

2020 1st Quarter Correspondence

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DEPARTMENT OF JUSTICE

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January 22, 2020

Bill Lueders
blueders@gmail.com

Dear Mr. Lueders:

The Wisconsin Department of Justice (DOJ) is in receipt of your email correspondence to Assistant Attorney General Paul Ferguson, dated June 27, 2019, in which you wrote, "A reporter contacted me about the response received from Brown County to a [public records] request for autopsy reports." You did not send DOJ the reporter's original inquiry to the county, but you did send us the county's response to the reporter and the county's fee schedule in the county budget. Based on the information you sent DOJ, it appears that the reporter believed the county sought to charge impermissible fees under the public records law for autopsy reports. The county's response to the reporter cited Wis. Stat. § 979.22 as the basis for those fees, and further indicated that, pursuant to that statute, the county budget set the fees of \$150 for an autopsy report, \$50 for a laboratory report, and \$50 for a medical examiner's report. On July 9, 2019 you sent a follow up email to AAG Ferguson in which you wrote, "The medical examiner has released these records to me at no cost. I would still like it if OOG would look into this, as it is not clear to me that this policy has been abandoned; perhaps it was just waived in this case."

As you know, under the Wisconsin Public Records Law, Wis. Stat. §§ 19.31 to 19.39, "[A]n authority may charge a fee not exceeding the actual, necessary, and direct costs of *four specific tasks*: (1) 'reproduction and transcription'; (2) 'photographing and photographic processing'; (3) 'locating'; and (4) 'mailing or shipping.'" *Milwaukee Journal Sentinel v. City of Milwaukee*, 2012 WI 65, ¶ 54 (citation omitted) (emphasis in original). The amount of such fees may vary depending on the authority. However, an authority may not profit from complying with public records requests. *WIREdata, Inc. v. Vill. of Sussex*, 2008 WI 69, ¶¶ 103, 107, 310 Wis. 2d 397, 751 N.W.2d 736 (an authority may not profit from its response to a public records request but may recoup all of its actual costs). The copy fees charged by an authority may not exceed the "actual necessary and direct cost of reproduction and transcription" unless another law establishes such a fee or authorizes such a fee to be established by law. Wis. Stat. § 19.35(3)(a).

The law also permits an authority to impose a fee for locating records if the location costs themselves are \$50.00 or more. Wis. Stat. § 19.35(3)(c). An authority cannot combine location costs with other costs to reach the \$50.00 threshold. An authority may require a requester prepay any such fees if the total amount exceeds \$5.00. Wis. Stat. § 19.35(3)(f). Generally, the rate for an actual, necessary, and direct charge for staff time should be based on the pay

rate of the lowest paid employee capable of performing the task. For more information on permissible fees, please see the Office of Open Government Advisory: Charging Fees under the Wisconsin Public Records Law, which was issued on August 8, 2018 and can be found on DOJ's website (<https://www.doj.state.wi.us/news-releases/office-open-government-advisory-charging-fees-under-wisconsin-public-records-law>).

The Attorney General and DOJ's Office of Open Government (OOG) are committed to increasing government openness and transparency, and DOJ endeavors to offer guidance in these areas with a focus on the Wisconsin Open Meetings Law, Wis. Stat. §§ 19.81 to 19.98, and the Wisconsin Public Records Law, Wis. Stat. §§ 19.31 to 19.39. As already noted, there may be other laws outside of the public records law establishing fees for the records in question, potentially rendering those fees permissible under the public records law. *See* Wis. Stat. § 19.35(3) (allowing fees outside the public records law if those fees are established by another law). In this case, the county cited Wis. Stat. § 979.22 as the basis for charging the fees at issue. That statute states,

Autopsies and toxicological services by medical examiners. A medical examiner may perform autopsies and toxicological services not required under this chapter and may charge a fee established by the county board for such autopsies and services. The fee may not exceed an amount reasonably related to the actual and necessary cost of providing the service.

Wis. Stat. § 979.22. The provision does not reference the public records law nor does it explicitly mention copy fees. On its face, the provision permits a medical examiner to charge a fee established by the county board for autopsies and toxicological services. The amount of such fees may not exceed that reasonably related to the actual and necessary cost of providing such services. The OOG is not authorized to provide advice about statutes which fall outside of the OOG's scope and authority under the public records law. However, I contacted the Brown County Corporation Counsel, Attorney David Hemery, to make him aware of your concerns and to learn more about their basis for charging the fees at issue.

Attorney Hemery informed me that he believes the medical examiner should only be charging fees authorized under the public records law—that is, fees for the “actual, necessary, and direct” costs of fulfilling public records requests for autopsy reports. *See* Wis. Stat. § 19.35(3). He also informed me that he has already directed the medical examiner not to charge the fees set forth in the county budget, and that he sent an email reminder to the medical examiner to that effect on January 10, 2020. Finally, he informed me that some kind of action will be taken regarding the fee schedule in the county budget, most likely a policy memo reminding the county board not to charge those fees for requesters who just want the autopsy report. In short, he has assured me that, going forward, requesters will be charged only those fees permissible under the public records law for the county medical examiner's autopsy reports.

Therefore, based on the information available to me, it appears that your concerns, and the concerns of the reporter, have now been resolved. DOJ expects that this issue will not recur in the future. If you have any additional concerns or questions about this information, please feel free to contact the OOG.

Thank you for your correspondence. We are dedicated to the work necessary to preserve Wisconsin's proud tradition of open government.

The information provided in this letter is provided pursuant to Wis. Stat. § 19.39 and does not constitute an informal or formal opinion of the Attorney General pursuant to Wis. Stat. § 165.015(1).

Sincerely,



Sarah K. Larson
Assistant Attorney General
Office of Open Government

SKL:lah

Cc: Attorney David Hemery, Brown County Corporation Counsel



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March 10, 2020

Jeffrey Haasch
jeffreyvh@protonmail.com

Dear Mr. Haasch:

The Wisconsin Department of Justice (DOJ) is in receipt of your correspondence, dated September 6, 2019 and October 27, 2019, regarding your open meeting law concerns in Pierce County. I am including a copy of our June 5, 2019 correspondence to you in which DOJ addressed those concerns.

DOJ has also received two pieces of correspondence from you dated July 20, 2019. In the first July 20, 2019 correspondence, you reference some concerns about minutes taken at a board meeting in Pierce County. In an effort to increase transparency, DOJ recommends that governmental bodies keep minutes of all meetings. However, there is no requirement under the open meetings law for a governmental body to do so. The open meetings law only requires a governmental body to create and preserve a record of all motions and roll-call votes at its meetings. Wis. Stat. § 19.88(3). Meeting minutes are a common method that governmental bodies use to do so. However, as long as the governmental body is maintaining some type of record of all motions and roll-call votes, the Wis. Stat. § 19.88(3) requirement is satisfied.

DOJ's Office of Open Government (OOG) works to increase government openness and transparency and we do so with a focus on the Wisconsin public records law and open meetings law. Based on the information you provided in your first July 20, 2019 correspondence, it appears that the remainder of the subject matter in that correspondence is outside this scope. Therefore, we are unable to offer you assistance regarding your concerns that are outside the scope of the OOG's responsibilities.

DOJ has also received your second July 20, 2019 correspondence and your November 29, 2019 correspondence, both regarding your public records requests to the University of Wisconsin, State Capitol Police, and the Waukesha Police Department. You wrote they have "refused" to fill your request and they "refuse to release even my own correspondences with them, clearly there is no reason to deny records that I have generated, myself."

The Attorney General and the OOG appreciate your concerns regarding the Wisconsin Public Records Law, Wis. Stat. §§ 19.31 to 19.39. However, DOJ cannot offer you legal advice

or counsel concerning your public records requests to the University of Wisconsin System or the State Capitol Police, as DOJ may be called upon to represent those entities.

It also appears that some of your second July 20, 2019 correspondence and your November 29, 2019 correspondence is outside of the scope of the OOG's authority and responsibilities. Therefore, as noted above, we are unable to assist you in those matters outside of OOG's scope. In addition, regarding your public records requests to the Waukesha Police Department, DOJ has insufficient information to fully evaluate those concerns. However, we can provide you with some general information regarding your public records request that we hope you will find helpful.

The public records law authorizes requesters to inspect or obtain copies of "records" created or maintained by an "authority." Records are presumed to be open to public inspection and copying, but there are exceptions. Wis. Stat. § 19.31. Requested records fall into one of three categories: (1) absolute right of access; (2) absolute denial of access; and (3) right of access determined by the balancing test. *Hathaway v. Joint Sch. Dist. No. 1 of Green Bay*, 116 Wis. 2d 388, 397, 342 N.W.2d 682 (1984). If neither a statute nor the common law requires disclosure or creates a general exception to disclosure, the records custodian must decide whether the strong public policy favoring disclosure is overcome by some even stronger public policy favoring limited access or nondisclosure. This balancing test, determines whether the presumption of openness is overcome by another public policy concern. *Hempel v. City of Baraboo*, 2005 WI 120, ¶ 4, 284 Wis. 2d 162, 699 N.W.2d 551. If a records custodian determines that a record or part of a record cannot be disclosed, the custodian must redact that record or part of that record. See Wis. Stat. § 19.36(6).

The public records law does not require a response to a public records request within a specific timeframe. In other words, after a request is received, there is no set deadline by which the authority must respond. However, the law states that upon receipt of a public records request, the authority "shall, as soon as practicable and without delay, either fill the request or notify the requester of the authority's determination to deny the request in whole or in part and the reasons therefor." Wis. Stat. § 19.35(4)(a). A reasonable amount of time for a response "depends on the nature of the request, the staff and other resources available to the authority to process the request, the extent of the request, and other related considerations." *WIREdata, Inc. v. Vill. of Sussex*, 2008 WI 69, ¶ 56, 310 Wis. 2d 397, 751 N.W.2d 736; see *Journal Times v. Police & Fire Comm'rs Bd.*, 2015 WI 56, ¶ 85, 362 Wis. 2d 577, 866 N.W.2d 563 (an authority "can be swamped with public records requests and may need a substantial period of time to respond to any given request").

Pursuant to Wis. Stat. § 19.35(4)(b), "If an authority denies a written request in whole or in part, the requester shall receive from the authority a written statement of the reasons for denying the written request." Specific policy reasons, rather than mere statements of legal conclusion or recitation of exemptions, must be given. *Pangman & Assocs. v. Zellmer*, 163 Wis. 2d 1070, 1084, 473 N.W.2d 538 (Ct. App. 1991); *Vill. of Butler v. Cohen*, 163 Wis. 2d 819, 824-25, 472 N.W.2d 579 (Ct. App. 1991). In every written denial, the authority must also inform the requester that "if the request for the record was made in writing, then the determination is subject to review by mandamus under s. 19.37(1) or upon application to the attorney general or a district attorney." Wis. Stat. § 19.35(4)(b).

While the law requires an authority to fill a request or notify the requester of a determination to deny a request, the law does not require an authority to respond to a requester if the authority has no records responsive to a request. However, DOJ advises that an authority notify a requester if they have no responsive records. *Journal Times v. City of Racine Bd. of Police & Fire Comm'rs*, 2015 WI 56, ¶ 85, 362 Wis. 2d 577, ¶ 102, 866 N.W.2d 563.

The public records law provides several remedies for a requester dissatisfied with an authority's response, or lack of response, to a public records request. A requester may file an action for mandamus, with or without an attorney, asking a court to order release of the records. Wis. Stat. § 19.37(1)(a). To obtain a writ of mandamus, the requester must establish four things: "(1) the petitioner has a clear legal right to the records sought; (2) the government entity has a plain legal duty to disclose the records; (3) substantial damages would result if the petition for mandamus was denied; and (4) the petitioner has no other adequate remedy at law." *Watton v. Hegerty*, 2008 WI 74, ¶ 8, 311 Wis. 2d 52, 751 N.W.2d 369.

Alternatively, the requester may submit a written request for the district attorney of the county where the record is found, or the Attorney General, to file an action for mandamus seeking release of the requested records. Wis. Stat. § 19.37(1)(b). The Attorney General is authorized to enforce the public records law; however, he generally exercises this authority in cases presenting novel issues of law that coincide with matters of statewide concern. As explained above, DOJ may be called upon to represent the University of Wisconsin System or the State Capitol Police. Therefore, although you did not specifically request the Attorney General to file an action for mandamus, nonetheless, we respectfully decline to pursue an action for mandamus on your behalf.

You may wish to contact a private attorney regarding your matter. The State Bar of Wisconsin operates an attorney referral service. The referral service is free; however, a private attorney may charge attorney's fees. You may reach the service using the contact information below:

Lawyer Referral and Information Service
State Bar of Wisconsin
P.O. Box 7158
Madison, WI 53707-7158
(800) 362-9082
(608) 257-4666

<http://www.wisbar.org/forpublic/inedalawyer/pages/lris.aspx>

The Attorney General and the OOG are committed to increasing government openness and transparency, and DOJ endeavors to offer guidance in these areas. DOJ offers several open government resources through its website (<https://www.doj.state.wi.us/office-open-government/office-open-government>). DOJ provides the full Wisconsin public records law and open meetings law, and maintains a Public Records Law Compliance Guide and Open Meetings Law Compliance Guide, on its website.

DOJ appreciates your concern. We are dedicated to the work necessary to preserve Wisconsin's proud tradition of open government. Thank you for your correspondence.

The information provided in this letter is provided pursuant to Wis. Stat. §§ 19.39 and 19.98 and does not constitute an informal or formal opinion of the Attorney General pursuant to Wis. Stat. § 165.015(1).

Sincerely,



Sarah K. Larson
Assistant Attorney General
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SKL:lah

Enclosure



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March 10, 2020

Greg Luce
greg@lacrosseteaparty.com

Dear Mr. Luce:

The Wisconsin Department of Justice (DOJ) is in receipt of your correspondence, dated June 12, 2019, in which you asked, "Can you tell me if there is state law that says if there is public input allowed at a city council meeting, can the public input be written and read into the record?" You wrote the "Onalaska City council is voting on prohibiting public input being written" and you think this is discriminatory.

The Attorney General and DOJ's Office of Open Government (OOG) are committed to increasing government openness and transparency. The OOG works in furtherance of this with a focus on the Wisconsin Open Meetings Law, Wis. Stat. §§ 19.81 to 19.98, and the Wisconsin Public Records Law, Wis. Stat. §§ 19.31 to 19.39. The OOG is only authorized to provide assistance within this scope. There may be disability discrimination laws that pertain to some of the subject matter of your correspondence, but such laws fall outside the scope of the OOG's statutory authority and responsibilities. Therefore, the OOG cannot provide you with any assistance on those matters, but we can provide you with some general information about the open meetings law that you may find helpful.

The Wisconsin Open Meetings Law acknowledges that the public is entitled to the fullest and most complete information regarding government affairs as is compatible with conducting government business. Wis. Stat. § 19.81(1). All meetings of government bodies shall be held publically and be open to all citizens at all times unless otherwise expressly provided by law. Wis. Stat. § 19.81(2). The provisions of the open meetings law are to be construed liberally to achieve that purpose. Wis. Stat. § 19.81(4).

While Wisconsin law requires that meetings of governmental bodies be open to the public so that citizens may attend and observe open session meetings, the law does not require a governmental body to allow members of the public to speak or actively participate in the body's meetings. While the open meetings law does allow a governmental body to set aside a portion of a meeting for public comment, it does not require a body to do so. Wis. Stat. §§ 19.83(2), 19.84(2). There are some other state statutes that require governmental bodies to hold public hearings on specified matters, but again, we cannot advise you on those statutes, as they fall outside of the OOG's scope. Unless such a statute specifically applies, however, a

governmental body is free to determine for itself whether and to what extent it will allow citizen participation at its meetings. For example, a body may choose to limit the time each citizen has to speak. *See, e.g.*, Nix Correspondence (October 29, 2002); Lundquist Correspondence (Oct. 25, 2005); Zweig Correspondence (July 13, 2006); Chiaverotti Correspondence (Sept. 19, 2006).

If a governmental body decides to set aside a portion of an open meeting as a public comment period, this must be included in the meeting notice. During such a period, the body may receive information from the public and may discuss any matter raised by the public. If a member of the public raises a subject that does not appear on the meeting notice, however, it is advisable to limit the discussion of that subject and to defer any extensive deliberation to a later meeting for which more specific notice can be given. *See, e.g.*, Sayles Correspondence (Aug. 4, 2017); *see also State ex rel. Buswell v. Tomah Area Sch. Dist.*, 2007 WI 71, ¶ 34, 301 Wis. 2d 178, 732 N.W.2d 804 (a meeting generally “cannot address topics unrelated to the information in the notice.”). In addition, the body may not take formal action on a subject raised in the public comment period, unless that subject is also identified in the meeting notice. *See, e.g.*, Sayles Correspondence (Aug. 4, 2017).

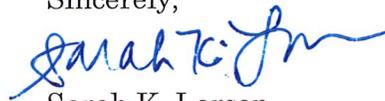
In the past, the Attorney General has advised about restrictions that would generally be considered permissible under the open meetings laws. For example, the Attorney General has deemed permissible various meeting procedures that restrict the length, subject, or timing of public comment periods. *See, e.g.*, Zweig Correspondence (July 13, 2006); Chiaverotti Correspondence (Sept. 19, 2006). Further, the Attorney General has previously opined that the open meetings law does not preclude governmental bodies from having a policy that “confines public comment to the beginning of meetings, restricts the subject of comments to agenda items, and allows participation only by individuals who reside or pay taxes in the community.” *See Chiaverotti Correspondence* (Sept. 19, 2006).

If you would like to learn more about the open meetings law, DOJ’s Office of Open Government offers several open government resources through the Wisconsin DOJ website (<https://www.doj.state.wi.us/office-open-government/office-open-government>). DOJ provides the full Wisconsin Open Meetings Law, Wis. Stat. §§ 19.81 to 19.98, and maintains an Open Meetings Law Compliance Guide.

DOJ appreciates your concern. We are dedicated to the work necessary to preserve Wisconsin’s proud tradition of open government. Thank you for your correspondence.

The information provided in this letter is provided pursuant to Wis. Stat. § 19.98 and does not constitute an informal or formal opinion of the Attorney General pursuant to Wis. Stat. § 165.015(1).

Sincerely,



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March 11, 2020

Brian Kvapil

[REDACTED]
Milton, WI 53563

Dear Mr. Kvapil:

The Wisconsin Department of Justice (DOJ) is in receipt of your correspondence, dated May 22, 2019, in which you requested “clarification and [DOJ’s] opinion regarding conditions which result in a walking quorum.” You wrote, “the School District of Milton Board of Education went into closed session and agreed to authorize the District’s legal council [*sic*] to negotiate terms of resignation agreements within specific quantitative parameters . . . The terms of the resignation agreement ultimately accepted . . . were different than the quantitative parameters approved by the Board.” You provided that the Board President called and informed each board member of three changes and sought their approval of the changes which were “within the parameters of his/her understanding of the original offer,” however, the two district officers had already signed their agreements.

In your correspondence, you have indicated that the Board President did not sign the agreements until he “polled every board member” and “received responses in the affirmative from all seven board members.” You further stated that the “District’s legal council [*sic*] suggested the Board President contact each Board Member individually” but that “the Board President did not follow this recommendation.” You asked, “was a walking quorum executed by the Board President and the Board of Education?”

The Attorney General and DOJ’s Office of Open Government (OOG) appreciate your concern for open government and your request for an opinion. Wisconsin law provides that the Attorney General must, when asked, provide the legislature and designated Wisconsin state government officials with an opinion on legal questions. Wis. Stat. § 165.015. The Attorney General may also give formal legal opinions to district attorneys and county corporation counsel under certain circumstances. Wis. Stat. §§ 165.25(3) and 59.42(1)(c). The Attorney General cannot provide you with the opinion you requested because you do not meet these criteria. However, DOJ can provide you with some general guidance regarding the Wisconsin Open Meetings Law, Wis. Stat. §§ 19.81 to 19.98.

The open meetings law acknowledges that the public is entitled to the fullest and most complete information regarding government affairs as is compatible with the conduct of governmental business. Wis. Stat. § 19.81(1). All meetings of governmental bodies shall be

held publicly and be open to all citizens at all times unless otherwise expressly provided by law. Wis. Stat. § 19.81(2). The provisions of the open meetings law are to be construed liberally to achieve that purpose. Wis. Stat. § 19.81(4).

The open meetings law applies to every meeting of a governmental body. A “meeting” is defined as:

[T]he convening of members of a governmental body for the purpose of exercising the responsibilities, authority, power or duties delegated to or vested in the body. If one-half or more of the members of a governmental body are present, the meeting is rebuttably presumed to be for the purpose of exercising the responsibilities, authority, power or duties delegated to or vested in the body. The term does not include any social or chance gathering or conference which is not intended to avoid this subchapter.

Wis. Stat. § 19.82(2).

A meeting occurs when a convening of members of a governmental body satisfies two requirements. See *State ex rel. Newspapers, Inc. v. Showers*, 135 Wis. 2d 77, 398 N.W.2d 154 (1987). The first requirement under the so-called *Showers* test is that there must be a purpose to engage in governmental business (the purpose requirement). Second, the number of members present must be sufficient to determine the governmental body’s course of action (the numbers requirement). A meeting does not include any social or chance gathering or conference that is not intended to avoid the requirements of the open meetings law.

The requirements of the open meetings law also extend to walking quorums. A “walking quorum” is a series of gatherings among separate groups of members of a governmental body, each less than quorum size, who agree, tacitly or explicitly, to act uniformly in sufficient number to reach a quorum. See *Showers*, 135 Wis. 2d at 92. The danger is that a walking quorum may produce a predetermined outcome and thus render the publicly-held meeting a mere formality. See *State ex rel. Lynch v. Conta*, 71 Wis. 2d 662, 685–88, 239 N.W.2d 313 (1976). Thus, any attempt to avoid the appearance of a “meeting” through use of a walking quorum or other “elaborate arrangements” is subject to prosecution under the open meetings law. *Id.* at 687.

The essential feature of a walking quorum is the element of agreement among members of a body to act uniformly in sufficient numbers to reach a quorum. Where there is no such express or tacit agreement, exchanges among separate groups of members may take place without violating the open meetings law.

For example, the requirements of the open meetings law cannot be circumvented by using an agent or surrogate to poll the members of governmental bodies through a series of individual contacts. See Clifford Correspondence (Apr. 28, 1986) (individual polling of every member is a prohibited walking quorum); Herbst Correspondence (Jul. 16, 2008) (individually polling of a quorum of members is a prohibited walking quorum). Similarly, the use of email voting to decide matters fits the definition of a “walking quorum” in violation of the open meetings law, even if the result of the vote is later ratified at a properly noticed meeting. See I-01-10 (Jan. 25, 2010).

Furthermore, where a majority of members of a body sign a document that expressly commits them to a future course of action, a court could find a walking quorum violation. *See Huff Correspondence* (Jan. 15, 2008). A walking quorum may be found when the members: 1) have effectively engaged in collective discussion or information gathering outside of the context of a properly noticed meeting; and 2) have agreed with each other to act in some uniform fashion. *Id.* Thus, for example, a walking quorum might be found where a quorum of members sign on to a document that “not only discussed policy matters pending” before the governmental body, but also “expressly committed the signatories not to vote for any additional funding” for a particular project. *Id.*

In contrast, the mere presence of signatories co-sponsoring a resolution would not necessarily imply a decision to later vote in a particular manner. *See Huff Correspondence* (Jan. 15, 2008). Similarly, the signing of a document by members of a body merely asking that a subject be placed on the agenda of an upcoming meeting does not constitute a “walking quorum” where the signers have not engaged in substantive discussion or agreed on a uniform course of action regarding the proposed subject. *See Kay Correspondence* (Apr. 25, 2007). An agreement that a subject should be considered is not the same as an agreement about what course of action is to be taken. *See Kittleson Correspondence* (June 13, 2007).

The Attorney General has advised that members of governmental bodies should reduce any possible appearance of impropriety by minimizing inter-member communications. *See Kay Correspondence* (Apr. 25, 2007). Members subject themselves to close scrutiny and possible prosecution whenever a majority of a body’s membership is involved in interactions connected to government business that take place outside the context of a duly noticed meeting. *Id.*

It is important to note that the phrase “convening of members” in Wis. Stat. § 19.82(2) is not limited to situations in which members of a body are simultaneously gathered in the same location, but may also include other situations in which members are able to effectively communicate with each other and to exercise the authority vested in the body, even if they are not physically present together. Whether such a situation qualifies as a “convening of members” under the open meetings law depends on the extent to which the communications in question resemble a face-to-face exchange. A convening of members may occur through written correspondence and electronic communications, including email.

Turning now to your question about whether a walking quorum occurred, I first note that it is unclear from the information you provided whether the Board President actually contacted the board members separately. You stated that the Board President “polled every board member,” but you also stated that the Board President “did not follow” the board’s legal counsel’s recommendation to contact board members separately. I also note that both you and the school board’s attorney, Shana Lewis, separately contacted the OOG’s Public Records-Open Meetings (PROM) helpline in June 2019, and provided Assistant Attorney General Paul Ferguson with conflicting facts. At that time, it was explained to both you and Attorney Lewis that, when responding to questions about the applicability of the open meetings law, DOJ cannot conduct factual investigations to determine the accuracy and completeness of the information, nor can DOJ make factual determinations if the parties present conflicting facts.

Therefore, whether the circumstances described in your correspondence constitute a violation of the open meetings law is a fact-specific question that cannot be definitively answered, given the conflicting facts presented here. While we cannot conclude whether a walking quorum has occurred given the conflicting information DOJ has received, we caution that if the Board President called each board member individually for the purpose of exercising the responsibilities, authority, power or duties delegated to or vested in the body, a court may find a prohibited walking quorum if the members: 1) effectively engaged in collective discussion or information gathering outside of the context of a properly noticed meeting; and 2) agreed with each other to act in some uniform fashion.

By copy of this letter, the OOG alerts the school board and the school board's attorney that this type of practice of individually contacting and polling board members should be avoided. It is instead advisable to conduct these discussions within the confines of a properly noticed meeting. We caution, however, that if an enforcement action alleging violations of the open meetings law were commenced, the parties would have an opportunity to develop a more complete factual record related to the issues, and upon review of a more complete factual record, DOJ's response to your correspondence could differ.

Under the open meetings law, the Attorney General and the district attorneys have authority to enforce the law. Wis. Stat. § 19.97(1). Generally, the Attorney General may elect to prosecute complaints presenting novel issues of law that coincide with matters of statewide concern. Although you did not specifically request the Attorney General to file an enforcement action, nonetheless, we respectfully decline to pursue an enforcement action at this time. While important, your matter does not appear to present novel issues of law that coincide with matters of statewide concern.

More frequently, the district attorney of the county where the alleged violation occurred may enforce the law. However, in order to have this authority, an individual must file a verified complaint with the district attorney. Wis. Stat. § 19.97(1). If the district attorney refuses or otherwise fails to commence an action to enforce the open meetings law within 20 days after receiving the verified complaint, the individual may bring an action in the name of the state. Wis. Stat. § 19.97(4). (Please note a district attorney may still commence an enforcement action even after 20 days have passed.) Such actions by an individual must be commenced within two years after the cause of action accrues. Wis. Stat. § 893.93(2)(a).

Additionally, you may wish to contact a private attorney regarding your matter. The State Bar of Wisconsin operates an attorney referral service. The referral service is free; however, a private attorney may charge attorney's fees. You may reach the service using the contact information below:

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DOJ appreciates your concern. We are dedicated to the work necessary to preserve Wisconsin's proud tradition of open government. Thank you for your correspondence.

The information provided in this letter is provided pursuant to Wis. Stat. § 19.98 and does not constitute an informal or formal opinion of the Attorney General pursuant to Wis. Stat. § 165.015(1).

Sincerely,



Sarah K. Larson
Assistant Attorney General
Office of Open Government

SKL:lah

cc: Joe Martin, Board President, School District of Milton
Attorney Shana Lewis



STATE OF WISCONSIN
DEPARTMENT OF JUSTICE

Josh Kaul
Attorney General

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March 11, 2020

Chris Schmuggerow
Clerk, Village of Couderay
4477 North Hoffer Road
Couderay, WI 54828

Dear Ms. Schmuggerow:

The Wisconsin Department of Justice (DOJ) is in receipt of your correspondence, dated July 22, 2019, in which you wrote, "Even though Couderay Volunteer Fire Department Inc. states that they are a 501.3 c, they still have money that is from Government Contracts and they received money from the Town of Couderay for the purchase of a Fire Truck and other equipment." You believe the Couderay Volunteer Fire Department is violating the open meetings law because they "do not post dates and times of their meetings," "do not post Public Notice as to subject matter," and "do not allow Public Access to their meetings."

The Open Meetings Law, Wis. Stat. §§ 19.81 to 19.98, acknowledges that the public is entitled to the fullest and most complete information regarding government affairs as is compatible with the conduct of government business. Wis. Stat. § 19.81(1). All meetings of governmental bodies shall be held publicly and be open to all citizens at all times unless otherwise expressly provided by law. Wis. Stat. § 19.81(2). The provisions of the open meetings law are to be construed liberally to achieve that purpose. Wis. Stat. § 19.81(4).

The open meetings law applies to every meeting of a governmental body. A "governmental body" is defined as:

[A] state or local agency, board, commission, 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, V, or VI of ch. 111.

Wis. Stat. § 19.82(1). The list of entities is broad enough to include essentially any governmental entity, regardless of what it is labeled. Purely advisory bodies are subject to the law, even though they do not possess final decision making power, as long as they are created by constitution, statute, ordinance, rule, or order. *See State v. Swanson*, 92 Wis. 2d

310, 317, 284 N.W.2d 655 (1979). An entity that fits within the definition of governmental body must comply with the requirements of the open meetings law.

The definition of a governmental body includes a “quasi-governmental corporation” which is not defined in the statutes. The Wisconsin Supreme Court discussed its definition of a quasi-governmental corporation in *State v. Beaver Dam Area Development Corp. (BDADC)*. *State v. Beaver Dam Area Dev. Corp.*, 2008 WI 90, 312 Wis. 2d 84, 752 N.W.2d 295. In that decision, the Court held that a “quasi-governmental corporation” does not have to be *created* by the government or be *per se* governmental, but rather is a corporation that significantly resembles a governmental corporation in function, effect, or status. *Id.* ¶¶ 33-36. The Court further held that each case must be decided on its own particular facts, under the totality of the circumstances and set forth a non-exhaustive list of factors to be examined in determining whether a particular corporation sufficiently resembles a governmental corporation to be deemed quasi-governmental, while emphasizing that no single factor is outcome determinative. *Id.* ¶¶ 7-8, 63 n.14, and 79. The factors set out by the Court in *BDADC* fall into five basic categories: (1) the extent to which the private corporation is supported by public funds; (2) whether the private corporation serves a public function and, if so, whether it also has other, private functions; (3) whether the private corporation appears in its public presentations to be a governmental entity; (4) the extent to which the private corporation is subject to governmental control; and (5) the degree of access that government bodies have to the private corporation’s records. *Id.* ¶ 62.

Based on the limited information you provided in your correspondence, DOJ cannot make a definitive determination as to whether the Couderay Volunteer Fire Department is a “governmental body” as defined in Wis. Stat. § 19.82(1), or a “quasi-governmental corporation” as defined in the *BDADC* case, and, therefore, subject to the open meetings law. It is possible that a court could find that it is a quasi-governmental corporation, because it appears to receive at least some of its funding from public sources and it serves a public function. See Kowalczyk Correspondence (Mar. 13, 2006). However, we have insufficient information to fully analyze the *BDADC* factors based on the limited information that you have provided.

If the open meetings law applies to a “governmental body” as defined in Wis. Stat. § 19.82(1), or a “quasi-governmental corporation” as defined in the *BDADC* case, then the law requires that public notice of all meetings of a governmental body must be given by communication from the governmental body’s chief presiding officer or his or her designee to the following: (1) the public; (2) to news media who have filed a written request for such notice; and (3) to the official newspaper (designated under Wis. Stat. §§ 985.04, 985.05, and 985.06) or, if there is no such paper, to a news medium likely to give notice in the area. Wis. Stat. § 19.84(1). In addition to these requirements, other statutes may also set forth the type of notice required for a meeting of a governmental body.

Every public notice of a meeting must give the time, date, place and subject matter of the meeting, and the notice must be in such a form so as to reasonably apprise the public of this information. Wis. Stat. § 19.84(2). The notice requirement gives the public information about the business to be conducted that will alert them to the importance of the meeting, so that they can make an informed decision whether to attend. *State ex rel. Badke v. Vill. Bd. of Vill. of Greendale*, 173 Wis. 2d 553, 573–78, 494 N.W.2d 408 (1993).

For additional information on the notice requirements of the open meetings law, please see pages 14 through 19 of the Open Meetings Law Compliance Guide available through DOJ's website (<https://www.doj.state.wi.us/office-open-government/office-open-government>).

Under the open meetings law, the Attorney General and the district attorneys have authority to enforce the law. Wis. Stat. § 19.97(1). Generally, the Attorney General may elect to prosecute complaints presenting novel issues of law that coincide with matters of statewide concern. Although you did not specifically request the Attorney General to file an enforcement action, nonetheless, we respectfully decline to file an enforcement action on your behalf.

More frequently, the district attorney of the county where the alleged violation occurred may enforce the law. However, in order to have this authority, an individual must file a verified complaint with the district attorney. Wis. Stat. § 19.97(1). If the district attorney refuses or otherwise fails to commence an action to enforce the open meetings law within 20 days after receiving the verified complaint, the individual may bring an action in the name of the state. Wis. Stat. § 19.97(4). (Please note a district attorney may still commence an enforcement action even after 20 days have passed.) Such actions by an individual must be commenced within two years after the cause of action accrues. Wis. Stat. § 893.93(2)(a).

Additionally, you may wish to contact a private attorney regarding this matter. The State Bar of Wisconsin operates an attorney referral service. The referral service is free; however, a private attorney may charge attorney's fees. You may reach the service using the contact information below:

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DOJ appreciates your concern. We are dedicated to the work necessary to preserve Wisconsin's proud tradition of open government. Thank you for your correspondence.

Chris Schmuggerow
Page 4

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Sincerely,



Sarah K. Larson
Assistant Attorney General
Office of Open Government

SKL:lah



STATE OF WISCONSIN
DEPARTMENT OF JUSTICE

Josh Kaul
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March 12, 2020

Alex T. Adams
SPN #103873
Racine County Jail
717 Wisconsin Avenue
Racine, WI 53403

Dear Mr. Adams:

The Wisconsin Department of Justice (DOJ) is in receipt of your correspondence, dated July 27, 2019, regarding your public records request to the Racine County Sheriff's Office. You believe the "Racine County Sheriffs Office Record Bureau or Racine County Jail is withholding" records you requested, but you also indicate that the jail told you there are no records responsive to your request. You have asked DOJ to provide "any and all help" obtaining these records.

The Wisconsin Public Records Law, Wis. Stat. §§ 19.31 to 19.39, authorizes requesters to inspect or obtain copies of "records" created or maintained by an "authority." The purpose of the public records law is to shed light on the workings of government and the official acts of public officers and employees. *Bldg. & Constr. Trades Council v. Waunakee Cmty. Sch. Dist.*, 221 Wis. 2d 575, 582, 585 N.W.2d 726 (Ct. App. 1998).

First, it should be noted that, as an incarcerated person, your right to request records under the Wisconsin Public Records Law is limited to records that contain specific references to yourself or your minor children for whom you have not been denied physical placement under Wisconsin Statutes Chapter 767, and the records are otherwise accessible to you by law. See Wis. Stat. § 19.32(1c) and (3).

If you are entitled to request the records you seek, certain information may still be redacted or withheld from the records under the public records law. The public records law authorizes requesters to inspect or obtain copies of "records" created or maintained by an "authority." Records are presumed to be open to public inspection and copying, but there are exceptions. Wis. Stat. § 19.31. Requested records fall into one of three categories: (1) absolute right of access; (2) absolute denial of access; and (3) right of access determined by the balancing test. *Hathaway v. Joint Sch. Dist. No. 1 of Green Bay*, 116 Wis. 2d 388, 397, 342 N.W.2d 682 (1984). If neither a statute nor the common law requires disclosure or creates a general exception to disclosure, the records custodian must decide whether the strong public policy favoring disclosure is overcome by some even stronger public policy favoring limited

access or nondisclosure. This balancing test determines whether the presumption of openness is overcome by another public policy concern. *Hempel v. City of Baraboo*, 2005 WI 120, ¶ 4, 284 Wis. 2d 162, 699 N.W.2d 551. If a records custodian determines that a record or part of a record cannot be disclosed, the custodian must redact that record or part of that record. See Wis. Stat. § 19.36(6).

The public records law “does not require an authority to provide requested information if no record exists, or to simply answer questions about a topic of interest to the requester.” *Journal Times v. City of Racine Board of Police and Fire Commissioners*, 2015 WI 56, ¶ 55 (citation omitted) (“While a record will always contain information, information may not always be in the form of a record.”); see also *State ex rel. Zinngrabe v. Sch. Dist. of Sevastopol*, 146 Wis. 2d 629, 431 N.W.2d 734 (Ct. App. 1988). An authority cannot fulfill a request for a record if the authority has no such record. While the public records law does not require an authority to notify a requester that the requested record does not exist, it is advisable that an authority do so.

Pursuant to Wis. Stat. § 19.35(4)(b), “If an authority denies a written request in whole or in part, the requester shall receive from the authority a written statement of the reasons for denying the written request.” Specific policy reasons, rather than mere statements of legal conclusion or recitation of exemptions, must be given. *Pangman & Assocs. v. Zellmer*, 163 Wis. 2d 1070, 1084, 473 N.W.2d 538 (Ct. App. 1991); *Vill. of Butler v. Cohen*, 163 Wis. 2d 819, 824-25, 472 N.W.2d 579 (Ct. App. 1991). In every written denial, the authority must also inform the requester that “if the request for the record was made in writing, then the determination is subject to review by mandamus under s. 19.37(1) or upon application to the attorney general or a district attorney.” Wis. Stat. § 19.35(4)(b).

The public records law provides several remedies for a requester dissatisfied with an authority’s response, or lack of response, to a public records request. A requester may file an action for mandamus, with or without an attorney, asking a court to order release of the records. Wis. Stat. § 19.37(1)(a). To obtain a writ of mandamus, the requester must establish four things: “(1) the petitioner has a clear legal right to the records sought; (2) the government entity has a plain legal duty to disclose the records; (3) substantial damages would result if the petition for mandamus was denied; and (4) the petitioner has no other adequate remedy at law.” *Watton v. Hegerty*, 2008 WI 74, ¶ 8, 311 Wis. 2d 52, 751 N.W.2d 369.

It is important to note that the public records law states that no action for mandamus may be commenced by an incarcerated person later than 90 days after the date the request was denied. See Wis. Stat. § 19.37(1m). Inmates who seek mandamus must also exhaust their administrative remedies first before filing an action under Wis. Stat. § 19.37. See Wis. Stat. § 801.07(7); *Moore v. Stahowiak*, 212 Wis. 2d 744, 749-50, 569 N.W.2d 70 (Ct. App. 1997). For requesters who are not committed or incarcerated, an action for mandamus arising under the public records law must be commenced within three years after the cause of action accrues. See Wis. Stat. § 893.90(2).

Alternatively, the requester may submit a written request for the district attorney of the county where the record is found, or the Attorney General, to file an action for mandamus seeking release of the requested records. Wis. Stat. § 19.37(1)(b). The Attorney General is authorized to enforce the public records law; however, he generally exercises this authority

in cases presenting novel issues of law that coincide with matters of statewide concern. Your matter, while important, does not appear to present such issues. Therefore, we respectfully decline to pursue an action for mandamus on your behalf.

You may wish to contact a private attorney regarding your matter. The State Bar of Wisconsin operates an attorney referral service. The referral service is free; however, a private attorney may charge attorney's fees. You may reach the service using the contact information below:

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DOJ appreciates your concern. We are dedicated to the work necessary to preserve Wisconsin's proud tradition of open government. Thank you for your correspondence.

The information provided in this letter is provided pursuant to Wis. Stat. § 19.39 and does not constitute an informal or formal opinion of the Attorney General pursuant to Wis. Stat. § 165.015(1).

Sincerely,



Sarah K. Larson
Assistant Attorney General
Office of Open Government

SKL:lah



STATE OF WISCONSIN
DEPARTMENT OF JUSTICE

Josh Kaul
Attorney General

17 W. Main Street
P.O. Box 7857
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Sarah K. Larson
Assistant Attorney General
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608/266-1221
TTY 1-800-947-3529
FAX 608/267-2779

March 12, 2020

John Brylski
[REDACTED]

Phillips, WI 54555

Dear Mr. Brylski:

The Wisconsin Department of Justice (DOJ) is in receipt of your correspondence, dated August 13, 2019, regarding your public records request to the Department of Natural Resources (DNR). In response to your request, the DNR told you "that they could not answer any of [your] questions : Stating under state statute agencies do not disclose info regarding the examination process." You asked for "this determination of not providing the info requested to be reviewed as well as the Hiring process of the WI DNR" to "be reviewed."

The Attorney General and DOJ's Office of Open Government (OOG) appreciate your concerns regarding the Wisconsin Public Records Law, Wis. Stat. §§ 19.31 to 19.39. However, DOJ cannot offer you legal advice or counsel concerning your public records request to DNR, as DOJ may be called upon to represent the DNR.

The OOG works to increase government openness and transparency and we do so with a focus on the Wisconsin public records law and open meetings law. While a portion of your correspondence pertained to the public records law, it also discussed a matter outside the scope of the OOG's responsibilities. As a result, we are unable to offer you assistance or insight regarding the DNR's hiring process.

Although we cannot offer you legal advice or counsel regarding your public records issue because DOJ may be called upon to represent the DNR, we can offer you some general information about the public records law that you may find helpful.

The public records law authorizes requesters to inspect or obtain copies of "records" created or maintained by an "authority." The purpose of the public records law is to shed light on the workings of government and the official acts of public officers and employees. *Bldg. & Constr. Trades Council v. Waunakee Cmty. Sch. Dist.*, 221 Wis. 2d 575, 582, 585 N.W.2d 726 (Ct. App. 1998).

Records are presumed to be open to public inspection and copying, but there are exceptions. Wis. Stat. § 19.31. Requested records fall into one of three categories: (1) absolute right of access; (2) absolute denial of access; and (3) right of access determined by the

balancing test. *Hathaway v. Joint Sch. Dist. No. 1 of Green Bay*, 116 Wis. 2d 388, 397, 342 N.W.2d 682 (1984). If neither a statute nor the common law requires disclosure or creates a general exception to disclosure, the records custodian must decide whether the strong public policy favoring disclosure is overcome by some even stronger public policy favoring limited access or nondisclosure. This balancing test determines whether the presumption of openness is overcome by another public policy concern. *Hempel v. City of Baraboo*, 2005 WI 120, ¶ 4, 284 Wis. 2d 162, 699 N.W.2d 551. If a records custodian determines that a record or part of a record cannot be disclosed, the custodian must redact that record or part of that record. See Wis. Stat. § 19.36(6).

Information “pertaining to an employee’s employment examination, except an examination score if access to that score is not otherwise prohibited,” is exempted from disclosure under the public records law. Wis. Stat. § 19.36(10)(c). Information “relating to one or more specific employees that is used by an authority or by the employer of the employees for staff management planning, including performance evaluations, judgments, or recommendations concerning future salary adjustments or other wage treatments, management bonus plans, promotions, job assignments, letters of reference, or other comments or ratings relating to employees” is also exempted from disclosure under the public records law. Wis. Stat. § 19.36(10)(d). Wisconsin Stat. § 230.13 also provides that certain personnel records of state employees and applicants for state employment may be closed to the public. However, the OOG cannot advise you on the provisions of Wis. Stat. § 230.13 as that statute falls outside the scope of the OOG’s authority and responsibilities.

Pursuant to Wis. Stat. § 19.35(4)(b), “If an authority denies a written request in whole or in part, the requester shall receive from the authority a written statement of the reasons for denying the written request.” Specific policy reasons, rather than mere statements of legal conclusion or recitation of exemptions, must be given. *Pangman & Assocs. v. Zellmer*, 163 Wis. 2d 1070, 1084, 473 N.W.2d 538 (Ct. App. 1991); *Vill. of Butler v. Cohen*, 163 Wis. 2d 819, 824-25, 472 N.W.2d 579 (Ct. App. 1991). In every written denial, the authority must also inform the requester that “if the request for the record was made in writing, then the determination is subject to review by mandamus under s. 19.37(1) or upon application to the attorney general or a district attorney.” Wis. Stat. § 19.35(4)(b).

The public records law provides several remedies for a requester dissatisfied with an authority’s response, or lack of response, to a written public records request. A requester may file an action for mandamus, with or without an attorney, asking a court to order release of the records. Wis. Stat. § 19.37(1)(a).

Alternatively, the requester may submit a written request for the district attorney of the county where the record is found, or the Attorney General, to file an action for mandamus seeking release of the requested records. Wis. Stat. § 19.37(1)(b). The Attorney General is authorized to enforce the public records law; however, he generally exercises this authority in cases presenting novel issues of law that coincide with matters of statewide concern. As explained above, DOJ may be called upon to represent the DNR. Therefore, although you did not specifically request the Attorney General to file an action for mandamus, nonetheless, we respectfully decline to pursue an action for mandamus on your behalf.

You may also wish to contact a private attorney regarding this matter. The State Bar of Wisconsin operates an attorney referral service. The referral service is free; however, a private attorney may charge attorney's fees. You may reach the service using the contact information below:

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DOJ appreciates your concern. We are dedicated to the work necessary to preserve Wisconsin's proud tradition of open government. Thank you for your correspondence.

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Sincerely,



Sarah K. Larson
Assistant Attorney General
Office of Open Government

SKL:lah

Cc: Chief Legal Counsel, DNR



STATE OF WISCONSIN
DEPARTMENT OF JUSTICE

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Attorney General

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FAX 608/267-2779

March 17, 2020

Karri Gumney

[REDACTED]
Plover, WI 54467

Dear Ms. Gumney:

The Wisconsin Department of Justice (DOJ) is in receipt of your correspondence, dated August 14, 2019, in which you asked how “to obtain copies or view” records from law enforcement agencies?

The Wisconsin Public Records Law, Wis. Stat. §§ 19.31 to 19.39, authorizes requesters to inspect or obtain copies of “records” created or maintained by an “authority.” The purpose of the public records law is to shed light on the workings of government and the official acts of public officers and employees. *Bldg. & Constr. Trades Council v. Waunakee Cmty. Sch. Dist.*, 221 Wis. 2d 575, 582, 585 N.W.2d 726 (Ct. App. 1998).

The public records law defines an “authority” as any of the following having custody of a record:

a state or local office, elective official, agency, board, commission, committee, council, department or public body corporate and politic created by the constitution or by any law, ordinance, rule or order; a governmental or quasi-governmental corporation except for the Bradley center sports and entertainment corporation; a special purpose district; any court of law; the assembly or senate; a nonprofit corporation which receives more than 50 percent of its funds from a county or a municipality, as defined in s. 59.001(3), and which provides services related to public health or safety to the county or municipality; a university police department under s. 175.42; or a formally constituted subunit of any of the foregoing.

Wis. Stat. § 19.32(1). Only an entity that falls within this definition of “authority” is subject to the provisions of the public records law.

In order to obtain records from an authority, you should make a public records request specifying the records you seek. There are no “magic words” that are required when making a public records request, and an authority may not require that a requester fill out a specific

form in order to submit a request. One may submit a request verbally or in writing. A request for records is sufficient if it is directed to an authority and reasonably describes the records or information requested. Wis. Stat. § 19.35(1)(h). Under the public records law, a request need not be made in person, and generally, a requester is not required to identify themselves or to state the purpose of the request. See Wis. Stat. § 19.35(1)i (“Except as authorized under this paragraph, no request . . . may be refused because the person making the request is unwilling to be identified or to state the purpose of the request”).

Records are presumed to be open to public inspection and copying, but there are exceptions. Wis. Stat. § 19.31. Requested records fall into one of three categories: (1) absolute right of access; (2) absolute denial of access; and (3) right of access determined by the balancing test. *Hathaway v. Joint Sch. Dist. No. 1 of Green Bay*, 116 Wis. 2d 388, 397, 342 N.W.2d 682 (1984). If neither a statute nor the common law requires disclosure or creates a general exception to disclosure, the records custodian must decide whether the strong public policy favoring disclosure is overcome by some even stronger public policy favoring limited access or nondisclosure. This balancing test, determines whether the presumption of openness is overcome by another public policy concern. *Hempel v. City of Baraboo*, 2005 WI 120, ¶ 4, 284 Wis. 2d 162, 699 N.W.2d 551. If a records custodian determines that a record or part of a record cannot be disclosed, the custodian must redact that record or part of that record. See Wis. Stat. § 19.36(6).

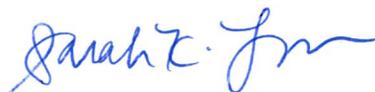
If an authority denies a written request, in whole or in part, the authority must provide a written statement of the reasons for such a denial and inform the requester that the determination is subject to review by mandamus under Wis. Stat. § 19.37(1) or upon application to the attorney general or a district attorney. Wis. Stat. § 19.35(4)(b).

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Thank you for your correspondence. We are dedicated to the work necessary to preserve Wisconsin’s proud tradition of open government.

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Sincerely,



Sarah K. Larson
Assistant Attorney General
Office of Open Government



STATE OF WISCONSIN
DEPARTMENT OF JUSTICE

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Sarah K. Larson
Assistant Attorney General
larsonsk@doj.state.wi.us
608/266-1221
TTY 1-800-947-3529
FAX 608/267-2779

March 17, 2020

Zeke Jackson
Village Administrator
123 North River Street
Waterford, WI 53105

Dear Mr. Jackson:

The Wisconsin Department of Justice (DOJ) is in receipt of your correspondence, dated August 28, 2019, in which you wrote, "Please contact me regarding Wis stat 19.85 and closed sessions related to intergovernmental agreements."

The Wisconsin Open Meetings Law, Wis. Stat. §§ 19.81 to 19.98, acknowledges that the public is entitled to the fullest and most complete information regarding government affairs as is compatible with the conduct of governmental business. Wis. Stat. § 19.81(1). All meetings of governmental bodies shall be held publicly and be open to all citizens at all times unless otherwise expressly provided by law. Wis. Stat. § 19.81(2). The provisions of the open meetings law are to be construed liberally to achieve that purpose. Wis. Stat. § 19.81(4).

Wisconsin Stat. § 19.85 lists exemptions in which meetings may be convened in closed session. Any exemptions to open meetings are to be viewed with the presumption of openness in mind. Such exemptions should be strictly construed. *State ex rel. Hodge v. Turtle Lake*, 180 Wis. 2d 62, 71, 508 N.W.2d 603 (1993). The exemptions should be invoked sparingly and only where necessary to protect the public interest and when holding an open session would be incompatible with the conduct of governmental affairs. "Mere government inconvenience is . . . no bar to the requirements of the law." *State ex rel. Lynch v. Conta*, 71 Wis. 2d 662, 678, 239 N.W.2d 313 (1976).

Wisconsin Stat. § 19.85(1) contains eleven exemptions to the open session requirement which permit, but do not require, a governmental body to convene in closed session. Krueger Correspondence (Feb. 13, 2019). For additional information on closed sessions, please see pages 24 through 30 of the Open Meetings Law Compliance Guide available through DOJ's website (<https://www.doj.state.wi.us/office-open-government/office-open-government>).

Every meeting must be initially convened in open session. At an open meeting, a motion to enter into closed session must be carried by a majority vote. No motion to convene in closed session may be adopted unless an announcement is made to those present the nature of the business to be considered at the proposed closed session and the specific

exemption or exemptions by which the closed session is claimed to be authorized. Wis. Stat. § 19.85(1).

Notice of a contemplated closed session (and any motion to enter into closed session) must contain the subject matter to be considered in closed session. Merely identifying and quoting a statutory exemption is not sufficient. The notice or motion must contain enough information for the public to discern whether the subject matter is authorized for closed session. If a body intends to enter into closed session under more than one exemption, the notice or motion should make clear which exemptions correspond to which subject matter.

Furthermore, some specificity is required since many exemptions contain more than one reason for authorizing a closed session. For example, Wis. Stat. § 19.85(1)(c) provides an exemption for the following: "Considering employment, promotion, compensation or performance evaluation data of any public employee over which the governmental body has jurisdiction or exercises responsibility." Merely quoting the entire exemption, without specifying the portion of the exemption under which the body intends to enter into closed session, may not be sufficient. Only aspects of a matter that fall within a specific exemption may be discussed in a closed session. If aspects of a matter do not properly fall within an exemption, those aspects must be discussed in an open meeting.

It does not appear from your correspondence that you are asking a specific question or requesting the help of the Attorney General at this time. However, we hope you find the information provided helpful. If you would like to learn more about the open meetings law, DOJ's Office of Open Government offers several open government resources through the Wisconsin DOJ website (<https://www.doj.state.wi.us/office-open-government/office-open-government>). DOJ provides the full Wisconsin open meetings law and maintains an Open Meetings Law Compliance Guide on its website.

The Attorney General and DOJ's Office of Open Government are committed to increasing government openness and transparency, and we are dedicated to the work necessary to preserve Wisconsin's proud tradition of open government. If you have additional questions, please contact the Office of Open Government's Public Records Open Meetings (PROM) Help Line at (608) 267-2220. Thank you for your correspondence.

The information provided in this letter is provided pursuant to Wis. Stat. § 19.98 and does not constitute an informal or formal opinion of the Attorney General pursuant to Wis. Stat. § 165.015(1).

Sincerely,



Sarah K. Larson
Assistant Attorney General
Office of Open Government

SKL:lah



STATE OF WISCONSIN
DEPARTMENT OF JUSTICE

Josh Kaul
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March 17, 2020

Phillip Lopez
Brown County Jail
3030 Curry Lane
Green Bay, WI 54311

Dear Mr. Lopez:

The Wisconsin Department of Justice (DOJ) is in receipt of your correspondence, dated August 21, 2019, in which you petitioned “the attorney general to bring [a] mandamus action against the Brown County Sheriff’s Department and the Brown County Jail to order the release of all records pertaining to the handling of [your] ingoing and outgoing USPS mail.”

DOJ’s Office of Open Government (OOG) works to increase government openness and transparency with a focus on the Wisconsin Open Meetings Law, Wis. Stat. §§ 19.81 to 19.98, and the Wisconsin Public Records Law, Wis. Stat. §§ 19.31 to 19.39. Based on the information you provided in your correspondence, it appears that some of the subject matter of your correspondence, regarding your claims about the alleged tampering of your mail and your constitutional rights, is outside this scope. Therefore, we are unable to offer you assistance regarding your concerns that are outside the scope of the OOG’s responsibilities.

It should be noted that, as an incarcerated person, your right to request records under the public records law is limited to records that contain specific references to yourself or your minor children and are otherwise accessible to you by law. *See* Wis. Stat. § 19.32(1c) and (3). If the records you requested pertain to you, you may request them pursuant to the public records law. However, under the public records law, certain information may still be redacted from the records.

The public records law authorizes requesters to inspect or obtain copies of “records” created or maintained by an “authority.” The purpose of the public records law is to shed light on the workings of government and the official acts of public officers and employees. *Bldg. & Constr. Trades Council v. Waunakee Cmty. Sch. Dist.*, 221 Wis. 2d 575, 582, 585 N.W.2d 726 (Ct. App. 1998).

Records are presumed to be open to public inspection and copying, but there are exceptions. Wis. Stat. § 19.31. Requested records fall into one of three categories: (1) absolute right of access; (2) absolute denial of access; and (3) right of access determined by the balancing test. *Hathaway v. Joint Sch. Dist. No. 1 of Green Bay*, 116 Wis. 2d 388, 397, 342

N.W.2d 682 (1984). If neither a statute nor the common law requires disclosure or creates a general exception to disclosure, the records custodian must decide whether the strong public policy favoring disclosure is overcome by some even stronger public policy favoring limited access or nondisclosure. This balancing test determines whether the presumption of openness is overcome by another public policy concern. *Hempel v. City of Baraboo*, 2005 WI 120, ¶ 4, 284 Wis. 2d 162, 699 N.W.2d 551. If a records custodian determines that a record or part of a record cannot be disclosed, the custodian must redact that record or part of that record. *See* Wis. Stat. § 19.36(6).

The public records law does not require a response to a public records request within a specific timeframe. In other words, after a request is received, there is no set deadline by which the authority must respond. However, the law states that upon receipt of a public records request, the authority “shall, as soon as practicable and without delay, either fill the request or notify the requester of the authority’s determination to deny the request in whole or in part and the reasons therefor.” Wis. Stat. § 19.35(4)(a). A reasonable amount of time for a response “depends on the nature of the request, the staff and other resources available to the authority to process the request, the extent of the request, and other related considerations.” *WIREdata, Inc. v. Vill. of Sussex*, 2008 WI 69, ¶ 56, 310 Wis. 2d 397, 751 N.W.2d 736; *see Journal Times v. Police & Fire Comm’rs Bd.*, 2015 WI 56, ¶ 85, 362 Wis. 2d 577, 866 N.W.2d 563 (an authority “can be swamped with public records requests and may need a substantial period of time to respond to any given request”).

Pursuant to Wis. Stat. § 19.35(4)(b), “If an authority denies a written request in whole or in part, the requester shall receive from the authority a written statement of the reasons for denying the written request.” Specific policy reasons, rather than mere statements of legal conclusion or recitation of exemptions, must be given. *Pangman & Assocs. v. Zellmer*, 163 Wis. 2d 1070, 1084, 473 N.W.2d 538 (Ct. App. 1991); *Vill. of Butler v. Cohen*, 163 Wis. 2d 819, 824-25, 472 N.W.2d 579 (Ct. App. 1991). In every written denial, the authority must also inform the requester that “if the request for the record was made in writing, then the determination is subject to review by mandamus under s. 19.37(1) or upon application to the attorney general or a district attorney.” Wis. Stat. § 19.35(4)(b).

The public records law “does not require an authority to provide requested information if no record exists, or to simply answer questions about a topic of interest to the requester.” *Journal Times v. City of Racine Board of Police and Fire Commissioners*, 2015 WI 56, ¶ 55 (citation omitted) (“While a record will always contain information, information may not always be in the form of a record.”); *see also State ex rel. Zinngrabe v. Sch. Dist. of Sevastopol*, 146 Wis. 2d 629, 431 N.W.2d 734 (Ct. App. 1988). An authority cannot fulfill a request for a record if the authority has no such record. While the public records law does not require an authority to notify a requester that the requested record does not exist, it is advisable that an authority do so.

The public records law provides several remedies for a requester dissatisfied with an authority’s response, or lack of response, to a public records request. A requester may file an action for mandamus, with or without an attorney, asking a court to order release of the records. *See* Wis. Stat. § 19.37(1)(a). To obtain a writ of mandamus, the requester must establish four things: “(1) the petitioner has a clear legal right to the records sought; (2) the government entity has a plain legal duty to disclose the records; (3) substantial damages would result if the petition for mandamus was denied; and (4) the petitioner has no other

adequate remedy at law.” *Watton v. Hegerty*, 2008 WI 74, ¶ 8, 311 Wis. 2d 52, 751 N.W.2d 369.

It is important to note that the public records law states that no action for mandamus may be commenced by an incarcerated person later than 90 days after the date the request was denied. *See* Wis. Stat. § 19.37(1m). Inmates who seek mandamus must also exhaust their administrative remedies first before filing an action under Wis. Stat. § 19.37. *See* Wis. Stat. § 801.07(7); *Moore v. Stahowiak*, 212 Wis. 2d 744, 749-50, 569 N.W.2d 70 (Ct. App. 1997). For requesters who are not committed or incarcerated, an action for mandamus arising under the public records law must be commenced within three years after the cause of action accrues. *See* Wis. Stat. § 893.90(2).

Alternatively, the requester may submit a written request for the district attorney of the county where the record is found, or the Attorney General, to file an action for mandamus seeking release of the requested records. Wis. Stat. § 19.37(1)(b). The Attorney General is authorized to enforce the public records law; however, he generally exercises this authority only in cases presenting novel issues of law that coincide with matters of statewide concern. As your matter does not appear to present novel issues of law that coincide with matters of statewide concern, we respectfully decline to pursue an action for mandamus on your behalf at this time.

You may wish to contact a private attorney regarding this matter. The State Bar of Wisconsin operates an attorney referral service. The referral service is free; however, a private attorney may charge attorney’s fees. You may reach the service using this contact information:

Lawyer Referral and Information Service
State Bar of Wisconsin
P.O. Box 7158
Madison, WI 53707-7158
(800) 362-9082
(608) 257-4666

<http://www.wisbar.org/forpublic/ineedalawyer/pages/lris.aspx>

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DOJ appreciates your concern. We are dedicated to the work necessary to preserve Wisconsin’s proud tradition of open government. Thank you for your correspondence.

The information provided in this letter is provided pursuant to Wis. Stat. § 19.39 and does not constitute an informal or formal opinion of the Attorney General pursuant to Wis. Stat. § 165.015(1).

Sincerely,



Sarah K. Larson
Assistant Attorney General
Office of Open Government

SKL:lah



STATE OF WISCONSIN
DEPARTMENT OF JUSTICE

Josh Kaul
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March 17, 2020

Phillippe Magliore

[REDACTED]
Glenview, IL 60025
pmagliore@gmail.com

Dear Mr. Magliore:

The Wisconsin Department of Justice (DOJ) is in receipt of your correspondence, dated September 6, 2019, in which you stated that you filed a public records request with the University of Wisconsin-Eau Claire “which was partially denied.” You also stated that you were told that you “could appeal the denial to the Wisconsin AG.” You ask if DOJ could “provide you instructions on how to file an appeal.”

The Attorney General and DOJ’s Office of Open Government (OOG) appreciate your concerns regarding the Wisconsin public records law, Wis. Stat. §§ 19.31 to 19.39. However, DOJ cannot offer you legal advice or counsel concerning your public records requests as DOJ may be called upon to represent the University of Wisconsin System or the University of Wisconsin-Eau Claire. By copy of this letter to the University of Wisconsin System Office of Legal Counsel, we are informing them of your concerns. While we cannot offer you legal advice or counsel, we can provide you with some general information regarding the Wisconsin public records law, Wis. Stat. §§ 19.31 to 19.39, that you may find helpful.

The public records law authorizes requesters to inspect or obtain copies of “records” created or maintained by an “authority.” Records are presumed to be open to public inspection and copying, but there are exceptions. Wis. Stat. § 19.31. Requested records fall into one of three categories: (1) absolute right of access; (2) absolute denial of access; and (3) right of access determined by the balancing test. *Hathaway v. Joint Sch. Dist. No. 1 of Green Bay*, 116 Wis. 2d 388, 397, 342 N.W.2d 682 (1984). If neither a statute nor the common law requires disclosure or creates a general exception to disclosure, the records custodian must decide whether the strong public policy favoring disclosure is overcome by some even stronger public policy favoring limited access or nondisclosure. This balancing test, determines whether the presumption of openness is overcome by another public policy concern. *Hempel v. City of Baraboo*, 2005 WI 120, ¶ 4, 284 Wis. 2d 162, 699 N.W.2d 551. If a records custodian determines that a record or part of a record cannot be disclosed, the custodian must redact that record or part of that record. See Wis. Stat. § 19.36(6).

While the law requires an authority to fill a request or notify the requester of a determination to deny a request, the law does not require an authority to respond to a requester if the authority has no records responsive to a request. However, DOJ advises that an authority notify a requester if they have no responsive records. *See Journal Times*, 2015 WI 56, ¶ 102 (“While it might be a better course to inform a requester that no record exists, the language of the public records law does not specifically require such a response.”).

The public records law provides several remedies for a requester dissatisfied with an authority’s response, or lack of response, to a public records request. A requester may file an action for mandamus, with or without an attorney, asking a court to order release of the records. Wis. Stat. § 19.37(1)(a). Alternatively, the requester may submit a written request for the district attorney of the county where the record is found, or the Attorney General, to file an action for mandamus seeking release of the requested records. Wis. Stat. § 19.37(1)(b). The Attorney General is authorized to enforce the public records law; however, he generally exercises this authority in cases presenting novel issues of law that coincide with matters of statewide concern. As explained above, DOJ may be called upon to represent the University of Wisconsin System or the University of Wisconsin-Eau Claire. Therefore, the Attorney General respectfully declines to take any action in this matter, including filing an action for mandamus on your behalf.

However, some of the other remedies described above may still be available to you, and you may wish to contact a private attorney regarding your public records matter. The State Bar of Wisconsin operates an attorney referral service. The referral service is free; however, a private attorney may charge attorney’s fees. You may reach the service using the contact information below:

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DOJ appreciates your concern. We are dedicated to the work necessary to preserve Wisconsin’s proud tradition of open government. Thank you for your correspondence.

The information provided in this letter is provided pursuant to Wis. Stat. § 19.39 and does not constitute an informal or formal opinion of the Attorney General pursuant to Wis. Stat. § 165.015(1).

Sincerely,



Sarah K. Larson
Assistant Attorney General
Office of Open Government

SKL:amh:lah

cc: University of Wisconsin System Office of Legal Counsel



STATE OF WISCONSIN
DEPARTMENT OF JUSTICE

Josh Kaul
Attorney General

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March 31, 2020

Amedeo Greco

████████████████████
Madison, WI 53705
agreco1492@sbcglobal.net

Dear Mr. Greco:

The Wisconsin Department of Justice (DOJ) is in receipt of your correspondence, dated October 8, 2019, regarding your public records request to the University of Wisconsin Hospital and Clinics. You requested DOJ “seek a Writ of Mandamus ordering the production of the three record requests referenced [in your] September 25, 2019 letter, along with all other records the Hospital has refused to produce.”

The public records law authorizes requesters to inspect or obtain copies of “records” created or maintained by an “authority.” The purpose of the public records law is to shed light on the workings of government and the official acts of public officers and employees. *Bldg. & Constr. Trades Council v. Waunakee Cmty. Sch. Dist.*, 221 Wis. 2d 575, 582, 585 N.W.2d 726 (Ct. App. 1998).

Records are presumed to be open to public inspection and copying, but there are exceptions. Wis. Stat. § 19.31. Requested records fall into one of three categories: (1) absolute right of access; (2) absolute denial of access; and (3) right of access determined by the balancing test. *Hathaway v. Joint Sch. Dist. No. 1 of Green Bay*, 116 Wis. 2d 388, 397, 342 N.W.2d 682 (1984). If neither a statute nor the common law requires disclosure or creates a general exception to disclosure, the records custodian must decide whether the strong public policy favoring disclosure is overcome by some even stronger public policy favoring limited access or nondisclosure. This balancing test determines whether the presumption of openness is overcome by another public policy concern. *Hempel v. City of Baraboo*, 2005 WI 120, ¶ 4, 284 Wis. 2d 162, 699 N.W.2d 551. If a records custodian determines that a record or part of a record cannot be disclosed, the custodian must redact that record or part of that record. See Wis. Stat. § 19.36(6).

The public records law does not require a response to a public records request within a specific timeframe. In other words, after a request is received, there is no set deadline by which the authority must respond. However, the law states that upon receipt of a public records request, the authority “shall, as soon as practicable and without delay, either fill

the request or notify the requester of the authority's determination to deny the request in whole or in part and the reasons therefor." Wis. Stat. § 19.35(4)(a). A reasonable amount of time for a response "depends on the nature of the request, the staff and other resources available to the authority to process the request, the extent of the request, and other related considerations." *WIREData, Inc. v. Vill. of Sussex*, 2008 WI 69, ¶ 56, 310 Wis. 2d 397, 751 N.W.2d 736; see *Journal Times v. Police & Fire Comm'rs Bd.*, 2015 WI 56, ¶ 85, 362 Wis. 2d 577, 866 N.W.2d 563 (an authority "can be swamped with public records requests and may need a substantial period of time to respond to any given request").

However, the public records law "does not require an authority to provide requested information if no record exists, or to simply answer questions about a topic of interest to the requester." *Journal Times v. City of Racine Board of Police and Fire Commissioners*, 2015 WI 56, 55 (citation omitted); see also *State ex rel. Zinngrabe v. Sch. Dist. of Sevastopol*, 146 Wis. 2d 629, 431 N.W.2d 734 (Ct. App. 1988). An authority cannot fulfill a request for a record if the authority has no such record. While the public records law does not require an authority to notify a requester that the requested record does not exist, it is advisable that an authority do so.

An authority is not required to create a new record by extracting and compiling information from existing records in a new format. See Wis. Stat. § 19.35(1)(L). See also *George v. Record Custodian*, 169 Wis. 2d 573, 579, 485 N.W.2d 460 (Ct. App. 1992).

Based on the limited information provided in your correspondence, it appears that the records you requested have been provided to you. If not, the public records law provides several remedies for a requester dissatisfied with an authority's response, or lack of response, to a public records request. A requester may file an action for mandamus, with or without an attorney, asking a court to order release of the records. Wis. Stat. § 19.37(1)(a). To obtain a writ of mandamus, the requester must establish four things: "(1) the petitioner has a clear legal right to the records sought; (2) the government entity has a plain legal duty to disclose the records; (3) substantial damages would result if the petition for mandamus was denied; and (4) the petitioner has no other adequate remedy at law." *Watton v. Hegerty*, 2008 WI 74, ¶ 8, 311 Wis. 2d 52, 751 N.W.2d 369.

Alternatively, the requester may submit a written request for the district attorney of the county where the record is found, or the Attorney General, to file an action for mandamus seeking release of the requested records. Wis. Stat. § 19.37(1)(b). The Attorney General is authorized to enforce the public records law; however, he generally exercises this authority in cases presenting novel issues of law that coincide with matters of statewide concern. While important, your matter does not appear to present such issues. Therefore, the Attorney General respectfully declines to take any action in this matter, including filing an action for mandamus on your behalf at this time, but the other enforcement options listed above may still be available to you.

Additionally, you may wish to contact a private attorney regarding your matter. The State Bar of Wisconsin operates an attorney referral service. The referral service is free; however, a private attorney may charge attorney's fees. You may reach the service using the contact information below:

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DOJ appreciates your concern. We are dedicated to the work necessary to preserve Wisconsin's proud tradition of open government. Thank you for your correspondence.

The information provided in this letter is provided pursuant to Wis. Stat. § 19.39 and does not constitute an informal or formal opinion of the Attorney General pursuant to Wis. Stat. § 165.015(1).

Sincerely,



Sarah K. Larson
Assistant Attorney General
Office of Open Government

SKL:lah



STATE OF WISCONSIN
DEPARTMENT OF JUSTICE

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March 31, 2020

Tom Pleuss

[REDACTED]
Tomah, WI 54660
tompleuss@hotmail.com

Dear Mr. Pleuss:

The Wisconsin Department of Justice (DOJ) is in receipt of your correspondence, dated October 19, 2019 and January 22, 2020, in which you wrote, "I have asked the city of Tomah several times in writing for information under the WI. FIOA Law 19.35." You received "a letter from the city saying [you] had to fill out a special form that the city has." You asked, "is it true that they can disregard my previous requests and now invent a special form?"

Your correspondence references the federal Freedom of Information Act (FOIA), 5 U.S.C. § 552. FOIA applies to federal agencies and helps ensure public access to records of federal agencies. In Wisconsin, the state counterpart to FOIA is the Wisconsin Public Records Law, Wis. Stat. §§ 19.31 to 19.39. The purpose of the public records law is to shed light on the workings of government and the official acts of public officers and employees. *Bldg. & Constr. Trades Council v. Waunakee Cmty. Sch. Dist.*, 221 Wis. 2d 575, 582, 585 N.W.2d 726 (Ct. App. 1998). The public records law authorizes requesters to inspect or obtain copies of "records" created or maintained by an "authority."

A request for records is sufficient if it is directed to an authority and reasonably describes the records or information requested. Wis. Stat. § 19.35(1)(h). There are no "magic words" that are required, and no specific form is permitted to be required in order to submit a public records request. However, the request must be reasonably specific as to the subject matter and length of time involved. Wis. Stat. § 19.35(1)(h); *Schopper v. Gehring*, 210 Wis. 2d 208, 212-13, 565 N.W.2d 187 (Ct. App. 1997).

In your January 22, 2020 correspondence, you wrote that you were "following the guide lines for obtaining information" under the public records law "dealing with the city of Tomah Wi," but you are "failing to get [all] the information [you] specifically asked for." You are contacting DOJ "to intervene on [your] behalf."

Records are presumed to be open to public inspection and copying, but there are exceptions. Wis. Stat. § 19.31. Requested records fall into one of three categories: (1) absolute

right of access; (2) absolute denial of access; and (3) right of access determined by the balancing test. *Hathaway v. Joint Sch. Dist. No. 1 of Green Bay*, 116 Wis. 2d 388, 397, 342 N.W.2d 682 (1984). If neither a statute nor the common law requires disclosure or creates a general exception to disclosure, the records custodian must decide whether the strong public policy favoring disclosure is overcome by some even stronger public policy favoring limited access or nondisclosure. This balancing test determines whether the presumption of openness is overcome by another public policy concern. *Hempel v. City of Baraboo*, 2005 WI 120, ¶ 4, 284 Wis. 2d 162, 699 N.W.2d 551. If a records custodian determines that a record or part of a record cannot be disclosed, the custodian must redact that record or part of that record. See Wis. Stat. § 19.36(6).

The public records law does not require a response to a public records request within a specific timeframe. In other words, after a request is received, there is no set deadline by which the authority must respond. However, the law states that upon receipt of a public records request, the authority “shall, as soon as practicable and without delay, either fill the request or notify the requester of the authority’s determination to deny the request in whole or in part and the reasons therefor.” Wis. Stat. § 19.35(4)(a). A reasonable amount of time for a response “depends on the nature of the request, the staff and other resources available to the authority to process the request, the extent of the request, and other related considerations.” *WIREdata, Inc. v. Vill. of Sussex*, 2008 WI 69, ¶ 56, 310 Wis. 2d 397, 751 N.W.2d 736; see *Journal Times v. Police & Fire Comm’rs Bd.*, 2015 WI 56, ¶ 85, 362 Wis. 2d 577, 866 N.W.2d 563 (an authority “can be swamped with public records requests and may need a substantial period of time to respond to any given request”).

Pursuant to Wis. Stat. § 19.35(4)(b), “If an authority denies a written request in whole or in part, the requester shall receive from the authority a written statement of the reasons for denying the written request.” Specific policy reasons, rather than mere statements of legal conclusion or recitation of exemptions, must be given. *Pangman & Assocs. v. Zellmer*, 163 Wis. 2d 1070, 1084, 473 N.W.2d 538 (Ct. App. 1991); *Vill. of Butler v. Cohen*, 163 Wis. 2d 819, 824-25, 472 N.W.2d 579 (Ct. App. 1991). In every written denial, the authority must also inform the requester that “if the request for the record was made in writing, then the determination is subject to review by mandamus under s. 19.37(1) or upon application to the attorney general or a district attorney.” Wis. Stat. § 19.35(4)(b).

The public records law “does not require an authority to provide requested information if no record exists, or to simply answer questions about a topic of interest to the requester.” *Journal Times v. City of Racine Board of Police and Fire Commissioners*, 2015 WI 56, ¶ 55 (citation omitted) (“While a record will always contain information, information may not always be in the form of a record.”); see also *State ex rel. Zinngrabe v. Sch. Dist. of Sevastopol*, 146 Wis. 2d 629, 431 N.W.2d 734 (Ct. App. 1988). An authority cannot fulfill a request for a record if the authority has no such record. While the public records law does not require an authority to notify a requester that the requested record does not exist, it is advisable that an authority do so.

DOJ’s Office of Open Government (OOG) encourages authorities and requesters to maintain an open line of communication. This helps to avoid misunderstandings between an authority and a requester. As a best practice, authorities should send requesters an acknowledgment of the request after receiving it. If it becomes apparent to an authority that

a public records request may require a longer response time, it may be prudent that the authority provide the requester with a letter providing an update on the status of the response and, if possible, indicating when a response might be anticipated. Similarly, if an authority receives an inquiry from a requester seeking an update on the status of the request, it is advisable for the authority to respond to the requester with an update.

The public records law provides several remedies for a requester dissatisfied with an authority's response, or lack of response, to a public records request. A requester may file an action for mandamus, with or without an attorney, asking a court to order release of the records. Wis. Stat. § 19.37(1)(a). To obtain a writ of mandamus, the requester must establish four things: "(1) the petitioner has a clear legal right to the records sought; (2) the government entity has a plain legal duty to disclose the records; (3) substantial damages would result if the petition for mandamus was denied; and (4) the petitioner has no other adequate remedy at law." *Watton v. Hegerty*, 2008 WI 74, ¶ 8, 311 Wis. 2d 52, 751 N.W.2d 369.

Alternatively, the requester may submit a written request for the district attorney of the county where the record is found, or the Attorney General, to file an action for mandamus seeking release of the requested records. Wis. Stat. § 19.37(1)(b). The Attorney General is authorized to enforce the public records law; however, he generally exercises this authority in cases presenting novel issues of law that coincide with matters of statewide concern. As your matter does not appear to present novel issues of law that coincide with matters of statewide concern, we respectfully decline to pursue an action for mandamus on your behalf at this time.

While DOJ is declining to pursue an action for mandamus at this time, I am sending the City of Tomah a copy of this letter to inform them of your concerns. In addition, the other enforcement options listed above may still be available to you, and you may wish to contact a private attorney regarding this matter. The State Bar of Wisconsin operates an attorney referral service. The referral service is free; however, a private attorney may charge attorney's fees. You may reach the service using the contact information below:

Lawyer Referral and Information Service
State Bar of Wisconsin
P.O. Box 7158
Madison, WI 53707-7158
(800) 362-9082
(608) 257-4666

<http://www.wisbar.org/forpublic/ineedalawyer/pages/lris.aspx>

The Attorney General and the OOG are committed to increasing government openness and transparency, and DOJ endeavors to offer guidance in these areas. DOJ offers several open government resources through its website (<https://www.doj.state.wi.us/office-open-government/office-open-government>). DOJ provides the full Wisconsin public records law and maintains a Public Records Law Compliance Guide on its website.

DOJ appreciates your concern. We are dedicated to the work necessary to preserve Wisconsin's proud tradition of open government. Thank you for your correspondence.

The information provided in this letter is provided pursuant to Wis. Stat. § 19.39 and does not constitute an informal or formal opinion of the Attorney General pursuant to Wis. Stat. § 165.015(1).

Sincerely,



Sarah K. Larson
Assistant Attorney General
Office of Open Government

SKL:lah

cc: City of Tomah



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March 31, 2020

Kevin Schmitz

[REDACTED]
Mishicot, WI 54228-9610
info@coinvisitor.com

Dear Mr. Schmitz:

The Wisconsin Department of Justice (DOJ) is in receipt of your correspondence dated October 15, 2019, in which you wrote, “we would fall under the category of municipalities who just did not get the messages about quorums, walking quorums, the showers test and public access to records. . . . I need to get information and I keep getting told they do not have time for that, they do not have time for posting agendas to meet the requirements and many other issues.”

DOJ has insufficient information to fully evaluate your concerns, however, we can provide you with some general information regarding the open meetings law and public records law that we hope you will find helpful.

The Wisconsin Open Meetings Law, Wis. Stat. §§ 19.81 to 19.98, acknowledges that the public is entitled to the fullest and most complete information regarding government affairs as is compatible with the conduct of governmental business. Wis. Stat. § 19.81(1). All meetings of governmental bodies shall be held publicly and be open to all citizens at all times unless otherwise expressly provided by law. Wis. Stat. § 19.81(2). The provisions of the open meetings law are to be construed liberally to achieve that purpose. Wis. Stat. § 19.81(4).

The open meetings law applies to every meeting of a governmental body. Wis. Stat. § 19.83. A “meeting” is defined as:

[T]he convening of members of a governmental body for the purpose of exercising the responsibilities, authority, power or duties delegated to or vested in the body. If one-half or more of the members of a governmental body are present, the meeting is rebuttably presumed to be for the purpose of exercising the responsibilities, authority, power or duties delegated to or vested in the body. The term does not include any social or chance gathering or conference which is not intended to avoid this subchapter

Wis. Stat. § 19.82(2).

A meeting occurs when a convening of members of a governmental body satisfies two requirements. See *State ex rel. Newspapers, Inc. v. Showers*, 135 Wis. 2d 77, 398 N.W.2d 154 (1987). The first requirement under the so-called *Showers* test is that there must be a purpose to engage in governmental business (the purpose requirement). Second, the number of members present must be sufficient to determine the governmental body's course of action (the numbers requirement). A meeting does not include any social or chance gathering or conference that is not intended to avoid the requirements of the open meetings law.

Regarding the purpose requirement, a body is engaged in governmental business when its members gather to simply hear information on a matter within the body's realm of authority. See *State ex rel. Badke v. Vill. Bd. of Vill. of Greendale*, 173 Wis. 2d 553, 573–74, 494 N.W.2d 408 (1993). Thus, mere attendance at an informational meeting on a matter within a body's realm of authority satisfies the purpose requirement. The members of the body need not discuss the matter or even interact. *Id.* at 574-76. This applies to a body that is only advisory and that has no power to make binding decisions. See *State v. Swanson*, 92 Wis. 2d 310, 317, 284 N.W.2d 655 (1979).

Regarding the numbers requirement, a quorum is the minimum number of a body's membership necessary to act. Certainly, a majority of the members of a governmental body constitutes a quorum. However, a negative quorum, the minimum number of a body's membership necessary to prevent action, also meets the numbers requirement. As a result, determining the number of members of a particular body necessary to meet the numbers requirement is fact specific and depends on the circumstances of the particular body.

The requirements of the open meetings law also extend to walking quorums. A "walking quorum" is a series of gatherings among separate groups of members of a governmental body, each less than quorum size, who agree, tacitly or explicitly, to act uniformly in sufficient number to reach a quorum. See *Showers*, 135 Wis. 2d at 92. The danger is that a walking quorum may produce a predetermined outcome and thus render the publicly held meeting a mere formality. See *State ex rel. Lynch v. Conta*, 71 Wis. 2d 662, 685–88, 239 N.W.2d 313 (1976). Thus, any attempt to avoid the appearance of a "meeting" through use of a walking quorum or other "elaborate arrangements" is subject to prosecution under the open meetings law. *Id.* at 687.

The essential feature of a walking quorum is the element of agreement among members of a body to act uniformly in sufficient numbers to reach a quorum. Where there is no such express or tacit agreement, exchanges among separate groups of members may take place without violating the open meetings law.

For example, the requirements of the open meetings law cannot be circumvented by using an agent or surrogate to poll the members of governmental bodies through a series of individual contacts. See Clifford Correspondence (Apr. 28, 1986); Herbst Correspondence (Jul. 16, 2008). Similarly, the use of email voting to decide matters fits the definition of a "walking quorum" in violation of the open meetings law, even if the result of the vote is later ratified at a properly noticed meeting. See I-01-10 (Jan. 25, 2010).

Furthermore, where a majority of members of a body sign a document that expressly commits them to a future course of action, a court could find a walking quorum violation. *See Huff Correspondence* (Jan. 15, 2008). A walking quorum may be found when the members: 1) have effectively engaged in collective discussion or information gathering outside of the context of a properly noticed meeting; and 2) have agreed with each other to act in some uniform fashion. *Id.* Thus, for example, a walking quorum might be found where a quorum of members sign on to a document that “not only discussed policy matters pending” before the governmental body, but also “expressly committed the signatories not to vote for any additional funding” for a particular project. *Id.*

In contrast, the mere presence of signatories co-sponsoring a resolution would not necessarily imply a decision to later vote in a particular manner. *See Huff Correspondence* (Jan. 15, 2008). Similarly, the signing of a document by members of a body merely asking that a subject be placed on the agenda of an upcoming meeting does not constitute a “walking quorum” where the signers have not engaged in substantive discussion or agreed on a uniform course of action regarding the proposed subject. *See Kay Correspondence* (Apr. 25, 2007). An agreement that a subject should be considered is not the same as an agreement about what course of action is to be taken. *See Kittleson Correspondence* (June 13, 2007).

The Attorney General has advised that members of governmental bodies should reduce any possible appearance of impropriety by minimizing inter-member communications. *See Kay Correspondence* (Apr. 25, 2007). Members subject themselves to close scrutiny and possible prosecution whenever a majority of a body’s membership is involved in interactions connected to government business that take place outside the context of a duly noticed meeting. *Id.*

It is important to note that the phrase “convening of members” in Wis. Stat. § 19.82(2) is not limited to situations in which members of a body are simultaneously gathered in the same location, but may also include other situations in which members are able to effectively communicate with each other and to exercise the authority vested in the body, even if they are not physically present together. Whether such a situation qualifies as a “convening of members” under the open meetings law depends on the extent to which the communications in question resemble a face-to-face exchange. A convening of members may occur through written correspondence and electronic communications, including email.

The open meetings law provides for the level of specificity required in agenda items for open and closed meetings, as well as the timing for releasing agendas in order to provide proper notice. Wis. Stat. § 19.84(2). Public notice of a meeting must provide the “time, date, place and subject matter of the meeting, including that intended for consideration at any contemplated closed session.” *Id.* The notice must be in such a form so as to reasonably apprise the public of this information. *Id.*

Whether the notice is specific enough is determined on a case-specific basis, based on a reasonableness standard. *State ex rel. Buswell v. Tomah Area Sch. Dist.*, 2007 WI 71, ¶¶ 27–29, 301 Wis. 2d 178, 732 N.W.2d 804. The notice requirement in the open meetings law functions to assure that members of the public are reasonably apprised of what is discussed at such meetings. *Id.* ¶ 34. The Wisconsin Supreme Court has reasoned that the notice requirement gives the public information about the business to be conducted that will

alert them to the importance of the meeting, so that they can make an informed decision whether to attend. *State ex rel. Badke v. Vill. Bd. of Vill. of Greendale*, 173 Wis. 2d 553, 573–74, 577–78, 494 N.W.2d 408 (1993). Therefore, a governmental body, when conducting a meeting, is free to discuss any aspect of any subject identified in the public notice of that meeting, as well as issues reasonably related to that subject, but may not address any topics that are not reasonably related to the information in the notice. *Buswell*, 301 Wis. 2d 178, ¶ 34 (a meeting generally “cannot address topics unrelated to the information in the notice.”).

There is no requirement, however, that a governmental body must follow the agenda in the order listed on the meeting notice, unless a particular agenda item has been noticed for a specific time. *See Stencil Correspondence* (Mar. 6, 2008). If an agenda item has been noticed for a specific time, the governmental body should make certain that the agenda item is discussed at that time, because citizens might have relied on the fact that a specific time was given. *Id.* But if an agenda item does not have a specific time listed, it is within the discretion of the governmental body to reorganize its agenda at the meeting. *Id.*

Nor is a governmental body required to actually discuss every item contained in the public notice. *See Black Correspondence* (Apr. 22, 2009). It is reasonable, in appropriate circumstances, for a body to cancel a previously planned discussion or postpone it to a later date. *Id.*

Under the open meetings law, the Attorney General and the district attorneys have authority to enforce the law. Wis. Stat. § 19.97(1). Generally, the Attorney General may elect to prosecute complaints presenting novel issues of law that coincide with matters of statewide concern. Although you did not specifically request the Attorney General to file an enforcement action, nonetheless, we respectfully decline to pursue an enforcement action at this time.

More frequently, the district attorney of the county where the alleged violation occurred may enforce the law. However, in order to have this authority, an individual must file a verified complaint with the district attorney. Wis. Stat. § 19.97(1). If the district attorney refuses or otherwise fails to commence an action to enforce the open meetings law within 20 days after receiving the verified complaint, the individual may bring an action in the name of the state. Wis. Stat. § 19.97(4). (Please note a district attorney may still commence an enforcement action even after 20 days have passed.) Such actions by an individual must be commenced within two years after the cause of action accrues. Wis. Stat. § 893.93(2)(a).

Regarding your general question about access to records, DOJ can provide you with the following general information that we hope you find helpful. The Wisconsin Public Records Law, Wis. Stat. §§ 19.31 to 19.39, authorizes requesters to inspect or obtain copies of “records” created or maintained by an “authority.” The purpose of the public records law is to shed light on the workings of government and the official acts of public officers and employees. *Bldg. & Constr. Trades Council v. Waunakee Cmty. Sch. Dist.*, 221 Wis. 2d 575, 582, 585 N.W.2d 726 (Ct. App. 1998).

Records are presumed to be open to public inspection and copying, but there are exceptions. Wis. Stat. § 19.31. Requested records fall into one of three categories: (1) absolute

right of access; (2) absolute denial of access; and (3) right of access determined by the balancing test. *Hathaway v. Joint Sch. Dist. No. 1 of Green Bay*, 116 Wis. 2d 388, 397, 342 N.W.2d 682 (1984). If neither a statute nor the common law requires disclosure or creates a general exception to disclosure, the records custodian must decide whether the strong public policy favoring disclosure is overcome by some even stronger public policy favoring limited access or nondisclosure. This balancing test determines whether the presumption of openness is overcome by another public policy concern. *Hempel v. City of Baraboo*, 2005 WI 120, ¶ 4, 284 Wis. 2d 162, 699 N.W.2d 551. If a records custodian determines that a record or part of a record cannot be disclosed, the custodian must redact that record or part of that record. See Wis. Stat. § 19.36(6).

If an authority denies a written request, in whole or in part, the authority must provide a written statement of the reasons for denying the written request. Wis. Stat. § 19.35(4)(b). Specific policy reasons, rather than mere statements of legal conclusion or recitation of exemptions, must be given. *Pangman & Assocs. v. Zellmer*, 163 Wis. 2d 1070, 1084, 473 N.W.2d 538 (Ct. App. 1991); *Vill. of Butler v. Cohen*, 163 Wis. 2d 819, 824-25, 472 N.W.2d 579 (Ct. App. 1991). In every written denial, the authority must also inform the requester that “if the request for the record was made in writing, then the determination is subject to review by mandamus under s. 19.37(1) or upon application to the attorney general or a district attorney.” Wis. Stat. § 19.35(4)(b).

The public records law provides several remedies for a requester dissatisfied with an authority’s response, or lack of response, to a public records request. A requester may file an action for mandamus, with or without an attorney, asking a court to order release of the records. Wis. Stat. § 19.37(1)(a).

Alternatively, the requester may submit a written request for the district attorney of the county where the record is found, or the Attorney General, to file an action for mandamus seeking release of the requested records. Wis. Stat. § 19.37(1)(b). The Attorney General is authorized to enforce the public records law; however, he generally exercises this authority only in cases presenting novel issues of law that coincide with matters of statewide concern. Although you did not specifically request the Attorney General to file an action for mandamus, nonetheless, we respectfully decline to pursue a mandamus action at this time.

Additionally, you may wish to contact a private attorney regarding your matter. The State Bar of Wisconsin operates an attorney referral service. The referral service is free; however, a private attorney may charge attorney’s fees. You may reach the service using the contact information below:

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We hope you find this information helpful. The Attorney General and DOJ's Office of Open Government are committed to increasing government openness and transparency, and we are dedicated to the work necessary to preserve Wisconsin's proud tradition of open government. If you would like to learn more about the public records law, DOJ's Office of Open Government offers several open government resources on DOJ's website (<https://www.doj.state.wi.us/office-open-government/office-open-government>). DOJ provides the full Wisconsin public records law and maintains a Public Records Law Compliance Guide. If you have additional questions, you may also contact the Office of Open Government's Public Records-Open Meetings (PROM) Help Line at (608) 267-2220.

DOJ appreciates your concern. We are dedicated to the work necessary to preserve Wisconsin's proud tradition of open government. Thank you for your correspondence.

The information provided in this letter is provided pursuant to Wis. Stat. §§ 19.39 and 19.98 and does not constitute an informal or formal opinion of the Attorney General pursuant to Wis. Stat. § 165.015(1).

Sincerely,



Sarah K. Larson
Assistant Attorney General
Office of Open Government

SKL:lah