

2021 1st Quarter Correspondence

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**STATE OF WISCONSIN
DEPARTMENT OF JUSTICE**

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January 15, 2020

Michael Yaker
mike@woodjoiners.com

Dear Mr. Yaker:

The Wisconsin Department of Justice (DOJ) is in receipt of your email correspondence, dated January 11, 2021, in which you wrote, "Can I request an opinion on this? If so how?" Attached to your email was a document entitled, "Motion to Dismiss for Failure to Acknowledge Statutory Defense" regarding Dane County Circuit Court Case No. 2011CM000535 and 2001CF001658.

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 limited information you provided, the subject matter of your correspondence is outside this scope. The legal authority of the Attorney General and DOJ is specifically defined, and limited, by laws passed by the Wisconsin Legislature. Therefore, we are unable to offer you assistance regarding your concerns because they are outside the scope of the OOG's legal authority and responsibilities.

To the extent you intended your correspondence to serve as a request for an Attorney General 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 provide 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.

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/inneedalawyer/pages/lris.aspx>

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,



Paul M. Ferguson
Assistant Attorney General
Office of Open Government



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January 25, 2021

Michele Kahle
Cruisers Driving School LLC
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Tomahawk, WI 54487
Cruisers@cruisersdrivingschool.com

Dear Ms. Kahle:

The Wisconsin Department of Justice (DOJ) is in receipt of your correspondence, dated January 13, 2020, regarding your public records requests to school districts “for student directory lists with names and addresses.” You wrote, “We have been receiving them for years from multiple school districts in our area to announce upcoming classes. . . . We were just notified by one district that their district policy does not allow release of this information to ‘for profit’ organizations.” You requested DOJ to “[p]lease advise if it is legal under the open records law for them to exclude organizations if the person themselves did not opt out of receiving it.”

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.” Records are presumed to be open to public inspection and copying, but there are exceptions. Wis. Stat. § 19.31. A statute may provide such an exception. If a federal or state statute prohibits the release of a record in response to a public records request, an authority’s records custodian cannot release the record. Wis. Stat. § 19.36(1). (The common law and the public records law balancing test, which weighs the public interest in disclosure of a record against the public interest in nondisclosure, also provide other exceptions to disclosure.)

One such federal statute, the Federal Educational Records Privacy Act (FERPA), generally prohibits a federally funded educational institution from disclosing a student’s personally identifiable information contained in a student’s educational records without the written consent of the student’s parents. *See* 20 U.S.C. §§ 1232g(b)(1) and 1232g(d). The Wisconsin pupil records statute, Wis. Stat. § 118.125(2), also generally requires confidentiality for “[a]ll pupil records.” Under Wis. Stat. § 118.125(1)(d), “[p]upil records” means “all records relating to individual pupils maintained by a school,” subject to some exceptions not relevant here. Additionally, the disclosure of certain information may be allowed if the school district has designated that information as “directory data” and other

public notice requirements have been met. *See Wis. Stat. §§ 118.125(1)(b) and (2)(j)*. Pursuant to its written policy specifying the content of pupil records, a school district may define the information it has designated as directory data. *See Wis. Stat. §§ 118.125(2)(j) and (3)*.

Under the public records law, the identity of the requester and the purpose of the request are generally irrelevant to whether a request should be granted. *See Wis. Stat. §§ 19.35(1)(h) and 19.35(1)(i)*; *see also Democratic Party of Wis. v. Wis. Dep't of Justice*, 2016 WI 100, ¶ 23, 372 Wis. 2d 460, 888 N.W.2d 584. Therefore, the school district could not deny your request on the ground that your organization was a “for-profit” organization. We have insufficient information to evaluate whether there might have been other reasons justifying the denial of your request, but we hope you found the foregoing information helpful.

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. *See 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 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 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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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



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January 25, 2021

Peter Vedro
Former Chair
Sauk County Board of Supervisors
pjvgroup@charter.net

Dear Mr. Vedro:

The Wisconsin Department of Justice (DOJ) is in receipt of your correspondence, dated February 2, 2020, in which you wrote, "A minority of the Sauk County Board of Supervisors held a Special Meeting on January 28th and illegally placed the Corporation Counsel Daniel Olson on Administrative leave, . . . violating both Sauk County Board rules as well as other more serious criminal codes." In your February 5, 2020 correspondence you wrote, "the public notice for the primary business items [for the January 28th meeting] did not satisfy the requirements under the Wisconsin Open Meeting Law and the gathering violated that law." You wrote the Sauk County District Attorney "improperly declined to pursue enforcement upon my verified complaint" and you requested DOJ "file an action to enforcement the Open Meeting Law." You included a copy of your open meetings law complaint and supporting documents, all of which we have reviewed.

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. Based on the information you provided, it appears some of the subject matter of your correspondence is outside the OOG's scope. Therefore, the OOG cannot provide assistance regarding those matters that fall outside the scope of the OOG's authority and responsibilities. However, to the extent your correspondence concerns the open meetings law, we can provide some information that you may find helpful. Throughout the letter, for each issue you have raised under the open meetings law, I will first outline some general information and then address your specific concerns.

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 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.

The open meetings law also provides for the timing for releasing agendas, as well as the level of specificity required in agenda items for open meetings, in order to provide proper notice. Wis. Stat. § 19.84(2). Public notice of every meeting of a governmental body must be provided at least 24 hours prior to the commencement of such a meeting. Wis. Stat. § 19.84(3). If, for good cause, such notice is impossible or impractical, shorter notice may be given, but in no case may the notice be less than two hours in advance of the meeting. *Id.* Furthermore, the law requires separate public notice for each meeting of a governmental body at a time and date "reasonably proximate to the time and date of the meeting." Wis. Stat. § 19.84(4).

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).

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. This includes analyzing such factors as the burden of providing more detailed notice, whether the subject is of particular public interest, and whether it involves non-routine action that the public would be unlikely to anticipate. *Id.* ¶ 28. There may be less need for specificity where a meeting subject occurs frequently, because members of the public are more likely to anticipate that the meeting subject will be addressed, but novel issues may require more specific notice. *Id.* ¶ 31.

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*, 2007 WI 71, ¶ 34. 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. Stencil Correspondence (Mar. 6, 2008). Nor is a governmental body required to actually discuss every item contained in the public notice. It is reasonable, in appropriate circumstances, for a body to cancel a previously planned discussion or postpone it to a later date. Black Correspondence (Apr. 22, 2009); Krueger Correspondence (Feb. 13, 2019).

Moreover, although the open meetings law governs public access to and notice of meetings of governmental bodies, it does not dictate all procedural aspects of how bodies run meetings. For example, the open meetings law does not specify requirements for the process that governmental bodies use to draft or adopt meeting agendas. Further, there is no requirement under the open meetings law that the governmental body approve the agenda at the beginning of each meeting, although such an action would be permissible under the open meetings law. So long as governmental bodies follow the requirements for adequate and timely notice to the public, the notice complies with the open meetings law.

Turning to your specific concerns about the agenda for the January 28, 2020 meeting, I first caution that any conclusions we have reached in this letter are based solely on the limited information you sent us in your correspondence, not on any factual investigation that we have conducted. We construe your correspondence as raising two related notice concerns under the open meetings law: 1) the agenda did not “match” the supervisors’ previous discussions of what should be on the agenda; and 2) the agenda was not specific enough regarding the closed session for item #7.

First, you indicated that the agenda items set forth on the January 28, 2020 notice “did not match” the items contained in the handwritten petition of the supervisors that was created on January 21, 2020. Based on the limited information available to me set forth in your correspondence, it appears that the supervisors had engaged in a series of email exchanges between January 9, 2020 and January 22, 2020 about items that they wanted placed on the agenda, and you allege that some of those topics were not included on the agenda for the January 28, 2020 meeting.

As noted above, the open meetings law governs public access to and notice of meetings of governmental bodies, but it does not dictate all procedural aspects of how bodies run meetings. The open meetings law does not specify requirements for the process that governmental bodies must use to draft meeting agendas, and the agenda does not necessarily need to “match” what was discussed previously as possible agenda items. Further, the Attorney General has previously opined that communication between members for the purpose of asking that a subject be placed on the agenda of an upcoming meeting does not constitute a prohibited “walking quorum” where the signers have not engaged in substantive discussion or agreed on a uniform course of action regarding the proposed subject. Kay Correspondence (Apr. 25, 2007); Kittleson Correspondence (June 13, 2007).

So long as governmental bodies follow the requirements for adequate and timely notice to the public, the notice complies with the open meetings law. Thereafter, the governmental body, when conducting the 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, so long as the body does not address any topics that are not reasonably related to the information in the notice. *Buswell*, 2007 WI 71, ¶ 34.

Second, you also raised a concern that agenda item #7 was not specific enough under the notice provisions of the open meetings law. Based on the materials you sent us with your correspondence, agenda item #7 indicated that the board would “Discuss Lighthouse Complaints and Threatened Litigation” in closed session under 19.85(1)(f) and (1)(g).” You

allege that this agenda item failed to “provide notice of proposed discussion about specific Lighthouse complaints and possible disciplinary action.”

Regarding closed sessions, 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.

Here, the meeting notice specified two exemptions for the closed session: Wis. Stat. §§ 19.85(1)(f) and (1)(g). The first exemption listed, Wis. Stat. § 19.85(1)(f), authorizes a closed session for:

Considering financial, medical, social or personal histories or disciplinary data of specific persons, preliminary consideration of specific personnel problems or the investigation of charges against specific persons except where par. (b) applies which, if discussed in public, would be likely to have a substantial adverse effect upon the reputation of any person referred to in such histories or data, or involved in such problems or investigations.

An example is where a state employee was alleged to have violated a state law. *See Wisconsin State Journal v. University of Wisconsin-Platteville*, 160 Wis. 2d 31, 38, 465 N.W.2d 266 (Ct. App. 1990). This exemption is not limited to considerations involving public employees. For example, the Attorney General concluded that, in an exceptional case, a school board could convene in closed session under the exemption to interview a candidate to fill a vacancy on the school board if information is expected to damage a reputation; however, the vote should be in open session. *See* 74 Op. Att’y Gen. 70, 72.

At the same time, the Attorney General cautioned that the exemption in Wis. Stat. § 19.85(1)(f) is extremely limited. It applies only where a member of a governmental body has actual knowledge of information that will have a substantial adverse effect on the person mentioned or involved. Moreover, the exemption authorizes closure only for the duration of the discussions about the information specified in Wis. Stat. § 19.85(1)(f). Thus, for example, the exemption would not authorize a school board to actually appoint a new member to the board in closed session. *See* 74 Op. Att’y Gen. 70, 72.

The second exemption listed in the notice here, Wis. Stat. § 19.85(1)(g), authorizes a closed session for “[c]onfering with legal counsel for the governmental body who is rendering oral or written advice concerning strategy to be adopted by the body with respect to litigation in which it is or is likely to become involved.” The presence of the governmental body’s legal counsel is not, in itself, sufficient reason to authorize closure under this exemption. The exemption applies only if the legal counsel is rendering advice on strategy to adopt for litigation in which the governmental body is or is likely to become involved.

In general, whether a notice is reasonable “cannot be determined from the standpoint of when the meeting actually takes place,” but rather, must be “based upon what information is available to the officer noticing the meeting at the time the notice is provided, and based upon what it would be reasonable for the officer to know.” *Buswell*, 2007 WI 71, ¶ 32. Further, whether a meeting notice reasonably apprises the public of the meeting’s subject matter may depend in part on the surrounding circumstances. A court would need to analyze all of the relevant facts before deciding whether the notice in question was reasonably specific.

Based on the information set forth in your correspondence, we are unable to definitively determine whether the meeting notice was sufficient for the public to discern whether the subject matter was authorized for closed session under these two exemptions. Although it might have been beneficial or helpful to the public to include more detail in the notice, a court might conclude that the notice was sufficiently specific, given the local publicity surrounding the meeting in question. A court could also reasonably find that the community may already have known that “Lighthouse Complaints” referred to the county’s anonymous complaint system, given that the county website apparently contained a link to the “Ethics and Fraud Anonymous Hotline.” Further, the attorney present at the meeting was the insurance counsel who was authorized by the county to investigate complaints against county officials, also suggesting that the meeting properly fell under the closed meeting exemption pertaining to rendering advice or strategy on prospective litigation. That said, a better practice would have been to include more specificity in the notice, such as “Discuss Lighthouse (anonymous hotline) complaints about county official pertaining to allegations of fraud and ethics violations, and conferring with counsel about related litigation in which the body is likely to become involved.”

In addition to the allegations of notice violations in your complaint, you also allege that the vote taken at the meeting itself was illegal, for two reasons: 1) the notice did not indicate that there would be a “disciplinary” action; and 2) there were insufficient votes to pass the measure because there was no quorum at the meeting.

Regarding the first allegation, the open meetings law does not expressly require that the notice indicate whether a meeting will be purely deliberative or if action will be taken. *State ex rel. Olson v. City of Baraboo Joint Review Bd.*, 2002 WI App 64, ¶ 15, 252 Wis. 2d 628, 643 N.W.2d 796. The *Buswell* decision inferred from this that “adequate notice . . . may not require information about whether a vote on a subject will occur, so long as the subject matter of the vote is adequately specified.” *Buswell*, 2007 WI 71, ¶ 37 n.7. But the information in the notice must be sufficient to alert the public to the importance of the meeting, so that they can make an informed decision whether to attend. *Id.* Thus, in some circumstances, a failure to expressly state whether action will be taken at a meeting could be a violation of the open meetings law. *Id.* See also Herbst Correspondence (July 16, 2008).

Although the agenda here did not specifically state that a vote would be taken, the agenda indicated that the governmental body would “[r]econvene in Open session immediately following closed session with *possible action* from closed session” (emphasis added). Again, although the agenda could have more specifically stated that a vote would be taken, the agenda indicated that there might be “possible action,” signaling to the public that some board action might be taken at the meeting following the closed session. Additionally, based upon the information contained in your correspondence, we cannot conclude that the vote resulted in “disciplinary” action, as you have alleged. Rather, the materials you have provided only indicate that the vote pertained to starting an investigation into alleged misconduct.

Regarding your second allegation about the vote, you have argued that the board did not have power to vote on the issue, because a majority of the body’s members needed to be present in order to vote. As noted above, OOG cannot specifically advise you as to this body’s powers, as those matters appear to be outside the scope of the open meetings law. If you have further questions about how other laws or county rules pertaining to the board’s powers may interact with the open meetings law, you may wish to consult with private counsel. However, to the extent that your allegation relates to quorums under the open meetings law, we can provide you some general information that you may find helpful.

Under the open meetings law, 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).

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.

Based on the information you have provided, the body in question had 31 members, and there were 16 or possibly 17 members present. Therefore, it appears that a "meeting" occurred as that term is defined by the open meetings law. Further, it appears that a majority of the members were present, constituting a quorum under the open meetings law.

Finally, you have alleged in your correspondence that the district attorney improperly declined to prosecute your open meetings law complaint, because the analysis was "tainted" and "wrong." To the extent that your concerns relate to the DA's handling of the complaint, the district attorney has broad discretion to determine whether a verified complaint should be prosecuted. As a courtesy to you, I am providing a copy of this letter to the DA to make him aware of your concerns.

Regarding enforcement more generally, as you are aware, 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. As your matter does not appear to present novel issues of law that coincide with matters of statewide concern, we respectfully decline to file an enforcement action on your behalf 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).

As discussed already, you filed a complaint with the district attorney and the district attorney declined to prosecute the complaint. Although the Attorney General is also declining to pursue an enforcement action at this time, the open meeting law's other enforcement options may still be available to you, and 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: Sauk County Deputy District Attorney Rick Spoentgen



STATE OF WISCONSIN
DEPARTMENT OF JUSTICE

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March 1, 2021

Jim Scurlock

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scurlockjim@centurytel.net

Dear Mr. Scurlock:

The Wisconsin Department of Justice (DOJ) is in receipt of your initial correspondence, dated May 11, 2020, and your multiple follow up correspondence, regarding public records requests you submitted to the Village of Poynette. You wrote, "The Village off Poynette has been ignoring my 'OPEN RECORD' requests. . . . There has been at least one request that I later discovered not all documents were provided." You also forwarded your correspondence with the Poynette Police Department regarding your public records request to the police department. You received records on June 18, 2020. However, in an email to Chief Fisher you wrote, "I just discovered the DVD-Rs you provided (at least 6) are: 'corrupt or not supported' . . . This includes the 2 you provided today!" In your May 15, 2020 correspondence you wrote, "The ultimate goal of my persistent efforts is to...have the Dept. of Justice listen to my story/allegations, review my documentation and determine if it warrants further investigation."

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, for example, "falsifying police records" and "abuse of power" mentioned in your June 26, 2020 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. However, we can provide you with information regarding your public records requests 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." 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).

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. A request “without a reasonable limitation as to subject matter or length of time represented by the record does not constitute a sufficient request.” *Id.* It is helpful for public records requests to be as specific as possible. This helps avoid any confusion the authority may have regarding the request, thereby helping to ensure the requester receives the records they seek in a timely fashion.

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.

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). However, we recommend communicating with an authority if you would like the records in a specific format, and we would encourage an authority to accommodate a requester’s request for a different format if possible.

Under the public records law, “[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>).

DOJ’s Office of Open Government encourages authorities and requesters to maintain an open line of communication. This helps to avoid misunderstandings between an authority and a requester. It is often mutually beneficial for a requester and an authority to work with each other regarding a request. This can provide for a more efficient processing of a request by the authority while ensuring that the requester receives the records that he or she seeks.

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. 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.

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/ineedalawyer/pages/lris.aspx>

The Attorney General and the Office of Open Government 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



STATE OF WISCONSIN
DEPARTMENT OF JUSTICE

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Paul M. Ferguson
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March 9, 2021

Tony Briscoe
ProPublica
tony.briscoe@propublica.org

Dear Mr. Briscoe:

The Wisconsin Department of Justice (DOJ) is in receipt of your correspondence, dated February 22, 2021, regarding “a denied fee waiver for an open records request to the Wisconsin Department of Natural Resources.” You requested “the Wisconsin Office of Open Government review [your] appeal regarding this fee waiver, recognizing that these records are in the public interest.”

The Attorney General and DOJ’s Office of Open Government (OOG) appreciate your concerns regarding your public records request. However, DOJ cannot offer you legal advice or counsel concerning this matter as DOJ may be called upon to represent the Wisconsin Department of Natural Resources (DNR). However, I reached out to DNR’s Bureau of Legal Services regarding your correspondence, and I made them aware of your concerns. Although DOJ cannot assist you with this matter, we can provide you with some general information regarding the public records law that you may find helpful.

Under the public records law, “[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, 341 Wis. 2d 607, 815 N.W.2d 367 (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). An authority may choose to provide copies of a requested record without charging fees or by reducing fees where an authority determines that waiver or reduction of the fee is in the public interest. Wis. Stat. § 19.35(3)(e).

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. It 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 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). As explained above, DOJ may be called upon to represent 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 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,



Paul M. Ferguson
Assistant Attorney General
Office of Open Government

PMF:lah

cc: Wisconsin Department of Natural Resources, Bureau of Legal Services



STATE OF WISCONSIN
DEPARTMENT OF JUSTICE

Josh Kaul
Attorney General

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March 9, 2021

Jessy Kurczewski #569589
Taycheedah Correctional Institution
Post Office Box 3100
Fond Du Lac, WI 54936

Dear Ms. Kurczewski:

The Wisconsin Department of Justice (DOJ) is in receipt of your correspondence, dated May 4, 2020, June 15, 2020, July 7, 13 and 22, 2020, and September 21, 2020, in which you requested “a review of a request for records” made to the Waukesha County Sheriff’s Department (WCSD). You provided WCSD’s response to your requests. It appears that WCSD denied your requests because the requested records contain information related to an ongoing investigation.

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, please note that as an individual who is currently incarcerated, your right to request records under the Wisconsin Public Records Law, Wis. Stat. §§ 19.31 to 19.39, 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 or your minor children, 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.

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).

Whether an investigation or litigation is ongoing and whether the confidentiality of the requested records is material to that ongoing investigation or litigation are factors that an authority may consider in applying the balancing test. *Cf. Linzmeyer v. Forcey*, 2002 WI 84, ¶¶ 30, 32, 39, 41, 254 Wis. 2d 306, 646 N.W.2d 811; *Journal/Sentinel, Inc. v. Aagerup*, 145 Wis. 2d 818, 824-27, 429 N.W.2d 772 (Ct. App. 1988); *Democratic Party of Wisconsin v. Wisconsin Dep't of Justice*, 2016 WI 100, ¶ 12, 372 Wis. 2d 460, 888 N.W.2d 584. An authority could determine that release of records while an investigation or litigation is in progress could compromise the investigation or litigation. Therefore, when performing the public records balancing test, an authority could conclude that the public interest in effectively investigating and litigating a case and in protecting the integrity of the current investigation or litigation outweighs the public interest in disclosing the requested records at that time. *Id.*; Wis. Stat. § 19.35(1)(a).

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.

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. *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). Incarcerated individuals 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. 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 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:

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The Attorney General and DOJ's Office of Open Government 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,



Paul M. Ferguson
Assistant Attorney General
Office of Open Government

PMF:lah



**STATE OF WISCONSIN
DEPARTMENT OF JUSTICE**

Josh Kaul
Attorney General

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Paul M. Ferguson
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608/266-1221
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FAX 608/267-2779

March 26, 2021

Gerald Hooyman
gah3900@yahoo.com

Dear Mr. Hooyman:

The Wisconsin Department of Justice (DOJ) is in receipt of your correspondence, dated February 5, 2021, in which you wrote, "I am asking you, and the Wisconsin Department of Justice to respond, via this email, on how does a tax paying United States Citizen, and United States Military Combat Veteran get answers to Questions, that may NOT be Records, from a Village of Caledonia Official, or other Public Entity/Personnel?"

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. Statutes, case law, and the public records law balancing test, which weighs the public interest in disclosure of a record against the public interest in nondisclosure, provide such exceptions. Exceptions to disclosure should be narrowly construed to effectuate the law's purpose of ensuring government openness and transparency.

The public records law only applies to records in the custody of an authority. Wis. Stat. § 19.32(1). 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, 362 Wis. 2d 577, 866 N.W.2d 563 ("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). Additionally, 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).

An authority cannot fulfill a request for a record if the authority has no such record. 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*, 362 Wis. 2d 577, ¶ 102.

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. 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.

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. We are unable to offer you further assistance regarding the aspects of your question that are outside the scope of the OOG's authority and responsibilities.

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.

Gerald Hooyman

Page 3

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Sincerely,

Paul M. Ferguson
Assistant Attorney General
Office of Open Government

PMF:lah



**STATE OF WISCONSIN
DEPARTMENT OF JUSTICE**

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March 26, 2021

Bruce Humphrey
Chumphrey@centurytel.net

Dear Mr. Humphrey:

The Wisconsin Department of Justice (DOJ) is in receipt of your correspondence, dated February 10, 2020, in which you wrote, “The city of Sparta has a seven member Chapter 27 Park Board. The city employs a Parks and Recreation Director who works under direction of the board.” You asked two questions: “1) May the board convene a closed session to discuss the general performance of the director? 2) May the board convene a closed session to discuss terms of a contract being negotiated between the director and the bar and restaurant concessionaire in the city’s golf clubhouse?”

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. The definition of a governmental body includes a “state or local agency, board, commission, council, department or public body corporate and politic created by constitution, statute, ordinance, rule or order[.]” 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.

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).

Regarding your first question, under the open meetings law, a closed session is authorized for “[c]onsidering employment, promotion, compensation or performance evaluation data of any public employee over which the governmental body has jurisdiction or exercises responsibility.” Wis. Stat. § 19.85(1)(c). The language of the exemption refers to a “public employee” rather than to positions of employment in general. The apparent purpose of the exemption is to protect individual employees from having their actions and abilities discussed in public and to protect governmental bodies “from potential lawsuits resulting from open discussion of sensitive information.” *Oshkosh Nw. Co. v. Oshkosh Library Bd.*, 125 Wis. 2d 480, 486, 373 N.W.2d 459 (Ct. App. 1985). It is not the purpose of the exemption to protect a governmental body when it discusses general policies that do not involve identifying specific employees. *See* 80 Op. Att’y Gen. 176, 177–78 (1992). *See also* *Buswell*, 2007 WI 71, ¶ 37 (noting that Wis. Stat. § 19.85(1)(c) “provides for closed sessions for considering matters related to *individual* employees”).

Thus, Wis. Stat. § 19.85(1)(c) authorizes a closed session to discuss the qualifications of and salary to offer a specific applicant but does not authorize a closed session to discuss the qualifications and salary range for the position in general. 80 Op. Att’y Gen. 176, 178–82. The section authorizes closure to determine increases in compensation for specific employees. 67 Op. Att’y Gen. 117, 118. Similarly, Wis. Stat. § 19.85(1)(c) authorizes closure to determine which employees to lay off, or whether to non-renew an employee’s contract at the expiration of the contract term, but not to determine whether to reduce or increase staffing, in general. *See* 66 Op. Att’y Gen. 211, 213.

Regarding your second question, under the open meetings law, a closed session is authorized for “[d]eliberating or negotiating the purchasing of public properties, the investing of public funds, or conducting other specified public business, whenever competitive or bargaining reasons require a closed session.” Wis. Stat. § 19.85(1)(e). Thus, the Wis. Stat. § 19.85(1)(e) exemption is not limited to deliberating or negotiating the purchase of public property or the investing of public funds, because the exemption also authorizes a closed session for “conducting other specified public business.” For example, the Attorney General has determined that the exemption authorized a school board to convene in closed session to develop negotiating strategies for collective bargaining. 66 Op. Att’y Gen. 93, 96-97 (1977).

However, it is important to note two things. First, exemptions authorizing a governmental body to meet in closed session should be construed narrowly. Governmental officials must keep in mind that this exemption is restrictive, not expansive. 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. Second, a closed session under this exemption is only permissible “whenever competitive or bargaining reasons require a closed session.” The use of the word “require” in

Wis. Stat. § 19.85(1)(e) limits that exemption to situations in which competitive or bargaining reasons leave a governmental body with no option other than to close the meeting. *State ex rel. Citizens for Responsible Dev. v. City of Milton*, 2007 WI App 114, ¶ 14, 300 Wis. 2d 649, 731 N.W.2d 640. When a governmental body seeks to convene in closed session under Wis. Stat. § 19.85(1)(e), the burden is on the body to show that competitive or bargaining interests require closure. *Id.* ¶¶ 6–8.

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>).

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. While 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).

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/Iris.aspx>

The Attorney General and the Office of Open Government 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 open meetings law and maintains an 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. § 19.98 and does not constitute an informal or formal opinion of the Attorney General pursuant to Wis. Stat. § 165.015(1).

Sincerely,

A handwritten signature in blue ink that reads "Sarah K. Larson". The signature is fluid and cursive, with a long horizontal flourish at the end.

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 26, 2021

Orlando Larry #08452-090
FCI Gilmer
Federal Correctional Institution
Post Office Box 6000
Glenville, WV 26351

Dear Mr. Larry:

The Wisconsin Department of Justice (DOJ) is in receipt of your correspondence, dated April 28, 2020, June 14 and 28, 2020, and July 6, 2020, regarding your public records requests to the Dane County Sheriff's Office, Madison Police Department, and Wisconsin Department of Corrections (DOC). You wrote you have not received "any acknowledgements or responses" from the Dane County Sheriff's Office or the Internal Affairs Division of the Madison Police Department regarding your requests. Regarding a different request to the Madison Police Department, you requested a review of the response you received. You wrote that your "request was not granted in full" because it did not contain certain reports and that the records were "overly redacted."

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 July 6, 2020 correspondence regarding your public records request to DOC, it appears that some of the subject matter of your correspondence, regarding issues with federal prison mailing procedures, 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.

Also, regarding your public records request to DOC, DOJ cannot offer you legal advice or counsel concerning your request as DOJ may be called upon to represent DOC. DOJ strives to provide the public with guidance on the interpretation of our State's public records and open meetings statutes. However, DOJ must balance that role with its mandatory obligation to defend state agencies and employees in litigation pursuant to Wis. Stat. § 165.25(6). Where that statutory obligation is at play, DOJ has a conflict in providing advice on the same topic. As a courtesy to you, however, I contacted DOC to make them aware of your concerns.

Although we are unable to offer you assistance regarding your public records request to DOC, we can offer some general information about the public records law that you may

find helpful regarding your concerns about your public records requests to the Dane County Sheriff's Office and the Madison Police Department.

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). However, please note that as an individual who is currently incarcerated, 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 or your minor children, 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.

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").

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.

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. 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.

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,

A handwritten signature in blue ink that reads "Sarah K. Larson". The signature is fluid and cursive, with a long horizontal stroke at the end.

Sarah K. Larson
Assistant Attorney General
Office of Open Government

SKL:lah



**STATE OF WISCONSIN
DEPARTMENT OF JUSTICE**

Josh Kaul
Attorney General

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March 26, 2021

Barry Marcello

[REDACTED]
Fond du Lac, WI 54935
barryjayc@aim.com

Dear Mr. Marcello:

The Wisconsin Department of Justice (DOJ) is in receipt of your correspondence, dated June 29, 2020, in which you wrote that you “have proof that the Wisconsin DOC has illegally removed email from his vault. This is where all employees emails are stored to comply with the open records laws. The DOC has removed emails to circumvent the open records laws.” You also stated that you “have proof that state officials use private email accounts to do official business.”

The Attorney General and DOJ’s Office of Open Government (OOG) appreciate your concerns. DOJ cannot offer you legal advice or counsel concerning this issue as DOJ may be called upon to represent the Wisconsin Department of Corrections (DOC). DOJ strives to provide the public with guidance on the interpretation of our State’s public records and open meetings statutes. However, DOJ must balance that role with its mandatory obligation to defend state agencies and employees in litigation pursuant to Wis. Stat. § 165.25(6). Where that statutory obligation is at play, DOJ has a conflict in providing advice on the same topic. As a courtesy to you, however, I reached out to DOC and informed 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. 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).

The public records law defines a “record” as any material on which written, drawn, printed, spoken, visual, or electromagnetic information or electronically generated or stored data is recorded or preserved, regardless of physical form or characteristics, which has been created or is being kept by an authority. Wis. Stat. § 19.32(2). A record includes handwritten, typed, or printed documents; maps and charts; photographs, films, and tape recordings;

tapes, optical disks, and any other medium on which electronically generated or stored data is recorded or preserved; and electronic records and communications.

Whether material is a “record” subject to disclosure under the public records law depends on whether the record is created or kept in connection with the official purpose or function of the agency. *See* OAG I-06-09, at 2 (Dec. 23, 2009). Not everything a public official or employee creates is a public record. The substance or content, not the medium, format or location, controls whether something is a record. *State ex rel. Youmans v. Owens*, 28 Wis. 2d 672, 679, 137 N.W.2d 470 (1965).

The fact that a record is subject to disclosure, however, does not necessarily mean an authority must disclose the record. While records are presumed to be open to public inspection and copying, 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).

Nothing in the public records law prohibits a government employee from using a personal email account to conduct official government business, but doing so may result in the creation of a “record” that is subject to disclosure under the public records law. Additionally, government business-related records found on personal email accounts are also subject to record retention requirements. Government employees should contact their agency’s legal counsel with any questions regarding such requirements.

Records retention is a subject that is generally related to, but different from, the access requirements imposed by the public records law. The general statutory requirements for record retention by state agencies, Wis. Stat. § 16.61, and local units of government, Wis. Stat. § 19.21, apply equally to electronic records. Although the public records law addresses the duty to *disclose* records, it is not a means of enforcing the duty to *retain* records, except for the period after a request for particular records is submitted. *See State ex rel. Gehl v. Connors*, 2007 WI App 238, ¶ 15 n.4 (citing Wis. Stat. § 19.35(5)) (citation omitted). The duty to retain records is governed by the records retention statutes and record retention schedules created pursuant to those statutes. For more information on record retention, you may wish to visit the Wisconsin Public Records Board website at <http://publicrecordsboard.wi.gov/>.

If you would like to learn more about the public records 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 Public Records Law, Wis. Stat. §§ 19.31 to 19.39, 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



**STATE OF WISCONSIN
DEPARTMENT OF JUSTICE**

**Josh Kaul
Attorney General**

17 W. Main Street
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**Paul M. Ferguson
Assistant Attorney General
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608/266-1221
TTY 1-800-947-3529
FAX 608/267-2779**

March 26, 2021

Aron O'Shaunessy
aoshaunessy@gmail.com

Dear Mr. O'Shaunessy:

The Wisconsin Department of Justice (DOJ) is in receipt of your correspondence, dated March 9, 2021, in which you wrote, "Pursuant to Wis Stat 19.39, I write to request your opinion as to whether the University of Wisconsin's conduct as described in this Washington Post article is compliant with Wisconsin's Public Records law." Your correspondence included a link to a March 5, 2021 Washington Post article concerning the Big Ten Conference.

DOJ cannot offer you legal advice or counsel concerning this issue as DOJ may be called upon to represent the Board of Regents of the University of Wisconsin. DOJ strives to provide the public with guidance on the interpretation of our State's public records and open meetings statutes. However, DOJ must balance that role with its mandatory obligation to defend state agencies and employees in litigation pursuant to Wis. Stat. § 165.25(6). Where that statutory obligation is at play, DOJ has a conflict in providing advice on the same topic.

While DOJ is unable offer legal advice or counsel in this instance, 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,

Paul M. Ferguson
Assistant Attorney General
Office of Open Government

PMF:lah



**STATE OF WISCONSIN
DEPARTMENT OF JUSTICE**

**Josh Kaul
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March 26, 2021

Phillip Pik

[REDACTED]
Berlin, WI 54923
phil@aioins.com

Dear Mr. Pik:

The Wisconsin Department of Justice (DOJ) is in receipt of your correspondence, dated February 13, 2020 and July 16, 2020, regarding your open meetings law complaint against the city of Berlin council filed with the District Attorney for Green Lake County. In your complaint, you allege “the Mayor and all 6 City Council Alderman” violated the open meetings law because “meetings were not properly noticed, failed to clearly disclose the subject matter to be discussed, met in closed session in violation of the permitted exceptions and committed other violations.” You wrote, “No [o]ne has done a thing or communicated on this complaint.” You would “like someone to look into this complaint as it is serious in nature.” We have reviewed the copy of the open meetings law complaint that you submitted to the Green Lake County District Attorney’s Office, along with the supporting documentation that you provided to DOJ. We also spoke by phone regarding your complaint on February 13, 2020.

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. Based on the information you provided, it appears that some of the subject matter of your correspondence is outside of that scope, including any requirements outside of the open meetings law that may have pertained to the city’s lawsuit. Therefore, the OOG cannot provide you with legal assistance on matters outside of the OOG’s scope of authority and responsibilities. However, to the extent your correspondence concerns the open meetings law, we will first provide some general information that you may find helpful, and then we will address your specific concerns.

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 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).

Regarding notice requirements generally, the open meetings 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. As noted above, however, the OOG cannot provide you legal advice about any other laws or requirements outside of the open meetings law.

The open meetings law provides for the level of specificity required in agenda items for open meetings as well as the timing for releasing agendas in order to provide proper notice. Wis. Stat. § 19.84(2). Public notice of every meeting of a governmental body must be provided at least 24 hours prior to the commencement of such a meeting. Wis. Stat. § 19.84(3). If, for good cause, such notice is impossible or impractical, shorter notice may be given, but in no case may the notice be less than two hours in advance of the meeting. *Id.* Furthermore, the law requires separate public notice for each meeting of a governmental body at a time and date "reasonably proximate to the time and date of the meeting." Wis. Stat. § 19.84(4).

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).

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. This includes analyzing such factors as the burden of providing more detailed notice, whether the subject is of particular public interest, and whether it involves non-routine action that the public would be unlikely to anticipate. *Id.* ¶ 28. There may be less need for specificity where a meeting subject occurs frequently, because members of the public are more likely to anticipate that the meeting subject will be addressed, but novel issues may require more specific notice. *Id.* ¶ 31.

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. *State ex rel. Buswell v. Tomah Area Sch. Dist.*, 2007 WI 71, ¶ 34, 301 Wis. 2d 178, 732 N.W.2d 804. 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. Stencil Correspondence (Mar. 6, 2008). Nor is a governmental body required to actually discuss every item contained in the public notice. It is reasonable, in appropriate circumstances, for a body to cancel a previously planned discussion or postpone it to a later date. Black Correspondence (Apr. 22, 2009); Krueger Correspondence (Feb. 13, 2019).

The open meetings law does not expressly require that the notice indicate whether a meeting will be purely deliberative or if action will be taken. *State ex rel. Olson v. City of Baraboo Joint Review Bd.*, 2002 WI App 64, ¶ 15, 252 Wis. 2d 628, 643 N.W.2d 796. But the information in the notice must be sufficient to alert the public to the importance of the meeting, so that they can make an informed decision whether to attend. *Id.* Thus, in some circumstances, a failure to expressly state whether action will be taken at a meeting could be a violation of the open meetings law. *Id.* See also Herbst Correspondence (July 16, 2008). For additional information on the notice requirements of the open meetings law, please see pages 13 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>).

Regarding closed meetings generally, Wis. 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).

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.

Turning now to your specific concerns about the meetings in question, I first caution that any conclusions I have reached in this letter are based solely on the limited information you sent us in your correspondence, not on any factual investigation that we have conducted.

You have raised two alleged violations of the open meetings pertaining to a variety of meetings, and I will address each in turn.

First, you allege that the notices for a variety of meetings were not sufficiently specific enough because the notices only contained a parcel number for, or a general description of, the land being discussed, not a more specific description of the land or exactly where it was located. Based on the information you provided, I have gleaned the following information from the notices.

The notice for the August 20, 2019 Special Meeting of the Common Council, agenda item #3, contained the following description of the subject to be discussed at the meeting: "Resolution Regarding Removing Restriction on Gifted Land. RECOMMENDATION: Approve Resolution #19-11 Electing Relief from Condition on Gift of Land relating to Parcel 206-01031-0000." Based on the information provided to me, it also appears that a draft of Resolution #19-11, dated August 16, 2019, was attached to the August 20, 2019 meeting notice, and contained the following description of the parcel in question: "Lot 1 and the North 90 feet of Lot 2 Block C of the North Park Addition, City of Berlin, Green Lake County, Wisconsin; Tax Parcel No. 206-01031-0000."

Further, the minutes from that same August 20, 2019 special meeting indicate that the following discussion took place in open session: "Council reviewed the proposed resolution regarding removing the property restrictions on parcel 206-01031-0000 at Waushara Street/River Drive so it could be available for sale. Kennitz included Exhibit A which was the deed to the property received by the City in 1949. Erdmann moved to approve Resolution #19-11 Electing Relief From Condition on Gift of Land relating to Parcel 206-01031-000."

Regarding later meetings on the same topic, the notice for the October 29, 2019 Plan Commission Meeting, agenda item #4 contained the following description of the subject to be discussed in open session at the meeting: "Review and discuss whether parcel 206-01031-0000 is no longer needed for park or public purposes and make recommendation as to sale or disposition of land to Common Council. Recommendation: Discuss and Recommend to Common Council." Similarly, the notices for subsequent meetings contained very similar descriptions for open session agenda items: November 5, 2019 Committee of the Whole Meeting, agenda item #4; November 6, 2019 Parks and Recreation Commission Meeting, agenda item #7; and November 26, 2019 Plan Commission Meeting, agenda item #4.

As noted above, whether a notice is sufficient under the open meetings law would depend on a reasonableness standard and would take into account a variety of factors. Using the limited information provided in your correspondence, we are unable to make a definitive determination about the reasonableness of these notices, but a court might find that the subject was of particular public interest and involved a non-routine action that the public would be unlikely to anticipate. However, a court might also find that the notices gave the public sufficient information about the business to be conducted that alerted them to the importance of the meetings so they could make an informed decision whether to attend, because the tax parcel number of the property in question was listed on all of the notices, even if it might have been beneficial or helpful to the public to include more detail in the notices, such as the physical address.

Moreover, whether the notice is reasonable “cannot be determined from the standpoint of when the meeting actually takes place,” but rather, must be “based upon what information is available to the officer noticing the meeting at the time the notice is provided, and based upon what it would be reasonable for the officer to know.” *Buswell*, 2007 WI 71, ¶ 32. Whether a meeting notice reasonably apprises the public of the meeting’s subject matter may also depend in part on the surrounding circumstances. A notice that might be adequate, standing alone, may nonetheless fail to provide reasonable notice if it is accompanied by other statements or actions that expressly contradict it, or if the notice is misleading when considered in the light of long-standing policies of the governmental body. *See, e.g.*, Linde Correspondence (May 4, 2007); Koss Correspondence (May 30, 2007); Musolf Correspondence (July 13, 2007); Martinson Correspondence (Mar. 2, 2009).

Conversely, a notice that might not be adequate, standing alone, may nonetheless be deemed reasonable notice under the open meetings law if it is accompanied by other documents, such as the city’s resolution here which gave a more detailed description of the parcel in question: “Lot 1 and the North 90 feet of Lot 2 Block C of the North Park Addition, City of Berlin, Green Lake County, Wisconsin; Tax Parcel No. 206-01031-0000.” In short, a court would need to analyze all other relevant facts before deciding whether the notices in question were reasonable, including the fact that the draft resolution describing the property’s location appears to have been attached to the August 20, 2019 meeting notice. Based on that information, a court might conclude that the notices were not misleading or vague under the open meetings law.

Second, you allege that the discussions pertaining to these parcels should not have taken place in closed session, because the closed meeting exemption under Wis. Stat. § 19.85(1)(e) for negotiations did not apply. Based on the information you provided, I have gleaned the following information from the notices.

The notices for the October 1, 2019 Committee of the Whole Meeting and the October 8, 2019 Common Council Meeting, agenda items #9 and #21, respectively, both contain the following identical description of the subject to be discussed in closed session at the meetings: “Motion to convene into closed session pursuant to Sec. 19.85(1)(e) of the WI Statutes, to deliberate or negotiate the purchase of public property, investment of public funds or conduct other specified public business, whenever competitive or bargaining reasons require a closed session ... (Potential Developers Agreement for Subdivision Development on north end of River Drive).” Similarly, the notice for the November 5, 2019 Committee of the Whole Meeting, agenda item #12, contains the following description in the closed session notice: “Motion to convene into closed session pursuant to Sec. 19.85(1)(e) of the WI Statutes, to deliberate or negotiate the purchase of public property, investment of public funds or conduct other specified public business, whenever competitive or bargaining reasons require a closed session. ... 2) Potential Developers Agreement with International Investment Group Corp. in regard to various parcels in the City and Parcel 206-01031-0000.”

Based on the limited information you provided, we cannot definitively determine whether the topics in question were authorized under any closed session exemptions, but the following general information may be helpful to you. Under the open meetings law, a closed session is authorized for “[d]eliberating or negotiating the purchasing of public properties, the investing of public funds, or conducting other specified public business, whenever

competitive or bargaining reasons require a closed session.” Wis. Stat. § 19.85(1)(e). Thus, the Wis. Stat. § 19.85(1)(e) exemption is not limited to deliberating or negotiating the purchase of public property or the investing of public funds, because the exemption also authorizes a closed session for “conducting other specified public business.” For example, the Attorney General has determined that the exemption authorized a school board to convene in closed session to develop negotiating strategies for collective bargaining. 66 Op. Att’y Gen. 93, 96-97 (1977). Therefore, going into closed session to discuss “Potential Developers Agreement” may have been permissible under one or more of the Wis. Stat. § 19.85(1)(e) exemptions, including “conducting other specific public business,” but there is insufficient information in your correspondence to thoroughly evaluate.

However, it is also important to note two things. First, exemptions authorizing a governmental body to meet in closed session should be construed narrowly. Governmental officials must keep in mind that this exemption is restrictive, not expansive. 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. Second, a closed session under this exemption is only permissible “whenever competitive or bargaining reasons require a closed session.” The use of the word “require” in Wis. Stat. § 19.85(1)(e) limits that exemption to situations in which competitive or bargaining reasons leave a governmental body with no option other than to close the meeting. *State ex rel. Citizens for Responsible Dev. v. City of Milton*, 2007 WI App 114, ¶ 14, 300 Wis. 2d 649, 731 N.W.2d 640. When a governmental body seeks to convene in closed session under Wis. Stat. § 19.85(1)(e), the burden is on the body to show that competitive or bargaining interests require closure. *Id.* ¶¶ 6–8.

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 have not asked DOJ to initiate an enforcement action, we respectfully decline to file an enforcement action on your behalf at this time, as 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).

Based on the information contained in your correspondence, it appears that you filed a complaint with the district attorney and the district attorney has not commenced an action. Although the Attorney General is also declining to pursue an enforcement action at this time, by copy of this letter, we are informing the governmental body of your concerns.

Further, the open meeting law's other enforcement options may still be available to you, and 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/ineedalawyer/pages/lris.aspx>

The Attorney General and the Office of Open Government 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 open meetings law and maintains an 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. § 19.98 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: Jodie Olson, City of Berlin
(Jolson@cityofberlin.net)