which they have no legal or equitable interest.
to obtain a local contractor’s license. Under that ordinance, at least one such license is apparently required in order to obtain a building permit to perform work on one and two family dwellings in that city. Neither city ordinance appears to impose financial responsibility or continuing education requirements. You apparently are concerned that local units of government in Juneau County may attempt to enact ordinances similar to the two ordinances described.

QUESTION PRESENTED AND BRIEF ANSWER

¶ 3. You ask whether the local ordinances requiring local licensure of dwelling contractors are preempted by the "ONE-AND-2-FAMILY DWELLING CODE," Wis. Stat. ch. 101, subch. II (the "Dwelling Code").

¶ 4. A particular municipal licensure requirement may be preempted if that requirement logically conflicts with, defeats the purpose of, or violates the spirit of state contractor financial responsibility and continuing education requirements. In my opinion, ordinances requiring local licensure are preempted if they impose on persons seeking a building permit for one- or 2-family dwellings greater financial responsibility, education, or examination requirements than required by state law.

ANALYSIS

¶ 5. To ascertain whether a municipality may license dwelling contractors, it is first necessary to examine structure of the Dwelling Code.

¶ 6. The Legislature’s stated purpose in enacting the Dwelling Code was to “establish statewide construction standards and inspection procedures” for such dwellings and “promote interstate uniformity in construction standards[].” Wis. Stat. § 101.60.

¶ 7. To that end, the Dwelling Code vests in the Department of Commerce the power to adopt rules establishing uniform standards for construction and inspection of one- and 2-family dwellings. Wis. Stat. § 101.63(1). The standards are to be nationally recognized, when feasible. Id. In addition to other powers, the Department of Commerce is given rulemaking authority over the certification of inspectors and the certification of dwelling contractors. Wis. Stat. §§ 101.63(2), (2m), 101.654. The certification of dwelling contractors includes education and financial responsibility components. Wis. Stat. § 101.654(1m), (2). The Department of Commerce must also develop a standard building permit form for all new one- and 2-family dwellings. Wis. Stat. § 101.63(7).

¶ 8. Municipal powers are also established in the Dwelling Code. Wis. Stat. § 101.65. The municipal powers provisions are set forth as things municipalities may do, things municipalities may not do, and things municipalities must do. In the first category, municipalities may “[e]xercise jurisdiction over the construction and inspection of new dwellings by passage of
ordinances, provided such ordinances meet the requirements of the one- and 2-family dwelling code adopted in accordance with this subchapter.” Wis. Stat. § 101.65(1)(a). These municipalities may also collect fees to defray the costs of jurisdiction, and may also by ordinance provide for remedies and penalties for violations of ordinances passed to enforce the Dwelling Code. Wis. Stat. § 101.65(1)(c), (d).

¶ 9. In the second category, municipalities may not issue building permits to individuals who are not in compliance with the education and financial responsibility certification requirements in Wis. Stat. § 101.654, so long as those requirements apply.2 Wis. Stat. § 101.65(1m).

¶ 10. In the third category, municipalities must use the Department of Commerce’s standard building permit for new dwellings. Wis. Stat. § 101.65(3). They must also require an owner who applies for a building permit to sign a statement acknowledging certain liabilities if the owner hires a contractor who is not bonded or insured as required by Wis. Stat. § 101.654(2)(a) to perform work. Wis. Stat. § 101.65(1r).

¶ 11. Absent from the provisions delineating a municipality’s powers under the Dwelling Code is any reference to a municipal power to license or certify contractors. Curiously, however, Wis. Stat. § 101.63(2)—which otherwise governs the state certification of inspectors and not contractors—provides that “[t]he department [of commerce] may not adopt any rule which prohibits any city, village, town or county from licensing persons for performing work on a dwelling in which the licensed person has no legal or equitable interest.” This language, which appears to prevent the Department of Commerce from preventing local licensure of dwelling contractors,3 was added to Wis. Stat. § 101.63(2) in ch. 221, sec. 545, Laws of 1979.

¶ 12. In construing the meaning of this language, “‘It must be presumed that the legislature did not intend to legislate in vain, and that it had a specific purpose in mind.’” Haas v. Welch, 207 Wis. 84, 86, 240 N.W. 789 (1932), quoting Harris v. Halverson, 192 Wis. 71, 76, 211 N.W. 295 (1927). “When the legislature enacts a statute, it is presumed to act with full knowledge of the existing laws, including statutes.” Mack v. Joint School District No. 3, 92 Wis. 2d 476, 489, 285 N.W.2d 604 (1979). The Legislature is presumed to know the meaning

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2For example, the certification requirements do not apply to the owner of a dwelling who resides or will reside in the dwelling. Wis. Stat. § 101.654(1)(b).

3While the remainder of Wis. Stat. § 101.63(2) addresses inspectors, as opposed to contractors, the placement of this provision in this subsection does not overcome the plain reading that dwelling contractors, and not inspectors, are the subject of the limitation on the Department of Commerce’s power to prohibit licensure. The phrase “performing work on” contemplates building, not inspecting. The phrase “inspecting” is used elsewhere in Wis. Stat. § 101.63(2), indicating the Legislature was not referring to inspectors and inspecting when it chose the phrase “performing work on” in the last sentence of Wis. Stat. § 101.63(2).
of the words it selects, and to "cho[o]se its terms carefully and precisely to express its meaning." Johnson v. City of Edgerton, 207 Wis. 2d 343, 351, 558 N.W.2d 653 (Ct. App. 1996), quoting Ball v. District No. 4, Area Board, 117 Wis. 2d 529, 539, 345 N.W.2d 389 (1984). "It should never be presumed that any part, much less all, of a statute is meaningless." 73 Op. Att'y Gen. 120, 121 (1984), citing Associated Hospital Service v. Milwaukee, 13 Wis. 2d 447, 109 N.W.2d 271 (1961). Accord State v. Wisconsin Telephone Co., 91 Wis. 2d 702, 714-15, 284 N.W.2d 41 (1979). Although the last sentence of Wis. Stat. § 101.63(2) does not itself grant authority to local units of government to require local licensure of dwelling contractors, it appears that when the language was enacted the Legislature must have been of the view that cities, villages, towns, and counties did possess the authority to require local licensure of dwelling contractors. If that were not the case, there was no apparent purpose for the enactment of that language.

¶ 13. When ch. 221, sec. 545, Laws of 1979 was enacted, the only possible source of authority to justify the Legislature's view that all four principal local units of government—cities, villages, towns, and counties—may require local licensure of dwelling contractors was Wis. Stat. § 101.65(1) (1979). That subsection authorized all four local units of government to "[e]xercise jurisdiction over the construction and inspection of new dwellings by passage of ordinances, provided such ordinances meet the requirements of the one- and 2-family dwelling code . . . ."

In Town of Clearfield v. Cushman, 150 Wis. 2d 10, 20-21, 440 N.W.2d 777 (1989), the court held that "[f]rom its statutorily assigned responsibilities, the Town has implicit power to require building permits." The court reasoned that ""[W]hen specific duties are intrusted to [towns] and made obligatory on their part, it must be assumed that it was the legislative intent to give them ample authority to carry out those duties."" Cushman, 150 Wis. 2d at 21. In light of the enactment of the last sentence of Wis. Stat. § 101.63(2), the Legislature must have been of the view that the language in Wis. Stat. § 101.65(1) (1979) authorizing cities, villages, towns, and counties to "[e]xercise jurisdiction over the construction and inspection of new dwellings by

4Cities and villages possess both constitutional and statutory home rule authority. Wis. Const. art. XI, § 3(1); Wis. Stat. §§ 62.11(5) and 61.34(1). Counties have only statutory administrative home rule powers. Wis. Stat. § 59.03(1). Towns do not have home rule powers. In 1979, existing legal authority was to the effect that even those towns that possessed village powers could not exercise those statutory powers granted villages under Wis. Stat. § 61.34(1) because "[t]he attempted exercise by towns of the general home rule power is inherently inconsistent with the constitutional rule requiring one system of uniform town government." 66 Op. Att'y Gen. 58, 59 (1977). Compare Town of Beloit v. County of Rock, 2003 WI 8, ¶ 23, 259 Wis. 2d 37, 657 N.W.2d 344. In 1979, the county administrative home rule statutes had not yet been enacted. 77 Op. Att'y Gen. 113, 116 (1988) subsequently concluded that county administrative home rule statutes "expand upon and 'fill the gaps' in the organizational and administrative structure which is already in place[.]") Also see Jackson County v. State, 2006 WI 96, ¶ 17, 293 Wis. 2d 497, 717 N.W.2d 713 (holding that a county's power to rescind a tax deed "must be found in a statute or necessarily be implied from a statute [other than the county administrative home rule statutes], in order for that power to exist.").
passage of ordinances . . .” constituted an implied legislative grant of authority to require local licensure of dwelling contractors.

¶ 14. Although the Legislature appears to have implicitly acknowledged the ability of municipalities to license dwelling contractors and prohibited the Department of Commerce from promulgating a rule that prohibits all licensure, that does not make every local licensure scheme valid. Indeed, as explained above, the implied source of statutory authority for cities, villages, towns, and counties to license dwelling contractors arose from their statutory power to “[e]xercise jurisdiction over the construction and inspection of new dwellings by passage of ordinances . . .” Wis. Stat. § 101.65(1)(a). But this exercise of jurisdiction is expressly limited to “such ordinances meet the requirements of the one- and 2-family dwelling code adopted in accordance with this subchapter.” Id. As shown below, licensure requirements that impose financial responsibility, education, and examination requirements beyond those required by state law are not permitted because they would not meet the requirements of the Dwelling Code.

¶ 15. After the enactment of ch. 221, sec. 545, Laws of 1979, the Legislature amended the Dwelling Code to provide for the certification of dwelling contractors. In order to obtain a building permit, a person who does not own and live in (or intend to live in) a dwelling must annually obtain from the Department of Commerce a certificate of financial responsibility. Wis. Stat. § 101.654. In order to obtain a certificate of financial responsibility from the Department of Commerce to perform work estimated to cost $25,000 or more, a dwelling contractor must have obtained either a surety bond of not less than $25,000 or a general liability insurance policy of at least $250,000 per occurrence, see Wis. Stat. § 101.654(2)(a) and (2m); must have obtained any worker’s compensation insurance that is required under Wis. Stat. § 102.28(2)(a) and (b), see Wis. Stat. § 101.654(2)(b); and must have demonstrated that all required state and federal unemployment taxes were paid, see Wis. Stat. § 101.654(2)(c). The Department of Commerce may deny, suspend, or revoke the certification of a dwelling contractor who fails to comply with state financial responsibility requirements. See Wis. Admin. Code § Comm 5.10(1)(a). While the statute uses the term “certificate,” because a person (other than a home owner) is required to hold the certificate to obtain a building permit, the state certificate is effectively a license.

¶ 16. In 2006, the Legislature added education and examination requirements to the state’s certification requirements necessary to obtain a building permit. 2005 Wisconsin Act 200, secs. 11-13; Wis. Stat. § 101.654 (2005). The Dwelling Code now requires that persons seeking to obtain a building permit, with certain exceptions, must complete continuing education requirements and provide proof that those requirements have been completed. Wis. Stat.
§ 101.654(1)(a). As amended by 2007 Wisconsin Act 14, these education requirements now include 12 hours of education relevant to the professional area of expertise every 2 years and also attendance at one or more professional meetings or educational seminars designed for both building contractors and building inspectors. Wis. Stat. § 101.654(1m)(b). Persons newly wishing to be certified—i.e., those who did not hold a certificate of financial responsibility on April 11, 2006 (the day after the date 2005 Wisconsin Act 200 was published)—must also successfully complete an examination developed by the Department of Commerce. Wis. Stat. § 101.654(1m)(b)3.

¶ 17. In 2005 Wisconsin Act 200, the Legislature also created the “contractor certification council,” which replaced the “contractor financial responsibility council” and expanded on its powers. 2005 Wisconsin Act 200, sec. 3. The new council is comprised of members appointed by the Secretary of Commerce who are involved in or have demonstrated an interest in continuing education for contractors. Wis. Stat. § 15.157(5). It is charged with recommending to the Department of Commerce rules for certifying financial responsibility of contractors and recommending to the Department of Commerce for its approval courses that meet continuing education requirements. Wis. Stat § 101.625(1), (2). In addition, the contractor certification council is required to advise the Department of Commerce on the development of course examination for those individuals who are required to pass examinations. Wis. Stat. § 101.625(3).

¶ 18. The Department of Commerce has promulgated rules to administer the continuing education requirements in the Dwelling Code. The rules create a “dwelling contractor qualifier certification” that is issued by the Department of Commerce, which serves as proof required under Wis. Stat. § 101.654(1)(a) that a person has completed his or her education requirements. Wis. Admin. Code § Comm 5.315(1). The rules also require that to obtain the “dwelling contractor qualifier certification,” an applicant must, among other requirements, show that he or she completed 12 hours of an approved education course, which must include instruction and an examination concerning construction laws, construction codes, and construction business.
practices. Wis. Admin. Code § Comm 5.315(2)(c)1.a.-c. 6 A dwelling contractor may renew a certification by obtaining additional hours of approved continuing education during the applicable 2-year time period. Wis. Admin. Code § Comm 5.315(3).

¶ 19. The Department of Commerce may deny, suspend, or revoke the certification of a dwelling contractor qualifier who fails to comply with state continuing education requirements. See Wis. Stat. § 101.654(5)(a); Wis. Admin. Code § Comm 5.10(1)(a).

¶ 20. A municipal ordinance is preempted if: "(1) the legislature has expressly withdrawn the power of municipalities to act; (2) it logically conflicts with state legislation; (3) it defeats the purpose of state legislation; or (4) it violates the spirit of state legislation." DeRosso Landfill Co. v. City of Oak Creek, 200 Wis. 2d 642, 651-52, 547 N.W.2d 770 (1996) (footnotes omitted).

¶ 21. The Legislature has not expressly withdrawn the authority of municipalities to regulate the local licensure of dwelling contractors. Wisconsin Stat. § 101.65(1) continues to authorize municipalities to "[e]xercise jurisdiction over the construction and inspection of new dwellings by passage of ordinances . . . ." and Wis. Stat. § 101.63(2) also continues to provide that the Department of Commerce "may not adopt any rule which prohibits any city, village, town or county from licensing persons for performing work on a dwelling in which the licensed person has no legal or equitable interest."

¶ 22. A municipal licensure provision may nevertheless logically conflict with, defeat the purpose of, or violate the spirit of state legislation. The validity of local licensure requirements must therefore be decided by determining whether the individual local licensure requirement can reasonably coexist with the state requirements with which dwelling contractors and dwelling contractor qualifiers must comply.

¶ 23. With respect to any municipal license requirements that impose additional financial responsibility requirements or educational qualifications beyond those required by state law on those seeking a building permit involving construction of dwellings covered by the Dwelling

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6Certain individuals who had held or applied for a certificate of financial responsibility between April 11 and 14, 2006 were not required to take these classes and examinations to obtain dwelling contractor certification qualifier, but must meet specified continuing education requirements to obtain a renewal. Wis. Admin. Code § Comm 5.315(2)(c)2., (3); see also Wis. Stat. § 101.654(1m)(c), (d) (stating that the rules promulgated under Wis. Stat. § 101.654(1m) shall not require a person holding a certificate of financial responsibility on April 11, 2006 to pass an examination on continuing education courses and permitting different course requirements for persons who held a certificate of financial responsibility on April 11, 2006 and for those who did not).
Code, it is my opinion that such municipal ordinances logically conflict with state law and also frustrate its purpose and spirit, and are therefore preempted.\footnote{Any lesser financial responsibility or education requirement required by a local ordinance is expressly prohibited, as municipalities are prohibited from issuing building permits that those who have not complied with the financial responsibility and education requirements in Wis. Stat. § 101.65(1m).}

¶ 24. The Dwelling Code is not designed to set minimal requirements that can be exceeded by local ordinance. Instead, the stated purpose of the Dwelling Code is to promote \textit{uniformity} with respect to the construction and inspection of one- and 2-family dwellings. Wis. Stat. § 101.60. As demonstrated above, the Legislature's implicit recognition in 1979 that municipalities have licensure authority stems from the Dwelling Code's grant of authority to the municipalities to exercise jurisdiction “over the construction and inspection of new dwellings[.]” Wis. Stat. § 101.65(1)(a). But that exercise must “meet the requirements of the one- and 2-family dwelling code[.]” \textit{Id.}

¶ 25. The Dwelling Code expressly creates state requirements relating to the financial responsibility and education of those applying for building permits. Wis. Stat. § 101.654. The Legislature’s education requirements addressed both those who were qualified to obtain building permits when education requirements were enacted—continuing education but not examination—as well as those wishing to be newly qualified to obtain a permit—education and examination. Wis. Stat. § 101.654(c); Wis. Stat. § 101.654(1m)(b)3. Thus, the state education requirements speak to not only continuing education, but also the education requirements for those who wish to enter the field. \textit{Id.}; compare also Wis. Stat. § 101.625(2) to Wis. Stat. § 101.625(3) (distinguishing dwelling contractor certification council’s duties to recommend to the Department of Commerce those courses appropriate for continuing education and those examination requirements that would be required for new dwelling contractors). In sum, for a municipality’s jurisdiction to “meet the requirements” of the Dwelling Code, it may not impose additional certification or licensure requirements with respect to the financial capability, education, and examination requirements of those seeking to obtain building permits. To do so would logically conflict with the Dwelling Code, defeat its purpose, and violate its spirit.

¶ 26. The fact that Wisconsin law restricts the ability of the Department of Commerce to prohibit local licensure by rule does not undermine my conclusion. Wisconsin Stat. § 101.63(2) limits only the authority of the Department of Commerce to adopt certain rules, it does not (and cannot) prevent subsequently enacted state law from doing so. The acts creating the state’s certification criteria for dwelling contractors with respect to financial responsibility, education, and examination requirements were passed after the Legislature enacted Wis. Stat. § 101.63(2). It is these acts, not an agency rule, that give rise to preemption in the context addressed in this opinion.
CONCLUSION

¶ 27. A particular municipal licensure requirement may be preempted if that requirement logically conflicts with, defeats the purpose of, or violates the spirit of state contractor financial responsibility and continuing education requirements. In my opinion, ordinances requiring local licensure are preempted if they impose on persons seeking a building permit for one- or 2-family dwellings greater financial responsibility, education, or examination requirements than required by state law.

Sincerely,

J.B. VAN HOLLEN
Attorney General

JBVH:KMS:cla
Mr. A. John Voelker  
Director of State Courts  
16 East, State Capitol  
Madison, WI 53702

Dear Mr. Voelker:

¶ 1. Your office has responsibility for the court information system. See SCR §§ 70.01 and 70.04. You have developed an electronic case management system called the Consolidated Court Automation Program (“CCAP”). You also have developed a web-based version of CCAP called the Wisconsin Circuit Court Access (“WCCA”). In cases involving a child in need of protective services (“CHIPS”) or involving the termination of parental rights (“TPR”), WCCA restricts access to related case information.

QUESTION PRESENTED AND BRIEF ANSWER

¶ 2. You ask whether corporation counsel, representing the public interest in CHIPS cases and TPR cases, may have access to related case information in the restricted area of the WCCA website. In my opinion, corporation counsel may not have access to such information because WCCA, due to technical limitations, cannot prevent corporation counsel from accessing private case information.

BACKGROUND

¶ 3. While WCCA generally makes case history and related documents accessible to the public in most civil and criminal cases, access is restricted for most records in juvenile cases. The restricted access is organized by county and by type of case. WCCA is programmed to permit limited access (with password authorization) to a particular restricted class of cases, e.g., juvenile cases. The problem, however, is that WCCA presently is not programmed to grant restricted access to a subset of cases within a class of cases. In other words, an individual who has access to CHIPS or TPR cases would have access to all of those cases, regardless of whether the individual was a party or an attorney involved in the cases.
¶ 4. Wisconsin Stat. § 48.396(2)(a) provides in relevant part:

Records of the court assigned to exercise jurisdiction under this chapter and ch. 938 [juvenile justice code] and of courts exercising jurisdiction under s. 48.16 shall be entered in books or deposited in files kept for that purpose only. They shall not be open to inspection or their contents disclosed except by order of the court assigned to exercise jurisdiction under this chapter and ch. 938 or as permitted under this section or s. 48.375(7)(e).

¶ 5. The statute includes specific exceptions that allow disclosure of juvenile records, on a case-by-case basis, to certain individuals such as the parents or guardians of the subject child, federal or state benefit agencies, the Department of Corrections for purposes of preparing pre-sentence investigations, or other courts, public officials, or private attorneys where needed. None of the statutory exceptions, however, permit continuing or regular access by anyone to all juvenile records or to all juvenile records of a particular nature.

¶ 6. The courts have confirmed that access to juvenile records under the subsections should be granted only on an “as needed” basis with case-by-case consideration. The leading case on the matter is the Wisconsin Supreme Court decision in State ex rel. Herget v. Waukesha Co. Cir. Ct., 84 Wis. 2d 435, 267 N.W.2d 309 (1978). In that case, a minor sought to prevent the court from allowing access to his juvenile court record, for use in a civil action brought against him and his parents. The court held that maintaining confidentiality of juvenile records is the general rule and disclosure is the exception because the best interest of the child and of the administration of the juvenile justice system require protecting the confidentiality of juvenile records. Id. at 450-51. The court explained:

Confidentiality is essential to the goal of rehabilitation, which is in turn the major purpose of the separate juvenile justice system. In theory, the role of the juvenile court is not to determine guilt or to assign fault, but to diagnose the cause of the child’s problems and help resolve those problems. The juvenile court operates on a “family” rather than a “due process” model. Confidentiality is promised to encourage the juvenile, parents, social workers and others to furnish information which they might not otherwise disclose in an admittedly adversary or open proceeding. Confidentiality also reduces the stigma to the youth resulting from the misdeed, an arrest record and a juvenile court adjudication.

In view of the statutory expression of the strong public interest in promoting the best interests of the child and the administration of the juvenile justice system by protecting the confidentiality of the police, court, and social agency records relating to juveniles, we hold that the circuit court is justified in ordering the discovery of all or any part of sec. 48.26 records only when the court
Mr. A. John Voelker
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has reviewed the records in camera and has made a determination that the need for confidentiality is outweighed by the exigencies of the circumstances.

*Herget*, 84 Wis. 2d at 451-52 (citations and footnotes omitted).

1/7. The procedure established by *Herget* requiring in camera review and a case-by-case balancing test is codified in Wis. Stat. §§ 48.396(5) and 938.396(1j). If a court determines that disclosure of the juvenile record is warranted, “it shall order the disclosure of only as much information as is necessary to meet the petitioner’s need for the information.” Wis. Stat. §§ 48.396(5)(d) and 938.396(1j)(d).

1/8. Shortly after the implementation of the WCCA, attorneys representing the interest of the public in juvenile courts cases sought access to WCCA restricted juvenile cases, in order to monitor their own cases or related cases. They argued that such access would create efficiencies and would make their work more effective. In late 2000, in response to a request from your predecessor, Assistant Attorney General (“AAG”) Alan Lee concluded that only a statutory change would allow attorneys representing the interests of the public to have general access to WCCA juvenile records. In July 2002, AAG Mary Woolsey Schlaefer reached the same conclusion with respect to juvenile justice agencies. In May 2005, AAG Lee reached the opposite conclusion with respect to juvenile dispositional, intake or protective service workers, but only because those workers were part of the juvenile court system and had general authorization to access juvenile records.

1/9. In late 2005, following an inquiry from Dane County, you asked my predecessor whether juvenile records could be electronically shared with attorneys in the office of the Dane County Corporation Counsel who were handling juvenile cases. You cited a 2004 study by a CCAP Steering Committee that concluded that corporation counsel must be denied general access to CHIPS, TPR, and other juvenile cases because there was no method by which the WCCA could permit corporation counsel access only to their cases and not to cases that were privately filed and involved private attorneys. In March 2006, AAG Lee concurred in the conclusion of the steering committee.

ANALYSIS

1/10. You now renew the question whether corporation counsel are entitled to unrestricted access to WCCA juvenile case records either because they are counsel for most of the CHIPS cases, or because, in TPR cases, they are entitled to access by virtue of Wis. Stat. § 48.417(1) and (2). In my opinion, the answer is “no.” This is because corporation counsel still will have access to juvenile records in privately-filed cases in which the public is not a party. Wisconsin Stat. § 48.417(1) and (2) recognize that corporation counsel may be required to join in some, but not all, privately filed TPR cases. Consistent with prior correspondence issued by Department of Justice Assistant Attorneys General, it is my opinion that the statutes and relevant court
decisions mandate the conclusion that corporation counsel may not have electronic access to CHIPS cases or to TPR cases unless and until WCCA is programmed in such a way as to limit access to privately filed cases in which corporation counsel are not involved. Permitting corporation counsel to access WCCA juvenile court files that they should not access would violate the statutory limitation that only information necessary to meet a specific need may be disclosed, on a case-by-case basis. See Wis. Stat. §§ 48.396(5)(d) and 938.396(1j)(d).

¶ 11. Wisconsin Stat. § 48.396(2)(g) does not compel a contrary conclusion. That statute initially was created by 1997 Wisconsin Act 205 to read:

Upon request of any other court assigned to exercise jurisdiction under this chapter and ch. 938, a district attorney or corporation counsel to review court records for the purpose of any proceeding in that other court, the court shall open for inspection by any authorized representative of the requester the records of the court relating to any child who has been the subject of a proceeding under this chapter.

¶ 12. The Legislative Reference Bureau (“LRB”) analysis of 1997 Assembly Bill 410, which was enacted as 1997 Wisconsin Act 205, stated in pertinent part:

[U]nder current law, subject to certain exceptions, the records of the juvenile court may not be open to inspection and their contents may not be disclosed except by order of the juvenile court.

This bill requires a juvenile court to open for inspection the records of the juvenile . . . who has been the subject of a proceeding in the juvenile court as follows:

2. Upon request of any other juvenile court, a district attorney or corporation counsel to review that juvenile court’s records for the purpose of any proceeding in the other juvenile court.

¶ 13. As originally enacted, therefore, courts were required to give corporation counsel access to the records of the juvenile court relating to any child who had been the subject of a proceeding in that court under Wis. Stat. ch. 48, but only upon request and only for the purpose of a proceeding in another court.
¶ 14. In 2003, Wis. Stat. § 48.396(2)(g) was amended by 2003 Wisconsin Act 82 as follows:

Upon request of any other court assigned to exercise jurisdiction under this chapter and ch. 938, any municipal court exercising jurisdiction under s. 938.17(2), or a district attorney or corporation counsel or city, village, or town attorney to review court records for the purpose of any proceeding in that other court or upon request of the attorney or guardian ad litem for a party to a proceeding in that court to review court records for the purpose of that proceeding, the court shall open for inspection by any authorized representative of the requester the records of the court relating to any child who has been the subject of a proceeding under this chapter.

(Strike-through and underlining in original).

¶ 15. The LRB analysis of 2003 Assembly Bill 62, which was enacted as 2003 Wisconsin Act 82, stated in pertinent part:

This bill requires a municipal court to open its records of a juvenile for inspection by . . . any juvenile court, municipal court, district attorney, [or] corporation counsel . . . or attorney or guardian ad litem for a party for purposes of proceedings in that juvenile court or municipal court . . . . The bill also requires a juvenile court to open its records of a juvenile for inspection by a municipal court, city, village, or town attorney . . . or guardian ad litem for a party for purposes of proceedings in that municipal court.

¶ 16. Although the amendment deleted the word “other” from the phrase “other court” in the statute, the meaning did not change. Even under the amended statute, while corporation counsel must be given access to the records of the juvenile court relating to any child who had been the subject of a proceeding in that court under Wis. Stat. ch. 48, such access need be given only upon request and only for the purpose of a proceeding in another court. The statute does not require that a corporation counsel be given access to a juvenile court’s records for purposes of a proceeding in that same juvenile court. Further, the statutory language providing for inspection of the juvenile court’s records “relating to any child who has been the subject of a proceeding under [ch. 48]” is subject to a reasonable, limiting interpretation, in view of Wis. Stat. § 48.396(2)(a), to records relating to a child which are relevant to a specific proceeding in the other court.

CONCLUSION

¶ 17. In conclusion, consistent with the advice that my office has offered previously, it is my opinion that corporation counsel may not have access to juvenile cases through the WCCA until such time as the WCCA can be programmed to provide for access only to individual files where
access is permitted under Wis. Stat. § 48.396. Although allowing corporation counsel access to electronic CHIPS and TPR files likely would improve the effective and efficient performance of their duties, and while I have faith that corporation counsel could be trusted to limit their review of WCCA records only to cases in which they represent the public interest, the statutes cannot be interpreted to provide unlimited access to WCCA juvenile records where the general rule is confidentiality and where disclosure is the exception granted only after a fact-specific, case-by-case analysis. See Herget, 84 Wis. 2d at 450-51. I encourage you to pursue the appropriate programming changes in WCCA necessary to permit corporation counsel to access juvenile court records consistent with the statutory limitations.

Sincerely,

[Signature]

J.B. VAN HOLLEN
Attorney General

JBVH:DCR:rk
Re: County Forest Statute - Wis. Stat. § 28.11 - Conservation Easements

Dear Mr. Frank:

¶ 1. The Wisconsin Public Forests law in part seeks "to enable and encourage the planned development and management of the county forests for optimum production of forest products together with recreational opportunities, wildlife, watershed protection and stabilization of stream flow, giving full recognition to the concept of multiple-use to assure maximum public benefits; to protect the public rights, interests and investments in such lands . . . ." Wis. Stat. § 28.11(1). To help assure these policies are carried out, counties must apply for and obtain Wisconsin Department of Natural Resources (DNR) approval for entry of county lands into county forests and obtain forest management plan approvals from their county boards and the DNR. Wis. Stat. § 28.11(4)(a) and (b), (5)(a).

¶ 2. In your May 6, 2010, letter to me, you ask for an opinion relating to the authority of the DNR to allow for conservation easements and restrictive covenants in county forests under the county forest law. Specifically, you ask whether Wisconsin county forests registered under Wis. Stat. §§ 28.10 and 28.11 can allow conservation easements and restrictive covenants where such easements or covenants would not interfere with the purposes of the county forest system. For the following reasons, I believe the answer is that such easements are permitted as long as they are consistent with and do not interfere with the purposes of county forests and the management plans developed for them under the county forest law.

¶ 3. You do not define "conservation easements" or "restrictive covenants" and these terms are not used in Wis. Stat. ch. 28. Wisconsin Stat. § 700.40(1)(a) of the Uniform Conservation Easement Act defines the first term as follows:

"Conservation easement" means a holder's nonpossessor interest in real property imposing any limitation or affirmative obligation the purpose of which includes retaining or protecting natural, scenic or open space values of real property,
assuring the availability of real property for agricultural, forest, recreational or open space use, protecting natural resources, maintaining or enhancing air or water quality, preserving a burial site, as defined in s. 157.70 (1) (b), or preserving the historical, architectural, archaeological or cultural aspects of real property.

As explained at the DNR website, WDNR-Forest Legacy Program, (last revised Friday April 24, 2009), http://dnr.wi.gov/forestry/legacy/conservation_easements.htm:

Landowners place conservation easements on their property because they want to protect it beyond their lifetimes. Easements help them fulfill their vision for the future of their lands and waters.

A conservation easement is a transfer of usage rights which creates a legally enforceable land preservation agreement between a landowner and an easement holder for the purpose of conservation. It can restrict real estate development, commercial and industrial uses, and certain other activities on a property to a mutually agreed upon level. Conservation easements selectively target only those rights necessary to protect specific conservation values.

Such easements are mutually agreed by both seller and purchaser.

¶ 4. Although the term "restrictive covenant" is used in Wisconsin statutes in the real property context [e.g., see Wis. Stat. §§ 92.03(4), 236.42(2)(b), 706.11(1m)(b)2., 847.03(3), 847.10], the term is not defined there. Black's Law Dictionary 392 (8th ed. 2004), defines "covenant" in the property context as a "promise made in a deed or implied by law; esp., an obligation in a deed burdening . . . a landowner." A "restrictive covenant" is defined as a "private agreement, usu. in a deed or lease, that restricts the use or occupancy of real property, esp. by specifying lot sizes, building lines, architectural styles, and the uses to which the property may be put." Id. at 393.

¶ 5. Both conservation easements and restrictive covenants often are intended to "run with the land," are permanent, and are binding on all future owners. They are filed with the local register of deeds with the transaction and deed documents. E.g., see Wis. Stat. § 59.43(1)(a). As mentioned above, a conservation easement or restrictive covenant may limit future uses of the land to any combination of forest, water or resource conservation, game or endangered species habitat, scenic, recreation, hunting, fishing or other similar purposes. These limits on land use can affect the value of the land for future sale and tax purposes.

¶ 6. Because easements and restrictive covenants serve the same purpose of limiting uses of land, I will use the term "conservation easement" to include both. Also, I will assume for the purposes of your question that either the conservation easements or restrictive covenants in
question would be for conservation purposes. I will also assume that the conservation easements or restrictive covenants that are the subject of this opinion are otherwise valid, comply with applicable laws, and were entered and duly recorded in compliance with applicable law.

\[7\] The easements about which you ask would be encumbrances or limitations on county and public uses of county forests. They can accompany mutually agreed transactions of either land acquisition or sale. For example, a landowner or land trust may wish to donate or sell to a county for county forest purposes land that is impressed by a conservation easement previously purchased with Warren Knowles-Gaylord Nelson stewardship program funds. See Wis. Stat. § 23.0915; The Knowles-Nelson Stewardship Program, Guidelines for Nonprofit Conservation Organization, (Rev. 11/05), http://dnr.wi.gov/org/caer/cfa/Grants/Forms/NCOGuidelines.pdf. Or, the state or federal government may wish to purchase from a county an easement restricting uses of certain county forest land parcels for forest preservation, habitat, or conservation purposes.

\[8\] In County of Milwaukee v. Williams, 2007 WI 69, ¶ 24, 301 Wis. 2d 134, 732 N.W.2d 770, the Wisconsin Supreme Court stated, "A county has only such powers as are expressly conferred upon it or necessarily implied from the powers expressly given or from the nature of the grant of power. As a creature of the legislature, a county must exercise its powers within the scope of authority that the State confers upon it." (Internal quotation marks and citations omitted.)

\[9\] In Jackson County v. State, 2006 WI 96, ¶ 16, 293 Wis. 2d 497, 717 N.W.2d 713, the court delineated the nature of the authority possessed by counties:

A county is a creature of the legislature and as such, it has only those powers that the legislature by statute provided. Wis. Const. art. IV, § 22. For more than a century, Wisconsin courts consistently have interpreted counties' powers as arising solely from the statutes[.]

\[10\] As a direct consequence of the fact that all county powers must be derived from a statutory source, "[a] county's home rule power is more limited than the home rule power that is afforded to cities . . . ." Jackson County, 293 Wis. 2d 497, ¶ 17.

\[11\] In State ex rel. Treat v. Puckett, 2002 WI App 58, ¶ 10, 252 Wis. 2d 404, 643 N.W.2d 515, the Wisconsin Court of Appeals summarized applicable rules of statutory interpretation.

The aim of all statutory construction is to discern the intent of the legislature. We look first to the language of the statute to determine whether it plainly conveys the legislature's intent. When our inquiry is directed at whether the legislature intended to grant a particular power to an administrative agency,
we first examine the language of the statute to determine whether it expressly grants that power; if it does, we conclude the legislature intended the agency to have that power. If the power is not expressly granted, we decide whether it is necessarily implied—either because it is necessary to carry out the purpose of the statute, or necessary to fully exercise the powers expressly granted, or necessary to perform an express duty.

(Citations and footnotes omitted.) Statutory interpretation "begins with the language of the statute. . . ." *State ex rel. Kalal v. Circuit Court*, 2004 WI 58, ¶ 45, 271 Wis. 2d 633, 681 N.W.2d 110 (citation omitted). Statutory language must be construed 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. *Kalal*, 271 Wis. 2d 633, ¶ 46.

¶ 12. I find in Wis. Stat. chs. 28 and 59 no specifically expressed authorization or prohibition of conservation easements in county forests. However, interpretation of the applicable statutes in context with each other leads me to the conclusion that the authority to allow conservation easements within county forests is necessarily implied. The following provisions of the state statutes are pertinent to answering your question.

¶ 13. The authority in Wis. Stat. chs. 28 or 59 on the types of acquisitions or sales of interests in county lands that may be made appears to be broad and with few exceptions, discussed below. In addition to providing counties with the authority to acquire land rights for any public uses and purposes, Wis. Stat. § 59.01 authorizes each county "to make such contracts and to do such other acts as are necessary and proper to the exercise of the powers and privileges granted and the performance of the legal duties charged upon it." Under Wis. Stat. § 59.03(2)(a), "Except as elsewhere specifically provided in these statutes, the board of any county is vested with all powers of a local, legislative and administrative character . . . ." Wisconsin Stat. § 59.03(2)(f) states, "The powers conferred by this subsection shall be in addition to all other grants of power and shall be limited only by express language." Finally, under Wis. Stat. § 59.04 provides, "To give counties the largest measure of self-government under the administrative home rule authority granted to counties in s. 59.03 (1), this chapter shall be liberally construed in favor of the rights, powers and privileges of counties to exercise any organizational or administrative power."

¶ 14. The statutes do not limit the authority of counties to purchase, acquire, sell or dispose of lands to only those lands that are unencumbered by easements. It is not uncommon for lands to be so encumbered, and the counties appear to have, subject to the limits of their authority, the power to acquire land whether it is so encumbered or not, so long as the acquisition is for a public use or purpose. Wis. Stat. §§ 59.01, 59.52(6)(a); 80 Op. Att'y Gen. 80 (1991) (A county may not acquire land for the purpose of leasing it to a private entity to operate a racetrack.) The notion that counties may acquire and own encumbered lands is supported by Wis. Stat. § 59.52(6)(c). That provision authorizes the county clerk, upon approval of the county
board, to lease, sell or convey county property. A notable exception to this authority is that property "donated and required to be held for a special purpose" may not be sold or conveyed. This exception recognizes that the county may own donated lands that are impressed with a restriction that they may not be sold and must remain in county ownership. Such a restriction is broader than an easement restricting land uses (but not ownership), and supports the notion that counties may acquire and own encumbered lands.

¶ 15. Wisconsin Stat. § 59.52(6)(e) authorizes counties to lease lands to the department for game management purposes. However, "[l]ands so leased shall not be eligible for entry under s. 28.11." This exception excluding DNR leased lands for game management purposes from entry into the county forest system is limited and does not inform the analysis here.

¶ 16. There being no limitation in Wis. Stat. ch. 59 on county ownership of lands encumbered by easements, the issue remains whether the county forest law in Wis. Stat. ch. 28 limits the authority of counties to acquire lands that are impressed with easement limitations on land use or limits their authority to sell easements limiting uses of lands in county forests.

¶ 17. As previously stated, authority for counties to grant conservation easements on lands enrolled in county forests or to acquire lands impressed with conservation easements for county forests is not expressly granted in Wis. Stat. ch. 28. However, there are significant indicia in the statutes that demonstrate that such authority is necessarily implied.

¶ 18. First and foremost, county forest lands are county lands. Wis. Stat. § 28.11(2). As discussed previously counties may acquire lands whether encumbered or not. The issue remains whether they may be acquired for county forest purposes.

¶ 19. Within the county forest law, Wis. Stat. § 28.10 provides specific authority to counties to acquire lands for county forest purposes. The authority of the county board under Wis. Stat. § 28.10, to "establish a county public forest and acquire land by tax deed or otherwise for that purpose" is broad and unqualified. The acquisition of land "by tax deed or otherwise" is not limited to acquisitions of unencumbered land. Wisconsin Stat. § 28.11(3)(c) empowers the county board to "[a]ppropriate funds for the purchase, development, protection and maintenance of such forests and to exchange other county-owned lands for the purpose of consolidating and blocking county forest holdings." Wisconsin Stat. § 28.11(3)(e) authorizes the county board to "[e]stablish aesthetic management zones along roads and waters . . . ." Acquisition and protection of lands in the county forest for these purposes may be served by lands impressed with conservation easements. In addition, Wis. Stat. § 28.11(5)(a) requires counties under the program to prepare a comprehensive county forest land use plan that "shall include . . . land acquisition . . . ." Again, this section does not limit land acquisition to unencumbered land. Moreover, this section also requires the plan to include "land use designations, . . . forest protection, annual allowable timber harvests, recreational developments, fish and wildlife
management activities, roads, silvicultural operations . . . ." These land uses can be served by and consistent with conservation easements.

¶ 20. Additionally, Wis. Stat. § 28.11(4)(c) contemplates the existence in county forests of lands having uses that may be served and are fully compatible with conservation easements that run with them. That section provides for "county special-use lands" within the county forest that "are not suited primarily for timber production . . . but . . . are suitable for scenic, outdoor recreation, public hunting and fishing, water conservation and other multiple-use purposes." These are consistent with the purpose of the county forest law "to enable and encourage the planned development and management of the county forests for optimum production of forest products together with recreational opportunities, wildlife, watershed protection and stabilization of stream flow, giving full recognition to the concept of multiple-use to assure maximum public benefits; to protect the public rights, interests and investments in such lands . . . ." Wis. Stat. § 28.11(1).

¶ 21. An interpretation of these provisions as including an unwritten restriction on the use of conservation easements in county forests would stifle the broad authority provided for land acquisitions and uses for county forest purposes. Limiting acquisitions and land agreements to unencumbered lands could significantly frustrate the public purposes to be served and public benefits to be derived from county forests including "for the purpose of consolidating and blocking county forest holdings." Wis. Stat. § 28.11(3)(c), (4)(b).

¶ 22. For the above reasons, I believe the legislature provided counties with the authority to acquire and grant conservation easements that run with the land in county forests because that authority is "necessarily implied from the powers expressly given or from the nature of the grant of power." County of Milwaukee v. Williams, 301 Wis. 2d 134, ¶ 24 (internal quotation marks and citation omitted). Because the broad authority of acquisition and management of county forests is not limited by the law, the counties' ability to fully carry out the purposes of the county forest law would be unduly constricted by an unexpressed, unqualified and unnecessary prohibition on the use of conservation easements, and such a prohibition could readily prevent consolidation and blocking of county forest holdings. I believe the authority to use conservation easements is necessary to carry out the purpose of the statute, is necessary to fully exercise the powers expressly granted, and is necessary to perform the express duties provided in the county forest law. State ex rel. Treat v. Puckett, 252 Wis. 2d 404, ¶ 10. Thus, counties have the authority to enter into conservation easements as part of their county forest acquisition and management authorities and duties.

¶ 23. I am mindful of the fact that it may be argued that the "Powers of county board" with respect to establishment and management of county forests are enumerated in Wis. Stat. § 28.11(3), and no express authority for conservation easements is provided within them or within the rest of Wis. Stat. ch. 28. Wisconsin Stat. § 28.11(3) provides, "The county board of any such county may" establish regulations governing public use of the county forest and enter into
various agreements, including for projects or actions that ordinarily would not be consistent with the purposes of the county forests stated in Wis. Stat. § 28.11(1). For example, see Wis. Stat. § 28.11(3)(i) and (j) (leases for ore, mineral, gas or oil exploration and extraction). Thus, it may be argued that because it is not enumerated, the authority to provide for conservation easements in county forests is not provided. I would reject that argument for the following reasons.

¶ 24. The use of the term "may" in Wis. Stat. § 28.11(3) is ambiguous. The word "may" connotes that there are other powers the board may exercise to fulfill the purposes of the county forest law. Or, the term "may" can simply connote that the enumerated power is available but not mandated by the statutory provision. It might also connote that the enumerated list of authorities is exclusive. Accordingly, the term "may" is ambiguous as to whether it provides the exclusive powers enumerated. See Eau Claire Cty. v. Teamsters Union No. 662, 228 Wis. 2d 640, 645-646, 599 N.W.2d 423 (Ct. App. 1999), citing In re J.A.L., 162 Wis. 2d 940, 962, 471 N.W.2d 493 (1991). Within the context of the above provisions of Wis. Stat. §§ 28.10 and 28.11, I am convinced that the enumerated powers in sub. (3) are not exclusive. For example, although the enumeration of powers under sub. (3) does not grant the board authority to approve county forest plans, that authority and duty is included in sub. (5). Although sub. (3) does not grant the board power to acquire lands for county forests, it is granted in Wis. Stat. § 28.10, and within the board's plan approval authority in sub. (5). Although sub. (3) does not grant the board power to apply for withdrawal of county forest lands, sub. (11) does. Clearly, the enumerated powers of the county board in Wis. Stat. § 28.11(3) with respect to county forests are not exclusive. Moreover, there are no provisions in Wis. Stat. § 28.11 that expressly or implicitly exclude the use conservation easements as a tool for fulfilling county forest purposes.

¶ 25. Although I find that conservation easements may be used as a tool to carry out county forest purposes, the authority to grant (sell) or acquire lands impressed with conservation easements for and in county forests is not without limits. Under Wis. Stat. § 28.10, encumbered lands must be acquired "for that purpose" only – that is, for establishing a public forest consistent with the county forest law. The grant of an easement on land in a county forest or the acquisition of lands impressed with conservation easements must not conflict with and be consistent with the purposes of the county forest law and with the county forest plan developed and approved by the county board and the department for the forest. I do not believe it is sufficient for an easement to be shown to "not interfere with the overall purpose of the county forest system" as your question is asked. An easement must be consistent with and not interfere or conflict with county forest law provisions of Wis. Stat. § 28.11, including with the county forest management plan developed and approved under Wis. Stat. § 28.11(5).

¶ 26. Lastly, counties that enter into conservation easement agreements, and the department that approves their use as part of the county forest plan approval process, should do so with open eyes. Easements and restrictive covenants appended to deeds often run with the land, are permanent, and may become unalterable. They may limit in perpetuity the uses to which land may be put, as they are intended to do. Even though an easement may be consistent
with county forest purposes and its management plan, it may limit a county's options in the future to alter forest management plans for particular units or parcels, such as for mining leases. Because the powers enumerated in Wis. Stat. § 28.11(3) are completely within the discretion of the county board to exercise, the board has the discretion to permanently forego or limit the future exercise of particular powers in that section with respect to particular lands by entering into conservation easements that are otherwise consistent with the law and approved forest management plans. Agreements that violate statutorily created duties are voidable. I do not see such easements affecting the authority of the county board to seek, or for DNR to approve, county forest withdrawals under Wis. Stat. § 28.11(11). If withdrawals are granted, the easements would remain in force and unaffected. On the other hand, the duties imposed under Wis. Stat. § 28.11 for compliance with the provisions of the law may not be waived by the board by entry into an easement agreement.

¶ 27. For the foregoing reasons, I believe conservation easements and restrictive covenants are permissible in county forests as long as they are consistent with and do not interfere with the purposes of county forests and the management plans properly developed for them under the county forest law.

Sincerely,

[Signature]

J.B. VAN HOLLEN
Attorney General

JBVH:TJD:drm