WISCONSIN'S PUBLIC RECORDS AND OPEN MEETINGS LAWS

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I. OVERVIEW OF WISCONSIN'S PUBLIC RECORDS LAW

A. Public Records Policy: The public policy in this state is to give the public the greatest amount of access to public records as possible. Wis. Stat. § 19.31. The general presumption is that public records are open to the public unless there is a clear statutory or common law exception. If there is no clear **statutory** or **common law** exception the custodian must "decide whether the strong presumption favoring access and disclosure is overcome by some even stronger **public policy** favoring limited access or nondisclosure." *Hempel v. City of Baraboo,* 2005 WI 120, para. 28 (Citations omitted.) Notwithstanding the presumption of openness, the public's right to access to public records is not absolute. *Journal/Sentinel v. Aagerup*, 145 Wis. 2d 818, 822 (Ct. App. 1988.) There are reportedly more than 175 specific statutory exceptions to the Public Records Law. *State ex rel. Blum v. Board of Educ., Sch. Dist. of Johnson Creek,* 209 Wis. 2d 377 (Ct. App. 1997).

1.) Examples of Statutory Exceptions

a.) Section 101.12(5) (Certain state building plans for "secure structures.")
b.) Section 43.30 (Library user records.)
c.) Section 5.05(5s) (Government accountability board investigations.)
d.) Section 51.30 (Mental health records.)
e.) Section 19.36(13) (Financial identifying information.)
f.) Section 968.26 (John Doe investigations.)
g.) Section 905.03 (Attorney-client privilege.)
h.) 42 U.S.C. § 405(c)(2)(C)(viii)(I) (Social security numbers.)

2.) Examples of Common Law Exceptions

a.) **Prosecutor's files,** *State ex rel. Richards v. Foust,* 165 Wis. 2d 429, 477 (1991).

b.) **Safety concerns,** Wisconsin courts have recognized personal safety as a strong public policy reason that may justify nondisclosure of a record, or a portion of a record. *Linzmeyer v. Forcey,* 2002 WI 84; *Klein v. Wisconsin Resource Center,* 218 Wis. 2d 487, 496-97 (Ct. App. 1998); *State ex rel. Morke v. Record Custodian,* 159 Wis. 2d 722, 726 (Ct. App.), *rev'd on other grounds,* 155 Wis. 2d 521 (1990).

In *Monfils v. Charles*, a police department complied with a public records request for a 911 call of an anonymous caller warning of an impending theft. The caller was later found brutally murdered. The alleged thief (who was also the requester) and some of his colleagues were later convicted of the murder. As one court has

stated, "In retrospect, the release of the tape was a tragic mistake." *MTEA v. MBSD*, 227 Wis. 2d 779, 802 (1999) (J. Bablich, concurring) (citing, *Monfils*, 216 Wis. 2d 323 (Ct. App. 1998).

c.) **Pledge of Confidentiality**, *Mayfair Chrysler-Plymouth, Inc. v. Baldarotta,* 162 Wis. 2d 142, 171-72 (1991).

d.) **Privacy/Reputational Interests**, *Woznicki v. Erickson,* 202 Wis. 2d 178 (1996).

e.) **On-going criminal investigations**, *Newspapers, Inc. v. Breier,* 89 Wis. 2d 417, 438 (1979) (under balancing test.)

f.) **Victim's rights**, *Schilling v. Crime Victim Rights Bd.,* 2005 WI 17, ¶ 26; *Milwaukee Journal Sentinel, et al. v. Dane County,* Circuit Court Case No. 08CV2161,

g.) **Suicide scene photographs**, *National Archives and Records Administration v. Favish,* 541 U.S. 157 (2003).

h.) **Purely Personal,** *Schill v. Wisconsin Rapids School Dist.,* 2010 WI 86, 327 Wis.2d 572, 786 N.W.2d 177. In a split decision, a majority of the court held that when a record custodian decides that the content of an e-mail is purely personal, has no connection to government's functions, and "evince no violation of law or policy," the custodian does not undertake the balancing test." The documents are not subject to disclosure under the public records law. *Id.* ¶ 10, n.4.

If the content of personal e-mail is used as evidence by the employer in a disciplinary matter or to investigate misuse of government resources by an employee, the personal e-mail is a "record" under Wis. Stat. § 19.32(2) and may be subject to disclosure under the public records law. *Id.* ¶ 141. If the content of the e-mail is "personal in part and has some connection with the government function in part, then the custodian may need to redact the personal content and release the portion connected to the government function." *Id.* ¶ 137.

3.) Balancing Test. The **decision** of whether to release a public record **lies with the custodian** of the records. If there is no clear statutory or common-law exception to the disclosure requirement, the custodian must conduct the balancing test and weigh the competing interests of the public in access to each record requested against the possible harmful effect on the public interest in disclosing a record. *State ex rel. Richards v. Foust,* 165 Wis. 2d 429 (1991).

The custodian's analysis must focus on whether the harm to the *public's* interest in nondisclosure outweighs the *public's* interest in inspection of the record. *Linzmeyer v. Forcey,* 2002 WI 84, 254 Wis. 2d 303. The balancing test must be conducted on a case-by-case basis. *Id.* ¶ 42.

> As the custodian considers an open records request under Wis. Stat. § 19.35(1)(a), the custodian must consider "all relevant factors" to determine "whether permitting inspection would result in harm to the public interest which outweighs the legislative policy recognizing the public interest in allowing inspection." In other words, the custodian must determine whether the surrounding factual circumstances create an "exceptional case" not governed by the strong presumption of openness. . ..

Hempel v. City of Baraboo, 2005 WI 120, ¶ 63. (Internal citations omitted.)

When denying inspection or access under the balancing test, a custodian is **not required to provide a detailed analysis for his or her nondisclosure decision,** but must provide a public policy reason for its nondisclosure decision. "Specific policy reasons are necessary for two primary reasons. First, the specificity requirement provides a means of restraining record custodians from arbitrarily denying access to public records without weighing the relative harm of non-disclosure against the public interest in disclosure. [Citation omitted] Second, the specific policy reasons are necessary to provide the requester with sufficient notice of the grounds for denial to enable the requester to prepare a challenge to the withholding." [Citation omitted] *Portage Daily Register v. Columbia County Sheriff's Department,* 2008 WI App 30, ¶ 14.

When conducting the balancing test, the custodian should factor in information that is "already in the public domain." *Kroeplin v. Wisconsin Department of Natural Resources,* 2007 WI 53, 297 Wis. 2d 254.

4.) Open Meetings Exceptions. In determining whether there are public policy interests that would support non-disclosure of a public record, the custodian may look to policy reasons underlying the exemptions in the Open Meetings Law as set forth in Wis. Stat. § 19.85, if sufficient public-policy reasons are given to support a nondisclosure decision. Wis. Stat. § 19.35(1)(a); 19.85(1).

B. Other Limitations.

1.) A request for a record is deemed **sufficient** if it reasonably describes the requested record. A request is **insufficient,** however, if it is **without a reasonable limitation as to subject matter or length of time represented by the requested record.** Wis. Stat. §19.35(1)(h).

The purpose of the "time and subject matter limitation is to prevent a situation where a request unreasonably burdens a record custodian, requiring the custodian to spend excessive amounts of time and resources deciphering and responding to a

request." *Gehl v. Connors, State ex rel Gehl v.* Connors, 2007 WI App. 238, citing, *WIREdata, Inc. v. Village of Sussex, et al.*, 2007 WI App 22, ¶ 1, reversed on other grounds, 2008 WI 69. The Court of Appeals interpreted the time and subject matter limitation to require both a reasonable limitation as to the subject and length of time for the records requested. *Id.* A request is **reasonably limited as to time and subject matter** where the record establishes that the parties were able to fulfill the request. *WIREdata, Inc. v. Village of Sussex*, 2008 WI 69, ¶¶ 65. A request should include sufficient specificity so the custodian does not have to guess at what a requester is seeking. *Seifert v. School Dist. of Sheboygan Falls*, 2007 WI App 207, ¶ 42, 305 Wis. 2d 582.

2.) A request can be denied if it is too **burdensome** and the requester could have limited the request but failed to do so. *Schopper v. Gehring*, 210 Wis. 2d 208, 210, 565 N.W.2d 187 (Ct. App. 1997). However, a custodian cannot deny a request only because he or she believes it could be narrowed. *State ex rel. Gehl v. Connors*, 2007 WI App 238, ¶ 20, 306 Wis. 2d 247, 742 N.W.2d 730. **Compliance with the Public Records Law should not "so burden the records custodian that the normal functioning of the office would be severely impaired."** *Schopper v. Gehring*, 210 Wis. 2d 208, 213.

3.) A request was ruled to be **overly broad** where the requester sought virtually every e-mail between all employees of five county offices and departments and any of approximately 35 individuals over a two-year period, and where the request was not linked to any particular subject matter. Even though the requester provided search terms, because the result would require production of a large volume of records without regard to the parties involved or whether matters implicated the requester's interests in any way, the court of appeals agreed with the custodian that the request was overly broad. *Gehl,* 2007 WI App 238, ¶ 17, 306 Wis. 2d 247, 742 N.W.2d 730.

C. **Definitions**.

1.) **Record:** the definition of what constitutes a public "record" is extremely broad encompassing almost any memorialization of information. Wis. Stat. §19.32(2). **A 'record' includes all electronic records, including video taped recordings, cell phone and other electronic device recordings, e-mail, and 'social media' such as Facebook, twitter, etc. These recordings are subject to the public records and record retention laws, regardless of whether they are stored or kept on government equipment or the personal equipment of a government official or employee if the content has to do with government business.**

2.) **A Record Does Not Include:**

a) Materials to which access is limited by **copyright, patent, or bequest.** Wis. Stat. § 19.32(2). For a discussion on the fair use limitation to the copyright exception see, *Zellner v. Cedarburg Sch. Dist.*, 2007 WI 53.

b) **Personal notes:** whether kept in electronic format or handwritten format, are not "records" as defined by the Public Records Law. Wis. Stat. § 19.32(2). **The personal notes of a trial judge, even when work-related, are not subject to disclosure.** Personal notes are a "voluntary piece of work completed by the trial court for its own convenience and to facilitate the performance of its duties." *State v. Panknin*, 217 Wis. 2d 200, 212 (Ct. App. 1998).

c) **Copies:** a record does not include **copies** of records. It is not a violation of the public records law to destroy or fail to produce copies of records when responding to a public records request. Wis. Stat. § 19.32(2), *Stone v. Bd. of Regents of Univ. of Wis. Sys.*, 2007 WI App 223.

d) **Draft:** documents are not 'records' as defined by the public records law, as long as they are truly draft records. Such records may loose their 'draft' status if they have been shared with other departments, outside entities, or when practices and procedures referenced in the document are implemented. Wis. Stat. § 19.32(2); *Fox v. Bock*, 149 Wis. 2d 403, 412-13 (1989).

e) **Records available for sale:** or distribution are not "records" subject to the public records law. Wis. Stat. § 19.35(1)(g).

f) **Copyrighted records:** are not "records" subject to the public records law.

g) **Requester:** Any person who seeks to inspect or copy a record, except a committed or incarcerated person, unless that person seeks to inspect certain types of records that reference him or her. Wis. Stat. § 19.32(3).

h) **Record Custodian**: The legal custodian of records includes elected officials, the chairs of governmental bodies or committees, and governmental department heads. Wis. Stat. § 19.33.

i) **Public Official**: Elected, appointed officials, board members, department heads, etc. Wis. Stat. § 19.32(1dm).

D. Public Notice. Each legal custodian must provide notice to the public and to employees entrusted with the authority's records. Wis. Stat. §§ 19.33(4), 19.34.

The notice must identify the legal custodian and his or her designees, include a description of the organization, times and locations where the public can request access to or copies of records, and the costs to be charged for records. The notice to the public must be posted at all of the authority's offices. It must identify each position of the authority that constitutes a "local public office."

E. Other Requirements:

1.) Identity of the requester. A record custodian normally cannot ask why a request is being made or require the requester to identify themselves. Wis. Stat. § 19.35(1)(i). When conducting the balancing test, however, a custodian "almost inevitably must evaluate context to some degree." *Hempel v. City of Baraboo*, 2005 WI 120, ¶ 66.

2.) Timing of Response. A custodian must respond to a record request "as soon as practicable and without delay." Wis. Stat. § 19.35(4)(a). The statutory guidelines for the timing of the response is ambiguous. A record custodian must be given reasonable latitude in the time frame for the responses when responding to requests that are complex. *WIREdata, Inc. v. Village of Sussex*, 2008 WI 69, ¶ 56. *Mandamus* actions should not be allowed where municipalities are working diligently to attempt to respond to complex requests in a timely manner. *Id.* "An authority should not be subjected to the burden and expense of a premature public records lawsuit while it is attempting in good faith to respond, or to determine how to respond, to a public records request." *Id.*, quoting DOJ *amicus* brief. What constitutes a reasonable time for response to a public records request "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." *Id.* The court ruled that determining what is a reasonable time to respond to a request will depend upon the "totality of circumstances" surrounding a particular request. *Id.*

The Wisconsin Attorney General recommends responding to simple public records requests within 10 business days of receipt of the request. Wisconsin Dep't. of Justice, *Wisconsin Public Records Law: A Compliance Guide*, 14 (2008).

3.) The public records law does not require any "**magic words**" to trigger the application of the law. Even though the Freedom of Information Act (FOIA) does not apply to Wisconsin, the use of this phrase when requesting records is sufficient to require compliance under the Wisconsin Public Records Law. Additionally, any request by a member of the public that appears to be asking for records should be construed as a request under this law. *ECO, Inc. v. City of Elkhorn*, 2002 WI App 302. Denial of a public records request because a requester asked for information under the FOIA rather than the "Public Records Law" can result in liability, including costs, attorney fees, and damages.

F. Responding to a Public Records Request

1.) If a request is made **verbally**, a custodian may deny the request verbally. Wis. Stat. § 19.35(4)(b). No legal action can be commenced on a verbal request. A requester may, however, request that reasons for a verbal denial of a public

records request be made in writing. Wis. Stat. § 19.35(4)(b). A denial is subject to *mandamus* action only if the request is made in writing. *Id.*

2.) If the request is made in **writing** the custodian must **respond in writing** and must provide the requester with a written statement setting forth **all reasons for any denials**. The written response must also inform the requester that he or she has a right to commence an action to review the adequacy of the reasons for denial by *mandamus* or to ask the county corporation counsel, the county district attorney or the Wisconsin Attorney General to seek enforcement. Wis. Stat. § 19.35(4)(b). **When responding to a written request, the written reasons given for the denial are the sole basis for defense if a *mandamus* action is brought. Consult with your legal counsel.**

3.) There is **no statutory obligation to create a new document** to respond to a request. Wis. Stat. § 19.35(1)(L).

4.) If a record is in the form of a voice recording and the authority is required to withhold portions of the recorded record where portions would reveal the identity of a confidential informant. The authority must provide the requester with a transcript of the record if the record is otherwise subject to disclosure under the Public Records Law. Wis. Stat. § 19.35(1)(em).

II. PERSONNEL RECORDS

A. Wisconsin courts have repeatedly ruled that **there is no blanket exemption from the Public Records Law for public-employee personnel records**. *Woznicki v. Erickson*, 202 Wis. 2d 178 (1996).

B. Requests for employee personnel files.

1.) An employer is **prohibited** from disclosing **employee** records relating to the employee's:

a.) **home address, home electronic mail address, social security number, and home telephone number** unless the employee so authorizes, Wis. Stat. § 19.36(10(a);

b.) information relating to a **current investigation** of possible employment-related misconduct or potential criminal or civil law violations, Wis. Stat. § 19.36(10(b);

c.) employee **examination information, except for the final score**, unless otherwise prohibited, Wis. Stat. § 19.36(10(c); and,

d.) information relating to one or more specific employees that is used by the authority for staff management planning, including **performance**

evaluations and other judgments concerning future salary adjustments or other wage treatments, bonuses, promotions, job assignments, and letters of recommendation. Wis. Stat. § 19.36(10)(d). This exception is limited to routine performance evaluations. *Kroeplin v. Wisconsin Dept. of Natural Resources*, 2006 WI App 227 (review denied, Jan. 10, 2007).

2.) Upon receipt of a public records request, and **after** determining whether there is a specific **statutory** or **common law** exception prohibiting disclosure, and, if necessary, conducting the required balancing test, an **employer must give notice to an employee or "any individual"** prior to disclosing information relating to:

a.) a **closed investigation** into a disciplinary matter involving the employee, Wis. Stat. § 19.356(2)(a)1;
b.) records obtained through a **subpoena or search warrant**, Wis. Stat. § 19.356(2)(a)2; or,
c.) **records from a previous employer** that reference the employee. Wis. Stat. §19.356(2)(a)3.

The notice must be given by personal service or certified mail, within **three** business days after deciding to release the record. The notice must give a brief description of the record and inform the employee of his or her right to go to court to try to prevent disclosure of the record. Wis. Stat. § 19.356(2)(a).

3.) The disclosure of information of an individual holding a "local public office" is much more narrow. The law prohibits disclosure of the home address, home e-mail address, home telephone number or social security number of a local public official, unless authorized by the individual. Wis. Stat. § 19.36(11). This subsection does not apply to the home address of an individual who holds an elective public office, or of a local public official who is required to live in a specific location (a local public official who is subject to a residency requirement). **This subsection does not address issues concerning on-going investigations, exam information or performance evaluations, etc., of individuals holding a "local public office."**

If a records custodian receives a public records request for records that contain information relating to a public official, he or she must determine whether any other **statute**, or the **common law**, prohibits disclosure. If not, he or she must then balance the public's interest in disclosure against the potential harm to the public in disclosing the record. If the balance tips in favor of disclosure, he or she must notify the official, in writing, prior to disclosure of the requested record. The notice must be delivered within **three** business days of the release decision and must be delivered by certified mail or personal service. The notice must inform the official of the release decision, describe the records to be released, and inform

the official of his or her right to **augment** the record, within **five** business days after receipt of the notice. If the official augments the record the custodian may then **release the record as augmented.** Wis. Stat. § 19.356(9).

C. Correction of Public Records. Any person has the right to inspect public records containing information about the person, and under limited circumstances may be allowed to correct it if they disagree with the record. Wis. Stat. § 19.365.

D. Personally Identifying Records. Any individual has a right to request access to or copies of records that include personally identifying information of the individual. Wis. Stat. § 19.35(1)(am). Exceptions to this right include:

1.) Records containing personally identifiable information collected or maintained in connection with a complaint, investigation, or other circumstance that may lead to an enforcement action, administrative proceeding, arbitration proceeding, or court proceeding, Wis. Stat. § 19.35(1)(am)1;

2.) Records containing personally identifying information that may endanger an individual's life or safety, identify a confidential informant, or create other **security or safety concerns,** Wis. Stat. § 19.35(1)(am)2;

3.) Records that are not indexed, arranged or automated in a way that the record could be retrieved by the authority, Wis. Stat. § 19.35(1)(am)3.

Records **denied** under this subsection are **not subject to a balancing test or common law exceptions.** Denials must be based on the statutory exceptions enumerated above, or other statutory exceptions. The definition of a confidential informant will be interpreted broadly under this subsection. The exceptions under this section **should not be narrowly construed.** *Hempel v. City of Baraboo*, 2005 WI 120, ¶¶ 40-44, 56.

E. Records Requests by the Employee. Under Chapter 103 of the statutes, an employer must allow an employee or his or her representative to inspect records used in determining the employee's employment, promotion, transfer, termination or other disciplinary action. The employer can require the request be in writing and can limit the number to **two** per year. A request for records made under this section must be **provided within seven business days of the request.** A custodian can charge copying costs. Wis. Stat. § 103.13(2) and (7). Exceptions:

1.) Records relating to the investigation of possible criminal offenses committed by that employee, Wis. Stat. § 103.13(6)(a);

2.) Letters of reference for the employee, Wis. Stat. § 103.13(6)(b);

3.) Any portion of a test document except the employee may see the cumulative test score for either a section or the entire test document, Wis. Stat. § 103.13(6)(c);

4.) Materials used by the employer for staff management planning, including judgments or recommendations concerning future salary increases and other wage treatments, management bonus plans, promotions and job assignments or other comments or ratings used for the employer's planning purposes, Wis. Stat. § 103.13(6)(d);

5.) Information of a personal nature about another person if disclosure would constitute a clearly unwarranted invasion of the other person's privacy, Wis. Stat. § 103.13(6)(e);

6.) An employer who does not maintain personnel records, Wis. Stat. § 103.13(6)(f); and,

7.) Records relevant to any other pending claim between the employer and the employee which may be discovered in a judicial proceeding. Wis. Stat. § 103.13(6)(g).

F. Personnel Records Requests by the Public.

1.) No blanket exception.

2.) An employment application is a public record unless there is a written request to keep it confidential. This does not apply to "final candidates." Wis. Stat. § 19.36(7).

3.) The custodian must use the **balancing test** for all personnel records not covered in Section II.B above.

G. Closed Employee Investigations.

1.) In *Linzmeyer v. Forcey*, a school teacher brought an action to prevent a city attorney from releasing a report from a closed police investigation of the teacher's alleged **inappropriate statements and interaction with female students.** The court ruled that the public's interest in preventing disclosure of the report did not outweigh the public's interest in releasing the information **even though the investigation did not lead to an arrest, prosecution, or disciplinary action.** One factor the court considered was that much of the information contained in the report was **already public.** The court also noted that the privacy interests of the

juvenile witnesses could be adequately protected by redacting their names and other personally-identifying information. 2002 WI 84, 254 Wis. 2d 306, 331.

When **considering release of police investigation records** there is a need to "take special care as we balance the public policies" when determining whether to release a record. *Id.* at 325. **Police investigations are particularly sensitive, regardless of whether or not the investigation is ongoing.** There is a strong public interest in investigating and prosecuting criminal activity. When release of a record would interfere with an ongoing investigation or prosecution, the presumption of openness will likely be overcome. *Id.* at 327.

2.) Public-policy considerations underlying other statutory provisions may supply policy reasons justifying non-disclosure. One of the areas in which the court has applied this rationale is in recognition of "the importance the legislature puts on **privacy and reputational interests** of Wisconsin citizens." *Woznicki v. Erickson*, 202 Wis. 2d 178, 187 (1996).

3.) Internal Sex Harassment Investigations. The Wisconsin Supreme Court agreed with a chief of police's decision to deny disclosure of an internal investigation of an employee complaint of **sexual harassment** by a co-worker. *Hempel v. City of Baraboo*, 2005 WI 120. The court ruled that, based upon the specific facts, the public interest in nondisclosure of the investigative records outweighed the public interest in disclosure under s. 19.35(1)(a), based on the following public policy reasons:

a.) The report was filed as a result of an internal complaint of sexual harassment resulting in a confidential investigation;
b.) disclosure would interfere with and impede law enforcement's ability to conduct a thorough and confidential internal investigation;
c.) disclosure would discourage victims and witnesses from providing information regarding personnel investigations;
d.) it is necessary to shield victims and witnesses who cooperate with personnel investigations and their families from the risk of harassment;
e.) there may be a loss of morale if employees know their personnel file will be made public;
f.) disclosure may discourage qualified candidates from entering police work;
g.) information in internal investigation reports may be factually inaccurate and cause damage to the subject's reputation; and,
h.) disclosure could inhibit candid assessments of employees.

The court considered it important that the city carefully **reviewed and redacted** disclosable information from non-disclosable information and provided the disclosable information within the records to the requester. The court agreed with

the **custodian's denial of the entire internal investigation report.** The court conducted an *in camera* inspection of the records which showed that some of the **witnesses were afraid of retaliation** if their responses were disclosed. These are factors that should be considered when conducting the balancing test to determine whether a closed investigatory report should be disclosed or not.

4.) In *Kroeplin v. Wisconsin Dept. of Natural Resources*, 2006 WI App 227, (review denied, Jan. 10, 2007), a newspaper requested disclosure of records relating to a closed internal investigation. Kroeplin was a DNR warden who allegedly used his position as a law enforcement officer to obtain a license plate check for personal reasons. After the DNR investigation was closed, the newspaper made a public records request for the investigation. After conducting the balancing test, DNR decided to release part of the investigation and denied other portions for various specific public policy reasons. Id. ¶ 39. Kroeplin was given the required notification under Wis. Stat. § 19.356, and subsequently filed an action in court seeking to enjoin release of the requested records. Id. ¶ 7. Kroeplin argued that the entire investigation fit within the exception found at Wis. Stat. § 19.36(10)(d), which includes information used by an employer for staff management planning, including performance evaluations. Id. ¶ 15.

The court ruled that § 19.36(10)(d) is ambiguous (¶ 18); it does not create a blanket exception for closed investigative records (¶ 30); and, the exception at § 19.36(10)(d) applies only to routine performance evaluations. *Id.* ¶ 21. The court noted that there is a strong public interest in disciplinary actions taken against public officials and employees, especially those employed in a law enforcement capacity. *Id.* at ¶ 22. The court rejected both the DNR's and Kroeplin's non-disclosure arguments, ruling that there was no statutory or common law exception to disclosure, and that in applying the balancing test, the balance tipped in favor of disclosure.

5.) In *Zellner v. Cedarburg School District*, 2007 WI 53, newspapers requested records relating to a disciplined public school employee, including a CD and a memo prepared by the school district's attorney. The memo listed websites and Google searches allegedly accessed by Zellner, which included pornographic images allegedly viewed by Zellner on his work computer. The court rejected Zellner's argument that the images were protected by **copyright** law, finding that they fit within the **"fair use" exception** to the copyright law and were therefore "records" subject to disclosure under the public records law. *Id.* ¶¶ 26-28.

Zellner argued that the record contained inflammatory information that would harm his reputation and privacy interests if released. He argued that that harm, when weighed against the small amount of public value that release of the CD and memo would offer, tips the balance in favor of nondisclosure. *Id.* ¶ 44. The

supreme court rejected this argument, noting that the **public's interest in protecting privacy and reputational interests is not about an individual's concerns about embarrassment**. *Id.* at ¶ 50.

The court held that the public has a "significant interest in favor of releasing the memo and the CD. Public school teachers like Zellner are in a significant position of responsibility and visibility. [citation omitted]. They are entrusted with the responsibility of teaching children, and the public has an interest in knowing about such allegations of teacher misconduct and how they are handled. The public also has an interest in knowing how the government handles disciplinary actions of public employees." *Id.* at ¶ 53.

6.) On-going Investigations. The exception found in Wis. Stat. § 19.36(10)(b) should be narrowly construed. An ongoing investigation of possible employee misconduct or criminal acts **ends** when the authority **disciplines** (or decides not to discipline) the employee, regardless of whether the employee appeals the decision or files a grievance. It may be less clear when the investigation ends if there is no resulting criminal charge or disciplinary action taken by the employer. *Local 2489, AFSCME, AFL-CIO*, 2004 WI 210.

7). Exceptions found in the Open Meetings Law. In determining whether there are public policy interests that would support non-disclosure of a public record, the custodian may look to policy reasons underlying the exemptions found in the Open Meetings Law set forth in Wis. Stat. § 19.85. Wis. Stat. § 19.35(1)(a). One such exception is "**considering strategy for crime detection or prevention.**" Wis. Stat. § 19.85(1)(d).

Additional relevant exceptions under the Open Meetings Law include **considering dismissal, demotion or discipline of any public employee** (19.85(1)(b)); considering employment promotion compensation or performance evaluation data of any public employee (19.85(1)(c)); and, **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.** Wis. Stat. § 19.85(1)(f).

8.) Closed Investigation as Attorney Work Product. In *Seifert v. School District of Sheboygan Falls*, 2007 WI App 207, the Seiferts filed a notice of injury against the school district in which they claimed a school coach mistreated their son. After receiving the notice, the school district hired an attorney/investigator to conduct an investigation relating to the claim. The Seiferts later made a public records request under Wis. Stat. §§ 19.35(1)(a) & (am), for all records relating to the investigation. ¶ 10.

On appeal the Seiferts argued that the circuit court used an improper statutory sequence when they analyzed the request under Wis. Stat. § 19.35(1)(am) first rather than under Wis. Stat. § 19.35(1)(a) as required by Wis. Stat. § 19.35(4)(c). ¶ 19. The court held that while the district's denial letter mentioned § 19.35(1)(am) first, it also listed numerous public policy reasons for nondisclosure. The letter did not say that "the sequence in which the reasons are listed represents either their order of consideration or their order of importance." ¶ 23. Next, the court held that since the Seiferts had filed a notice of injury, which caused the district to initiate an investigation, the specific exception found at Wis. Stat. § 19.35(1)(am)1 could be used under the balancing test for purposes of their Wis. Stat. § 19.35(1)(a) analysis, relying on *Hempel v. City of Baraboo*, 284 Wis. 2d 162, ¶¶ 32, 58-81. The court ruled that under a section 19.35(1)(a) analysis, a record custodian may, under the balancing test, factor in the specific exception found at Wis. Stat. § 19.35(1)(am)1 that permits nondisclosure of records pertaining to potential litigation. *Id.* at ¶ 33.

The court held that the investigation was protected from disclosure under the attorney work product rule and under the balancing test. "The open records law cannot be used to circumvent established principles that shield work product. Nor can it be used as a discovery tool." ¶ 28. The court held that the records were generated by the district's attorney in response to the Seiferts' filing of the notice of injury claim and that therefore the attorney work product rule qualifies as an exception under the "otherwise provided by law" exception, citing Wis. Stat. § 804.01(2)(c)1. ¶ 28.

9.) After receiving responsive records, a requester filed a writ of *mandamus* claiming that the custodian's admitted act of destroying copies of the responsive records violated the public records law. The requester argued that a copy of a record is a "record" as defined in Wis. Stat. § 19.32(2). He argued that some of the destroyed copies of records were altered versions of the documents he received. The court held that copies of records are not "records" as defined by Wis. Stat. § 19.32(2); and, it is therefore not a violation of the law to destroy or fail to produce copies of records when responding to a public records request. *Stone v. Board of Regents of the University of Wisconsin System*, 2007 WI App 223.

H. Prosecutor's files. The Wisconsin courts have created a common law exception to disclosure of district attorney prosecution files. *State ex rel. Richards v. Foust*, 165 Wis. 2d 429 (1991). The court of appeals declined to extend the common law exception established in *Foust* to on-going criminal investigations in the custody of a law enforcement agency. *Portage Daily Register v. Columbia County Sheriff's Department*, 2008 WI App. 30. The Portage Daily Register made a public records request to a sheriff's department for a criminal investigation. The

sheriff's department denied the request under the *Foust* common law exception. *Id.* at ¶ 16.

The court noted that the sheriff's department did not argue that it is "independently entitled to a common law exception for the records forwarded to the district attorney's office." *Id.* fn. 6. The court held that the *Foust* exception does not apply to police reports in the custody of a law enforcement agency. *Id.* at ¶ 17. The court held that the sheriff's department could have, but failed to "articulate a policy reason why the public interest in disclosure is outweighed by the interest in withholding the particular record – including that disclosure would interfere with an ongoing investigation . . .." *Id.* at ¶ 20. Because the sheriff's department **failed to state with specificity** the public policy reasons for nondisclosure, the court ruled that it violated the public records law. *Id.* at ¶ 25.

III. RECORDS OR SPECIFICATIONS FOR STATE BUILDINGS

Certain records for buildings and plans for specifications for state-owned or leased buildings are not subject to the right of inspection under the Public Records Law. The City of Milwaukee has adopted an ordinance similar to the state law prohibiting access to or copies of certain building plans that fall under the exception, usually for safety reasons. Wis. Stat. § 101.12(5)(c), as amended.

IV. CONTRACTORS' RECORDS

Records produced or collected, created or maintained under a contract for a government body, by a contractor, are considered public records, just as if they were in a public official's custody. Records cannot be shielded from the public by keeping them in a contractor's custody. Contractor employee records are protected from disclosure, except for wages and hours information. Wis. Stat. § 19.36(12).

A. Wis. Stat. § 19.36(3) applies to records of a party in privity with a governmental authority, not records of that party's subcontractors. **This provision does not require an authority to provide access to the payroll records of the subcontractors of a prime contractor of a public construction project.** *Building and Construction Trades Council of So. Wisconsin v. Waunakee Community School District*, 221 Wis. 2d 275 (Ct. App. 1998) review denied. Wis. Stats. § 19.36(12).

B. This includes wage and hour information of employees working on a public contract. All personally-identifying information must be redacted prior to disclosure pursuant to Wis. Stat. § 19.36(12).

C. Exceptions.

1.) Under limited circumstances, certain information may be redacted from contractor's records if the information, such as a financial statement, was obtained after a clear pledge of confidentiality, when the pledge was given in order to obtain the information; and, the pledge of confidentiality was necessary to obtain the information. Even if a pledge of confidentiality has been given the records custodian must still conduct the balancing test on a case-by-case basis and make a determination that the harm to the public interest in disclosure outweighs the great public interest in full inspection of public records. The custodian must also give the requester sufficient public-policy reasons for nondisclosure to overcome the presumption that the record is open to the public. 60 Op. Att'y Gen. 284, 289 (1971).

2.) Trade secrets. The Wisconsin Public Records Law allows a records custodian to withhold access to any record or portion of a record containing "trade secret" as defined in Wis. Stat. § 134.90(1)(c).

V. COMPUTER PROGRAMS

In general, a computer program is not open for access by the public, but the records entered into the program, and the output of the program, are subject to analysis under the Public Records Law. Wis. Stat. § 19.36(4); *WIREdata, Inc. v. Village of Sussex,* 2008 WI 69, ¶ 42.

VI. ELECTRONIC RECORDS

A. Electronic records are subject to the public records law just as are paper records.

B. Under the law, all records must be detained for a default retention schedule of seven years. Wis. Stat. § 19.21(4)(b). Governmental bodies must keep in mind that the default record retention schedule applies to electronic records. If a shorter retention schedule is desired, such schedule must be approved by the State Records Board. Wis. Stat. § 16.61(3).

C. Government bodies increasingly rely on electronic records and e-mail messaging for conducting business. Contracts are negotiated, formed and signed, orders are taken and received, permits and licenses are applied for and received, or denied. Legal documents are sent and received, and e-mail messages and correspondence are being used in the electronic format at an exponential rate. The City frequently receives public records requests for records, including requests for electronic records.

D. **A requester may demand that the electronic record be provided in its** original format. A request for a copy of the original digital form is not met by providing an analog copy. *State ex rel. Milwaukee Police Association v. Jones*, 2000 WI App. 146, 237 Wis. 2d 840.

E. The "Authentications and Electronic Transactions and Records," amends Chapter 137 of the Wisconsin Statutes. It attempts to unify and codify all current federal and state laws governing the use of electronic records, transactions, and signatures. The law provides that, upon mutual agreement of parties, electronic records and electronic signatures will have the same legal effect and enforceability as written records. Wis. Stat. § 137.13. It contains two key components: electronic record retention and electronic transactions. **It is applicable only if electronic records are the exclusive means of record storage or transaction.**

Legal documents can be **notarized by electronic signatures**. Wis. Stat. § 137.19. If the electronic record reflects the original document in its final form and remains accessible, the electronic record will satisfy legal requirements for evidentiary, audit, and like purposes. Wis. Stat. § 137.15; 137.20(6).

VII. PRIVILEGES

In some circumstances privileges, as established by the common law and by Wis. Stat. Chapter 905, may act as an exception to disclosure of records under the Public Records Law. If relying on a privilege for denial of a public records requests, in most cases, a record custodian should refer to the specific privilege and public policy reasons sufficient to support a nondisclosure decision.

A. Attorney-client privilege. The attorney-client privilege acts as an absolute exception to disclosure of records under the Public Records Law.

1.) There are three standards which must be considered:

a.) **The Wisconsin Public Records Law**. All public records are presumed open to inspection by members of the public unless the record is specifically exempt by statute, common law, or under the balancing test.

b.) **Wis. Stat. § 905.03**. The attorney-client privilege prohibits an attorney from revealing, without the client's consent, communications defined under the rule as confidential. The attorney-client privilege provides sufficient grounds to deny access without resorting to the balancing test, because it is "no" mere evidentiary rule. It restricts professional conduct." *Armada Broadcasting, Inc. v. Stirn*, 177 Wis. 2d 272, 279, fn.3, 501 N.W.2d 899

(Ct. App. 1993). Wisconsin Dep't of Justice, *Wisconsin Public Records Law: Compliance Outline* 27 (2008).

c.) **Supreme Court Rule 20:1.6.** One of the rules of professional conduct for attorneys which, with certain narrow exceptions, prohibits an attorney from revealing information related to the representation of a client without the consent of the client.

2.) The attorney-client privilege allows the client to refuse to disclose, and to prevent any other person from disclosing, confidential comments and records made for the purpose of facilitating the rendition of professional legal services to the client. Wis. Stat. § 905.03(2).

This includes communication:

a.) between the client and the client's attorney;
b.) between the client's attorney and the attorney's representative;
c.) or by the client or the client's attorney to an attorney representing another in a matter of common interest;
d.) between representatives of the client;
e.) between the client and a representative of the client;
f.) between attorneys representing the client.

3.) The attorney-client privilege covers disclosure of correspondence or other documents from an attorney to a government entity as a client if "disclosure of the lawyer-to-client communications will directly or indirectly reveal the substance of the client's confidential communications to the lawyer." *Journal/Sentinel v. School Board of Shorewood*, 186 Wis. 2d 443 (Ct. App. 1994). In *Shorewood*, the court ruled that a signed settlement agreement held in a school board attorney's file is not exempt from disclosure under the Public Records Law, because the agreement did not directly or indirectly reveal the substance of the client's confidential communications to the lawyer.

The court ruled that a settlement agreement held by the parties' attorney was not protected by the attorney-client privilege. The court ruled that "[T]he privilege applies only to confidential communications from the client to the lawyer; it does not protect communications from the lawyer to the client unless disclosure of the lawyer to client communications would directly or indirectly reveal the substance of the client's confidential communications to the lawyer." *Id.*

4.) In *Wisconsin Newspress, Inc. v. School District of Sheboygan Falls*, 199 Wis. 2d 768 (1996), the supreme court ruled that disclosure of even a portion of a letter from a school district's attorney to the school district regarding sanctions to be imposed upon a school district administrator as a result of disciplinary actions is

subject to the attorney-client privilege. The court found that the release of even a portion of the attorney letter would "reveal information protected by the attorney-client privilege." *Id.* at 272-273. The court ruled that even though the attorney-client privilege generally does not apply to communications from an attorney to the client there is an exception where disclosure of the communication would "indirectly reveal the substance of the district's confidential communication to its lawyer." *Id.*, citing Shorewood, 186 Wis. 2d at 460, 521 N.W.2d 165.

5.) "Client" includes a person, public officer, or corporation, association, or other organization or entity either public or private who is rendered professional legal services by an attorney. Wis. Stat. § 905.03(1)(a). For example, the City of Milwaukee is a municipal corporation.

6.) When legal advice is given to or for the benefit of a governmental body, it rather than the individual office holder enjoys the benefits of the privilege. *Id.*, at 871-872 citing *In re Grand Jury Witness*, 288 F.3d 289 (7th Cir. 2002).

B. Supreme Court Rule 20:1.6A - Professional Rule of Confidentiality

SCR 20:1.6a includes a much broader concept of confidentiality of information relating to the representation of a client than the attorney-client privilege. This rule broadly proscribes an attorney from disclosing information relating to the representation absent the client's authorization, which can be express or implied, unless a specific exception applies.

C. Identity of an Informer

The identity of a confidential informant is protected by a privilege that allows a federal, state or local governmental unit to refuse to disclose the identity of any individual who has furnished information relating to or assisting in an investigation of a possible violation of the law when such information is given to a law enforcement officer who is conducting an investigation. Wis. Stat. § 905.10(1). This exception may provide a limited exception to disclosure under the Public Records Law.

Wisconsin courts have ruled that the privilege protecting the identities of confidential informants recognizes "the reality that informers are an important aspect of law enforcement and that the anonymity of informers is necessary for their effective use." *State v. Vanmanivong*, 2003 WI 41 ¶ 18, quoting *State v. Outlaw*, 108 Wis. 2d 112, 121 (1982).

Other evidentiary privileges may apply as a limitation to disclosure under the Public Records Law. Wis. Stat. Ch. 905 lists 12 different privileges. These are

strictly interpreted in the trial context. *Davison v. St. Paul Fire & Marine Ins. Co.*, 75 Wis. 2d 190 (1977). Evidentiary privileges are not in themselves sufficient justification for denying access to records, but may be used as public policy arguments in support of a nondisclosure decision. See, Wisconsin Dep't of Justice, *Wisconsin Public Records Law: Compliance Outline* 30 (2008).

D. Other Privileges

There is a governmental privilege that protects material reflecting decisional or policy-making processes within a governmental agency. The privilege "protects material relating to the methods by which a decision is reached, as well as the matters considered, contributing influences, and the role played by the work of others." *Green v. IRS*, 556 F. Supp. 79, 84 (N.D. Indiana, 1982) (citations omitted).

Other states have found an exception to disclosure under the equivalent of the Wisconsin Public Records Law where disclosure of materials would expose the decision-making process in such a way as to discourage candid discussion. *Times Mirror Company v. Superior Court*, 53 Cal. 3d 1325, 1342 (Sup. Ct. Cal., 1991). This exception is known as the deliberative-process privilege, or executive privilege, and has been recognized as a common-law exception in other states under the public records statutes. *See, Capital Information Group v. State of Alaska,* 923 P.2d 29 (Sup. Ct. Alaska, 1996); *New England Coalition for Energy Efficiency and the Environment v. Office of the Governor,* 670 A.2d 815 (Sup. Ct. Vt., 1995) (further citations omitted).

In *Sands v. Whitnall School District,* 2008 WI 89 the court considered whether the deliberative process privilege should be recognized in Wisconsin but determined that it would not create a new deliberative process privilege judicially. *Id.* ¶ 60.

> . . . Wisconsin does not recognize a deliberative process privilege. Wisconsin Stat. § 905.01 precludes the extension of common law privileges by the court on a case-by-case basis, but rather requires common law privileges not originating in the constitution be adopted by statute or court rule. *Id.* ¶ 67, citing *Davison*, 75 Wis. 2d at 205-06, 248 N.W.2d 433.

VIII. FEES. Wis. Stat. § 19.35(3), Stats., sets forth the fees that a custodian may impose upon a requester:

A. Reproduction Fees. Wisconsin law authorizes the imposition of a fee for reproduction that does not exceed the actual, necessary, and direct costs of

reproducing the record, unless a fee is otherwise specifically established or authorized to be established by law. Wis. Stat. § 19.35(3)(a).

A custodian may charge for a copy of a record that does not exceed the actual, necessary, and direct cost of photographing and photographic processing if the authority provides a photograph of the record the form of which does not permit copying. Wis. Stat. § 19.35(3)(b).

A records custodian may charge a fee for the "actual, necessary and direct cost of **complying** with a public records request." *Osborn v. Board of Regents of the University of Wisconsin*, 2002 WI 83, 254 Wis. 2d 266.

B. Location Fees. A records custodian may charge a fee for locating a record, not exceeding the actual, necessary, and direct costs of location, if the cost of **locating** the record is $50 or more. Wis. Stat. § 19.35(3)(c). This fee is to be determined **separately** from the cost imposed for copying or reproduction of the record.

In 2008 the Wisconsin Supreme Court ruled that a record custodian may charge the requester "for the authority's actual costs in complying with the request, such as any computer program expenses or any other related expenses." *WIREdata, Inc. v. Village of Sussex*, 2008 WI 69, ¶ 107.

C. Shipping or mailing fees. Under Wis. Stat. § 19.35(3)(d), an authority may impose a fee upon a requester for the actual, necessary and direct costs of mailing or shipping of any copy or photograph of a record which is mailed or shipped to the requester.

D. Miscellaneous. The cost of retrieval alone does not constitute an adequate reason for denial of a public-records request. *Nichols v. Bennett*, 199 Wis. 2d 268 n.5 (1994); *Osborn*, 2002 WI 83.

E. Under Wis. Stat. § 19.35(3)(f), an authority may require prepayment by a requester of any fee or fees imposed if the total amount exceeds $5. An authority is permitted to give a reasonable estimate of the costs expected to exceed $5 and to require prepayment before it undertakes large copying and locating costs. *State ex rel. Hill v. Zimmerman*, 196 Wis. 2d 419 (Ct. App. 1995). "This subsection is clearly intended to protect an authority from squandering staff time, supplies and equipment usage for a substantial copying project that a requester might later disavow. To read the statute otherwise would require the authority to actually copy the documents to obtain an exact amount of the costs, which would soundly defeat the purposes of § 19.25(3)(f)." *Id.* at p. 430.

F. Certification Fees. A requester of copies of public records is not required to pay for certified copies if certification is not requested. *72 Op. Att'y Gen. 35* (1983).

IX. RECORD RETENTION.

There is, by statute, a default record retention schedule of seven years for all government records, including electronic records, unless otherwise prescribed by ordinance. Wis. Stat. § 19.21(4)(b). Any recording of an open meeting of any governmental body may be destroyed no sooner than 90 days after the minutes have been approved and published, if the purpose of the recording was to make minutes of the meeting. Wis. Stat. § 19.21(7). Any governmental body that wishes to extend or reduce the retention schedule of any governmental record must do so through application to the local records committee or request directly to the State Records Board. Wis. Stat. § 19.61(3).

X. ENFORCEMENT. There are four types of penalties to which an authority may be subjected under Wis. Stat. § 19.37:

A. *Mandamus*. An authority **withholding** a record or part of a record **or delaying granting access to** a record may be subject to a *mandamus* action. Wis. Stat. § 19.37. This means the requester may petition a court to order the custodian to release the record.

In *Watton v. Hegerty*, 2008 WI 73, 310 Wis. 2d 52, 751 N.W.2d 369, reconsideration denied by 2008 WI 124 (September 8, 2008) (hereinafter *Watton II*), the supreme court made clear that the four-prong test applies to *mandamus* actions compelling disclosure of records under the provisions of the Wisconsin Public Records Law. *Id.*, ¶ 8. In *Watton*, the court ruled that the petitioner must establish that all four prerequisites are satisfied, including: (1) the petitioner has a clear legal right to the record sought; (2) the government entity has a plain legal duty to disclose the record; (3) substantial damages would result if the petition for *mandamus* was denied; and (4) the petitioner has no other adequate remedy at law. *Id.*, citing, *Pasko v. City of Milwaukee*, 2002 WI 33, ¶ 24.

In *Watton II*, the requester petitioned for a *writ of mandamus* prior to the police department's denial of his records request. The supreme court further noted that there is a "lack of clarify in our case law regarding whether it is Watton or whether it is the custodian who bears the initial burden of persuasion. . .." *Watton II*, 2008 WI 74, n. 9. The court noted that in the usual case, the public records request is denied and then *mandamus* is brought. Notwithstanding the unusual posture of the *Watton* case the court declined to place the burden of persuasion entirely on Watton, as would normally be the case in filing a petition for *mandamus*. The

court did, however, make clear that the requester must "prove the four prerequisites to the issuance of the writ he seeks." *Id.*

In *WIREdata v. Village of Sussex*, 2008 WI 69, ¶ 58 (hereinafter, "*WIREdata II*"), the court ruled that *WIREdata* "filed the mandamus actions without first giving the municipalities an appropriate amount of time to comply with its requests, especially given all the complex copyright and licensing issues, and given the large volume of data requested." Id. The court noted that *WIREdata II* threatened two of the municipalities with *mandamus* actions four days after submitting their initial requests. The court noted that the municipalities were engaged in communications with the requester indicating that they were attempting to work through the lengthy and complex public records requests. Finally, the court noted that the municipalities offered to provide the requester with paper copies of the requested information, which WIREdata turned down. The court ruled that WIREdata had not properly commenced its *mandamus* actions because the municipalities had not denied WIREdata's public records requests. *Id.* ¶ 59.

B. Damages and Fees. The court may award damages and fees, including attorney's fees. A successful pro se plaintiff is not entitled to attorney's fees in a public records *mandamus* action. *State ex rel. Young v. Shaw*, 165 Wis. 2d 276 (Ct. App. 1991).

C. Punitive Damages. If a court finds that an authority or legal custodian has arbitrarily and capriciously denied or delayed a response to a request or charged excessive fees, the court may award punitive damages to the requester.

D. Forfeitures. An authority or legal custodian who arbitrarily and capriciously denies or delays response to a request or charges excessive fees may be required to forfeit not more than $1000. Enforcement actions in Milwaukee are brought by the Wisconsin Attorney General, the Milwaukee County Corporation Counsel, or by an individual on behalf of the state. Actual and punitive damages and forfeitures may be a liability of either the agency or the **legal custodian or both.**

An authority or custodian should <u>never destroy a record after a request has been made</u> until after the request is granted or at least 60 days after the request is denied (90 days if the requester is a committed or incarcerated person.) If the custodian receives notice that an action has been commenced under sec. 19.37, the record may not be destroyed until after a court order has been issued in the matter and the deadline for appeal has passed. Wis. Stat. § 19.35(5).

OPEN MEETINGS LAW

I. COVERAGE OF THE OPEN MEETINGS LAW

A. What are the relevant statutes?

1. There is a strong statutory presumption in favor of providing the fullest and most complete information regarding the affairs of government to citizens as is "compatible with the conduct of government business." Wis. Stat. § 19.81.

2. Every meeting of governmental bodies must be preceded by a public notice. With certain narrow exceptions, all business of any governmental body must be conducted in open session. Wis. Stat. § 19.83.

3. What is a "governmental body?" Under the statute, a "government body" includes a state or local agency, board, commission, committee, council, department or public body corporate and politic created by constitution, statute, ordinance, rule or order. It includes a governmental or quasi-governmental corporation. There are certain specific exceptions, including the Bradley Center, and the Olympic Ice Training Center. Wis. Stat. § 19.82(1).

B. What is the scope of the law?

The Open Meetings Law applies only to a body or group considered a "governmental body" as defined in Wis. Stat. § 19.82(1).

C. Who is covered?

1. State or local agencies, boards and commissions.

a.) A "formally constituted subunit" of a governmental body is itself a "governmental body" within the definition of Wis. Stat. § 19.82. For example, a standing committee of a common council comprised solely of members of that body would be a subunit subject to the Open Meetings Law. See, 74 Op. Att'y Gen. 38, 40 (1985.)

b.) Where an existing, definable group of employees of a governmental entity are assigned by the entity's chief administrative officer to prepare recommendations for the entity's policy-making board, that group's meeting with regard to the subject or the directive are subject to the Open Meetings Law created by "rule or order." Attorney General

correspondence, June 8, 2005. *Wisconsin Open Meetings Law: A Compliance Guide*, Wisconsin Department of Justice, 5 (2007). (*Compliance Guide)*

c) A municipal public utility commission managing a city-owned public electric utility is a government body. 65 Op. Att'y Gen. 243 (1976.)

d.) Citizen advisory committee appointed by public officials for a governmental body is a government body subject to the requirements of the Open Meetings Law. 78 Op. Att'y Gen. 67 (1989.)

2. Governmental or quasi-governmental corporations. A volunteer fire department created by private citizens under Chapter 213, Wis. Stats., is not a "governmental body" subject to the Open Meetings Law. 66 Op. Att'y Gen. 113, 115 (1977.)

The Wisconsin Attorney General has interpreted the term *quasi-governmental* to include a corporation that closely resembles a governmental corporation in function, effect, or status, even though the corporation was not directly created by a governmental body. 80 Wis. Op. Att'y Gen. 129 (1991) (OAG 20-91).

In 2008 the Wisconsin Supreme Court issued a decision in which it provided guidance in defining quasi-governmental bodies. Relying in part on past attorney general opinions, the court defined the term "quasi-governmental body" to include not only corporations that are specifically created by acts of government, but also includes an entity who, "if, based on the totality of the circumstances, it resembles a governmental corporation in function, effect, or status." *State v. Beaver Dam Area Dev. Corp.*, 2008 WI 90 ¶ 9. The court held that the determination must be made on a case-by-case basis based on the totality of facts about the entity; including: (1) where the entity obtains its funding; (2) whether it serves a public function; (3) whether it appears to the public to be a government entity; (4) whether it is subject to government control; and, (5) the degree of access the government has to the entity's records. *Id.* ¶¶ 45, 62.

3. Voluntary Submission to the Open Meetings Law. In *State ex rel. Journal/Sentinel, Inc. v. Pleva*, 155 Wis. 2d 704 (1990), the Wisconsin Supreme Court held that because the Milwaukee World Festival, Inc. (a private, non-profit corporation) voluntarily agreed to comply with the Open Meetings Law in a contract clause, it is subject to the requirements of the Open Meetings Law. The Court held that *Journal/Sentinel*, as a

representative of the public, had standing as a third party to seek enforcement of the Open Meetings Law with regard to festival meetings.

D. Can a Governmental Body Be Created by Rule or Order?

Yes. The Attorney General has written that determinations of whether a body is created by rule or order and therefore subject to the Open Meetings Law must be determined on a case-by-case analysis. The Attorney General has concluded that this is a gray area but that any doubt should be resolved in favor of openness. *Compliance Guide*, 3 (2007).

Some factors to be considered when determining whether a governmental body is created by rule or order include the following:

1. Whether there are a definable number of members in the body;
2. Whether they exercise collective power; and,
3. Whether there is a definition of when their collective power exists.

When there is no collective power or definition of when that power exists, there is probably not a governmental body subject to the Open Meetings Law. There is no governmental body created where discussion is the key factor of the group. Informal Correspondence Wis. Op. Att'y Gen. (September 24, 1998).

In analyzing the creation of a governmental body by rule or order, no formal order is required; all that is required is to create a body and assign it duties. Informal Correspondence Wis. Op. Att'y Gen. (September 20, 2005), citing 78 Wis. Op. Att'y Gen. 67 (1989).

This provision focuses on the manner in which a body was created, rather than on the type of authority the entity possesses. This rule has been liberally construed to include any directive, formal or informal, creating a body and assigning its duties. This directive may come from a Mayor, or the head of an agency, department or division. 78 Op. Att'y Gen. 67, 68-69 (1989); Informal Correspondence from Wis. Att'y Gen. to Bill Lueders, President, Wis. Freedom of Info. Council (Sept. 20, 2005).

A task force ordered by a school district's superintendent was found to be a governmental body in that it was a "committee . . . created by constitution, statute, ordinance, rule or order" under Wis. Stat. § 19.82(1). Wisconsin Attorney General Letter, June 8, 2001. In this case the task force was organized to study enrollment disparities within the school district. In his opinion, the Attorney General references *State v. Swanson*, 92 Wis. 2d 310 (1979), which pointed out that the

definition of a governmental body focuses on the manner in which a body was created rather than the type of authority the body possesses.

On June 8, 2005 an Assistant Attorney General wrote that meetings of a management team created by a school superintendent was a governmental body subject to the requirements of the Open Meetings Law. A school board directed its superintendent to make recommendations for addressing its budget deficiencies. The superintendent held two meetings with a management team. The team subsequently wrote an 8-page memorandum to the board in which it detailed its budget recommendations. The board ultimately adopted the recommendations. Informal Correspondence Wis. Op. Att'y Gen. (June 8, 2005).

The Assistant Attorney General wrote that there are two key factors in determining whether the management team was a government body subject to the requirements of the Open Meetings Law. The factors included the following:

1. There must be a collective body acting as a unit rather than a mere assemblage of individuals.

    a. The group must include a multi-member group acting together as a unit performing a common purpose.
    b. The group must be exercising the responsibilities, authority and power of the body.
    c. The group must be vested with identifiable governmental powers and duties.
    d. There must be a numerically defined body.

2. There must be a directive creating the group. The directive can be formal or informal and must assign duties to the group.

On January 26, 2004 the Attorney General, in another informal opinion, wrote that a citizen advisory panel appointed by a county executive is a governmental body created by rule or order because the body was created by the county executive and was assigned specific duties. The Assistant Attorney General cited a 1989 Attorney General opinion, stating, "Advisory committees are an affair of government because their actions affect the decisions of the department and its employees; and because the committees are an affair of government, the public is entitled to the fullest information about them, pursuant to the policy stated in § 19.81(1)." 79 Wis. Op. Att'y Gen. 67, 70 (1989) Informal Correspondence Wis. Op. Att'y Gen. (January 26, 2004).

E. <u>Which entities are not covered</u>?

1. The statute explicitly excludes the Bradley Center Sports and Entertainment Corporation. Wis. Stat. § 19.82(1).

2. Bodies formed for, or meeting for the purpose of, collective bargaining with municipal or state employees. Wis. Stat. § 19.82(1). The collective bargaining exclusion does not allow a body to consider the final ratification or approval of the collective bargaining agreement in closed session. Wis. Stat. § 19.85(3).

3. The definition does not include bodies created by the Wisconsin Supreme Court.

4. The definition of a "governmental body" is only rarely satisfied when groups of a governmental unit's employees gather on a subject within the unit's jurisdiction. The Attorney General has concluded that the predecessor to the current Open Meetings Law did not apply when a department head met with some or even all of his or her staff. 57 Op. Att'y Gen. 213, 216 (1968).

5. The Open Meetings Law does not apply to single-member governmental bodies. *Plourde v. Habhegger*, 2006 WI App 174.

II. WHAT IS THE LEGAL DEFINITION OF A "MEETING"?

A. Statute.

The convening of members of the governmental body for the purpose of exercising the responsibilities, authority, power or duties delegated to or vested in the body. Wis. Stat. § 19.82(2).

B. What triggers the application of the law?

The Wisconsin Supreme Court has held that the Open Meetings Law applies whenever a gathering of members of a governmental body satisfies two requirements: (1) there is a **purpose** to engage in governmental business; and (2) the **number** of members present is sufficient to determine the governmental body's course of action. *State ex rel. Newspapers, Inc. v. Showers*, 135 Wis. 2d 77, 102 (1987.)

1. Courts have interpreted **the "purpose test"** to include any gathering of the members of the governmental body for the purpose of engaging in governmental business including **discussion, decisions or information-gathering.** *State ex rel. Badke v. Village Board of the Village of*

Greendale, 173 Wis. 2d 553 (1993). If members of the government body are gathering but do not conduct business within their jurisdiction, the gathering does not constitute a "meeting." *Paulton v. Volkmann*, 141 Wis. 2d 370 (Ct. App. 1987.)

2. **The numbers test.** If one-half or more of the members of the body are present, the meeting is rebutably presumed to be for the purpose of exercising its responsibilities, authority, power or duties of the body. Wis. Stat. § 19.82(2).

   This does not include social or chance gatherings, or conference, which are not intended to avoid the requirements of the Open Meetings Law. *Id.*

   Where board chair has unilateral authority to decide what items will be on a meeting agenda and non-chair members have no authority over the items that will be included on agenda, the open meetings law is not violated when a quorum discusses agenda items without a proper open meetings notice. Board successfully rebuts presumption where facts show discussion by quorum of board consisted only of whether or not to include an item on agenda. *State ex rel. Gates v. Dorshorst*, 2004 WL 524928, ¶ 18 (Wis. Ct. App. Mar. 18, 2004)(unpublished opinion not to be cited as precedent or authority per section 809.23(3) of the Wisconsin Statutes.)

3. What is a negative quorum? When a government body operates under a super majority rule (2/3 majority) for example, less than half of the members of the body could block a proposal by agreeing to vote in opposition to the proposal. *Showers* made clear that the Open Meetings Law applies when such a group gathers for the purpose of conducting government business. *Showers*, 135 Wis. 2d at 101-02; *Compliance Guide* 6 (2007).

4. Who has the burden of proof? If one-half or more members of the body are present there is a presumption that it is for the purpose of conducting governmental business. The body may overcome the presumption by establishing that they did not gather information, etc. *Compliance Guide* 7 (2007).

   When a person alleges that a gathering of less than one-half of the members of the body was held in violation of the Open Meetings Law, that person has the burden of proving that the gathering constituted a "meeting" subject to the law. *Showers*, 135 Wis. 2d at 102.

C. Are there special situations that might trigger the Law?

1. What is a walking quorum? The requirements of the Open Meetings Law extends to walking quorums, which is defined as a series of gatherings among separate groups of the members of a body, each less than the quorum, who agree, passively or explicitly, to act in sufficient numbers to reach a quorum. *Showers*, 135 Wis. 2d at 92. Any attempt to avoid the appearance of a "meeting" through use of a walking quorum is subject to prosecution under the Open Meetings Law. *State ex rel. Lynch v. Conta*, 71 Wis. 2d 662, 687 (1976.)

   Allegations of an open meeting violation involving an alleged walking quorum are not necessarily mooted by the trial court's ruling that a board's actions were void. A walking quorum allegation is an action against the board members, not the board in general. *State ex rel. Lawton v. Town of Barton*, 2005 WI App. 16, ¶¶ 11-15.

2. Can an Open Meeting be held via conference call? Telephone conference calls among members of a governmental body fit within the definition of "meeting" subject to the Open Meetings Law. 69 Op. Att'y Gen. 143 (1980.) A telephone conference call meeting is acceptable as long as the appropriate notice is given and the conference call is made reasonably accessible to the public. Conference call meetings are not recommended where testimony is anticipated.

3. What if a quorum of a government body attends a subcommittee meeting? When a quorum of a governmental body attends a subunit meeting or a meeting of another government body for purpose of gathering information about matters over which they have decision-making responsibility, both government bodies must properly give notice to the public of its intent to attend the meeting of the subunit body. *Badke v. Village of Greendale*, 173 Wis. 2d 553, 570, 578 (1992). Separate meeting notices must be given if: (1) a quorum of a body is present at a properly noticed meeting of a subunit of the body, (2) when such gatherings are not social or chance; and, (3) one or more of the members of the quorum of the body is not also a member of the subunit of the governmental body. Separate notice must be given to provide the public with the broadest possible knowledge of the purpose of the meeting. *Id.* at page 578.

4. Are e-mail messages covered by the Open Meetings Law? The use of e-mail communications between members of the governmental body can potentially trigger the provisions of the Open Meetings Law.

In a recent letter from the Wisconsin Attorney General interpreting the use of e-mail by members of the governmental body, the Attorney General strongly urged governmental bodies to avoid using electronic mail to communicate on matters within the realm of its authority, because such use creates a "serious risk" of violating the Open Meetings Law. Informal Op. Att'y Gen., October 3, 2000.

In his opinion, the Attorney General compared the use of e-mail by members of a governmental body to both **written correspondence** and to **telephone conference calls** between such members. He found that while correspondence to and from members within the body are not deemed to be meetings, telephone conference calls have been interpreted to be "meetings" subject to the Open Meetings Law, requiring proper notice and accessibility to the public. He further stated that because the exchange of e-mail can result in a "near-simultaneous exchange of information between members of a governmental body on a subject matter within the bodies realm of authority" such exchange may be subject to the Open Meetings Law. While acknowledging that there are no current Wisconsin cases interpreting such use, he stated that factors courts might consider include: "(1) the number of participants involved in the communication; (2) the **number of communications** regarding the subject; (3) a **time frame** within which the electronic communications occurred; and (4) the **extent** of the conversation – like interactions reflected in the communications." *Id.*

The Wisconsin Attorney General has recommended that e-mail communications between members of a governmental body be used only "to **transmit information one-way** to a body's membership; if the originator of the message reminds recipients to reply only to the original, if at all; and if the message recipients are scrupulous about minimizing the content and distribution of their replies." Attorney General Correspondence, October 3, 2000; correspondence, March 12, 2004. Attorney General correspondence, June 8, 2005. *Compliance Guide* 7-8 (2007). Ultimately, the Attorney General strongly discourages members of governmental bodies from using electronic mail to communicate about issues within the body's realm of authority.

A Washington Court of Appeals has ruled that e-mail exchanges may constitute a "meeting" triggering the Open Meetings Law if a quorum participates and it is used to conduct the official business of the governmental body. Mere use or passive receipt of e-mail did not, however, automatically constitute a "meeting." *Wood v. Battle Ground School Dist.*, 27 P.3d 1208 (Wash. Ct. App. 2001).

5. What is the Statute of Limitations under the Open Meetings Law? When an action alleging an Open Meetings Law violation is brought by a private citizen acting as a "private attorney general" under section 19.97, and therefore brought on behalf of the public, the applicable statute of limitation is governed by section 893.93(2). Under this section, a complaint alleging a violation of the statute must be filed within **two years**. The "discovery rule," which under some circumstances may toll the running of the statute of limitation until an injury is discovered, is not applicable to a claim of an Open Meetings Law violation. *State ex rel. Leung v. City of Lake Geneva*, 2003 WI App 129.

III. WHAT IS AN "OPEN SESSION" OR "OPEN MEETING"?

An "open session" means a meeting that is held in a place reasonably accessible to members of the public and open to all citizens at all times. Wis. Stat. § 19.82(3). A governmental body must conduct all of the body's business in open session, unless an exemption found in § 19.85(1) exists.

A. What does "readily accessible" mean?

An open meeting must be held in a facility giving reasonable access, not total access, and it may not systematically exclude or arbitrarily refuse admittance to any individual. *State ex rel. Badke v. Village Board of Greenfield*, 173 Wis. 2d 553 (1993.)

Whether the requirement that a meeting be reasonably accessible to the public has been met "depends upon the facts in each individual case. Any doubt as to whether a meeting facility is large enough to satisfy the requirement should be resolved in favor of holding the meeting in a larger facility." *Compliance Guide* 10 (2007).

In order to comply with the "reasonably accessible" requirement, governmental bodies should conduct all their meetings at a location within the district they serve, unless there are special circumstances that make it impossible or impractical to do so. Informal Op. Att'y Gen., May 25, 1977.

B. Must the governmental body ensure the meeting is accessible to persons with functional limitations?

Under Wis. Stat. § 19.82(3), accessibility in cases of state governmental bodies means a building and room that enables access by persons with functional limitations as defined in Wis. Stat. § 101.13(1). This has been interpreted to mean accessibility without assistance to such persons. Although this technically does

not apply to local governmental bodies, it is strongly encouraged that this type of accessibility be provided by local governmental bodies. 69 Op. Att'y Gen. 251(1980.)

C. Must a governmental entity comply with the ADA for its Open Meetings?

Under Title II of the Americans With Disabilities Act, a public entity is prohibited from denying equal services to individuals because of their disabilities. Title II of the ADA applies to both state and local governments. 42 U.S.C.A. 12131(1)(A) and (B). The analysis under Title II is similar, but not identical to the analysis under Title I of the ADA relating to accommodations in employment. A government entity must make a reasonable accommodation. The determination of what is reasonable is highly fact-specific and must be determined on a case-by-case basis, balancing the cost to the defendant and the benefit to the person requesting accommodation, if the accommodation does not fundamentally alter the nature of the service, program, or activity. *Olmstead v. Zimring*, 119 S.Ct. 2176 (1999).

IV. WHEN IS A PUBLIC NOTICE REQUIRED?

A. Public notice for all meetings of a government body shall be given: (a) as required by any other statutes; (b) as required by the open meetings law; and (c) by communication from the chief presiding officer of a governmental body or such person's designee to the public, to those news media who have filed a written request for such notice, and to the official newspaper designated under §§ 985.04, 985.05 and 985.06 or, if none exists, to a news medium likely to give notice in the area. Wis. Stat. § 19.84.

B. How and to whom should notice be given?

Wis. Stat. § 19.84 describes the public notice requirements. It specifies when, how and to whom notice must be given, as well as the information a notice must contain.

1. Notice must be given to the public by **posting** the notice in one or more places likely to be seen by the general public. 66 Op. Att'y Gen. 93, 95 (1977.) The Attorney General has advised posting the notices in at least three different locations within the jurisdiction that the body serves. *Id.* "The requirement to communicate notice to the public can be satisfied by posting a notice or by publication of notice in the newspaper." 77 Op. Att'y Gen. 312.

2. To the news media. The chief presiding officer must also give notice of each meeting to the members of the **news media who have requested a written request for notice**. Wis. Stat. § 19.84(1)(b).

3. Additionally, the chief presiding officer must also give notice to the **officially designated newspaper** or, if none exists, to a news medium likely to give notice in the area. Wis. Stat. § 19.84(1)(b). The governmental body is not required to pay for, and the newspaper is not required to publish, the notice. 66 Op. Att'y Gen. 230, 231 (1977.)

4. While not required, a government body may additionally give notice to the public on its official web site. Posting on the government body's web site may be used as an additional notice provision, but it may not substitute for other posted notices given to the public. Correspondence from Wis. Att'y Gen. to Mr. Greg Peck (April 17, 2006).

C. What information should be in the public notice?

Every public notice of a meeting must give "the time, date, place and subject matter of the meeting, including that intended for consideration at any contemplated closed session, in such form as is reasonably likely to apprise members of the public and the news media thereof." Wis. Stat. § 19.84(2).

General subject matter designations such as "miscellaneous business," or "agenda revisions," or "such other matters as may be authorized by law" are not sufficient.

1. How specific must the notice be? In *Buswell v. Tomah Area School District*, 2007 WI 71, the Supreme Court overturned the long-standing rule established in *State ex rel. H.D. Enterprises v. City of Stoughton*, 230 Wis. 2d 480 (Ct. App. 1999). *H.D. Enterprises* that held that an open meeting public notice listing general topics to be discussed, such as "licenses," was sufficient to satisfy the requirements of Wis. Stat. § 19.84(2). In *Buswell* the court established a "reasonableness" test that must be applied by public officials in determining how detailed and specific a meeting notice must be. The court ruled that a public notice must be "reasonably specific under the circumstances." *Buswell*, 2007 WI 71, ¶ 21.

   The reasonableness standard "requires taking into consideration the circumstances of the case in determining whether notice is sufficient." The factors to be considered by the public official providing the public notice include:

   a.) balancing the burden of providing a more detailed notice,

b.) making a determination of whether the subject of the meeting is of particular interest to the public; and,

c.) determining whether the subject to be discussed involves non-routine actions that the public would be unlikely to anticipate. *Id.*, ¶ 28.

With regard to the first factor, the public official must consider the amount of time and effort required to assess what information should be included in the notice, keeping in mind that the demands of specificity should not "thwart the efficient administration of governmental business." *Id.*, ¶ 29. With regard to the second factor, the court ruled that the greater the public interest the greater the specificity required. This includes considering the number of interested citizens and the intensity of the interest. *Id.* at ¶ 30. Finally, a "novel" issue requires more specificity. *Id.* at ¶ 31. All three factors require a **case-by-case analysis**, based on what the public officer noticing the meeting knows, or reasonably should know, at the time the notice is provided. *Id.* at ¶ 32. **Under the reasonableness standard members of the public body may discuss any aspect of the noticed subject matter and issues reasonably related to that subject matter.** *Id.* at ¶ 31. The court applied its ruling prospectively.

Finally, the court awarded attorney fees, in order to "provide an incentive to others to protect the public's right to open meetings and to deter governmental bodies from skirting the open meetings law." *Id.* at ¶ 54.

The notice will not be held to be a violation of Wis. Stat. § 19.84(2) if the notice contains a mistake if it still reasonably apprises members of the public of the subject matter and "contains enough information to alert any interested individual who might have been confused by the notice to find out more." *State ex rel. Olson v. City of Baraboo Joint Revenue Bd.*, 2002 WI App 64.

Recent Attorney General opinions have indicated that agenda items designated "staff comments", "aldermen comments" are "at best, at the edge of lawful practice, and may well cross the line to be unlawful." Informal Wis. Op. Att'y Gen. to Mayor Charles A. Rude (March 5, 2004).

2. Must a governmental body allow a time for public comment? Wisconsin Statutes §§ 19.83(2) and 19.84(2) specifically allows governmental bodies to receive information from members of the public, **if the public notice of the meeting designates a period of public comment.** The law allows the governing body to discuss, but not act on, issues that are raised during a public comment period. The better practice is to defer extensive discussion

and action until specific notice of the subject can be given. Unless public comment is required by another statute, the governmental body is free to determine whether to allow citizen participation at its meetings. The body may refuse to permit citizens to speak at its meeting or limit the degree to which they can comment without violating the Open Meetings Law. I-5-93, April 26, 1993. *Compliance Guide* 11 (2007).

3. Closed session. The notice must include notice that a closed session is contemplated, and must include the subject matter and statutory authority for convening in closed session. Wis. Stat. § 19.84(2). The subject matter for the closed session requires the same specificity as required for open session agenda items. *Buswell*, 2007 WI 71, ¶ 37, n. 7.

   If the chief presiding officer is not aware of a contemplated closed session when the notice is given, the governmental body may still convene in closed session under Wis. Stat. § 19.84(1) to discuss an item that is included on the open meeting agenda. 66 Op. Att'y Gen. 106, 108 (1977); *Compliance Guide* (12) 2007.

D. When should the notice be made available?

1. Wis. Stat. § 19.84(3) requires that every public notice of a meeting be given at least 24 hours in advance of the meeting, unless "for good cause" such notice is "impossible or impractical." If "good cause" exists, the notice should be given as soon as possible and must be given at least 2 hours in advance of the meeting. *Compliance Guide* 12-13 (2007.)

2. There have been no court decisions or attorney general opinions that define what "good cause" is sufficient to allow less than 24-hour notice of a meeting. If there is any doubt as to whether good cause exists err in the favor of 24-hour notice. *Id.*

E. Can a governmental body post a notice one time annually for regularly scheduled meetings?

No. Wis. Stat. § 19.84(4) requires a separate notice for each meeting of a government body, which must be given at a date and time reasonably close to the meeting date. A single notice that lists all the meetings that a government body intends to hold over a period of time does not comply with the notice requirements of the Open Meetings Law. 63 Op. Att'y Gen. 509, 513 (1974); *Compliance Guide* 13 (2007).

V. CAN OPEN OR CLOSED MEETINGS BE TAPE RECORDED AND/OR VIDEOTAPED?

A. The Open Meetings Law allows citizens the right to tape record or video tape open session meetings, as long as it does not disrupt the meeting. A governmental body must make a reasonable effort to accommodate anyone who wants to record, film, or photograph a open meeting session as long as it does not interfere with the meeting. Wis. Stat. § 19.90.

B. By contrast, members of the governmental body and persons attending a lawfully convened closed meeting have no right to record the closed meeting under circumstances that might void or violate its private and secret nature. If the governmental body desires to record its closed meetings it should arrange for the security of the records to prevent their improper disclosure. 66 Op. Att'y Gen. 318, 325 (1977.) This implies that in some circumstances the government body who convenes in closed session for an authorized and appropriately-noticed reason has some duty to make sure that the issues discussed in closed session are not "leaked."

VI. HOW IS VOTING RECORDED?

A. Statute:

Wis. Stat. § 19.88 provides that unless "otherwise specifically provided by statute, no secret ballot may be utilized to determine any election or other decision of a governmental body, except the election of the officers of such body in any meeting." Any member of a governmental body may require that a vote be taken at any meeting in a manner that the vote of each member is ascertained and recorded (except the election of officers of the body.) All motions and roll-call votes of each meeting shall be recorded and preserved and open to the public inspection. Wis. Stat. §§ 19.88 (1), (2) and (3).

B. Ballots:

Secret ballots are only authorized where specifically provided by statute, to determine the election of officers of the body, and as an advisory ballot where the body will not take further action. Wis. Stat. § 19.88(1), 66 Op. Att'y Gen. 60 (1977.)

C. Votes:

Any member of the governmental body may require that a vote be taken in a manner that the vote of each member is ascertained and recorded. Wis. Stat. §

19.88(2). If such a request is made a voice vote or a vote by a show of hands is not sufficient unless the vote is unanimous and the minutes reflect who is present for the vote. *Wisconsin Open Meetings Law: A Compliance Guide*, Wisconsin Atty. Gen. 12 (2007.)

D. Must a governmental body keep minutes of meetings?

The Open Meetings Law does not require a governmental body to take detailed minutes of its meetings. Other statutes, however, may impose minute-taking requirements. The Open Meetings Law does require a governmental body to keep a record of all motions and roll-call votes at each meeting of the body. Wis. Stat. § 19.88(3). If a member of the body requests the vote of each member be recorded, a voice-vote or a vote by a show of hands is not permissible unless the vote is unanimous and the minutes reflect who was present for the vote. Informal opinion of Wisconsin Attorney General (I-95-89.) *Compliance Guide* 14-15 (2007.)

VII. WHAT ARE THE CRITERIA FOR CLOSED MEETINGS?

A. Statute.

Every meeting of a governmental body **must first be convened in open session.** All business of any kind must be initiated, discussed and acted upon in open session unless one of the exemptions in Wis. Stat. § 19.85(1) applies. Wis. Stat. § 19.83(1).

Authorized closed sessions. Wis. Stat. § 19.85(1) contains 13 exemptions to the Open Meetings requirement which permit, **but do not require**, a governmental body to convene in closed session. These exemptions should be narrowly construed. *State ex rel. Hodge v. Turtle Lake*, 180 Wis. 2d 62, 71 (1993). The exemption should be invoked only where necessary to protect the public interest.

A closed session may be held for any of the following purposes:

1. Judicial or quasi-judicial hearings. Deliberations on a case which was the subject of any judicial or quasi-judicial trial or hearing before that governmental body can be held in closed session. Wis. Stat. § 19.85(1)(a).

   For this exemption to apply there must be a "case" that is the subject of a quasi-judicial proceeding. *Turtle Lake*, 180 Wis. 2d at 72. A "case" contemplates a controversy among parties that are adverse to one another; it does not include a mere request for a permit. *Id.* At 74.

Boards of Review boards cannot convene in closed session for any purpose. Wis. Stat. § 62.23(7)(e)3, 70.47(2m).

2. Employment and Licensing Matters. Wis. Stat. § 19.85(1)(b) authorizes a closed session for: "[c]onsidering dismissal, demotion, licensing or discipline of any public employee or a person licensed by a board or commission or the investigation of charges against such person, or considering the grant or denial of tenure for a university faculty member, and the taking of formal action on any such matter...."

Required Notice. In considering dismissal, demotion, etc., the affected individual must be given **actual notice** of any "evidentiary hearing which may be held prior to final action being taken and of any meeting at which final action may be taken." Wis. Stat. § 19.85(1)(b). This notice must state that the person affected has the right to request that a related hearing or meeting be held in open session. If so requested, the governmental body may not meet in closed session under this exemption to conduct an evidentiary hearing or to take final action. *Id.*

The exemption does not allow the subject person to demand that the governmental body convene in closed session. *State ex rel. Schaeve v. Van Lare*, 125 Wis. 2d 40 (Ct. App. 1985).

The Wisconsin Court of Appeals held that Wis. Stat. § 19.85(1)(b) did not require the city to give an employee a specific notice of a closed session where the common council discussed his performance pursuant to Wis. Stat. § 19.85(1)(c), because no final action took place during those closed sessions. In that case, the common council reconvened in open session after the closed session and voted to terminate the employee. *State ex rel. Epping v. City of Neilsville*, 218 Wis. 2d 516 (Ct. App. 1998).

An "evidentiary hearing" means a formal examination of accusations, testimony and evidence received, that may be relevant to the dismissal, demotion, licensing, or discipline of any public employee. A court held that where a council considered the mayor's accusation against an employee in closed session without giving the employee prior notice, there was a violation of the requirement of actual notice to the employee. *Campana v. City of Greenfield*, 38 F. Supp. 2d 1043 (E.D. Wis. 1999). 66 Op. Att'y Gen. 211, 214 (1977).

3. Consideration of employment, promotion, compensation and performance evaluation data of any public employee over which the governmental body has jurisdiction or exercises responsibility. Wis. Stat. § 19.85(1)(c).

The Supreme Court ruled that Wis. Stat. § 19.85(1)(c) "does not create a blanket privilege shielding closed session contents from discovery." *Sands v. Whitnall School District*, 2008 WI 89, ¶¶ 47, 59. The court concluded that the discretionary and limited exceptions to the open meeting law found in § 19.85(1) "do not create an implicit evidentiary privilege against discovery requests." *Id.* ¶ 59. The court considered whether the deliberative process privilege should be recognized in Wisconsin but determined that it would not create a new deliberative process privilege judicially. *Id.* ¶ 60.

> . . . Wisconsin does not recognize a deliberative process privilege. Wisconsin Stat. § 905.01 precludes the extension of common law privileges by the court on a case-by-case basis, but rather requires common law privileges not originating in the constitution be adopted by statute or court rule. *Id.* ¶ 67, citing *Davison*, 75 Wis. 2d at 205-06, 248 N.W.2d 433.

The Supreme Court held that discussions held by members of a government body in a lawfully convened closed meeting are not subject to an evidentiary privilege, such as the deliberative process privilege, that would protect the discussions from discovery in litigation. *Sands*, 2008 WI 89, ¶ 44.

While the court refused to recognize a deliberative process privilege in Wisconsin, the majority recognized that while the scope of discovery is broad it is not without limits. For example, subjects of discovery can object where the discovery requests are not relevant to the pending action, parties may seek protective orders from the court or may ask a court to seal the record. *Id.* ¶¶ 71, 74. Additionally, other specific statutory privileges such as the attorney client privilege, will limit discovery of closed session discussions. *Id.* ¶ 75. Because of these types of limitations, the court noted that "government bodies in Wisconsin that are subject to discovery requests related to closed meeting contents may similarly request courts to increase their supervision of the discovery process to ensure the protection of sensitive information." *Id.*

The language of the exemption refers to a specific public employee rather than to general positions of employment. The purpose is to protect individual employees from having their actions and abilities discussed in public and to "allow governmental bodies to protect themselves from

potential lawsuits resulting from open discussion of sensitive information." *Oshkosh Northwestern Co., v. Oshkosh Library Board*, 125 Wis. 2d 480 (Ct. App. 1985); *Compliance Guide* 17 (2007).

Wis. Stat. § 19.85(1)(c) permits a closed meeting to consider which specific employee to lay off, but not to discuss whether to increase or reduce general workforce levels. 66 Op. Att'y Gen. 211 (1977), as referenced in: Natkins and Schneider, *Understanding Wisconsin's Open Meetings Law*, 103-04 (1994.)

The Attorney General has interpreted this exemption to extend to public officers, such as a police chief, who the governmental body has the authority to hire. Correspondence, September 20, 1982. The Attorney General also concludes that this exemption authorizes convening in closed session to interview and consider applicants for positions of employment. *Id.*, *Compliance Guide* 17 (2007.) This exception applies only to public employees. An elected official is not considered to be a public employee. Therefore, this exception cannot be used to consider appointments, etc. of officials to fill vacancies of an elected position. Id. 17 (2007); 76 Op. Att'y Gen. 276 (1987).

4. Probation, supervision, parole. Wis. Stat. § 19.85(1)(d) allows an exemption to the Open Meetings Law when considering a specific application for probation, parole or considering strategy for crime detection or prevention.

5. Conducting public business with competitive or bargaining implications. Wis. Stat. § 19.85(1)(e). A closed session is authorized for "[d]eliberating or negotiating the purchase of public properties, the investing of public funds, or conducting other specific public business, whether competitive or bargaining reasons require a closed session." Wis. Stat. § 19.85(1)(e).

The Attorney General has interpreted this exemption to authorize a School Board to convene in close session to develop negotiating strategies for collective bargaining. 66 Op. Att'y Gen. 96 (1977). Once again, this exemption should be construed very narrowly.

This exemption applies to purchases that the body has the power to recommend or the delegated power to conduct. Whether it also applies to plans for remodeling or construction depends on the existence of competitive or bargaining reasons that require a closed session. 66 Wis. Op. Att'y Gen. (1977).

In *Citizens for Responsible Government v. Milton*, 2007 WI App 114, the court ruled on the exception to the Open Meetings Law found at Wis. Stat. § 19.85(1)(e). The City of Milton held ten meetings, all in closed session, to discuss negotiations with a company to build an ethanol plant in Milton and to negotiate purchasing land for the ethanol plant. The court held that the city violated the Open Meetings Law by holding all of its meetings in closed session, finding that **competitive and bargaining reasons did not require closed sessions for the entirety of its meetings**. The court held that **developing a negotiating strategy or deciding on a price to offer for the land** are examples of what is contemplated by "whenever competitive or bargaining reasons require a closed session." Wis. Stat. § 19.85(1)(e).

The court stated that the burden is on the governmental body to show that competitive or bargaining reasons require a closed session. Additionally, the court made clear that a private entity's **desire** for confidentiality is not sufficient to **require** a closed meeting under this exception. In order for § 19.85(1)(e) to apply, the court ruled, the government body must be able to establish that the government's competitive or bargaining reasons leave no other option than to close the meetings. *Id.* at ¶ 14.

Where town and village create a joint committee to resolve boundary issues, court of appeals held that "nothing in Wis. Stat. § 19.85(1)(e) suggests that a reason for going into closed session must be shared by each municipality participating in an intergovernmental body." See, *State ex rel. Herro v. Village of McFarland, et al.*, 2007 WI App 172, ¶ 16.

6. Deliberating to discuss unemployment insurance. Wis. Stat. § 19.85(1)(ee).

7. Deliberating by the council on worker's compensation issues. Wis. Stat.§ 19.85(1)(eg).

8. Deliberating on issues of location of burial sites. Wis. Stat. § 19.85(1)(em).

9. "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 upon any person referred to in such histories or data, or involved in such problems or investigations." Wis. Stat. § 19.85(1)(f).

Applicants for a vacant position may be interviewed in private under this exemption, but the appointment should be made in open session. 74 Op.

Att'y Gen. 70 (1985.) Additionally, the Attorney General stresses that the information solicited and discussed must be likely to have a substantial adverse affect upon the reputation of any person referred to in such histories or data in order for the exception to apply. *Id.*

In order for the exemption to apply at least one member of the body must have actual knowledge of information which he or she reasonably believes would unduly damage reputations if divulged in open session and that there was a probability that such information would be divulged. 76 Op. Att'y Gen. 276, 277 (1987.).

This exemption does not permit a vote in closed session to appoint a person to a vacant school board position because the vote to appoint is not an integral part of such deliberations. The exemption applies only for the duration of the part of the discussions concerning financial, medical, social, personal histories, or specific disciplinary data that would likely substantially and adversely affect the reputation of the specific individual discussed. 74 Op. Att'y Gen. 70, 71 (1985.).

10. "Conferring 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." Wis. Stat. § 19.85(1)(g).

    This exemption applies only if legal counsel is actually rendering advice on strategy to adopt concernintg litigation in which the governmental body is or is likely to become involved. There is no clear-cut standard to determine whether a governmental body is "likely" to become involved in litigation. Members of the body should rely on the body's legal counsel for advice on whether litigation is sufficiently "likely" to authorize a closed session under this exemption. *Compliance Guide* 15 (2007.) Convening in closed session under this exception is a exemption from the notice specificity requirement. Informal Corresp. of Attorney General. 10/23/03.

11. Ethics Board. Consideration of requests for confidential written advice from the Government Accountability Board or from any county or city ethics board. Wis. Stat. § 19.85(1)(h).

12. Considering "any and all matters related to acts by business ... which, if discussed in public, could adversely affect the business, its employees or former employees." Wis. Stat. § 19.85(1)(i). See, *State ex rel. Herro v. Village of McFarland, et al.*, 2007 WI App 172, ¶ 16.

13. Considering specified financial information relating to the support of a non-profit corporation operating an ice rink owned by the state. Wis. Stat. § 19.85(1)(j).

VIII. WHAT PROCEDURES MUST BE FOLLOWED TO CONVENE IN CLOSED SESSION?

A. Every meeting subject to the Open Meetings Law must begin as an open meeting. Wis. Stat. §§ 19.83 and 19.85(1).

To convene in closed session a motion must be made and may not be adopted unless the chief presiding officer announces at the meeting the nature of the business to be considered at the closed session **and** the specific statutory exemption **or exemptions** which authorize the closed session.

1. Specific reference to the statutory exemption must be included in the notice of a closed meeting. 66 Op. Att'y Gen. 94 (1997.) The notice must include enough specific information to allow the public to determine whether the subject matter is authorized for closed session under s. 19.85(1). *Buswell*, 2007 WI 71, ¶ 37 n. 7; *Compliance Guide* 12 (2007)

2. A motion carried by a majority vote recorded in the open meeting is required to convene in closed session. If a motion is unanimous, there is no requirement to record the votes individually. *State ex rel. Schaeve*, 125 Wis. 2d at 51. If the vote is unanimous it should be specifically referenced in the minutes and the record must identify which members were present.

3. The legislature has empowered the governmental unit, not a citizen to close meetings. *State ex rel. Schaeve*, 125 Wis. 2d at 53.

4. No business may be taken up during the closed session except that relating to matters specifically referenced and noted on the record in the announcement for closed session. Wis. Stat. § 19.85(1).

B. Who can attend the closed meeting?

1. No member of a governmental body may be excluded from a meeting of that body; nor may a member be excluded from any meeting of a subunit unless the rules of the governmental body provide otherwise. Wis. Stat. § 19.89.

For example, a member of the governmental body may not be excluded when that member's family member or close personal friend has a claim or

lawsuit against the body and the body is meeting to confer with legal counsel regarding the legal strategy to be adopted with regard to the lawsuit. Another example is where a member of the official's family is the subject of a closed meeting under one of the authorized exemptions. Claire Silverman, *Closed Sessions Under Wisconsin's Open Meetings Law*, 97 The Municipality, 421, 424 (Nov. 2002.)

2. A member of a governmental body, however, should avoid all acknowledged or perceived conflicts of interest. It is strongly recommended that any member of a governmental body recuse him/herself from any meeting when an actual or perceived conflict of interest exists. If the member fails to recuse him/herself, another member of the body may have a duty to ask the conflicted member to recuse him/herself voluntarily or take procedural actions necessary to make sure that a breach of the public trust does not occur. See generally, City of Milwaukee Code of Ordinances, Code of Ethics, Ch. 303, CAO 9/12/02; Restatement of the Law of Trusts, Sec. 224, 184, and Sec. 183, Comment e.

3. The rights granted in Wis. Stat. § 19.89 do not require a body to allow an official to attend a closed session if the body is not a subunit of the official's parent body.

4. This section also does not grant to non-subunit members the right to participate in the activities and business of a closed meeting of the subunit even though they may have a right to attend. Natkins and Schneider, *Understanding Wisconsin's Open Meetings Law*, 103-04 (1994), citing informal opinion of Wisconsin Attorney General (July 25, 1989.)

5. Attendance at a closed session is limited to the members of the governmental body, necessary staff and other officers such as clerks and attorneys, and any other persons whom the governmental body determines are necessary to be present for conducting the business noticed. Claire Silverman, *Closed Sessions Under Wisconsin's Open Meetings Law*, 97 The Municipality, 421, 424 (Nov. 2002); *Compliance Guide* 20 (2007.)

C. What if the governmental body wants to meet in closed session and then reconvene in open session?

When a closed session is to be followed by an open session the public notice must include notification that the governmental body will reconvene in open session. Wis. Stat. § 19.85(2). If this language is not included in the public notice, the governmental body "could not reconvene into open session after closed session within 12 hours unless the notice of such intention to reconvene in open session

was given at the same time and in the same manner as the public notice of the meeting convened prior to the closed session." 67 Op. Att'y Gen. 117 (1978.) The notice need not specify the time it will reconvene in open session. *Compliance Guide* 16 (2007). If the closed meeting notice includes a time for reconvening in open session the government body must wait until that time to reconvene in open session. Id. The presiding official must open the door and announce to the public when it is reconvening in open session. Claybaugh Correspondence, February 16, 2006.

D. Can members of a governmental body vote during the closed meeting?

The Wisconsin Supreme Court ruled that Wis. Stat. § 14.90 (1959), which predated the current Open Meetings Law, authorized a governmental body to vote in closed session on matters that were the legitimate subject of deliberation in the closed session. *State ex rel. Cities S.O. Co.*, 21 Wis. 2d at 538. Subsequent to the passage of the current Open Meetings Law, the Court of Appeals commented on the advisability of voting in closed session under the current Open Meetings Law, indicating that the governmental body must vote in open session unless an exemption in Wis. Stat. § 19.85(1) expressly authorizes voting in closed session. *State ex rel. Schaeve*, 125 Wis. 2d at 53.

The Attorney General advises, taking into consideration the ambiguity of the above two referenced cases, that governmental bodies vote in open session unless the vote is "clearly an integral part of deliberations authorized to be conducted in closed sessions under Wis. Stat. § 19.85(1). Stated another way, a governmental body should vote in open session, unless doing so would compromise the need for the closed session." *Compliance Guide* 16 (2007.)

IX. WHO ENFORCES THE OPEN MEETINGS LAW?

A. Enforcement.

The Attorney General and the District Attorney have authority to enforce the Open Meetings Law. Wis. Stat. § 19.97(1). By intergovernmental agreement, in Milwaukee it is the Milwaukee Corporation Counsel rather than the District Attorney who has enforcement authority. Wis. Stat. § 59.42(2)(b)4.

If the Corporation Counsel (or District Attorney) refuses to commence an enforcement action or fails to act within 20 days of receiving a complaint, the individual who filed a complaint has the right to bring an action, in the name of the state, to enforce the Open Meeting Law. Wis. Stat. § 19.97(4). If successful, the court is authorized to award the person the actual and necessary costs of prosecution, including reasonable attorney fees.

Bringing a complaint on behalf of the individual, rather than on behalf of the state, is a fatal error and will cause the complaint to be dismissed. *Fabyan v. Achtenhagen*, 2002 WI App 214 ¶ 7.

An action to enforce the open meetings law must be commenced within two years after the cause of action accrues or the proceedings will be barred. *State ex rel. Leung v. City of Lake Geneva,* 2003 WI App 129, ¶ 6.

The Attorney General or District Attorney may commence an action separately or in conjunction with the action brought under Wis. Stat. § 19.96 and may ask the court for such other legal or equitable relief, including but not limited to mandamus, injunction or declaratory judgment, as may be appropriate in the circumstances. Wis. Stat. § 19.97(2).

Actions brought under the Open Meetings and Open Records Laws are exempt from the notice provisions of Wis. Stat. § 893.80(1). *Auchinlek v. Town of LaGrange*, 200 Wis. 2d 585 (1996).

B. What are the penalties for violating the open meetings law?

Any member of the governmental body who "knowingly" attends a meeting in violation of the Open Meetings Law is subject to a forfeiture between $25 and $300 for each violation. Wis. Stat. § 19.96. **This is a personal liability.**

The word "knowingly" has been defined by the Wisconsin Supreme Court as not only positive knowledge of the illegality of a meeting, but also the awareness of the high probability of the meeting's illegality or conscious avoidance or awareness of the illegality. *State v. Swanson*, 92 Wis. 2d 310, 319 (1979).

"A member of a governmental body who is charged with knowingly attending a meeting held in violation of the law may raise one of two defenses: (1) that the member made or voted in favor of a motion to prevent the violation or (2) that the member's votes on all relevant motions prior to violation were inconsistent with the cause of violation." Wis. Stat. § 19.96, *Compliance Guide* 17 2007.

A governmental body may not reimburse a member for a forfeiture incurred as a result of violation of the law, unless the enforcement action involved an issue regarding the constitutionality of the Open Meetings Law. 66 Op. Att'y Gen. 226 (1977). A governmental body may reimburse a member for his or her attorney fees in defending against an enforcement action and for any plaintiff's attorney fees that the member is ordered to pay. The City Attorney may represent City

officials in Open Meetings Law enforcement actions. 77 Op. Att'y Gen. 177, 180 (1988).

Any action taken at a meeting of a governmental body in violation of the Open Meetings Law is voidable. However, any judgment declaring such action void shall not be entered unless the court finds that the public's interest in enforcement of the Public Meetings Law outweighs the public interest in sustaining the validity of the action taken. Wis. Stat. § 19.97(3).

Only actions taken during closed sessions are voidable, actions taken in open session are not voidable. *State ex rel. Herro v. Village of McFarland, et al.*, 2007 WI App 172, ¶ 22.

X. WHO INTERPRETS THE OPEN MEETINGS LAW?

Any person may request advice from the Attorney General as to the applicability of this subchapter under any circumstances." Wis. Stat. § *19.98.*

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