

Jonathan Anderson
Jesse Manser
Matt Schultz
c/o Mark Zoromski
University of Wisconsin – Milwaukee
Department of Journalism and Mass Communication
117 Johnston Hall
P.O. Box 413
Milwaukee, Wisconsin 53201

Wednesday, April 15, 2009

VIA HAND DELIVERY

Hon. J.B. Van Hollen
Attorney General of Wisconsin
State Capitol
Suite 114 East
Madison, Wisconsin 53707-7857

Dear Mr. Van Hollen:

We are a group of student journalists at the University of Wisconsin – Milwaukee and are writing to request a formal opinion under Wis. Stat. § 19.39 as to whether student government organizations at University of Wisconsin system campuses (“SGOs”) are independently subject to the Wisconsin Public Records Law (Wis. Stat. §§ 19.31-19.39) (“WPRL”) and the Wisconsin Open Meetings Law (Wis. Stat. §§ 19.81-19.98) (“WOML”). Because we believe this specific question is a matter of first impression to your office, we have attempted to provide as much information and context as possible about how SGOs are organized and funded, the governmental functions they perform, and their role in university governance, among other things. We have set forth arguments as to why, in our view, WPRL and WOML independently apply to SGOs. And, we have included relevant records, court opinions, prior attorney general opinions, and other documents that form the basis of our position.

This examination is of great public importance because it confronts whether the public really is “entitled to the greatest possible information regarding the affairs of government,”¹

¹ Wis. Stat. §19.31 Declaration of policy: “In recognition of the fact that a representative government is dependent upon an informed electorate, it is declared to be the public policy of this state that all persons are entitled to the greatest possible information regarding the affairs of government and the official acts of those officers and employees who represent them. Further, providing persons with such information is declared to be an essential function of a representative government and an integral part of the routine duties of officers and employees whose responsibility it is to provide such information. To that end, ss. 19.32 to 19.37 shall be construed in every instance with a presumption of complete public access, consistent with the conduct of

specifically the governance of University of Wisconsin (UW) institutions.² Acting with statutory authority, SGOs are active participants in the governance of UW institutions, have primary responsibility for doling out tens of millions of dollars in public money every year,³ and have significant university policy formulation and review powers – all governmental functions embedded in a significant state interest⁴. Yet despite this authority, SGOs are seemingly free to operate in the dark. There have been recent attempts by SGOs to shroud themselves in secrecy and avoid public scrutiny, including withholding public records where disclosure would have been mandated by WPRL and attempting to eject journalists and the public from formal student governmental meetings where closed session exemptions would not have applied. Such actions stand grossly counter to the longstanding Wisconsin tradition of open and transparent government, holding elected officials accountable, and having an informed electorate. There is also apparent confusion among UW stakeholders, including UW administration and SGOs themselves, as to whether SGOs must comply with WPRL and WOML. Through this letter, we seek your opinion not just to have formal legal analysis, but to help shine light on a dim segment of Wisconsin government.

I. THE PLAIN LANGUAGE OF WIS. STAT. § 36.09(5) IS INDICATIVE OF A LEGISLATIVE INTENT TO MANDATE STUDENT PARTICIPATION IN INSTITUTIONAL GOVERNANCE.

Wis. Stat. § 36.09 is the basis of the governance framework that university administrators and student government officials, among others, commonly refer to as “shared governance.” This framework provides that the responsibility to govern UW institutions be shared among campus administration, faculty and students, with Wis. Stat. § 36.09(5) the section outlining the role of students in institutional governance. Shared governance is often a source of contention between students (acting through SGOs) and university administrators and has been the impetus of litigation, because the line that delineates the shared responsibilities and final authority is not always clear. What is clear to us, though, is that with respect to WPRL and WOML, the actions and effects of SGOs are not just elements of “shared governance,” but plainly “governance.” Wis. Stat. § 36.09(5)⁵ reads:

governmental business. The denial of public access generally is contrary to the public interest, and only in an exceptional case may access be denied.” (Emphasis added)

² “The rights of residents who are students are of great public importance.” UW-Oshkosh Student Association v. Board of Regents (App. 1979) 90 Wis. 2d 79

³ See Exhibit A

⁴ Wis. Stat. §36.01(1) articulates this “significant state interest”: “**The legislature finds it in the public interest** to provide a system of higher education which enables students of all ages, backgrounds and levels of income to participate in the search for knowledge and individual development; which stresses undergraduate teaching as its main priority; which offers selected professional graduate and research programs with emphasis on state and national needs; which fosters diversity of educational opportunity; which promotes service to the public; which makes effective and efficient use of human and physical resources; which functions cooperatively with other educational institutions and systems; and which promotes internal coordination and the wisest possible use of resources.” (Emphasis added)

⁵ See Exhibit D: Wis. Stat. § 36.09

The students of each institution or campus subject to the responsibilities and powers of the board, the president, the chancellor and the faculty shall be active participants in the immediate governance of and policy development for such institutions. As such, students shall have primary responsibility for the formulation and review of policies concerning student life, services and interests. Students in consultation with the chancellor and subject to the final confirmation of the board shall have the responsibility for the disposition of those student fees which constitute substantial support for campus student activities. The students of each institution or campus shall have the right to organize themselves in a manner they determine and to select their representatives to participate in institutional governance. (Emphasis added)

Through Wis. Stat. § 36.09(5), the Legislature has not just given students a mere spectator role in institutional governance, but it has explicitly mandated that students be “active participants in the immediate governance of and policy development” for UW institutions. The Legislature has mandated that students have “primary responsibility for the formulation and review of policies concerning student life, services and interests.” And, the Legislature has mandated that students have the “responsibility for the disposition of those student fees which constitute substantial support for student activities.” Former Attorney General Bronson C. La Follette found a consistent legislative intent, writing in an attorney general opinion⁶ that “[u]nder sec. 36.09(5), Stats., the students of each institution or campus in the University of Wisconsin System are empowered, and indeed obligated to participate actively ‘in the immediate governance of and policy development for’ their respective institution or campus...” (Emphasis added)

II. STUDENTS PARTICIPATE IN INSTITUTIONAL GOVERNANCE VIA STUDENT GOVERNMENT ORGANIZATIONS (SGOs).

Acting with legislative authorization, students fulfill their statutory responsibilities and exercise their power through SGOs. This practice is evidenced by:

- (a) Student Association of University of Wisconsin – Milwaukee v. Baum, 74 Wis. 2d 283; 246 N.W.2d 622; 1976 Wis. (“Baum”)⁷ and UW-Oshkosh Student Association v. Board of Regents (App. 1979) 90 Wis. 2d 79 (“Oshkosh”)⁸, which found that SGOs are the representatives of students for purposes of Wis. Stat. § 36.09(5);
- (b) Op. Att’y Gen., August 6, 1980, which found that the students of UW-Madison participated in institutional governance through the student government organization they created and that the student government organization was an entity in the executive branch of state government;

⁶ See Exhibit B: Op. Att’y Gen., August 6, 1980

⁷ See Exhibit

⁸ See Exhibit

(c) Kaye v. Board of Regents, 158 Wis. 2d 664; 463 N.W.2d 398; 1990 Wis. App. (“Kaye”)⁹, which found that a committee of the student government organization at UW-Milwaukee was so inextricably tied to university governance that it constituted a “state agency” in the executive branch for purposes of Wis. Stat. § 20.918 (now Wis. Stat. § 20. 930);

(d) and UW System policy.

In 1976, the Wisconsin Supreme Court in Baum unanimously ruled that “[t]he legislative intent of [Wis. Stat. § 36.09(5)] was to give students the statutory right to organize themselves as they determined and through the organization select their representatives to participate in institutional governance.” (Emphasis added) Baum established that the student government organization at UW – Milwaukee, the Student Association, “must be recognized as the organized representative of the students” of UW – Milwaukee. The court concluded that the Student Association, and not the student body, held the “statutory authority to select the student members” of the university committee in question to the court case.¹⁰

Three years later, in Oshkosh¹¹, the Wisconsin Court of Appeals applied Baum’s holding that the UWM Student Student Association held the statutory authority to select representatives to participate in institutional governance, finding that the UW – Oshkosh Student Association (the student government organization at UW – Oshkosh) (“OSA”) could not be required to submit more names into nomination than there were student positions to fill on committees. In Oshkosh, the president of the UW System requested that OSA submit a list of four students to serve on a system search and screen committee, from which the president wanted to choose two. The OSA refused, arguing it had the right to directly appoint the student representatives to the committee. In its ruling, the court held that OSA “had the right to directly appoint their representatives to the Search and Screen committee.”

A year after Oshkosh, then-Governor Lee Dreyfus asked then-Attorney General Bronson C. La Follette to opine if the student government organization at UW-Madison, the Wisconsin Student Association (“WSA”), was a state agency within the meaning of such term as employed in Wis. Stat. § 20.918 (now Wis. Stat. § 20. 930), which read, “[e]xcept as provided in ss. 5.05 (2m) (c) 7., 46.27 (7g) (h), 49.496 (3) (f), and 49.682 (6), no state agency in the executive branch may employ any attorney until such employment has been approved by the governor.” In his opinion¹², Attorney General La Follette did not believe

⁹ See Exhibit

¹⁰ See Exhibit S: Baum. See Exhibit D: Wis. Stat. § 36.09(5) Annotated Statute: “Sub. (5) gives student organizations, rather than the student body, the right to select representatives to participate in institutional governance. Student Association of U.W.-Milwaukee v. Baum, 74 Wis. 2d 283, 246 N.W.2d 622 (1976).”

¹¹ See Exhibit S-1: Oshkosh

¹² See Exhibit B: Op. Att’y Gen., August 6, 1980

WSA was a state agency within the meaning of such term as employed in Wis. Stat. § 20.918 (now Wis. Stat. § 20.930), but did discuss two points that are pertinent to this matter.

First, Attorney General La Follette noted that the students of UW-Madison participated in institutional governance through a surrogate: WSA. La Follette wrote:

W.S.A. functions pursuant to sec. 36.09(5), Stats., as a surrogate for the students of the University of Wisconsin-Madison, in which it participates actively in the immediate governance of and policy development for the University of Wisconsin-Madison. Under sec. 36.09(5), Stats., the students of each institution or campus in the University of Wisconsin System are empowered, and indeed obligated to participate actively ‘in the immediate governance of and policy development for’ their respective institution or campus; but they also have the right thereunder ‘to organize themselves in a manner they determine and to select their representatives to participate in institutional governance’...The students of the University of Wisconsin-Madison have chose to ‘participate in institutional governance’ through a surrogate corporation, namely, the W.S.A.’ (Emphasis added)

Second, Attorney General La Follette found WSA to be an entity in the executive branch of state government. La Follette wrote:

[T]he W.S.A. is an entity functioning within the executive branch of Wisconsin state government, in that it functions within a university component of the University of Wisconsin System, which is subject to the governance of the Board of Regents of the University of Wisconsin System, with that Board being recognized as an independent agency constituting part of the structure of the executive branch of Wisconsin state government...

In 1990, the Wisconsin Court of Appeals in Kaye¹³ ruled that the Union Policy Board at the University of Wisconsin-Milwaukee (“UPB”), an organization formed under Wis. Stat. § 36.09(5), was subject to Wis. Stat. § 20.918 (now Wis. Stat. § 20.930). The Court said:

We conclude that we must interpret sec. 20.918, Stats., broadly to apply to the principal administrative unit and whatever agencies that assist the principal administrative unit in the administration and governance of the unit. UPB is an ‘active participant in the immediate governance of and policy development’ of the University of Wisconsin-Milwaukee. Sec. 36.09(5), Stats... Student organizations such as UPB have ‘primary responsibility’ for certain acts of governance. Sec. 36.09(5), Stats.

¹³ See Exhibit S-2: Kaye

However, they are subject to the responsibilities and powers of the Board of Regents.’ (Emphasis added)

The court concluded that “UPB is subject to sec. 20.918, Stats., because it is an integral part of the principal administrative unit – the University of Wisconsin System – under the authority of the Board of Regents.” The annotated statute of Wis. Stat. § 20.918 (now Wis. Stat. § 20.930) summarizes the Kaye ruling: that the statute “applies to principal administrative units and whatever agencies assist those units in administration and governance of the unit.” (Emphasis added) Kaye found that UPB constitutes an “agency” that assisted a principal administrative unit in administration and governance, but is not itself a formal subunit of the principal administrative unit. SGOs, just like UPB in Kaye, assist UW institutions (principal administrative units) in administration and governance, but are not formal subunits of the institutions themselves.

The UW System is cognizant of the role that SGOs play in institutional governance. This is evidenced through its policy, practice, and public references to SGOs. For example:

- UW System Policy 30-3 “Guidelines for Student Governance,” shows that the Board of Regents recognizes that “students” act through SGOs for purposes of Wis. Stat. § 36.09(5): “[s]tudents, acting through the SUF Allocations Committee (SUF AC) or other designated institution-wide body, shall be responsible for formulation of the allocable SUF budget, subject to the responsibilities of the chancellor.” (Emphasis added)¹⁴
- UW System Policy 30-3 also specifically utilizes the phrase “student government association”: “[i]nstitutions, in consultation with the student government association, shall define the area of “student life, services, and interests...”” (Emphasis added)¹⁵
- UW System Policy F50 “Segregated University Fees” mandates that “[t]he student group organized at each UW institution for the purpose of engaging in the allocation process under s. 36.09(5), Wis. Stats., is referred to in this policy as the Student University Fee Allocation Committee or “SUFAC.”” (Emphasis added)¹⁶
- UW System Policy 6-4 “Search and screen procedures for chancellors, senior vice presidents and vice presidents,” is cognizant that SGOs are recognized by UW institutions, as it mandates that “[s]tudents selected by the recognized institutional student government” shall be appointed by the UW System President to search and

¹⁴ See Exhibit Y

¹⁵ See Exhibit Y

¹⁶ See Exhibit X

screen committees. (Emphasis added)¹⁷

- The UW System web site contains a section about SGOs, including a web page describing student involvement in university governance, a roster of most SGOs in the UW System and a page of links to the web sites of most SGOs in the UW System.¹⁸
- In order to meet constitutional muster, allocable segregated university fees (SUF) must be disbursed in a viewpoint-neutral manner (Board of Regents v. Southworth, 529 U.S. 217, 120 S. Ct. 1346 (2000)) (“Southworth”). UW System General Counsel has reviewed student government policies to ensure compliance with Southworth and considers it best practice to do so.¹⁹

The Wisconsin Supreme Court, the Wisconsin Court of Appeals, the Wisconsin Attorney General and the UW System have all recognized that students participate in institutional governance through the legislatively-authorized organizations they have created- SGOs. It is through SGOs that students fulfill their statutory obligations and exercise their power, participate in institutional governance, and assist UW institutions in “administration and governance.” UW institutions formally recognize those SGOs that are part of the institutional governance structure.

III. THE RESPONSIBILITIES MANDATED TO STUDENTS BY WIS. STAT. § 36.09(5) ARE CLEARLY GOVERNMENTAL FUNCTIONS.

Wis. Stat. § 36.09(5) mandates that students (a) be “active participants in the immediate governance of and policy development” for UW institutions; (b) have “primary responsibility for the formulation and review of policies concerning student life, services and interests”; and (c) have the “responsibility for the disposition of those student fees which constitute substantial support for student activities.” SGOs, as the organizations formed by the “students” and recognized by courts and the Board of Regents as the official representatives of the students, carry out these responsibilities to participate in institutional governance.

¹⁷ See Exhibit H

¹⁸ See Exhibit L or visit <http://www.uwsa.edu/acss/studentreps/>

¹⁹ See Exhibit C: “[T]he University is committed to assisting the student government in evaluating the application in a manner consistent with *Board of Regents v. Southworth*, 529 U.S. 217(2000), a case we are very familiar with.” See Exhibit C-1: “Please be advised that the legislation you discuss in your letter is not yet in effect, pending review by my office. We will work with the campus and the student government to provide any guidance necessary to assure that their segregated fee policies are consistent with *Board of Regents v. Southworth*, 529 U.S. 217 (2000) and other relevant law.”

A. Students are “active participants in the immediate governance of and policy development” for UW institutions.

Wis. Stat. § 36.09(5) declares a broad mandate that students be “active participants” in institutional governance and policy development. On its face, the statute recognizes that students, through SGOs, are part of the governing framework of UW institutions, because being an “active participant” in governance and policy development is inherently governance itself.

B. Students have “primary responsibility for the formulation and review of policies concerning student life, services and interests.”

SGOs are empowered by Wis. Stat. § 36.09(5) to have “primary responsibility for the formulation and review of policies concerning student life, services and interests.” Having this responsibility for a publicly funded educational institution that is an arm of state government is inherently a function of government. For example, the student government organization at UW – La Crosse, the Student Association, voted in early December to approve a proposal that would add vending machines to the university library. According to one media report²⁰, after students spoke with the Student Senate president about the idea, the president discussed the matter with the library director. A proposal was developed and debated, and ultimately approved by the Student Senate, which is the legislative arm of the Student Association. At UW – Platteville, one of the campus SGOs, which is also called the Student Senate, approved²¹ in early November a measure affecting textbook rentals on campus. According to the UW – Platteville student newspaper, the *Exponent*, the resolution aims to “expedite textbook returns and cut down costs at the Textbook Center.” Through the approved legislation, the Textbook Center is expected to reduce payroll expenses of temporary workers. And at UW – Milwaukee, the Union Policy Board approved a measure to ban smoking in the UWM Union in 2006. The director of the union told the *UWM Post* that the decision by the policy board “will force [the university] to police the facility more.”²²

C. Students have the “responsibility for the disposition of those student fees which constitute substantial support for student activities.”

SGOs budgeted to allocate a minimum combined total of \$25,331,296.82 during the 2007 – 2008 academic year, disbursing money to campus student activities, including student organizations, university departments, and programs. This responsibility is delegated to SGOs by law, as Wis. Stat. § 36.09(5) mandates that SGOs, “in consultation with the chancellor and subject to the final confirmation of the board shall have the responsibility for the disposition of those student fees which constitute substantial support for campus student activities.” For example, the student government organization at UW – Madison, Associated Students of Madison, budgeted to allocate during the 2007-2008 academic year \$49,746 to UW – Madison’s Rape Crisis Center and \$17,925 to UW – Madison’s Legal

²⁰ See Exhibit E

²¹ See Exhibit F

²² See Exhibit G

Information Center, among other allocations²³. At UW – Eau Claire, the Student Senate budgeted to allocate \$26,000 to the student radio station, WUEC Radio, among other allocations, for the 2007 – 2008 academic year²⁴. At UW – Stevens Point, the UWSP Student Government Association budgeted to allocate \$49,017 to the UW – Stevens Point’s day care center and \$862,125 to student organizations and other organized activities, among other allocations, during the 2007 – 2008 academic year²⁵. And at UW – Superior, the Student Government Association budgeted to allocate during the 2007 – 2008 academic year \$868.70 to the German Club and \$6,830.00 to the BBQ Club, among other allocations.²⁶ These are just a few examples of the types of allocations SGOs make with state funds each year. To see an aggregate listing of total allocations by campus for the 2007 – 2008 academic year, see Exhibit A.

The funds that the above mentioned SGOs, and all SGOs across the state allocate, are derived from mandatory fees that students must pay as a requirement to enroll in classes. The UW System classifies these mandatory fees as segregated university fees (“SUF”) and divides the revenue into two portions: allocable SUF and non-allocable SUF. SUF are considered to be state funds, held in the state treasury and “subject to the same limitations on use as other state funds.”²⁷ In clarifying Wis. Stat. § 36.09(5), UW System Policy F50 effectively defines the statutory language “those student fees which constitute substantial support for campus student activities” as allocable SUF²⁸. F50 I(A)(1) states:

Allocable SUF are those SUF that provide substantial support for campus student activities and services as outlined in Section I.(B)(6)(a) and that are allocated by students, in consultation with the chancellor and subject to the final confirmation of the Board of Regents, in accordance with s. 36.09(5), Wis. Stats.

The responsibilities mandated to students by Wis. Stat. § 36.09(5)- to be “active participants in the immediate governance of and policy development” for UW institutions, to have “primary responsibility for the formulation and review of policies concerning student life, services and interests,” to have the “responsibility for the disposition of those student fees which constitute substantial support for student activities”- are governmental functions. These functions are unarguably within the inherent governance purview of the UW Board of Regents, as the responsibilities and powers delegated to students are “subject to the responsibilities and powers of the board.” The Legislature and the UW Board of Regents

²³ See Exhibit A-2

²⁴ See Exhibit A-3

²⁵ See Exhibit A-4

²⁶ See Exhibit Z

²⁷ See Exhibit X: UW System Policy F50 I(C)(1): “SUF are state funds which are deposited and held in the State Treasury, and which are subject to same limitations on use as other state funds.”

²⁸ See Exhibit X: UW System Policy F50 I(A)(1)

have implemented a governance framework that delegates certain governmental functions to students. The students of each institution carry out these responsibilities through SGOs.

IV. ANY LACK OF FINAL DECISION-MAKING AUTHORITY IS IRRELEVANT BECAUSE SGOs PARTAKE IN INFORMATION-GATHERING AND DISCUSSION – TWO FORMS OF GOVERNMENTAL BUSINESS.

In the process of fulfilling their statutory responsibilities, SGOs partake in information-gathering and discussion on matters they have oversight of, despite their responsibilities, powers and decision-making authority being subject to the “responsibilities and powers of the board, the president, the chancellor and the faculty.” The Wisconsin Supreme Court has held that information-gathering and discussion constitute governmental business for purposes of WOML, else “the public... may never be exposed to the actual controlling rationale of a government decision.”²⁹

For example, SGOs have the responsibility to disburse allocable segregated university fees (SUF), because pursuant to Wis. Stat. § 36.09(5), students “have the responsibility for the disposition of those student fees which constitute substantial support for campus student activities.” SGOs partake in discussion and information-gathering about the funding levels of student organizations and university programs and departments, ultimately making funding decisions. However, the funding decisions are to be made “in consultation with the chancellor and subject to the final confirmation of the board.” The Board of Regents is empowered to have final authority over the administration of segregated university fees.³⁰ Thus, SGOs may lack final decision-making authority, but they are still conducting governmental business that fulfills their statutory obligations in institutional governance. If SGOs are not independently subject to WPRL and WOML, then the “controlling rationale” of the decisions that university administrators make may never be exposed.

V. SGOs ARE PRIMARILY, THOUGH NOT EXCLUSIVELY, PUBLICLY FUNDED.

In addition to making allocations of public money, all SGOs are primarily, though not always exclusively, funded through allocable segregated university fees. For the 2007 –

²⁹ The Wisconsin Supreme Court, in State ex rel. Newspapers, Inc. v. Showers, 135 Wis.2d 77, 398 N.W.2d 154 (1987) (“Showers”), found that information-gathering and discussion, among other activities, constituted governmental business. The Wisconsin Supreme Court ruled in State ex rel. Badke v. Vill. Bd. of the Vill. of Greendale, 173 Wis.2d 553, 494 N.W.2d 408 (1993) (“Badke”), information-gathering is a type of governmental business, else “the public... may never be exposed to the actual controlling rationale of a government decision.”

³⁰ See Exhibit Y: UW System Policy 30-3 “Guidelines for Student Governance”: “Students, acting through the SUF Allocations Committee (SUF AC) or other designated institution-wide body, shall be responsible for formulation of the allocable SUF budget, subject to the responsibilities of the chancellor. The basis for denying or changing the student decision shall be substantial and shall be communicated by the chancellor to the recommending student agency in a timely manner. The chancellor shall discuss any changes s/he recommends to the SUF budget for student consideration and decision before the chancellor forwards the institution's budget to System Administration and the Regents.”

2008 academic year, the student government organization at UW – Milwaukee, the UWM Student Association, was allocated \$127,100 for staff payroll, travel, programming, office operations and election management³¹. At UW – Green Bay, the Student Government Association was allocated \$37,474.42 for the 2007 – 2008 academic year³². And at UW – Stout, the Stout Student Association was allocated \$49,398.00 for the 2007 – 2008 academic year³³. These are only three examples of the public money that SGOs receive every year.

VI. SOME SGOs HAVE ACTED CONTRARY TO PRINCIPLES OF OPENNESS AND ACCOUNTABILITY

Through a survey of student media at four-year UW system campuses, we have discovered multiple cases of SGOs withholding records and closing meetings despite the public interest in making the records public and keeping the meetings open.

A. The student government organization at UW – Milwaukee refused to release records concerning an expensive trip – records that arguably would have been releasable under WPRL.

In March of 2008, the *UWM Post* requested records from the UWM Student Association (“SA”) regarding a trip the SA took to New York City, including the names of those officers who went. After nearly a month, SA initially agreed to turn over the records. However, only one SA official produced a response to a minor portion of the request, directing the *UWM Post* to a web site. No records, however, were produced by the Student Association. The SA president told the newspaper that it had consulted with UWM’s Office of Legal Affairs (“OLA”) as to whether or not it was subject to WPRL, despite the fact that OLA denies any such consultation and says it cannot give legal advice to students and student organizations³⁴. The SA president pointed the newspaper to the university’s public records custodian, however the public records custodian told the newspaper that the university did not have purview over the Student Association’s records, writing in an e-mail “...SA records are not within my purview.”³⁵ The newspaper ultimately obtained records that the university had custody of, though heavily redacted due the university’s interpretation of the federal Family Educational Rights and Privacy Act (FERPA). The newspaper found that the SA spent over \$12,000 on the trip and that one of the trip participants was not an SA official. The newspaper also found the group stayed at a luxury hotel in Manhattan and rented private vans for ground transportation- all with public money.³⁶

³¹ See Exhibit K

³² See Exhibit A-12: “Student Government Association” (Page 2 of exhibit)

³³ See Exhibit M: “SSA Total” (Page 2 of exhibit)

³⁴ See Exhibit N

³⁵ See Exhibit O

³⁶ See Exhibit’s R and R-1

B. An official of the student government organization at UW – Milwaukee ordered campus media to leave a public meeting in violation of WOML.

In April of 2008, a television reporter and photojournalist from UWM *PantherVision* covering a UWM Student Association (“SA”) hearing concerning student government election violations were ordered to leave the hearing. An SA official called UWM Union staff to escort the news crew out of the meeting room. However, the reporter and photojournalist invoked their right to attend the meeting via WOML. The SA official rescinded the demand.³⁷

C. UW – Milwaukee determined it could not release student government records it had custody of due to the federal Family Education Rights and Privacy Act (“FERPA”).

The university determined it could not release individual time records of a UWM Student Association (“SA”) official due to the university’s interpretation of FERPA. The official’s compensation was paid from segregated fees and the university manages the printing and cutting of paychecks for the SA. Nonetheless, in the university’s denial response, the records custodian wrote³⁸:

[I]t is noteworthy that the Student Association itself is not bound by FERPA and should have copies of these records. Thus, as I suggested to you in my prior email, you may be able to get the requested time records from the Student Association. If the Student Association has decided as a matter of policy not to release these sorts of records upon request, that is a matter of policy to take up with the Student Association. (Emphasis added)

D. The student government organization at UW – River Falls was unable to release records of a controversial meeting because it claimed it had not taken minutes of the meeting.

The *Student Voice* requested meeting minutes from a committee of the student government organization at UW – River Falls, the Leadership Development Programming Board (“LDPB”). The LDPB could not produce any records, as it claimed to have not taken meeting minutes at some meetings.

VII. THERE IS APPARENT CONFUSION AMONG UW SYSTEM STAKEHOLDERS, INCLUDING SGOs AND UNIVERSITY ADMINISTRATION

We submit that that there is general confusion as to what responsibilities SGOs have in complying with WPRL and WOML. This submission is evidenced through the following examples:

³⁷ See Exhibit I or visit <http://www.uwm.edu/Dept/JMC/showcase/pvision/cameraclip.mov>

³⁸ See Exhibit P

A. Recognition of openness differs across the state.

A review of the bylaws of SGOs at all 4-year UW system institutions shows that some SGOs explicitly state in their governing documents that they will follow WPRL and WOML, while other SGOs not only give no credence to WPRL and WOML, but they say nothing of access to records, holding public meetings, or any sense of a responsibility to operate in a transparent manner- elements foundational in democratic governance.

B. UW – Milwaukee and UW-Whitewater require WOML compliance in certain instances.

UW-Milwaukee appears to require SGOs and student organizations in certain situations to follow WOML. Yet, this practice is inconsistent throughout UW institutions. The UWM Student Activities Office *2008 Student Organization Manual* states, in relevant part:

Meetings of student governance groups (e.g. Student Association, Senate Appropriations Committee, Union Policy Board, Student Court) and meetings of other student organizations at which decisions concerning the use of segregated fees are made are considered meetings of governmental bodies and must therefore be held according to the provisions of the Wisconsin Open Meetings Law (Wisconsin Statutes 19.81-19.98).³⁹

This mandate is inconsistent throughout the UW System. It appears UW-Whitewater⁴⁰ has a similar mandate for its SGOs, yet we have not found any other campus (besides UW-Milwaukee) that has adopted a similar policy.

Additionally, UW – Milwaukee does not require SGOs to follow WPRL, but does have a limited policy on releasing records connected with the utilization of funds/resources received from segregated fees. The UWM Student Activities Office *2008 Student Organization Manual* states, in relevant part:

Any discussion or deliberations held on actions in relation to the utilization of funds and/or resources received from segregated fees could be considered public record. If these discussions are recorded in any manner, the recording must be available to the public upon request⁴¹. This includes the use of electronic mail... Students should exercise caution when discussing items on electronic media because the confidentiality of such material cannot be guaranteed. Electronic mail and all computer files are routinely backed-up by UITS and stored. Any messages on the Pantherlist or other electronic

³⁹ See Exhibit T: "Open Meeting Law Compliance." *Student Organization Manual*: 28. University of Wisconsin – Milwaukee Student Activities Office, 2008

⁴⁰ See Exhibit J: UW-Whitewater University Handbook

⁴¹ It is unclear if the university means the student organization must make the recording available, or if the university would have to make the recording available should the university have custody of the recording. Presumably, FERPA would apply to any records the university has custody of.

messages are accessible through the discovery process in the event of litigation and may also be accessible under the Wisconsin Freedom of Information Act. Therefore, it is suggested that electronic mail should be a means of communicating only information you would be willing to share publicly.⁴²

We have not been able to find a similar records policy explicitly mandated by the UW System or at individual institutions.

C. UW – Milwaukee presents contradictory information regarding compliance with WPRL.

There exists contradictory information as to whether the UW-Milwaukee Office of Legal Affairs (“OLA”) believes the student government organization at UW-Milwaukee, the Student Association (“SA”), is subject to WPRL. In an e-mail⁴³ to the *UWM Post* on March 31, 2008, UW-Milwaukee Office of Legal Affairs Director and Senior University Legal Counsel Robin Van Harpen noted, “the university has not opined on whether or not student organizations, including Student Association, are government authorities for the purpose of the Wisconsin Public Records Law.” However, we have obtained an e-mail⁴⁴ dated October 3, 2006 from UW-Milwaukee records custodian Amy Watson that says OLA *has* formulated an opinion on the matter. Ms. Watson wrote:

[T]he Office of Legal Affairs has indicated that Student Association records are outside my purview as UWM Public Records Custodian, because OLA has concluded that SA is not an ‘authority’ as defined in Wis. Stat. 19.32(1), but is instead an independent student organization created by students, not the university. Therefore, UWM does not have direct access to SA records, unless a UWM employee has obtained a copy of an SA record through the course of his or her job duties...

UW – Milwaukee has formulated the policy that SGOs are subject to the WOML, yet it has somehow determined that SGOs are not “authorities” for purposes of WPRL.

D. There is evidence to suggest that University of Wisconsin System General Counsel has opined that faculty and academic staff governance bodies are “governmental bodies” for purposes of WOML.

The UW-Whitewater *University Handbook* contains the campus open meetings policy, which includes the following example under “definitions and examples” of governmental bodies. The handbook says this example was prepared by “System Legal Counsel.”

⁴² See Exhibit U: “Public Records.” Student Organization Manual: 32. University of Wisconsin – Milwaukee Student Activities Office, 2008

⁴³ See Exhibit W

⁴⁴ See Exhibit Q

The Faculty Senate and an Academic Staff Assembly are governmental bodies because they are created as a result of authority from the statutes. Their meetings and [sic] the meetings of committees created by the Senate or Assembly, whether they are "standing committees" or "ad hoc committees" are subject to the open meetings law.⁴⁵

Faculty and academic staff, just like students, are delegated institutional governance responsibilities by Wis. Stat. § 36.09 and have "the right to organize themselves in a manner they determine and to select their representatives to participate in institutional governance."⁴⁶

VIII. SGOs ARE THE ORGANIZATIONAL STRUCTURES OF THE STUDENT-COMPOSED, INSTITUTION-LEVEL GOVERNING UNITS CREATED BY THE LEGISLATURE THROUGH WIS. STAT. § 36.09(5); SUCH UNITS CONSTITUTE "AUTHORITIES" FOR PURPOSES OF WPRL AND "GOVERNMENTAL BODIES" FOR PURPOSES OF WOML.

Under WPRL, an "authority" means:

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

Under WOML, a "governmental body" means:

[A] state or local agency, board, commission, committee, council, department or public body corporate and politic created by constitution, statute, ordinance, rule or order; a governmental or quasi-governmental corporation except for the Bradley center sports and entertainment corporation; a local exposition district under subch. II of ch. 229; a long-term care district under s. 46.2895; or a formally constituted subunit of any of the foregoing, but excludes any such body or committee or subunit of such body which is formed for or meeting for the purpose of collective bargaining under subch. I, IV or V of ch. 111. (Emphasis added)

⁴⁵ See Exhibit J: UW-Whitewater University Handbook

⁴⁶ See Exhibit D: Wis. Stat. 36.09(4) and Wis. Stat. 36.09(4m)

A. The Legislature created specific governing units that are charged with executing governmental functions.

The Legislature, in creating the governance framework of the UW System, created specific governing units that are charged with executing governmental functions. These units have been delineated through statute:

- Wis. Stat. § 36.09(1): The Board of Regents
- Wis. Stat. § 36.09(2): UW System President
- Wis. Stat. § 36.09(3): Chancellors of UW institutions
- Wis. Stat. § 36.09(4): Faculty of UW institutions
- Wis. Stat. § 36.09(4a): Academic staff of UW institutions
- Wis. Stat. § 36.09(5): Students of UW institutions

For purposes of WPRL and WOML, the Legislature has created these governing units because it has, at minimum, authorized them and has assigned them duties and functions through statute. 78 Op. Att'y Gen. 67 (1989)⁴⁷, an attorney general opinion concerning the applicability of WOML on Department of Natural Resources advisory committees, wholly supports this determination:

Webster's Third New International Dictionary 1588 (1976) defines "order" to include: "3 a... (2): an authoritative mandate usu. from a superior to a subordinate." The board would, therefore, be creating a committee by order whenever it authorizes the committee and assigns the duties and functions of the committee. (Emphasis added)

B. The Legislature, through Wis. Stat. § 36.09(5), created a governing unit to be composed of the students of each UW institution – a “student-composed, institution-level governing unit” – that exists within the broader governance framework of the UW System.

The Legislature has created a student-composed, institution-level governing unit at each UW institution⁴⁸ because (a) Wis. Stat. § 36.09(5) expressly authorizes⁴⁹ students at UW institutions to be “active participants” in university governance, to be responsible for performing certain governmental functions, and to organize themselves as they determine; and (b) Wis. Stat. § 36.09(5) explicitly assigns the duties and functions that students are required to perform.

⁴⁷ See Exhibit V: 78 Op. Att'y Gen. 67 (1989)

⁴⁸ Wis. Stat. § 36.09(5), in relevant part: “The students of each institution or campus subject to the responsibilities and powers of the board, the president, the chancellor and the faculty shall be active participants in the immediate governance of and policy development for such institutions.”

⁴⁹ Defined as “to give legal power to.” The Merriam-Webster Dictionary, 1994.

C. SGOs are the organizational structures of the student-composed, institution-level governing unit.

The Legislature has created student-composed, institution-level governing units at each UW institution, but unlike the other governing units created as components of the UW system governance framework, the Legislature did not specify the organizational structure. Rather, the Legislature expressly gave students the right to determine the unit's structure.⁵⁰ SGOs, as the governing entities students have chosen to form and organize through pursuant to their rights and duties under Wis. Stat. § 36.09(5), are therefore the organizational structures of the student-composed, institution-level governing units that were created by the Legislature through Wis. Stat. § 36.09(5).

D. Variances in the organizational structures of the student-composed, institution-level governing units are irrelevant.

The organizational structures of the student-composed governing units at UW institutions may vary – some considerably more than others. The students at different institutions have organized themselves in different manners – as is their right under Wis. Stat. § 36.09(5). But organizational structures are irrelevant when determining the applicability of WPRL and WOML, because all of the student-composed governing units at all UW institutions are identical in that they all have been expressly authorized and assigned the same governmental functions through the same statute – Wis. Stat. § 36.09(5).

IX. CONCLUSION

The Legislature's mandate in Wis. Stat. § 36.09(5) is unambiguous: students, along with other governing units, are to be partially responsible for the governance of UW institutions. This directive has been carried out at the UW institutions across the state, with students actively participating in institutional governance. But while such meaningful governance authority is enjoyed by students, whether there is a right to know under WPRL and WOML about the governmental functions that students perform – such as allocating tens of millions of dollars in public funds every year and formulating and reviewing institutional policies – is a question that is in dire need of an answer. UW System policies, as well as legal opinions from Wisconsin courts and the Attorney General's office, recognize the significant and legitimate role that SGOs have in the governance framework of UW institutions and the UW System. SGOs are primarily funded by public money, some have acted contrary to the principles of government openness and accountability, and there is apparent confusion among UW System stakeholders as to whether WPRL and WOML apply to SGOs.

We believe that SGOs are independently subject to WPRL and WOML because:

1. UW institutions are governed by the governing units created by Wis. Stat. § 36.09.

⁵⁰ Wis. Stat. § 36.09(5), in relevant part: "The students of each institution or campus shall have the right to organize themselves in a manner they determine and to select their representatives to participate in institutional governance."

2. Through § 36.09(5), the Legislature determined that one of those units would be a unit composed of students, situated at the institutions of the UW System, and responsible for certain acts of institutional governance – hence what we call the “student-composed, institution-level governing unit.”
3. In assigning governmental duties to the student-composed, institution-level governing unit, the Legislature also gave the members of the unit (the students) the right to “organize as they determine.”
4. SGOs are the organizational structures that students have established to carryout their legislatively-mandated governmental duties, as SGOs are the structural products of students exercising their statutory right to organize.
5. Even though the Legislature didn’t outline the structure of the student-composed, institution-level governing unit, it nonetheless created the unit, authorized the unit, and assigned the unit governmental tasks.
6. Therefore, because the unit was created by the Legislature, and because SGOs compose the organizational structure of the unit, we contend that the unit itself and the SGOs that make up the unit constitute “authorities” for purposes of WPRL and “governmental bodies” for purposes of WOML.

As WPRL declares, it is “the public policy of this state that all persons are entitled to the greatest possible information regarding the affairs of government and the official acts of those officers and employees who represent them.” If SGOs are not independently subject to WPRL and WOML, then the public does not have access to the “greatest possible information regarding the affairs of government and the official acts of those officers and employees who represent them,” because the institutional governance component that SGOs are obligated to fulfill can operate in the dark. The resulting conclusion is that, at present, SGOs and the UW System are not accountable to the citizens they govern and to the people who underwrite their finances, a conclusion that contradicts Wisconsin law.^{51, 52} Moreover, the Wisconsin Supreme Court in State of Wisconsin v. Beaver Dam Area Development Corporation, 2008 WI 90; 752 N.W.2d 295; 2008 Wis., proclaimed that it “cannot countenance a government body circumventing the legislative directive for an open and transparent government by paying an entity to perform a governmental function.” If SGOs are not independently subject to WPRL and WOML, then the UW System, and indeed the Legislature, are “circumventing the legislative directive for an open and

⁵¹ State ex rel. Buswell v. Tomah Area School District, 2007 WI 71, 301 Wis. 2d 178, 732 N.W.2d 804 (“Buswell”): Government “must be held accountable to the people who write government finances.”

⁵² Journal/Sentinel, Inc. v. School Board of the School District of Shorewood, 186 Wis. D2 443, 521 N.W.2d 165 (Ct. App. 1994)(“Shorewood”): “Taxpayers of a community have a right to know how and why their money is being spent.”

Hon. J.B. Van Hollen
WISCONSIN DEPARTMENT OF JUSTICE
Wednesday, April 15, 2009
Page 19

transparent government” by paying SGOs to perform governmental functions as private entities.

Based on the foregoing, Wisconsin’s longstanding public policy of presuming access to government information, and basic commonsense, we believe that SGOs are independently subject to WPRL and WOML, and we respectfully request an opinion as to whether the Attorney General’s office comes to the same conclusion, including an answer to the following questions:

1. Are entities that (a) are organized by students pursuant to legislative authority under Wis. Stat. § 36.09(5); (b) perform the governmental functions mandated by Wis. Stat. § 36.09(5); and (c) are recognized by their respective UW institution or the UW System as formal components of the student-composed, institution-level governing unit, independently subject to WPRL and WOML?
2. Are the SGOs listed in Exhibit L-1, which are organized by students pursuant to legislative authority under Wis. Stat. § 36.09(5), perform the governmental functions mandated by Wis. Stat. § 36.09(5), and are recognized by their respective UW institution or the UW System as formal components of the student-composed, institution-level governing unit, independently subject to WPRL and WOML?

We ask if SGOs are “independently” subject to WPRL and WOML to mean that SGOs are, because of the law itself, subject to WPRL and WOML, not because UW institutions or the UW System may require compliance, or that SGOs may mandate self-compliance.

Thank you for your attention to this matter. If you have any questions, or need additional information, please contact Jonathan Anderson via e-mail at jca3@uwm.edu or via telephone at (920) 676-5399. We look forward to reviewing your opinion.

Sincerely,

Jonathan Anderson
Editor in Chief
The UWM Post

Jesse Manser
Producer
UWM PantherVision

Matt Schultz
Producer
UWM PantherVision

CC: Bill Lueders, President, Wisconsin Freedom of Information Council
Frank LoMonte, Executive Director, Student Press Law Center
Charles Davis, Executive Director, National Freedom of Information Coalition