

# Legal Issues Facing Wisconsin Technical Colleges

## Open Meetings And Public Records

November 5, 2009

Presented by:

Attorney Kirk D. Strang\*  
Davis & Kuelthau, s.c.  
10 E. Doty Street, Ste. 600  
Madison, WI 53703  
(608) 280-6203 - Direct Phone  
(608) 280-3043 - Direct Fax  
[kstrang@dkattorneys.com](mailto:kstrang@dkattorneys.com)

\*The presenter wishes to acknowledge the work of  
Attorney Erin E. Kastberg of the Madison Office in preparing these materials.



Copyright © Davis & Kuelthau, s.c. 2009  
All rights reserved

## ABOUT DAVIS & KUELTHAU, S.C.

Davis & Kuelthau, s.c. is a multidisciplinary law firm with offices in Milwaukee, Madison, Oshkosh, Green Bay, Sheboygan, and Brookfield. The firm's practice areas include: school law, labor and employment, municipal law, public finance, employee benefits, business and corporate, commercial and civil litigation, environmental law, real estate, banking and commercial finance, bankruptcy and creditor's rights law, antitrust, securities, taxation, immigration law, insurance defense, international law, construction, and trusts, estate planning and probate.

This program is provided by Davis & Kuelthau, s.c. with offices in Milwaukee, Madison, Oshkosh, Green Bay, Sheboygan, and Brookfield. The seminar and materials are intended to provide information only and **should not be construed as legal advice**. In addition, attendance at this program does not create an attorney-client relationship. Please consult one of the speakers or another Davis & Kuelthau, s.c. attorney if you have any questions concerning the information discussed in this seminar. Copyright © Davis & Kuelthau, s.c. 2009. All Rights Reserved.



***Kirk D. Strang***  
***Shareholder, Labor and Employment***

Mr. Strang chairs the firm's School Law Practice Group and is the Managing Shareholder of its Madison office.

Mr. Strang has extensive experience in school, labor and employment law issues, including labor relations, collective bargaining, family and medical leave, arbitration, employment policies and contract negotiations. He works with large and small private sector companies as well as public sector entities and practices at the agency, circuit court and appellate court levels.

**Areas of Experience**

- School Law
- Labor and Employment, including contracts, personnel policies, family and medical leave, collective bargaining, grievance arbitration, disability accommodation, wage and hour issues, unemployment and worker's compensation

**Professional and Community Involvement**

- State Bar of Wisconsin (Past Committees: Professionalism, Legislation, and Judicial Independence; Current Committee: Continuing Legal Education)
- State Bar of Wisconsin (Board of Directors, Labor & Employment Law Section 1998-2001)
- Wisconsin Academic Decathlon Board of Directors
- CESA Foundation Board of Directors
- Former President, Wisconsin School Attorneys Association
- General Counsel to the Wisconsin Technical College Boards Association

**Articles, Publications and Lectures**

- Contributing Author, "Public Sector Labor Law Relations in Wisconsin"
- Guest Lecturer, Wisconsin Association of School District Administrators, Wisconsin Association of School Superintendent's Assistants, and Association of Wisconsin School Administrators
- Chair, Annual State Bar of Wisconsin Employment Law Conference

**Education**

- J.D., University of Wisconsin-Madison, 1985
- B.A., University of Wisconsin-Madison, 1982

**Admitted to Practice**

- State of Wisconsin
- Wisconsin Supreme Court
- United States Court of Appeals for the Seventh Federal Circuit
- United States District Court for the Western District of Wisconsin

# THE WISCONSIN OPEN MEETINGS LAW

## I. POLICY AND CONSTRUCTION

### A. Policy

“In recognition of the fact that a representative government of the American type is dependent upon an informed electorate, it is declared to be the policy of this state that the public is entitled to the fullest and most complete information regarding the affairs of the government as is compatible with the conduct of governmental business.” Wis. Stat. § 19.81(1).

“To implement and ensure the public policy herein expressed, all meetings of all state and local governmental bodies shall be publicly held in places reasonably accessible to members of the public and shall be open to all citizens at all times unless otherwise expressly provided by law.” Wis. Stat. § 19.81(2). (emphasis added).

### B. Construction

The Open Meetings Law is to be liberally construed (any doubts should be resolved in favor of openness). Wis. Stat. § 19.81(4).

## II. DEFINITIONS

### A. Governmental Body

“A state or local agency, board, commission, committee, council, department or public body corporate and politic created by constitution, statute, ordinance, rule, or order; a governmental or quasi-governmental corporation . . .; a local exposition district under subch. II of ch. 229; a long-term care district under § 46.2895; or a formally constituted subunit of any of the foregoing. . . .” Wis. Stat. § 19.82(1).

1. What authority created the body?
2. What means were used to create the body?

A “governmental body” does not include any body or committee or subunit of such body which is formed for or meeting for the purpose of collective bargaining. Wis. Stat. § 19.82(1).

3. Where a municipal common council hears a labor dispute/grievance under a procedure established under a signed contract, the council is engaged in collective bargaining and, is therefore for that purpose not a “governmental body.” 67 Op. Att’y Gen. 276 (1978).

B. Meeting

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

1. There must be a purpose to engage in governmental business be it discussion, decision or information gathering. *State ex rel. Newspapers, Inc. v. Showers*, 135 Wis. 2d 77 (1987).
2. The number of members present must be sufficient to determine the present body’s course of action regarding the proposal discussed. *Id.*
  - a. “If one-half or more of the members of a governmental body are present, the meeting is rebuttably presumed to be for the purpose of exercising the responsibilities, authority, power or duties delegated to or vested in the body.” Wis. Stat. § 19.82(2).
  - b. Negative Quorum. A gathering of less than one-half of the members of a governmental body may be a meeting if that group possesses the power to defeat action taken by the governmental body. *Showers, supra*.
  - c. Walking Quorum. Even though a limited number of members gathered together may not be able to determine the outcome of a matter, the gathering may nonetheless constitute a “meeting” under the Open Meetings Law if it is one of a series of meetings through which ultimately agreement as to a particular matter is reached. *Showers, supra*.

The term “meeting” does not include social or chance gatherings or conferences which are not intended to avoid the Open Meetings Law. Wis. Stat. § 19.82(2).

3. Members must convene for there to be a meeting, which includes both face-to-face gatherings and situations where members are able to effectively communicate with each other and exercise the

body's authority, even if the members are not physically present together.

C. Open Session

"A meeting which 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).

1. Room size: Rooms must be reasonably calculated to be large enough to accommodate all citizens who wish to attend the meetings. *State ex rel. Badkev v. Greendale Village Bd.*, 173 Wis.2d 553 (1993).
2. Location: Meetings should be held in places within the geographical area they serve and should be held on premises that are open and accessible to the public. The body should take special precautions with meetings involving travel.
3. Access for persons with disabilities: Meetings must be held in buildings and rooms that permit persons with functional limitations to enter, circulate and leave the facility without assistance. Wis. Stat. § 19.82(3); 69 Op. Att'y Gen. 251 (1980).

### III. NOTICE REQUIREMENTS

- A. Every meeting of a governmental body must be preceded by public notice and initially convened in open session. Wis. Stat. § 19.83.

Exemption from notice requirements: Formally constituted subunits may meet without notice during a meeting of the parent body, during a recess of the parent body, or immediately after a meeting of the parent body, for the purpose of discussing or acting on a matter which was the subject of the parent body's meeting, and where the presiding officer of the parent body publicly announces the time, place, and subject matter of the subunit's meeting in advance, at the parent body's meeting. Wis. Stat. § 19.84(6).

- B. Public notice of all meetings (open and closed) must be noticed in the following manner:

1. As required by any other statute; and where a required Class II notice of a public hearing Wis. Stat. § 62.23(7)(d) before a committee of the Milwaukee Common Council was not provided, the committee's approval of a zoning change was held to be void. *Oliveira v. City of Milwaukee*, No. 98-2474 (Ct. App. 2000).

2. To the public; to those news media who have filed a written request for such notice; and to the official newspaper, or if none exists, to the news media most likely to give notice in the area.

C. Methods Of Providing Notice

1. Direct Public Notice. Post in one or more public places or through sufficient newspaper publications.
2. Notice To The Media. Written or verbal notice to members of the news media.

D. Notice Contents

1. Time
2. Date
3. Place
4. Subject Matter
  - a. The notice must be in a form that is reasonably likely to apprise members of the public and the news media of the subject matter. For example, the Village Board for the Village of West Milwaukee was not required to provide notice of the names of the candidates for Commission vacancies on the Civil Service and Zoning Board of Appeals even if the Village Board knew that relatives of trustees were candidates for the vacancies. *State ex rel. Blonien v. Carl*, No. 98-0911 (Ct. App. 1999) (unpublished decision).
  - b. Rule of Thumb for Drafting Meeting Notices: Would a citizen interested in a specific subject be aware from the meeting notice that the subject might be discussed? *Wisconsin Open Meetings Law: A Compliance Guide*, Department of Justice (2009).
5. Matters intended for consideration at a closed session.

E. Notice Time Lines

1. Generally at least 24 hours prior to the commencement of the meeting. When calculating the 24 hour notice period, Wis. Stat. §

990.001 (4)(a) requires that Sundays and legal holidays shall be excluded.

2. In an emergency (where “good cause” is shown) at least 2 hours prior to the commencement of the meeting.

F. Public Comment

1997 Wisconsin Act 123 amended the Open Meetings Law to permit public notice of a meeting of a governmental body to provide for a period of public comment, during which the body may receive information from the public. Wis. Stat. § 19.84(2). During a period of public comment, a governmental body may discuss any matter raised by the public. Wis. Stat. § 19.83(4).

1. The amendments do not require governmental bodies to designate a public comment period.
2. The amendments authorize only discussion and not other action by the governmental body. A governmental body should refrain from deliberating or taking action on items raised during public comment sessions and, if necessary, should place such matters on future agendas.
3. Governmental body members may not bring up items not specifically designated on the agenda under a period of public comment. This may be interpreted as an attempt to circumvent the notice requirements of the Open Meetings Law.

G. Separate Notice

Separate notice of each meeting must be given to the public at a time and date reasonably proximate to the time and date of the meeting. Wis. Stat. § 19.84(4).

H. Sub-Units Of A Parent Body

Sub-units of a parent body, such as a committee, may meet during the meeting of the parent body during recess, or directly after such meeting to discuss or act on matters that were the subject of the meeting of the parent body without public notice required under Wis. Stat. § 19.84. However, the presiding officer of the parent body must announce the time, place and subject matter of the committee meeting in advance at the meeting of the parent body. Wis. Stat. § 19.85(6).

I. Compliance with Notice

A governmental body is free to discuss any aspect of any subject identified in the public notice of the meeting, as well as issues reasonably related to that subject, but may not address any topics that are not reasonably related to the subject identified in the meeting notice. *State of Wisconsin ex rel. Brian L. Buswell v. Tomah Area School District*, 2007 WI 71, ¶ 34. (See VII. B). A body need not follow the agenda in the order listed on the meeting notice unless a particular agenda item has been noticed for a specific time. Nor is a body required to address every item contained in the meeting notice.

J. Dual Meeting Notices

Where a quorum of one governmental body regularly attends the meetings of another governmental body, and one or more of the members of the quorum is not also a member of the second governmental body, separate meeting notice must be given.

**IV. CLOSED SESSION**

A. The Right To Close A Meeting Of A Governmental Body

1. Any meeting of a governmental body, upon motion duly made and carried, may be convened in closed session under one or more of the specific exemptions of Wis. Stat. § 19.85, Wis. Stat. § 19.85(1).
2. Only the elected or presiding officials may exercise the right to convene into closed session; the public does not have the right or power to close a meeting.
3. Even under Wis. Stat. § 19.85(1)(b), an employee cannot close a meeting.
  - a. All meetings are open, unless the governmental body decides to invoke an exemption to the Open Meetings Law.
  - b. If the governmental body invokes an exemption to the Open Meetings Law, then and only then, does an employee have the right to:
    - i. Specific, individual notice of the meeting; and
    - ii. The right to require that the governmental body conduct the meeting as an open session.

- c. Not all disciplinary meetings of a governmental body require notice to the employee, only those meetings at which evidence is presented or a final decision is made.

Actual notice to an employee and the right to demand that the meeting be held in open session is only required if there is an “evidentiary hearing” (the taking of testimony and the receipt of evidence) or final action is taken in closed session. *Epping v. City of Neillsville Common Council*, 218 Wis. 2d 516 (Ct. App. 1998).

## B. Requirements

1. The chief presiding officer must announce to all present the intention of going into a closed session. Wis. Stat. § 19.85(1).
2. The chief presiding officer must state the specific exemption or exemptions, by number, which allow such a closed meeting.
3. A motion, with a second and roll call vote as to closing the session, must be recorded by the custodian of records.
4. Majority vote required.
5. If notice has been given of the intent to reconvene into open session in the announcement for the meeting at which the closed session is held, the chief presiding officer should also announce the estimated time at which the reconvened open session will commence.

## C. Exemptions To The Open Meetings Law

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

1. Judicial or Quasi-Judicial Matters. Deliberations concerning a case which is the subject of any judicial or quasi-judicial trial or hearing before the governmental body. Wis. Stat. § 19.85(1)(a).
2. Discharge/Discipline. Considering dismissal, demotion or discipline of a public employee provided the public employee is given actual notice of the evidentiary hearing prior to the final action being taken and the notice contains a statement that the person has the right to demand that the evidentiary hearing or meeting be held in open session. Wis. Stat. § 19.85(1)(b).

3. Compensation and Evaluation. Considering the employment, promotion, compensation or performance evaluation of a public employee. The discussion must pertain to a specific employee, as contrasted with general policies which do not involve specifically identified employees. Wis. Stat. § 19.85(1)(c).
4. Crime Prevention. Considering specific applications of probation or parole or considering strategy for crime detection or prevention. Wis. Stat. § 19.85(1)(d).
5. Competitive or Bargaining Reasons. Deliberating or negotiating the purchase of public properties, the investing of public funds, or conducting other specific public business, whenever competitive or bargaining reasons require a closed session. Wis. Stat. § 19.85(1)(e).
  - a. The burden is on the governmental body to show that competitive or bargaining interests require closure. *State ex rel. Citizens for Resp. Dev. v. City of Milton*, 2007 WI App. 114.
  - b. Once a tentative agreement has been entered into with a bargaining unit, the governmental body must conduct its vote as well as its deliberations leading up to the vote on final ratification in open session. 81 Op. Att’y Gen. 139 (1994).
6. Personnel Matters. 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 Wis. Stat. § 19.85(1)(b) applies which, if discussed in public, would be likely to have a substantial adverse effect upon the reputation of any person referred to in such histories or data, or involved in such problems or investigations. Wis. Stat. § 19.85(1)(f).
7. Conferring With Legal Counsel. 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).

NOTE: Once the governmental body has convened in closed session, it may discuss or consider only those subjects specifically allowed by the statutory exemptions and is limited to matters that the presiding

officer has announced would be the subject of the closed session. Wis. Stat. § 19.85 (1).

D. Reconvening Into Open Session

No governmental body may commence a meeting, subsequently convene in closed session and thereafter reconvene again in open session within 12 hours after completion of a closed session, unless public notice of such subsequent 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. Wis. Stat. § 19.85(2).

E. Closed Session Minutes

1. The Open Meetings Law provides that minutes of all meetings (open and closed) must be prepared. Wis. Stat. § 19.88(3).
2. In closed session, it is common practice to be specific; however, there is no statutory requirement that the minutes be specific.
3. All actions must be preserved, recorded and open to public inspection.

F. Taking Action In Closed Session

1. Governmental bodies can take final action by voting in closed session. Motions and roll call votes of each closed session must be recorded and preserved and open to the public inspection to the extent prescribed by the Public Records Law. The record must show all motions made, who initiated and seconded the motion, how each member voted and all votes taken by the body.
2. Guidelines for determining the appropriateness of voting in closed session:
  - a. The governmental body must have convened itself into a proper closed session.
  - b. The same reason for convening itself into closed session must apply to the need to vote in closed session, i.e., to keep the action in confidence.
  - c. Mere convenience in voting in closed session is impermissible. The better practice is to notice a meeting to convene in open session, adjourn to closed session and

then reconvene into open session for action where voting in open session is preferred.

## V. MISCELLANEOUS PROVISIONS

### A. Exclusion Of A Member Of A Governmental Body

Attendance at a closed session is limited to the body, necessary staff and other officers, such as clerk and attorney, and other persons whose presence is necessary for the business at hand. If the meeting is of a subunit such as a committee, then the members of the parent body must be allowed in the closed session, unless rules of the parent body provide otherwise. Wis. Stat. § 19.89.

### B. Secret Ballots, Votes And Records

#### 1. Secret ballots.

Unless the statutes specifically authorize, no secret ballot may be utilized to determine any election or other decision, except the election of a body's own officers. Wis. Stat. § 19.88(1).

#### 2. Roll-call votes.

If a member requests that the vote of each member be recorded, a voice vote or show of hands is not sufficient unless the vote is unanimous and the minutes reflect who is present for the vote. I-95-89 (November 13, 1989).

#### 3. Record-keeping.

The open meetings law requires a governmental body to create and preserve a record of all motions and roll-call votes at its meetings. Wis. Stat. § 19.88(3). This requirement applies to both open and closed sessions. Written minutes are the most common method used to comply with the requirement, but they are not the only permissible method. Other methods, such as tape recording, are also permitted.

Wis. Stat. § 19.88(3) does not indicate how detailed the record of motions and votes should be. However, in light of the general legislative policy of the open meetings law that "the public is entitled to the fullest and most complete information regarding the affairs of government as is compatible with the conduct of governmental business," Wis. Stat. § 19.81(1), it seems clear that a

governmental body's records should provide the public with a reasonably intelligible description of the essential substantive elements of every motion made, who initiated and seconded the motion, the outcome of any vote on the motion, and, if a roll-call vote, how each member voted.

*Wisconsin Open Meetings Law: A Compliance Guide*, Department of Justice (2009).

C. Use Of Equipment In Open Session

The governmental body must make reasonable effort to accommodate any person desiring to record, film or photograph the meeting. Wis. Stat. § 19.90. This requirement applies only to open session.

## VI. ENFORCEMENT AND PENALTIES

A. Enforcement

Violations of the Open Meetings Law may be prosecuted by:

1. The Attorney General. Wis. Stat. § 19.97(1);
2. The District Attorney upon the verified complaint of any person, Wis. Stat. § 19.97(1); or
3. The individual who filed the complaint if the District Attorney fails to commence an action within 20 days after receiving a complaint. Wis. Stat. § 19.97(4).

B. Penalties

Members of a governmental body who knowingly attend meetings in violation of the Open Meetings Law or otherwise violate the Open Meetings Law by some act or omission are subject to a forfeiture of between \$25 and \$300 for each violation. This is a personal liability not reimbursable by the municipality or state agency. Wis. Stat. § 19.96.

1. "Knowingly includes positive knowledge and an awareness of the high probability of the existence of a violation. *State v. Swanson*, 92 Wis.2d 310 (1979).
2. Even if a "knowing" violation has occurred, a private individual who prevails in an open meetings action may be awarded attorneys'

fees and costs in order to deter future violations unless “special circumstances” exist.

3. No definition of “special circumstances” exists. However, a good faith mistake on the part of government does not amount to “special circumstances” and will not necessarily avoid an award of fees and costs.
4. No member is liable for attendance at an unlawful meeting if that member makes or votes in favor of a motion to prevent the violation from occurring. Wis. Stat. § 19.96.

C. Actions May Be Voided

Any action taken at a meeting held in violation of the Open Meetings Law is voidable if the public interest and enforcing provisions of the law is greater than the public interest in upholding the action. Wis. Stat. § 19.97(3).

## VII. CASE STUDIES INVOLVING THE OPEN MEETINGS LAW

A. *Sands v. Whitnall School District*, 2008 WI 89.

1. Factual Background.

Sands was hired by the Whitnall School District as a supervisor/facilitator of the District’s Gifted and Talented Education Program, and signed a contract commencing July 1, 2001, and ending June 30, 2002. The District alleged that Sands’ job performance was unsatisfactory and that efforts to improve that performance were unsuccessful. Consequently, the School Board met in closed session on April 29, 2002, and May 13, 2002, and discussed Sands’ employment with the District. The Board subsequently met in open session on May 13, 2002, and voted not to offer Sands a contract of employment for the 2002-2003 school year.

On April 24, 2004, Sands filed suit against the District, alleging that the District failed to comply with Wis. Stat. § 118.24, which requires that an “administrator” receive five months’ preliminary notice of the District’s consideration of nonrenewal and four months’ notice of final nonrenewal. The District disputed the claim that Sands was an “administrator” within the meaning of the statute.

However, during the discovery phase of the case, the District refused to answer all or part of three interrogatories, which sought

information concerning the content of the two closed sessions that had been held by the Board of Education. The Circuit Court granted Sands' motion to compel discovery and the District appealed this ruling to the Court of Appeals.

The Court of Appeals concluded that the closed sessions were held in compliance with state statutes and that, based upon the plain language of the statute, the substance of what was discussed at the closed meetings is not discoverable. The Court noted that the statute does not provide for exceptions to the non-disclosure principle that applies to the content of closed session discussions. The Court reasoned that, if it were to conclude that disclosure of the substance of the closed session is permitted, it would render the statute meaningless by undermining the need for closed sessions in the first place. In this regard, the Court noted that the mere filing of a lawsuit cannot open the door to what was once closed. The Court also rejected Sands' contention that separate closed session provisions concerning evidentiary hearings should have been followed and that, consequently, she should be given access to the closed session information, holding that if an evidentiary hearing is not held, those provisions do not apply.

As a result, the Court held that the privilege of non-disclosure is implicit in state statutes governing a closed session of a school board and, accordingly, discussions that occurred in closed session are not discoverable.

2. The Wisconsin Supreme Court Decision.

The Court began its analysis by addressing the broad access to information accorded by Wisconsin discovery statutes and the contrasting narrow nature of the privileges that may be claimed in the face of discovery requests. The Supreme Court disagreed with the Court of Appeals' conclusion that the privilege of nondisclosure is implicit within Wis. Stat. § 19.85(1)(c). The Court noted that it found no language in the Wisconsin Open Meetings Laws to indicate that the legislature intended to create a broad privilege preventing discovery of communications occurring in closed sessions of governmental bodies, whereas the Wisconsin discovery statutes explicitly provide for numerous other privileges. Furthermore, the language of Wis. Stat. § 19.85 does not describe the contents of closed meetings as either secret or exempt from discovery. Furthermore, the text of Wis. Stat. § 19.85, allowing closed meetings in some circumstances is permissive, not mandatory.

The Wisconsin Supreme Court concluded that allowing limited exceptions to the open meetings statute does not equate to creating an implicit evidentiary privilege against discovery requests. Wis. Stat. § 19.85 provides only that some meetings may be closed, not that their contents are privileged against discovery requests under Wis. Stat. § 804.01. According to the Court, “‘closed meeting’ is not synonymous with ‘a meeting that, by definition, entails a privilege exempting its contents from discovery.’” Considering the general presumptions of openness and access underlying both our discovery and open meetings statutes, the Court reasoned that there is no compelling justification for denying a litigant’s rights to discovery regarding the substance of closed session discussions pertaining to that litigant. Therefore, Wis. Stat. § 19.85 does not create a privilege shielding the contents of closed meetings from discovery requests.

Although the Wisconsin Supreme Court concluded that the closed session exemption to the Open Meetings Laws does not create an evidentiary privilege which exempts the District from discovery compliance, the Court stated that its decision is not meant to undermine the ability of government bodies to conduct certain meetings in closed session where statutorily authorized. For example, Wis. Stat. § 804.01(3) provides specific protections in the form of protective orders in response to annoying, embarrassing, oppressive, unduly burdensome or unduly expensive discovery requests. In addition to issuing protective orders, courts may consider motions to seal the record, or may conduct in camera proceedings to ensure that the information requested is necessary to the litigant and does not exceed the scope of allowable discovery.

B. *State of Wisconsin ex rel. Brian L. Buswell v. Tomah Area School District*, 2007 WI 71.

The Wisconsin Supreme Court established a standard for determining how specific meeting notices must be; however, that standard is both flexible and situational.

1. Factual Background.

In June 2004, the Tomah Board of Education (“Board”) held two meetings regarding a new master contract with the Tomah Education Association (“TEA”). Prior to the June meetings, some community members expressed an interest in how the Board would hire athletic coaches and whether teachers would be given preference for those positions.

On June 1, 2004, the Board held a special meeting in closed session to discuss the new TEA master contract. The tentative agreement for the new contract included a hiring procedure for coaches that gave preference to TEA members over other applicants.

The public meeting notice for the meeting's agenda stated:

Contemplated closed session for consideration and/or action concerning employment/negotiations with District personnel pursuant to Wis. Stat. § 19.85(1)(c).

During the June 1 closed session, the Board did not direct its negotiations committee to seek further adjustments to the contract and indicated that it would consider ratification in a subsequent open session.

On June 15, 2004, the Board held a regular meeting preceded by a public notice stating, in relevant part: "New Business — Consideration and/or Action on the Following: TEA Employee Contract Approval." At that time, the Board ratified the TEA master contract in open session.

Following the June 15 meeting, Brian Buswell filed a complaint alleging that the June 1 meeting notice was not "reasonably likely to apprise members of the public" of the subject matter of the meeting. In addition, Buswell claimed that the June 15 meeting notice was deficient because it did not state that the Board would act upon the new hiring policy for coaches.

2. The Wisconsin Supreme Court decision.

The Supreme Court's majority opinion first overruled *State ex rel. H.D. Enterprise, II, LLC v. City of Stoughton*, 230 Wis. 2d 480, 602 N.W. 2d 72 (Ct. App. 1999). In that case, a City Council agenda item regarding the granting of a liquor license was found to provide sufficient public notice, because it used the word "licenses" under the agenda heading of "new business." The Supreme Court reasoned that, because it is declared policy of the state that the public is entitled to the fullest and most complete information regarding the affairs of government, a public meeting notice that only informs the public of the general topics to be discussed is not always "reasonably likely to apprise members of the public."

The Supreme Court replaced the *H. D. Enterprise* rule with what it referred to as a "reasonableness standard." This standard requires that a public entity account for the circumstances surrounding a particular issue to determine how much detail a notice must

include. The Court indicated that, under this standard, factors such as the following need to be considered: (1) the time and effort that would be needed to provide more detailed notice and whether efficient operations of the entity would be compromised; (2) whether the subject is of particular public interest; and (3) whether the matter involves routine or novel issues, with routine matters requiring less specificity because the public can anticipate the matter to be addressed.

The Court then applied these three factors to the case before it, and determined that the notice for the June 1 closed session was not specific enough, but also concluded that the June 15 notice for the open meeting was sufficiently specific.

3. Considerations and questions arising under *Tomah*.

a. Questions raised by *Tomah*.

- (1) The Court gave remarkably little guidance on how to apply its *Tomah* standard in other cases. Further, the three factors identified by the Court were not derived from its own precedent and, as a result, prior case law is not available to provide direct assistance in applying these factors.
- (2) The Court's discussion on how to apply the factors identified is indefinite. How will an entity's awareness of items of particular interest or uniqueness be evaluated?
- (3) The Court's application of the three factors to the facts in *Tomah* does not do much to clarify how this standard will be applied in the future. The Court suggests that the public was particularly interested in the selection policy for coaches. Assuming the Court's understanding of the public's level of interest was accurate, and assuming it would not have interfered with the District's operation to place the topic of the coaching contracts on the agenda, why then did the Court conclude that separate notice of the coaching issue was not required?

b. Considerations for public entities in applying the *Tomah* standard.

- (1) Open and closed sessions covered. This case applies to open as well as closed sessions and, consequently, broad open meeting agenda items that

have been commonplace in the past will likely have to be reviewed to ensure that the public has adequate notice of what is likely to be discussed. For example the Attorney General previously found a notice provision that stated “report of the Village Administrator” to be deficient. The Court’s decision suggests that it may also find such notice insufficient, particularly where an administrator plans on discussing items that are unique or that are topics of public interest.

- (2) Boilerplate rejected. Closed session agendas will need to at least cite the correct statutory subsection for a closed session and provide specific information regarding the subject to be discussed in the closed session. Making a boilerplate reference to the statutory language contained in the subsection of the statute that is cited will generally not be sufficient.
- (3) Content of closed session notice. Closed session agendas generally must provide enough information so that a member of the public will understand why the matter is being discussed in closed session and why it properly falls under the statutory provision that has been cited. At the same time, closed session agendas cannot provide so much information that the confidential purpose of having a closed session is undermined.
- (4) Burdens/governmental efficiency factor likely minimal. The Court’s identification of the burdens associated with providing more detailed notice is a factor that should be relied upon with caution. First, it is not clear that reviewing courts will evaluate the burdens of providing more detailed notice in a manner that corresponds to that of school officials (indeed, in the context of public records cases, the courts have previously observed that responding to records requests is itself an important function of local government, and will likely see the formulation of meeting notices as similarly important). Second, this factor potentially has a double-edge, because when a public body cannot show that definable burdens or impositions on government efficiency are associated with providing notice on a particular matter, this may bolster claims that notice was not specific enough. Therefore, public bodies should assume that

assembling meeting notices is an important, team effort that requires active participation by directors and administrators, and specific schedules for providing input.

- (5) Factors to consider. Although the Court does not define how one determines whether a subject is a routine matter or, alternatively, a matter of particular public interest, we can identify factors and inquiries that help to apply this standard. They might include:
- (a) Does the subject routinely appear as part of every board agenda or is it a special policy issue to be debated and resolved? It seems logical to conclude that ministerial, routine matters may not be “matters of particular public interest” to the same extent as policy issues confronting the board.
  - (b) Is the subject one that has had substantial media coverage?
  - (c) Is the issue a matter that has resulted in an appreciable level of communication from the public to administrators or the board?
  - (d) Does the matter involve significant expenditures?
  - (e) Is the issue one that has been presented by groups that have or are likely to have substantial constituencies?
  - (f) Is the board considering making changes in existing policy that have a relatively broad impact on students, or school district constituents?
  - (g) Is it possible that final action might be taken on the matter at the meeting in question?
  - (h) Does the board enjoy broad discretion on the issue under consideration?
  - (i) Can the board reasonably anticipate the course of the board’s discussion and action? The Court’s opinion must be considered in light of already-established principles under the

Open Meetings Law, such as the prohibition against walking quorums, negative quorums, etc. As a result, existing prohibitions against communications outside of public meetings will, in at least some cases, make more specific notice difficult to provide, because board members are expected to have their debates at the meeting itself, after public notice of the meeting already has been provided.

- (j) Can members of the public understand how an issue under consideration might relate to them by reading the notice for the meeting? The corollary to this point is that notices that identify possible board action are, by their nature, generally more specific and more illuminating to members of the public that read the meeting notice.

NOTE: These factors and inquiries cannot be considered in isolation and certainly do not capture all of the issues that may arise in evaluating the sufficiency of public notice, but can help to determine whether matters are routine or, alternatively, matters of particular public interest.

C. *State of Wisconsin v. Beaver Dam Area Development Corporation*, 2008 WI 90.

1. Factual Background.

The bylaws of the Beaver Dam Area Development Corporation (BDADC) stated that its inclusive purpose was to engage in economic development and business retention within the corporate limits and lands that could become part of the corporate limits of the City of Beaver Dam. The officers of BDADC were private individuals who were elected to the BDADC Board of Directors. The City of Beaver Dam did not direct the election of Board members. In April, 1997, and January, 2004, BDADC and the City of Beaver Dam entered into corporation agreements whereby the City of Beaver Dam agreed to provide BDADC with office space, clerical support, copy and fax machine use, telephone use and postage. The agreements also provided that the City of Beaver Dam representatives may examine BDADC's accounting records and finances and that the City of Beaver Dam may make funds available to BDADC for economic development.

In late 2004, the state filed a complaint seeking declaratory judgment that BDADC is a quasi-governmental corporation and therefore subject to the state's Open Meetings Law and Public Records Laws. The complaint also alleged that BDADC convened on various occasions in violation of the Open Meetings Law. The Circuit Court determined that the BDADC is not a quasi-governmental corporation and entered judgment in favor of BDADC, dismissing the state's complaint. The state appealed.

2. The Wisconsin Supreme Court Decision.

The central issue before the Supreme Court of Wisconsin was whether BDADC is a quasi-governmental corporation within the meaning of Wisconsin's Open Meetings and Public Records statutes. The Court considered statutory language, principles of statutory construction, the history of Wisconsin's Open Meetings and Public Records Law and interpretations of the Attorney General.

The Court determined that quasi-governmental corporations are not limited to corporations created by acts of the government. Rather, a quasi-governmental corporation is a corporation that, to a sufficient degree, resembles a governmental corporation.

The Court stated that superficial resemblance to governmental corporations in a single respect is insufficient for an entity to be subject to Open Meetings and Public Records Laws. Rather, a determination that an entity resembles a governmental corporation to the point that it is subject to state Open Meetings and Public Records Laws depends on the totality of the circumstances, and requires a case by case analysis.

The Wisconsin Supreme Court determined that BDADC is a quasi-governmental corporation for the following reasons:

1. Other than interest income, BDADC's sole source of funds is public tax dollars.
2. BDADC serves a public function and has no purely private function.
3. BDADC presents to the public as a part of the City of Beaver Dam.
4. The City of Beaver Dam maintains a degree of control over BDADC.

5. The City of Beaver Dam has access to BDADC's financial information and management plan.

Having determined that BDADC is a quasi-governmental corporation does not mean that all of its meetings are automatically open or that all of its records are immediately disclosed to the public. Exemptions to open session requirements under Wis. Stat. §19.85 can serve as a basis for denying public access to a record. Aside from the express statutory provisions limiting disclosure under the Public Records Law, Wisconsin courts have recognized other limitations to disclosure such as:

1. Harm to the public from disclosure.
2. Interference with ongoing proceedings.
3. Harm that could result from premature record release.
4. Premature disclosure of records that could undermine an important public policy objective in the context of economic development.

## **VIII. INTERPRETATION BY THE ATTORNEY GENERAL**

### **A. Statute**

Any person may request advice from the Attorney General as to the interpretation/application of the Open Meetings Law. Wis. Stat. § 19.98.

### **B. Attorney General Opinions**

1. Notice of Open Meetings: City of Lake Geneva, Letter to Charles Rude (March 5, 2004).

- a. Overview and Analysis.

The City of Lake Geneva asked the Attorney General to consider a practice that it observed in its open meeting notices, where city council agenda items were entitled, e.g., "staff comments," "alderman comments," and "mayor comments." These individuals were given an opportunity to comment about forthcoming events and other informational matters under these agenda provisions. The City was careful to take no action, have no "action discussion," or vote of any kind on matters that were raised under these

headings. The Attorney General was asked whether this practice violates the open meeting law.

The Attorney General noted that every public notice of a meeting must provide the “subject matter of the meeting ... in such form as is reasonably likely to apprise members of the public and the news media thereof.” The Attorney General indicated that, because the most complete information “compatible with the conduct of governmental business” is required, “the notice should be specific.” Accordingly, the Attorney General reasoned that when a member of a governmental body knows in advance of the time a public meeting notice is given that a matter come before the body or when the chief presiding officer of the governmental body is aware of such matters, those matters must be included in the meeting notice.

Consequently, when descriptions of the subject matter of a meeting are given through a public meeting notice, the public is entitled to “the best notice that can be given at the time the notice is prepared.” While noting that a subject matter designation such as “licenses” had been interpreted to be sufficient notice to the public that a liquor license would be considered, general subject matter designations such as “miscellaneous business,” “agenda revisions,” or “such other matters as are authorized by law” would not be acceptable. The Attorney General concluded that “it is my opinion that the practice you describe is, at best, at the outer edge of lawful practice, and may well cross the line to become unlawful.”

b. Practical Considerations

(1) The Attorney General’s Opinion places a premium on advance board member communications.

(a) For formulating public meeting notices.

(b) For public bodies to manage meetings where individual board members may insist that particular issues be discussed.

NOTE: District administrators may wish to consider contacting board members before board meetings to determine if they are aware of specific matters that should be added to the

agenda (e.g., e-mail). However, bear in mind that this procedure should allow for any final meeting notice to be completed and posted no less than 24 hours prior to the meeting (2 hours for any emergency additions to the agenda) and, in addition, comply with any established board procedures in formulating meeting notices (e.g., board chair determination of what is to be included in particular meeting agendas).

- (2) School districts that make an effort to provide meeting notices to the local newspaper may need to take greater care to advise the newspaper that the meeting agenda may be supplemented after the notice is published in order to comply with the open meetings law. Schools may even consider footnoting the meeting notice that appears in the newspaper (some notices must be submitted a substantial period of time before the meeting itself in order to meet the newspaper's publishing deadlines) and specifically state that the meeting notice may be supplemented. However, care should be taken with the specific language used:

- (a) A school may wish to state that:

This notice may be supplemented with additions to the agenda *that come to the attention of the board prior to the meeting*. A final agenda will be posted and provided to the media no later than 24 hours prior to the meeting or no later than 2 hours prior to the meeting in the event of an emergency. (Emphasis supplied for discussion purposes only).

The benefit of this language is that it assures the media that any supplementation will be only with matters that come to the attention of the board after the original notice was formulated. However, this places a burden on board members to communicate effectively before the first notice is prepared, because the media and members of the public may react negatively if they learn that board members

were aware of a particular agenda item, but simply neglected to include it in the agenda that was published.

- (b) A less demanding and more practical version of this language might be:

This meeting notice may be supplemented in order to comply with Wisconsin's open meetings law. If this notice is supplemented, the final notice will be posted and provided to the media no later than 24 hours prior to the meeting or no later than 2 hours prior to the meeting, in the event of an emergency.

- (3) Public comments sections of meetings do not provide flexibility under the Attorney General's opinion. Board members are also electors and citizens, and some might ask whether this means that a board member can simply raise issues during the "public comment" section of a board meeting (and, thereby, avoid the reasoning of the Attorney General's opinion).

However, the Attorney General specifically noted that the public comments section of meetings is authorized by statute to allow governmental bodies to hear from the constituents they serve, but also noted that these statutes make such an allowance:

...because citizens do not have access to the body's process for creating meeting notices. The members of governmental bodies and the officials of the governmental unit are not so limited. They have regular opportunities to suggest meeting subjects to the presiding officer responsible for establishing the agenda.

The Attorney General concluded that allowing members of the body and governmental officials to present nonspecific "informational items" is "even more troublesome," because information "by definition relates to a particular subject matter." Therefore, she

concluded that there is “no good reason” why a board cannot include specific agenda items that are known to board members at the time the agenda is formulated.

2. Administrative Team Meetings and Open Meetings Law:  
*Informal Opinion to Joe Tylka* (June 8, 2005).

a. Overview and Analysis.

The Attorney General was also asked recently to determine whether “certain meetings between the Superintendent ... and the District’s Management Team” are covered by Wisconsin’s Open Meetings Law.

The District’s school board had directed the superintendent to formulate recommendations to address the District’s budget deficit. According to the requestor, the superintendent held two meetings with the management team as a result of that directive, although it was conceded that the management team regularly meets on a bi-weekly basis for other purposes.

The Attorney General indicated that two factors would have to be present to conclude that the management team’s meetings qualified as meetings of a “governmental body” under the Open Meetings Law: (1) the group must constitute a collective body, rather than a mere assemblage of individuals, and (2) there must be a directive creating the group in question.

The Attorney General noted that the superintendent viewed the management team’s meetings as meetings of “administrative staff,” rather than meetings of a separate governmental body that has been vested with identifiable governmental powers and duties. However, she also observed that the management team engaged in an advisory process that resulted in a written memorandum, collectively issued, that made joint recommendations directly to the board regarding the District’s budget deficit. Noting that the management team did not merely consult with the superintendent, but also acted as a collective body to formulate budget recommendations, the Attorney General concluded that it is “more likely than not” that a court would find the management team acted “as a separate, collective, advisory body to the board.”

Turning to the second issue, the Attorney General noted that, when an individual governmental official creates an advisory body pursuant to properly delegated authority, that advisory body is treated as if it had been directly created by the governmental body itself. However, she also noted that, in this case, the superintendent reported that no such directive had been given to him by the Board of Education. Instead, the superintendent maintained that the initiative to develop budget recommendations for the board originated with the members of the management team. She concluded that, if this were the case, the meetings in question were likely not held pursuant to a “rule or order,” and thus would not be subject to the Open Meetings Law.

b. Practical Considerations.

(1) Issues to consider in evaluating open meetings issues for administrative meetings.

(a) How is the administrative agenda formulated?

i. Is the agenda item placed before the administrative team at the board’s initiative or by board direction to the district administrator?

ii. Is the agenda item before the administrative team by the district administrator?

iii. Is the agenda item before the administrative team through the contributions of members of the administrative team?

iv. Is the agenda item before the administrative team through public input or based on pending student issues?

c. What is the subject being considered by the administrative team?

(1) Does the subject fall within the board’s statutory powers or duties?

(2) Is the matter within the decisional authority of the administration to decide and implement without delegation of authority from the board of education?

- (3) Has the matter traditionally been identified, decided, and implemented by the administration?
  - d. Has the board committed to a clear policy/management distinction in governance?
  - e. Who dictates the timetable on which a particular issue is considered by the administrative team?
  - f. Is the issue resolved by means that suggest collective decision making?
    - (1) Does the administrative team vote on its decision?
    - (2) Does the administrative team reach or attempt to reach consensus on the issue in order to resolve it?
    - (3) Does the district administrator take input from the administrative team, but independently decide how an issue is to be resolved?
  - g. Is the discussion meant to be an exchange of ideas as opposed to formulation of policy or decisions?
  - h. Is the provision meant to be addressed for the professional development of the participants?
  - i. How is any resulting report to the board “packaged”?
    - (1) As an effective recommendation?
    - (2) As a report?
    - (3) As notification of decisions that the administrative team has made or is implement?
- 3. Application of Wisconsin Open Meetings and Public Records Laws To A Private, Non-Profit Local Economic Development Corporation. OAG 1-02-09 (March 19, 2009).

Drawing from the Wisconsin Supreme Court Decision of *State v. Beaver Dam Development Corp.*, 2008 WI 90, the Attorney General opined as follows:

- a. If a private entity does not want to be subject to open government requirements, then it should change the way it operates so that it does not too closely resemble a government corporation.

- b. An entity could reduce the likelihood of being deemed quasi-governmental by:
    - i. Not receiving all its revenue from public funds and the interest thereon;
    - ii. Not giving the municipality a reversionary interest in corporate assets if the corporation dissolves;
    - iii. Not housing corporate offices in municipality facilities;
    - iv. Not combining the corporation's website with the municipality's website;
    - v. Not giving the municipality mandatory access to corporate records and management plans;
    - vi. Not having municipalities' officials serve *ex officio* on the corporate board of directors; and
    - vii. Having other, private clients in addition to the municipality.
  - c. Courts have construed legislative policy regarding the open meetings and public records laws to favor disclosure at all stages of the decision making process.
  - d. A local economic development corporation may be able to reduce the likelihood of being deemed quasi-governmental by structuring any receipt of public funds as an arm's length contractual transaction in which the public funds are bargain-for consideration exchanged for professional services rendered by the private entity.
  - e. It may be possible for an economic development corporation to maintain a cooperative relationship with the municipality and to receive public funds, provided that it structures a relationship as a contractual sale of professional services to the municipality, rather than as a use of public revenue stream to fund the corporation in performing some portion of the municipality's governmental services.
4. Publishing Requirements Of Minutes From Closed Hearing Sessions (June 17, 2009).
- a. A governmental body is required to create and preserve a record of all motions and roll call votes at its meetings, including closed session meetings.

- b. So long as the governmental body creates and preserves a record of all motions and roll call votes, it is not required by the Open Meetings Law to take more formal or detailed minutes on other aspects of the closed session meetings.
- c. The record of every motion and roll call vote, whether in open or closed session, should show how the motion was made, who initiated and seconded the motion, the outcome of any vote on the motion, and, if a roll call vote is taken, how each member voted.
- d. Because the Open Records Law contains no general exemption for records created during a closed session, a custodian must release closed session minutes unless the particular record at issue is subject to a specific statutory exemption or the custodian concludes that the harm to the public from its release would outweigh the benefit to the public.

# THE WISCONSIN PUBLIC RECORDS LAW

## I. POLICY

Access to public records is presumed.

Sections 19.32 to 19.37 “. . . shall be construed in every instance with a presumption of complete public access, consistent with the conduct of governmental business. The denial of public access generally is contrary to the public interest, and only in an exceptional case may access be denied.” § 19.31, Wis. Stat.

## II. DEFINITIONS

### A. Authority

Any of the following having custody of a record: a state or local office, elected official, agency, board, commission, committee, council, department or public body corporate and politic created by constitution, law, ordinance, rule or order; a governmental or quasi-governmental corporation. . .; a local exposition district under subch. II of ch. 229; any public purpose corporation. . .; any court of law; the assembly or senate; a non-profit corporation which receives more than 50% of its funds from a county or a municipality. . . and which provides services related to public health or safety to the county or municipality; a non-profit corporation operating the Olympic ice training center under section 42.11(3); or a formally constituted subunit of any of the foregoing. Wis. Stat. § 19.32(1).

### B. Employee

“Employee” means any individual who is employed by an authority, other than an individual holding local public office or a state public office, or any individual who is employed by an employer other than an authority. Wis. Stat. § 19.32(1bg).

### C. “Local public office”

has the meaning given in section 19.42 (7w), and also includes any appointive office or position of a local governmental unit in which an individual serves as the head of a department, agency, or division of the local governmental unit, but does not include any office or position filled by a municipal employee, as defined in section 111.70(1)(i). Wis. Stat. § 19.32(12m).

### D. Record

Any material on which written, drawn, printed, spoken, visual or electromagnetic information is recorded or preserved, regardless of

physical form or characteristics, which has been created or is being kept by an authority. "Record" includes, but is not limited to, handwritten, typed or printed pages, maps, charts, photographs, films, recordings, tapes (including computer tapes), computer printouts and optical disks. Wis. Stat. § 19.32(2).

The term "Record" does not include:

1. Drafts, notes, preliminary computations and like materials prepared for the originator's personal use or prepared by the originator in the name of a person for whom the originator is working;
2. Materials which are purely the personal property of the custodian and have no relation to his or her office;
3. Materials to which access is limited by copyright, patent or bequest; and
4. Published materials in the possession of an authority other than a public library which are available for sale, or which are available for inspection at a public library.

E. Record Subject

An individual about whom personally identifiable information is contained in a record. Wis. Stat. § 19.32(2g).

### III. LEGAL CUSTODIAN

- A. An elected official is the legal custodian of his or her records and the records of his or her office, but may designate an employee of his or her staff to act as the legal custodian. Wis. Stat. § 19.33(1).
- B. The chairperson of a committee of elected officials or the designee of the chairperson, is the legal custodian of the records of the committee. Wis. Stat. § 19.33(2).
- C. When a legal custodian is not otherwise identified by law, a governmental entity must designate in writing one or more positions occupied by an officer or employee of the governmental entity as a legal custodian to fulfill the duties of the governmental entity.

In the absence of a designation the governmental entity's highest ranking officer and the chief administrative officer, if any, are the legal custodians for the governmental entity. Wis. Stat. § 19.33(4).

- D. A governmental entity must provide the name of the legal custodian and a description of the nature of his or her duties to all employees of the governmental entity entrusted with records subject to the legal custodian's supervision. Wis. Stat. § 19.33(4).

#### **IV. PROCEDURAL INFORMATION**

A governmental entity must adopt, prominently display and make available for inspection and copying at its offices, for the guidance of the public, a notice containing a description of its organization and the established times and places at which, the legal custodian from whom, and the methods whereby, the public may obtain information and access to records in its custody, make requests for records, or obtain copies of records, and the costs thereof.

As a result of 2003 Act 47, the notice must include the identification of each position in the governmental body that is considered a "local public office" position.

This requirement is not applicable to members of any local governmental body who serve as legal custodians. Wis. Stat. § 19.34(1).

#### **V. ACCESS TO RECORDS AND FEES**

##### **A. Access To Records**

Except as otherwise provided by law, any requestor has a right to inspect any record. Substantive common law principles construing the right to inspect, copy or receive copies of records shall remain in effect.

The exemptions to the requirement of a governmental body to meet in open session under section 19.85 are indicative of public policy, but may be used as grounds for denying public access to a record only if the governmental entity or legal custodian under section 19.33 makes a specific demonstration that there is a need to restrict public access at the time that the request to inspect or copy the record is made. Wis. Stat. § 19.35(1)(a).

Any requestor has a right to inspect any record containing personally identifiable information pertaining to the individual that is maintained by a governmental entity and to make or receive a copy of any such information. Wis. Stat. § 19.35(1)(am).

The right to inspect or copy a record does not apply to any of the following:

1. Any record containing personally identifiable information that is collected or maintained in connection with a complaint, investigation or other circumstances that may lead to an enforcement action, administrative proceeding, arbitration proceeding or court proceeding, or any such record that is collected or maintained in connection with such an action or proceeding.
2. Any record containing personally identifiable information that, if disclosed would do any of the following:
  - a. Endanger an individual's life or safety.
  - b. Identify a confidential informant.
  - c. Endanger the security of any state correctional institution, jail, secured correctional facility, secured child caring institution, mental health institute, center for the developmentally disabled, or the population or staff of any of these institutions, facilities or jails.
3. Any record that is part of a records series that is not indexed, arranged or automated in a way that the record can be retrieved by the governmental entity maintaining the records series by use of an individual's name, address or other identifier.

Except as otherwise provided by law, any requestor has a right to inspect a record and to make or receive a copy of a record which appears in written form. If a requestor requests a copy of the record, the governmental entity having custody of the record, may, at its option, permit the requestor to photocopy the record or provide the requestor with a copy substantially as readable as the original. Wis. Stat. § 19.35(1)(b).

Except as otherwise authorized, no request may be refused because the person making the request is unwilling to be identified or to state the purpose of his or her request. Wis. Stat. § 19.35(1)(i).

Except as otherwise authorized, no request may be refused because the request is received by mail, unless prepayment of a fee is required under section 19.35(3)(f). Wis. Stat. § 19.35(1)(j).

The Public Records Law does not require a governmental entity to create a new record by extracting information from existing records

and compiling the information in a new format. Wis. Stat. § 19.35(1)(L).

Each request for access to public records is to be decided individually, balancing the interests involved. In determining whether or not to permit access to a record:

. . . the custodian of the records must weigh the competing interests involved and determine whether permitting inspection would result in harm to the public interests which outweighs the legislative policy recognizing the public interest in allowing inspection. *Newspapers, Inc. v. Breier*, 89 Wis.2d 417, 279 N.W.2d 179 (1979).

## B. Fees

1. A governmental entity may impose a fee upon the requestor of a copy of a record which may not exceed the actual, necessary and direct costs of reproduction and transcription of the record, unless the fee is otherwise specifically established or authorized to be established by law. Wis. Stat. § 19.35(3)(a).
2. Except as otherwise provided by law or as authorized to be prescribed by law, a governmental entity may impose a fee upon a requestor for locating a record, not exceeding the actual, necessary and direct costs of location, if the cost is \$50 or more. Wis. Stat. § 19.35(3)(c).
3. A governmental entity may impose a fee upon a requestor for the actual, necessary and direct cost of mailing or shipping of any copy or photograph of a record which is mailed or shipped to the requestor. Wis. Stat. § 19.35(3)(d).
4. A governmental entity may provide copies of a record without charge or at a reduced charge where the authority determines that waiver or reduction of the fee is in the public interest. Wis. Stat. § 19.35(3)(e).
5. A governmental entity may require payment by a requestor of any fee or fees imposed under this subsection if the total amount exceeds \$5. Wis. Stat. § 19.35(3)(f).
6. Costs of a computer run may be imposed on a requester as a copying fee. Wis. Stat. § 19.35(1)(e) and (3)(a); 72 Op. Att'y Gen. 68, 70 (1983). An authority may charge a requester for any

computer programming expenses required to respond to a request. *WIREData II*, 2008 WI 69, ¶ 107.

7. Redaction costs. The Attorney General has taken the position that costs of separating, or “redacting,” the confidential parts of records from the public parts generally must be borne by the authority. 72 Op. Att’y Gen. 99 (1983). A recent Wisconsin Supreme Court case has been relied upon by some authorities as permission to charge these costs to the requester. *Osborn v. Bd. Of Regents of Univ. of Wisconsin System*, 2002 WI 83, ¶ 46.

The somewhat contradictory views of the Attorney General and the court in *Osborn* may simply reflect the difficulty, in extreme cases, of distinguishing between redacting discrete items of confidential information from a larger document, and the practical necessity of actually creating or compiling a new record from a mass of collected data. *Wisconsin Public Records Law, Compliance Outline*, Department of Justice (2009). The more the manipulation of the non-confidential information resembles the creation of a new record, the more likely it is that a court will approve charging the “actual, necessary and direct cost of complying with” a public records request. *Id. Osborn*, 2002 WI 83, ¶¶ 3, 46; *WIREData II*, 2008 WI 69, ¶ 107, (“an authority may charge a requester for the authority’s actual costs in complying with the request, such as any computer programming expenses or any other related expenses. . . . [A]n authority may recoup all of its actual costs”).

8. An authority may not make a profit on its response to a public records request, but may recoup all of its actual costs. *WIREData II*, 2008 WI 69, ¶¶ 103, 107.

## VI. TIME FOR COMPLIANCE

- A. Each governmental entity, upon request for any record, shall as soon as practicable and without delay, fill the request or notify the requestor of the governmental entity’s determination to deny the request in whole or in part and the reasons therefore. Wis. Stat. § 19.35(4)(a).

The statutory language “as soon as practicable” implies a reasonable time for response – otherwise the legislature would have established a specific deadline. *Walton v. Hegerty*, 2007 WI App 267, ¶ 36, (*rev’d on other grounds*). What is reasonable depends, at least in part, upon the nature and scope of the request, and the staff and the other resources reasonably available to process the request. *Id.*

- B. If a request is made orally, the governmental entity may deny the request orally unless a demand for a written statement of the reasons denying the request is made by the requestor within 5 business days of the oral denial.

If a governmental entity denies a written request in whole or in part, the requestor shall receive from the governmental entity a written statement of the reasons for denying the written request.

Every written denial of a request by a governmental entity shall inform the requestor that if the request for the record was made in writing, then the determination is subject to review by mandamus under Wis. Stat. § 19.37(1), or upon application to the attorney general or a district attorney. Wis. Stat. § 19.35(4)(b).

- C. The need to restrict access must exist at the time the request is made for the record.
- D. Even if the record falls within an exemption category, the custodian must make a specific demonstration justifying the restriction.
- E. When computing time under the Public Records Law, Saturday, Sunday, and any legal holiday are excluded. Wis. Stat. § 19.345.

## **VII. RETENTION OF RECORDS**

No governmental entity may destroy any record at any time after the receipt of a request for inspection or copying of the record until after the request is granted or until at least 60 days after the date that the request is denied. Wis. Stat. § 19.35(5).

## **VIII. LIMITATIONS UPON ACCESS AND WITHHOLDING**

- A. Any record which is specifically exempted from disclosure by state or federal law or authorized to be exempted from disclosure by state laws is exempt from disclosure under Wis. Stat. § 19.35(1), except that any portion of that record which contains public information is open to inspection subject to separation. Wis. Stat. § 19.36(1).

If a record contains information that may be made public and information that may not be made public, the governmental entity having custody of the record shall provide the information that may be made public and delete the information that may not be made public from the record before release. Wis. Stat. § 19.36(6).

- B. Pupil/student records
- C. Law enforcement records
- D. Computer programs and data
- E. Trade secrets
- F. Identities of applicants for public positions

Every applicant for a position with a governmental entity may indicate in writing that the applicant does not wish to reveal his or her identity. Except with respect to an applicant whose name is certified for appointment to a position in the state classified service or a final candidate, if an applicant makes such an indication in writing, the governmental entity shall not provide access to any record related to the application that may reveal the identity of the applicant. Wis. Stat. § 19.36(7).

“Final candidate” means each applicant for a position who is seriously considered for appointment or whose name is certified for appointment and whose name is submitted for final consideration for appointment to any state position, except a position in the classified service, or to any local public office, as defined in Wis. Stat. § 19.42(7w) 2003. Act 47 expanded the definition of local public office to include head of a department, agency or division of the local government unit. See Section II of this outline.

1. Whenever there are at least five (5) candidates for an office or position, each of the five (5) candidates who are considered most qualified for the office or position by an authority is deemed a “final candidate.”
2. Whenever there are less than five (5) candidates for an office or position, each candidate is deemed a “final candidate.”
3. Whenever an appointment is to be made from a group of more than five (5) candidates, each candidate in the group is deemed a “final candidate.”

G. Contractor’s Payroll Records

In *Kraemer Brothers Inc. v. Dane County*, 229 Wis.2d 86 (Ct. App. 1999), the Building and Construction Trades Council of South Central Wisconsin sought, pursuant to the Public Records Law, to inspect and copy the payroll records of a private company working as a contractor on a public works project. The Wisconsin Court of Appeals held that the public

interest in protecting the privacy interest of employees of a private company engaged in a public works project outweighed the public interest in disclosing the employees' names.

2003 Act 47 now specifically prohibits the release of a record prepared or provided by an employer, performing under a contract requiring the payment of prevailing wages, that contains personally identifiable information relating to an employee of that employer, unless the employee authorizes the authority to provide access to that information. The term "personally identifiable information" does not include information relating to an employee's work classification, hours of work, or wage or benefit payments received for work on such projects. Wis. Stat. § 19.36(12).

## **IX. ENFORCEMENT AND PENALTIES**

- A. If a governmental entity withholds a record or a part of a record or delays granting access to a record or part of a record after a written request for disclosure is made, the requestor may:
  - 1. Bring an action for mandamus asking a court to order release of the record; and
  - 2. Request in writing that the district attorney of the county where the record is found or attorney general bring an action for mandamus asking a court to order release of the record to the requestor.
- B. Sections 893.80 and 893.82, Wis. Stats. do not apply to actions commenced under this section.
- C. If the requestor prevails in a mandamus action in whole or substantial part, the requestor may recover:
  - 1. Damages of not less than \$100.
  - 2. Court costs and reasonable attorney's fees.
  - 3. Punitive damages for arbitrary and capricious denial of access, delay in responding to a request or for charging excessive fees
- D. A district attorney or the attorney general may seek forfeiture of up to \$1,000 for arbitrary and capricious denial of access, delay in response or for charging excessive fees.

## **X. CASE STUDIES IN THE PUBLIC RECORDS LAW**

A. *Kroeplin v. DNR and Lakeland Times*, 2006 WI App 227.

1. Factual background.

This case was based on a public records request made by a newspaper under the public records law, seeking documents related to a misconduct investigation and subsequent disciplinary action taken against a conservation warden for the Department of Natural Resources. Both Kroeplin, the DNR warden, and the DNR itself appealed a Circuit Court's decision that required full disclosure of the records requested by the newspaper.

Kroeplin maintained that Wis. Stat. § 19.36(10)(d), exempts all records from public disclosure that relate to the investigation of his violation of DNR work rules and to the subsequent disciplinary action taken. The DNR argued that this statute exempted only certain portions of those records, which it had redacted. This statutory provision creates an exemption from disclosure for "information used in staff management planning." Both the DNR and Kroeplin also argued, in the alternative, that the public interest favoring nondisclosure outweighed the public interest favoring disclosure.

2. Wisconsin Court of Appeals Decision.

The Court of Appeals concluded that the records in question had to be disclosed to the newspaper and, in this regard, made a number of observations and reached several conclusions concerning the proper interpretation of the public records law:

a. Presumption of public access.

The Court pointed out that there is a strong presumption that records will be open to the public and that exceptions to the public records law that appear in the statute are to be narrowly construed, to the point that "unless the exception is explicit and unequivocal, we will not hold it to be an exception."

b. Disciplinary records of employees are different from periodic performance evaluations.

The Court rejected the notion that, because a disciplinary record in an employee personnel file will be used by an employer for matters such as staff management planning, performance evaluations, or recommendations concerning future salary adjustments, such records are exempt from

disclosure under Wis. Stat. § 19.36(10)(d). It also rejected the DNR's more narrow understanding of the statute (the DNR argued that factual information must still be disclosed, while supervisory opinions may not be disclosed).

The Court acknowledged that the statutory subsection at issue was ambiguous and that each party had offered interpretations of the statute that had "reasonable aspects." However, the Court concluded that the statute does not create a "blanket exception" for misconduct investigation and disciplinary records. The Court noted that a series of previous cases had established the importance of disclosing disciplinary records of public employees and officials where the conduct involves violations of law or significant work rules. The Court also pointed out that, while performance evaluations are among the documents listed as exempt from disclosure, and while performance evaluations might make reference to disciplinary records, the text of the statute itself did not specifically exempt disciplinary records from disclosure. The Court also noted that a related exemption – Wis. Stat. § 19.36(10)(b). -- applies only to records of ongoing investigations into employee misconduct, and reasoned that related statutory provisions could not sensibly be interpreted to mean that final records of an investigation or disciplinary action are not subject to disclosure.

c. Subjective commentary in disciplinary records not exempt.

The Court also concluded that evaluative judgments in disciplinary records are not exempt from disclosure under Wis. Stat. § 19.36(10)(d). The Court reasoned that the text of the statute offered no basis for making a further distinction between "facts" and "evaluative comments."

d. Balancing test requires disclosure.

(1) Increased public scrutiny must be expected by those who held certain positions.

The Court concluded that the public interest balancing test requires disclosure of the requested investigative and disciplinary records. The Court pointed out that Kroeplin's role as a quasi-law enforcement official subjects him to greater public scrutiny, including the possibility that disciplinary records may be released to the public. In this regard, the Court stated:

We are not persuaded that the public's interest in encouraging open and frank discussions between supervisors and disciplined employees outweighs the public's interest in being well-informed about the circumstances surrounding a law enforcement officer's discipline for conduct that violates a significant work rule.

- (2) The case for disclosure is strengthened when information is already in the public domain.

The Court also rejected Kroeplin's contention that he is not an employee in a "high profile" position and that, therefore, he should have a greater expectation of privacy than higher ranking officials. The Court reasoned that teachers disciplined for improper sexual contact with minors and non-law enforcement employees of a sheriff's department have both been the subject of previous cases where the Court concluded that disciplinary records must be disclosed to requesting media.

The Court also noted that many of the pertinent facts related to Kroeplin's discipline were already in the public domain, a factor that gives Kroeplin's concern for privacy and reputation less weight in applying the balancing test (the Court made reference to "privacy-related public interests," but did not squarely discuss how personnel privacy and the public interest in non-disclosure relate to one another).

The Court concluded that the balancing test requires a finding that the public has a particularly strong interest in being informed about public officials who have been derelict in their duty and that Kroeplin's case did not qualify as an "exceptional case" in which access to records could be denied. See, Wis. Stat. § 19.31. As a result, the Court found that the public interest in information concerning an employee's misconduct and supervising agency's investigation of that misconduct outweighs public interest in non-disclosure and, accordingly, the DNR's conclusions and findings, as well as supporting documents, reached in an investigation must be disclosed.

3. Implications of the Court's Ruling.

- a. Does the Court's decision have import to professional employee evaluations?

We have previously reported that, in an Attorney General Opinion on Public Access to Superintendent's Evaluations (*Informal Opinion to Attorneys James Friedman and Charles Graupner* (October 31, 2005)), the Journal-Sentinel sought disclosure of a technical college president's evaluation and the Attorney General concluded that the public interest in disclosure required that his evaluation be provided to the newspapers. However, as the Court pointed out, Wis. Stat. § 19.36(10)(d), is an exception to Wisconsin's Public Records Law related to employee personnel records. That subsection exempts the following from public access:

[i]nformation relating to one or more specific employees that is used by an authority or by the employer of the employees for staff management planning, including performance evaluations, judgments, or recommendations concerning future salary adjustments or other wage treatments, management bonus plans, promotions, job assignments, letters of reference, or other comments or ratings relating to employees.

The Court discussed this exemption to the public records law in the following manner:

However, we note two things in the language of § 19.36(10)(d). First, the subsection does not expressly except disciplinary records from public access; as The Lakeland Times points out, § 19.36(10)(d) does not contain the word "discipline" within its text. Second, performance evaluations are just one type of document among others listed in that subsection that are exempt from disclosure as containing information an employer uses for "staff management planning." A common sense reading of "performance evaluations" in this context refers to evaluations management generates on a routine basis for planning purposes.

Kroeplin, *supra*.

School districts should bear in mind that this discussion (and this exception to the Public Records Law) relates to information that appears under the heading “*Employee personnel records.*” The Attorney General’s previous opinion concerns an individual who was not an “employee” but, rather, was a “local public office” holder for purposes of the Public Records Law.

Therefore, this decision does not strengthen a local public officer holder’s claim that their evaluations are confidential, but does put in full relief the issue of who qualifies as a “local public office” holder, because it appears that periodic employee evaluations may be held in confidence while local public office holder’s evaluations may not be.

- b. Concluded investigations are subject to disclosure (see discussion of *Zellner, infra*).

B. *Robert Zellner v. Cedarburg School District and Daryl Herrick, 2007 WI 53.*

1. Factual background.

Zellner was employed by the Cedarburg School District as a science teacher. Following an evidentiary hearing, the Board of Education terminated his employment for allegedly viewing images from adult websites on his computer at work.

The Journal-Sentinel and the Ozaukee News Graphic made a request for all exhibits presented at the School Board evidentiary hearing and, at the time, Zellner did not oppose the release of the records.

Following his termination, Zellner and District representatives met privately to discuss settlement. At that time, the District’s legal counsel presented a CD containing digital images that Zellner had allegedly viewed at his work computer, as well as a memorandum that contained a summary of search terms and website addresses that Zellner allegedly accessed to reach the adult images that had been recorded on the CD. The CD and the memo were created as a result of a forensics analysis of Zellner’s work computer that was conducted after the evidentiary hearing resulting in Zellner’s termination.

The Board of Education held a grievance hearing the following day with the Cedarburg Education Association, to discuss its grievance on Zellner’s behalf. The next day, the Journal-Sentinel sent a letter to the District seeking release of the CD and memo. The District

then notified Zellner of this request and of its decision to release the requested records.

Zellner filed an action in Circuit Court to review the District's decision. Zellner argued that the requested materials were not "records" that were subject to release, because they were part of a current "investigation" under Wis. Stat. § 19.36(10)(b). Zellner also argued that the CD and memo contained inaccurate and unauthenticated data that would be prejudicial to his reputation and privacy interests.

2. Wisconsin Supreme Court Decision.

- a. Even if the requested materials were copyrighted, they constitute "records" nevertheless under the Public Records Law in light of the "fair use" exception to copyright infringement rules.
- b. The CD and memo do not fall within the statutory exception for pending disciplinary records, because the District's investigation was concluded when the District terminated Zellner's employment. As a result, the CD and memo were not exempt from disclosure. In this regard, the Supreme Court cited a previous Wisconsin Court of Appeals decision with approval, *Local No. 2489, AFSCME v. Rock County*, 277 Wis. 2d 208, 689 N.W.2d 644 (2004).
- c. Although privacy and reputation interests are important to consider, the public interest in disclosure of the records "outweighs the public's interests in protecting the privacy and reputation interests of a citizen such as Zellner in this case."

3. Strategic and practical considerations.

- a. An investigation will be deemed concluded when an administration formally recommends disposition or, at the most, when a board takes action. After these events occur, a school district would not be able to deny access to an investigative record based on the pending investigation exemption to the public records law.
- b. Once an investigation is concluded and a records request for records from a disciplinary investigation concerning an employee is received, public employers must bear in mind that there is a specific statutory process that must be strictly followed in providing requesters with access to records. Wis. Stat. § 19.356.

- c. The public's zeal for action and a public employer's efforts to strengthen its case are not always compatible and often need to be balanced. In this case, the Supreme Court's decision—at least insofar as the Court's description of the facts has it—had to do with a CD and memo that were developed through a forensic analysis of Zellner's computer after the hearing that resulted in Zellner's termination.

In cases such as this, legal counsel often must argue that such "after-acquired" evidence can still be considered in arbitration proceedings regarding an employee's termination. However, arbitrators are not universally receptive to this argument and, certainly, public employers have difficulty arguing that the information gained from after-acquired evidence was considered as part of any decision to recommend termination or to terminate employees' employment.

Consequently, while the need to proceed promptly in sensitive cases is clear (particularly in cases that present issues of general public interest), employers should resist taking final action prematurely, as they can, at least in some cases, deprive themselves of evidence and arguments that would have helped to defend their decisions.

- d. The timing for declaring an investigation concluded can influence a just cause analysis under a collective bargaining agreement. In many situations, the reasons for the recommended dismissal or termination are or need to be articulated by the employer. When this occurs, arbitrators generally focus on why the employer claims to have terminated the employee in evaluating just cause issues, and not on reasons (and related evidence) developed after the fact.
- e. School districts and other public employers must regularly review their acceptable use policies and protocols. Although much can be said on this subject alone, at least some commentators believe that employers must make distinctions between *de minimis* and unacceptable levels of non-work use of computers, and must distinguish between types of unacceptable use (stock market reports and pornographic material are not the same in an educational environment; if employers wish to make distinctions between employees that account for the type of non-work material

that is accessed from work computers, policies governing employees' use of computers may need to make this clear).

- f. School districts should have a task force in place to deal with computer misconduct promptly. The group should include the school's legal counsel and technology consultants who are capable of rapidly isolating and reporting on the content of computer records.

C. *Zellner v. Herrick*, 2009 WI 80.

1. Factual Background.

In *Zellner v. Cedarburg School District*, 2007 WI 53, 300 Wis. 2d 290, 731 N.W. 2d 240, the Wisconsin Supreme Court affirmed the Circuit Court's denial of Zellner's request for an injunction prohibiting the School District from releasing a memorandum and a compact disc containing adult images and internet searches that the teacher allegedly viewed and conducted on his school computer. In *Cedarburg Education Ass'n v. Cedarburg Board of Education*, No. 2007 AP 852, unpub. slip op. (Wis. Ct. App. July 23, 2008), the Wisconsin Court of Appeals affirmed the Circuit Court's conclusion that an arbitrator exceeded his authority when he ordered Zellner to be reinstated in contradiction of public policy that immoral behavior in our public schools is grounds for immediate termination. The arbitrator determined that the School Board had violated the collective bargaining agreement which provided that no permanently employed teacher may be discharged except for just cause, and ordered the School District to reinstate the teacher, reduce his discipline to a letter of reprimand, and compensate him for lost wages and benefits.

After the District decided not to reinstate the teacher as ordered by the arbitration award, a private citizen filed a formal request under Wis. Stat. § 19.35, for the transcript of the closed arbitration proceeding. The District determined that the transcript was a public record and, under the requirements of Wis. Stat. § 19.356 (2) (a), it notified the teacher of its intent to release the transcript. The teacher sought judicial review contending that the transcript was not a "public record" and, in the alternative, if it was a public record, certain personal and medical information must be redacted prior to releasing the transcript.

The Circuit Court determined that the transcript was a "public record" and that no statutory or common law exceptions exempted the transcript from release. The Court then considered "whether the presumption of openness under the Open Records law is

overcome by any other policy” and concluded that allowing the disclosure of the transcript would defeat the purpose of closed arbitration proceedings. The case was then appealed to the Wisconsin Court of Appeals.

2. The Wisconsin Court of Appeals Decision.

The Court of Appeals acknowledged that the answers to the two questions presented in this certification will have a significant impact on governmental labor relations throughout the state. Whether transcripts of arbitration proceedings should be disclosed as “public records” will have an impact on governmental bodies and public employees filing, pursuing and defending grievances. Both sides to a labor dispute may seek other, non-voluntary, means to resolve grievances contrary to the express purpose of the Municipal Employment Relations law. The potential release of medical and other personal information, submitted to a prosecutor to defend a grievance, could deter public employees from fully exercising their right under the collective bargaining agreement in the Municipal Employment Relations law. Because the resolution of these issues will reverberate across the state, the Court of Appeals certified these issues to the Wisconsin Supreme Court, which is solely invested with the power to oversee and implement the statewide development of the law.

As part of the litigation arising from the Cedarburg School District’s discharge of a teacher for viewing pornography on a District-provided computer, the issues before the Wisconsin Supreme Court on certification were as follows:

- a. Is a transcript of a closed arbitration proceeding a public record under Wisconsin Public Records law.
- b. If the transcript is a public record, must all personal and medical information be redacted before release.

3. The Wisconsin Supreme Court Decision.

The Wisconsin Supreme Court held that the Court of Appeals erred when it determined that the appeal was timely under Wis. Stat. § 19.356(8). The statute requires that an appeal of a decision related to an open records request be filed in “the time period specified in s. 808.04(1m).” The time period specified in that statute is 20 days. Because the appeal was filed outside the 20-day period, the Supreme Court determined that the Court of Appeals did not have jurisdiction to review the decision or to certify the decision to the

Wisconsin Supreme Court; therefore, the Court did not consider the certified questions.

D. *Seifert v. School District of Sheboygan Falls*, 2007 WI App 207.

1. Factual Background.

The Seiferts' son, Patrick, played varsity football at Sheboygan Falls High School. During the 2004-2005 school year, a dispute arose between the Seiferts and football coach, Dan Juedes. The Seiferts contended that Juedes had belittled Patrick in front of the team for not playing. They also contended that Juedes had withheld mail from college recruitment programs addressed to Patrick in care of the school.

In October, 2005, the Seiferts filed a request with the District under the Open Records Law for:

All records (including, but not limited to, all materials, documents, reports, statements, interviews, meeting minutes and agenda, correspondence, evaluations, memoranda, agreements, contracts, notes, etc.) which were considered, produced, created, maintained, or kept by the District and/or its agents and attorneys in the course of the investigation, including records which relate to the disposition of the investigation, any disciplinary actions taken or to be taken by the District and/or its agents against Coach Juedes, and/or any recommendations with regard to the future as a result of the investigation.

The Seiferts also specifically requested, pursuant to Wis. Stat. §19.35(1)(am), all records containing personally identifiable information about David, Sandra or Patrick which were "considered, produced, created, maintained, or kept by the District and/or its agents and attorneys in the course of the investigation, including the disposition of the investigation."

The District denied the Seiferts' request. The three page response detailed numerous reasons for the denial, including: (1) the records were exempt under Wis. Stat. §19.35(1)(am)1, as records containing personally identifiable information that was collected or maintained in connection with a complaint, investigation or other circumstances that may lead to a court proceeding; (2) the records were the work product of the District's counsel and contained privileged information; and (3) the records were part of Juedes'

personnel file. The letter did not address any attorney fee billing records.

The Seiferts then filed a petition for a writ of mandamus pursuant to the Open Records Law seeking an order directing the District to release the records cited in their request. Shortly thereafter they filed a supplemental petition for the attorney fee billing records after learning that the District had released those billing records to another open records requestor who had specifically requested them.

The Circuit Court denied both petitions. As to the initial petition, the Court concluded that the records were exempt under Wis. Stat. §19.36(10)(d) because they were maintained in Juedes' personnel file for purposes of evaluating his job performance. The Court also concluded that the records were exempt under Wis. Stat. §19.35(1)(am)1, as records collected or maintained in connection with circumstances that may lead to a court proceeding because the investigation flowed from the Notice of Injury, the first step in a court proceeding against a government entity. Finally, the Court denied the supplemental petition because the request was ambiguous as to whether it covered the attorney fee billings.

## 2. Wisconsin Court of Appeals Decision.

The Court of Appeals stated that the common law has long recognized the privileged status of attorney work product, including the material, information, mental impressions and strategies an attorney compiles in preparation for litigation. The records in this matter were clearly generated in response to the Seiferts' formal indication, via their Notice of Injury filing and their declarations at the School Board meeting, that the possibility of litigation loomed, even if not certainly and imminently. The Open Records Law cannot be used to circumvent established principles that shield work product nor can it be used as a discovery tool. Accordingly, the Court of Appeals concluded that the presumption of access under Wis. Stat. §19.35(1)(a) is defeated because the attorney work product qualifies under the "otherwise provided by law" exception.

If no statutory or common law exceptions apply, a records custodian is permitted to engage in a balancing test to decide whether the strong presumption favoring disclosure is overcome by some even stronger public policy favoring limited access or nondisclosure. While custodians must remain mindful of the presumption of openness, each request entails a fact intensive inquiry such that the legislature entrusted custodians with

substantial discretion in performing a disclosure analysis. The resulting records could not more clearly have been collected in connection with “a complaint, investigation or other circumstances that may lead to ... [a] court proceeding,” and therefore constitute an exemption under subsection (1)(am)1. The subsection plainly allows a records custodian to deny access to one who is, in effect, a potential adversary in litigation or other proceeding unless or until required to do so under the rules of discovery and actual litigation.

The Court of Appeals also determined that the Seiferts did not have a right to the records under Wis. Stat. §19.35(1)(am). Instead of a balancing analysis, the inquiry is whether the request is made by an appropriate individual and any of the enumerated exceptions apply. Under Wis. Stat. §19.35(1)(am), any requestor is entitled to disclosure of records “containing personally identifiable information pertaining to the individual” unless, among other narrowly drawn reasons, the records were “collected or maintained in connection with a complaint, investigation or other circumstances that may lead to ... [a] court proceeding.” The Court of Appeals determined that the records generated from the investigation fell squarely within the exemption under Wis. Stat. §19.35(1)(am)1. Therefore, the District and the Circuit Court properly denied the request for records.

With regard to the attorney billing records, the Appellate Court agreed with the Circuit Court, finding that, as a request for billing records, the request was ambiguous. While the Court acknowledged that an Open Records Law request need not contain any “magic words,” the request is sufficient if it is directed at an authority and reasonably describes the record or information requested. However, the law recognizes that an overly broad request is insufficient if it is “without a reasonable limitation as to subject matter.” The Court of Appeals concluded that a reasonable custodian would not have read the Seifert’s request as extending to the attorney fee billings resulting from the investigation. Rather, a reasonable custodian would read the request as limited to exactly what the requestor recited: records produced “in the course of the investigation”; records “related to the disposition of the investigation”; records of “any disciplinary actions”; and “any recommendations with regard to the future as a result of the investigation.” A custodian should not have to guess at what records a requestor desires.

E. *Stone v. Board of Regents of the University of Wisconsin System*, 2007 WI App 223.

1. Factual Background.

Robert Stone was employed by the University of Wisconsin-Madison Survey Center. During 2004, Stone received information that he interpreted as indicating that a co-worker and Stone's immediate supervisor, Steven Coombs, were actively working toward Stone's termination. On April 15, 2005, Stone served a written public records request on his supervisor's supervisor, John Stevenson. The request read, in pertinent part:

This serves notice that under Wisconsin Statutes 19.35(1)(a) and 19.35(1)(am), I am requesting all correspondence and documents, electronic or otherwise, concerning or mentioning me by name or reference in any permutation or derivative, those concerning or mentioning performance or review in any permutation or derivative, and those that contain the terms "supervisor," "interview," or "questions" in any permutation or derivative, from 4/01/04 through the present. I request these from Steve Coombs, Lisa Klein, and John Stevenson.

Coombs and Stevenson were responsible for responding to Stone's open records request. The two men searched electronic files on their computers, such as saved e-mails, looking for responsive documents. Coombs and Stevenson averred that they had no hard-copy documents responsive to Stone's request that were not also available in electronic form. Both men printed out hard-copy versions of documents they believed might be responsive to Stone's request. Coombs took his documents to Kinko's for copying, and Stevenson personally made photocopies of documents he printed out. Both men admitted destroying these printouts and photocopies, but averred that they destroyed only printouts and photocopies that were identical to either retained hard-copy documents or documents that remained available as electronic documents.

On April 28, 2005, Stevenson informed Stone that the requested records were available. Stone reviewed the materials, which, in his view, indicated that some records responsive to his requests had not been made available, but had instead been destroyed. Stone petitioned for a writ of mandamus and alleged, among other things, that Coombs and Stevenson shredded documents that were within the scope of Stone's public records request. The Circuit Court accepted Stevenson's and Coombs' averments that only identical copies were destroyed. The Court explained that Stone provided no evidence of a factual dispute regarding whether the destroyed documents were anything other than identical copies. The Court then rejected Stone's argument that an identical copy of a "record"

is itself a “record” under Wis. Stat. §19.32(2), and therefore, the destruction of identical copies of responsive documents that continue to exist is a violation of Wis. Stat. §19.35(5).

2. Wisconsin Court of Appeals Decision.

The Court of Appeals agreed with the University that it would be absurd to construe the term “record” and Wis. Stat. §19.32(2) as including an identical copy of an otherwise available record. “Record” is defined in Wis. Stat. §19.32(2) as “any material on which ... information is recorded or preserved, regardless of physical form or characteristics.” The obvious purpose of the Open Records Law is to provide access to the recorded information in records. Granting access to just one of two or more identical copies fulfills this purpose. Likewise, it would be absurd to say that an authority or custodian violates Wis. Stat. §19.35(5) by destroying an identical copy of an otherwise available record. This interpretation would mean that the statute is violated even if multiple extra copies of an electronic record are printed out by mistake and then the extra identical copies are destroyed. The Court of Appeals agreed with the Circuit Court’s decision that the plain language of “record” in Wis. Stat. §§19.32(2) and 19.35(5) does not include identical copies of otherwise available records.

F. *WIREdata, Inc. v. Village of Sussex*, 2008 WI 69.

1. Factual Background.

This case revisits the issue of how the Public Records Law is applied to records as they have been created and/or stored by contractors that work with governmental bodies.

In this case, a Wisconsin company developed and copyrighted software that, in turn, was licensed to property appraisers. The computer program at issue allowed appraisers to input raw property appraisal data from handwritten notations contained on property record cards into a computer program. The program then collated and arranged the collected information so that a variety of tables and reports for various categories of properties could be generated.

WIREdata sent registered letters to various municipal custodians of records requesting “an electronic/digital copy of the detailed real estate property records (showing the specific characteristics of each parcel and the improvements thereupon) used and/or maintained by the Assessor in determining the proper assessments for each parcel ...”. WIREdata sought the information in order to make it available to real estate brokers.

The municipalities directed WIREdata to parties that contracted to program the software and, thereafter, WIREdata formally advised the municipalities that they were required to satisfy the request under the Open Records Law.

A complex series of legal battles ensued, first resulting in a finding by the Seventh Circuit Court of Appeals that the process of extracting raw data (as WIREdata sought) from the database did not violate copyright law. After this decision was received by the parties, WIREdata was provided the municipalities' property records in an electronic and digital form (a .pdf), but did not provide the data as entered by assessors and as stored in the format the program provided.

The municipalities maintained that they did not qualify as an "authority" under the Public Records Law, because their contract assessors create and have custody of the records sought by WIREdata. The Court found otherwise, reasoning as follows:

- a. The fact that records are in the custody of private parties that contract with public entities does not change the fact that a public body may be held responsible as an "authority" under the statute, citing *Journal-Sentinel, Inc., v. School District of Shorewood*, 186 Wis.2d 443, 520 N.W.2d 165 (Ct. App. 1994).
- b. Governmental bodies, and not their independent contractors, bear the responsibility for complying with Wisconsin's Open Records Law, because contractors are not "authorities" under the law.
- c. The Court recommended (at footnote 4) that public entities consider indemnification and hold harmless clauses in contracts with outside contractors to protect themselves in open records disputes.
- d. The Public Records Law requires access to requested material and, as a result, a requestor can seek the material as it is both inputted and stored in the database, regardless of its physical form or characteristics. The inputted property data, entered by municipal assessors into a program, is as much a part of the public record as if it were written on paper property cards and stored in a file cabinet. The organization of the data in a database, at public expense, allows greater public access to the information that the public might seek. As a result, the subject municipalities violated the Open Records Law when they provided a .pdf file, rather than

more full access to property assessment records in the format created and maintained by the municipalities' independent contractor assessors in a computer database.

2. Wisconsin Supreme Court Decision.

The Wisconsin Supreme Court affirmed part of the Court of Appeals decision and reversed part of the decision, reasoning as follows:

- a. The Wisconsin Supreme Court held that WIREdata did not properly commence the mandamus actions against the municipalities under the Open Records Law, pursuant to Wis. Stat. §19.37(1), because the municipalities had not denied WIREdata's requests for the records before WIREdata filed the mandamus actions. The Supreme Court also stated that in cases where the requests are complex, municipalities should be afforded reasonable latitude in timeframe for their responses. The Court agreed with the Department of Justice's opinion that 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. What constitutes a reasonable timeframe for a response by an authority 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. Whether an authority is acting with reasonable diligence in a particular case will depend upon the totality of the circumstances surrounding the particular request.
- b. The Supreme Court concluded that WIREdata's initial requests were sufficient as a matter of law in regard to subject matter and length of time. Wis. Stat. §19.35(1)(h), in relevant part, provides that a request "is deemed sufficient if it reasonably describes the requested record or the information requested. However, a request for a record without a reasonable limitation as to subject matter or length of time represented by the record does not constitute a sufficient request." The Court found that WIREdata's requests were sufficient as to time and subject matter because the municipalities were able to fulfill WIREdata's requests using the PDF's that were provided to WIREdata. Furthermore, there never appeared to be a dispute between the parties, before the Court actions commenced, on what WIREdata was requesting or on whether the amount of

information that was being requested was too great to be produced.

- c. The Supreme Court determined that a municipality's independent contractor assessor was not an "authority" under the Open Records Law, therefore such an assessor was not a proper recipient of an open records request. Wis. Stat. §19.32(1), in relevant part, states "authority means any of the following having custody of a record: a state or local office, elected official, agency, board, commission, committee, counsel, department or public body corporate and politic created by constitution, law, ordinance, rule or order; ...or a formally constituted subunit of any of the foregoing." This statute clearly envisions a public entity, a quasi-government corporation, or a governmental entity, not an independent contractor hired by such a public or governmental entity, as being the "authority" for purposes of the Open Records Law. The Supreme Court held that the municipalities themselves were the "authorities" for purposes of the Open Records Law. Accordingly, only the municipalities were proper recipients of the relevant open records requests. Therefore, a communication from an independent contractor assessor should not be construed as a denial of an open records request.
- d. The Wisconsin Supreme Court held that the municipalities may not avoid liability under the Open Records Law by contracting with independent contractor assessors for the collection, maintenance, and custody of property assessment records, and by then directing any requestor of those records to the independent contractor assessors. The plain language of Wis. Stat. §19.36(3) makes an authority solely responsible for any liability for failing to comply with the Open Records Law where it states that "each authority shall make available for inspection and copying under Section 19.35(1) any record produced or collected under a contract entered into by the authority with a person other than an authority to the same extent as if the record were maintained by the authority."
- e. The Wisconsin Supreme Court determined that the Court of Appeals was mistaken in concluding that the municipalities had not fulfilled WIREdata's initial open records requests once they produced PDFs with the requested information and gave those files to WIREdata. The Supreme Court disagreed with the Court of Appeals' statement that the requestors must be given access to the authority's electronic

databases to examine them, extract information from them, or copy them. The Wisconsin Supreme Court determined that it is sufficient, for the purposes of the Open Records Law, for an authority to provide a copy of the relevant data in an appropriate format, due to confidentiality concerns.

- f. The Wisconsin Supreme Court held that because no fees were actually charged to WIREdata for the information provided in the PDF format, the municipalities did not violate the Open Records Law. Wis. Stat. §19.35(3)(a) states: “An authority may impose a fee upon the requestor of a copy of a record which may not exceed the actual, necessary and direct cost of reproduction and transcription of the record, unless a fee is otherwise specifically established or authorized to be established by law.” The authority may not make a profit on its response to an open records request. Under Wis. Stat. §19.35(3), an authority may impose a fee on the records requestor “for the location, reproduction, or photographic processing of the requested records, but the fee may not exceed the actual, necessary and direct costs of complying with the open records requests.” An authority may charge a requestor for the authority’s actual costs in complying with the request, such as any computer programming expenses or any other related expenses. The Court emphasized that an authority may not make a profit, but may recoup all of its actual costs.

G. *Portage Daily Register v. Columbia County Sheriff’s Department*, 2008 WI App 30.

1. Factual Background.

On July 26, 2006, the Portage Daily Register made a written request under the Wisconsin Public Records Law for a document it described as “Sheriff’s Department report No. 06-24428 dated on or about June 28, 2006.” The Sheriff’s Department denied the request in a letter dated August 9, 2006. The letter stated the following basis for its denial:

The matter has been referred to the District Attorney’s Office for review to determine if, in fact, it is criminal in nature or not and/or whether additional investigation is required. The matter, therefore, remains an open and ongoing investigation and cannot be released at this time.

The letter further asserted that upon termination of the investigation, “the report can be reviewed for release under the Wisconsin Open Records Law.” On September 1, 2006, the District Attorney released to the public a memorandum he had sent to the Columbia County Sheriff indicating that after reviewing the investigative reports prepared by the Sheriff, he had declined prosecution. In addition, the District Attorney released to the public “copies of the law enforcement reports generated by this investigation,” including report No. 06-24428. Prior to the time that the report was made public, the Register filed a mandamus action against the Sheriff’s Department and Sheriff Steven Rowe under the Public Records Law, Wis. Stat. §19.37. The Court determined that the reason stated by the Sheriff’s Department for denying the request was sufficiently specific because the requested report was implicated in a crime detection effort. The Court further concluded that the stated reason for denial was sufficient to overcome the presumption of openness under the Public Records Law. Accordingly, the Court denied the request for a judgment of mandamus and dismissed the complaint.

2. Wisconsin Court of Appeals Decision.

The Court of Appeals referenced a two-step process for analyzing the question of whether a custodian’s denial of access can be sustained by the reviewing court. First, the Court must decide whether the Circuit Court correctly assessed whether the custodian’s denial of access was made with the requisite specificity. If this inquiry is resolved in favor of the records custodian, the Court must then determine whether the stated reasons for withholding the records are sufficient to outweigh the strong public policy favoring disclosure.

When denying inspection, a records custodian is not required to provide a detailed analysis of the record and why public policy directs that it must be withheld. However, the custodian must be given a public policy reason why the record warrants confidentiality. Specific policy reasons are necessary to provide a means of restraining records custodians from arbitrarily denying access to public records without weighing the relative harm of nondisclosure against the public interest in disclosure and to provide the requestor with sufficient notice of the grounds for denial to enable the requestor to prepare a challenge to the withholding.

The Court of Appeals concluded that the Sheriff’s Department was not entitled to invoke the categorical exception for prosecutorial records. The Court of Appeals found that allowing the Sheriff’s Department to withhold a record, regardless of its content, simply

because a copy of that record has been forwarded to a District Attorney's office, would not serve the purposes of the Public Records Law. As further support for its decision, the Court of Appeals noted that the Sheriff's Department's statement provided no policy reason; it stated only that the matter had been referred to the District Attorney's office and was related to an ongoing investigation, which was a statement of act, not a public policy reason for denying access. The Court of Appeals concluded that the Sheriff's Department's generic statement to the effect that the sought after record was part of an open investigation in the District Attorney's office was not made with the requisite specificity.

- H. *State v. Zien*, 314 Wis. 2d 340, 761 N.W.2d 15, 2008 WI App. 153 (Ct. App. 2008)

The Court concluded that Wis. Stat. § 19.37(1), outlines two distinct courses of action when a records request is denied. First, a requestor who is denied access to records may proceed with his or her own mandamus action "asking a court to order release of the record." If the requestor chooses to do so, the potential remedies include access to the records and the recovery of costs, attorney fees, actual damages and punitive damages.

However, if a records requestor decides to seek the assistance of the attorney general or district attorney, and if an authority or legal custodian of records is found to have acted arbitrarily and capriciously, he or she may be required to forfeit "not more than \$1,000," and this forfeiture "shall be enforced by action on behalf of the state by the attorney general or ... district attorney." The statute further provides that the court shall award any forfeiture recovered, together with reasonable costs to the state. Thus, the original records requestor does not control the conduct of litigation or have the ability to selectively seek alternative remedies when the requestor chooses to seek the assistance of the attorney general or district attorney.

- I. *Milwaukee Journal Sentinel v. Wisconsin Department of Administration*, 2009 WL 2032156

The Wisconsin Supreme Court was presented with a case where the Wisconsin State Employees Union had negotiated a provision in a collective bargaining agreement that prohibited disclosure of employees' names to the press. The collective bargaining agreements are negotiated pursuant to the State Employment Labor Relations Act, under which collective bargaining agreements must be ratified by the Wisconsin Legislature. Because the Legislature also has enacted the statutory public records law, this case presented a question of how the requirements of

the public records law should be reconciled with inconsistent provisions of a state collective bargaining agreement.

The Court first determined that the ratification of the collective bargaining agreement was insufficient to amend the public records law. Based on this conclusion, the Court turned its attention to the question of whether the collective bargaining agreement's prohibition against disclosing union employees' names to the press nevertheless could be enforced as a "condition of employment," and effectively supersede the Public Records Law's disclosure requirement. In this regard, the Court concluded that neither the specific provision of the collective bargaining agreement nor the statutory language authorizing state labor contracts superseded the requirements of the Public Records Law and, accordingly, that the usual balancing test needed to be applied to determine whether employee names should be released to the media.

J. *Schill v. Wisconsin Rapids School District*, 2009 WL 1154920 (Certified by WI Court of Appeals to WI Supreme Court).

1. Factual Background.

A citizen sent the School District a public records request for emails from five school district employees "from the computers they used during their school work day," over a six week period. The District subsequently informed the employees that it intended to comply with the request. The employees did not object to release of their work-related emails, but commenced an action to enjoin release of their personal emails. The Circuit Court denied the injunction and order the release of all the requested emails, including personal emails, subject to deletion of home addresses, home telephone numbers, home email addresses, Social Security numbers, medical information, bank account number and pupil record information.

2. The Wisconsin Court of Appeals Decision.

The Court of Appeals found that the issue of whether and to what extent personal emails of public employees are subject to the Open Records law is a question of first impression in Wisconsin. Therefore, the Court of Appeals found that the Wisconsin Supreme Court is the appropriate forum to decide this question.

## XI. INTERPRETATION BY THE ATTORNEY GENERAL

A. Attorney General Letter Clarifying the Terms "Candidate" and "Applicant" for Purposes of an Open Records Request (January 17, 2008).

The Attorney General was asked to reconsider the conclusions reached in a 1993 Attorney General Opinion and Department of Justice correspondence from 2004. A 1993 Attorney General Opinion concluded that the term “candidate” in the statute is synonymous with “applicant” for purposes of a public records request for information on final candidates for a particular position. The Opinion reached this conclusion because it resulted in the greatest number of applicants as final candidates, consistent with the public policy providing the greatest information to the public. Correspondence from the Department of Justice in 2004 applied Wis. Stat. §19.36(7), defining “final candidate” and the 1993 Attorney General Opinion to a situation in which a consultant referred eight applicants to an interview team and the school board picked two finalists. The conclusion was that all eight applicants, not just the top two finalists, were “final candidates” whose names and addresses should have been disclosed in response to a public records request

The 2008 Opinion concluded that the 1993 Opinion and the Department of Justice correspondence from 2004 contained the correct interpretation of Wis. Stat. §19.36(7), because that interpretation results in the greatest number of candidates being identified as final candidates. This result is consistent with the legislative mandate in Wis. Stat. §19.31 that the public records statute be “construed in every instance with a presumption of complete public access, consistent with the conduct of governmental business.”

B. Attorney General Opinion Regarding E-Mail Transmissions Of Public Officials (March 12, 2004).

The Milwaukee Journal Sentinel asked the Attorney General to evaluate certain e-mail practices used by various officials in Ozaukee County.

The Attorney General noted that “e-mail communications must be conducted and preserved in a way that ensures the public can access information about how public officials conduct the public’s business.” The Attorney General observed that e-mail communications are public records and that, under the public records law, governmental bodies must have a records retention policy published in a public place. E-mails are subject to these policies and must be maintained according to whatever policy the governmental unit has adopted regarding records retention.

The Attorney General added that elected officials are the custodians of their own documents, because they constitute an “authority” under the public records law. Thus, the Attorney General reasoned, each elected official is responsible for maintaining e-mail records so that they can be accessed under the governmental body’s records policy; this rule applies to home computers as well as office computers, if the subject of the e-mail is the business of the governmental unit (the same is true with other

documents that an elected official may choose to keep at his or her home).

1. Public records requests can be made regarding board member home computers and their contents, so long as they relate to records that concern the business of the board.
  - a. Computers that are property of the school are likely to be accessible regardless of content.
  - b. Personal computers that are individual board members' property, according to the Attorney General, can be accessed for e-mails and other documents that are created, sent, or received in the individual's capacity as a board member. E-mails that may be accessible include:
    - i. E-mails from constituents.
    - ii. E-mails to or from other board members.
    - iii. E-mails from or to school district personnel.
2. The Attorney General's opinion implicates a series of open meetings law issues:
  - a. Walking quorum.
  - b. Negative quorum.

NOTE: Intent is not relevant if, objectively, the communications at issue involve the business of the governmental body. As a result, open meetings law violations can occur even if an individual board member's e-mail to another board member was not meant to trigger subsequent electronic correspondence with other board members.
3. Retention and Destruction of Governmental Records.
  - a. Board member home computers.
  - b. Computer systems owned and operated by the school district.

- C. Attorney General Opinion on Public Access to Local Public Office Holders' Evaluations. *Informal Opinion to Attorneys James Friedman and Charles Graupner* (October 31, 2005).

The Attorney General issued an opinion concerning the public's right to have access to the performance evaluations of a technical college board president prepared by the college's board of directors under Wisconsin's Public Records Law. This opinion is authoritative on the issue of public access to a superintendent's evaluation.

In this case, the Milwaukee Journal-Sentinel made a request for "evaluations," as well as "letters and memos shared among board members as part of (the president's) annual evaluation." The college denied the request, stating that disclosure would discourage honest assessments of the president's performance, discourage the written feedback process, and serve to limit or undermine the effectiveness of the president's leadership. The college relied, in part, on statutory language governing closed board meetings, which acknowledged that closed meetings can be scheduled to review performance evaluation data.

The Attorney General noted that the Public Records Law makes a distinction between employees and individuals who hold a "local public office." While companion language in the public records statute limits access to employee performance evaluations, she reasoned, a president of a technical college qualifies as a "local public official" and, thus, the statutory restrictions on disclosing employee evaluations in the Public Records Law do not apply. As a result, the Attorney General concluded that the issue could only be resolved by balancing the strong presumption favoring access to records with public policy considerations that favor limiting access or non-disclosure.

The Attorney General observed that the deliberative process leading to the board's conclusions did not necessarily have to be disclosed, noting that, to the extent that releasing letters and memos shared among board members would adversely affect the public interest in promoting frank and complete evaluations, such records might be withheld or redacted. However, she also concluded that the board's ultimate evaluation must be disclosed, reasoning that the public not only has the right to evaluate the president's performance; it also has the right to evaluate the board by having access to records "reflecting on the board's most important responsibilities (including evaluation of the president)."

1. Historical significance: Previous cases have generally dealt with personnel file information involving matters that are closed or concerning former employees. Thus, for example, a superintendent's written reprimand has been found open to the public. Similarly, the evaluation of a former superintendent has

been found open to the public. This case represents a new development, in that the evaluation of the chief executive for a public entity has been found subject to disclosure, even though his employment was ongoing.

2. The Newspapers' Association sought the following information in this case:
  - a. Evaluations.
  - b. Letters and memos shared among board members as part of the evaluation process.

**NOTE:** The parties agreed to be bound by the opinion of the Attorney General in this matter. Following the Attorney General's opinion, Milwaukee Area Technical College turned over information that had been requested, but redacted certain information.

3. Issues of interest not fully discussed in the Attorney General's opinion:
  - a. The Attorney General's opinion has little discussion of the significance (if any) of the college president's ongoing employment relationship with the board or his ongoing role as college president generally. The Attorney General acknowledges that the college expressed concern that candor in the evaluation process could compromise the president's effectiveness, but generally dismisses this argument as subordinate to the public interest in knowing how the president has been evaluated and how the board performs its evaluation function. As a result, the Attorney General's opinion does not (at least not expressly) balance the public interest in disclosure against the public interest in maintaining the confidentiality of the evaluation.
  - b. The Attorney General acknowledges that documents concerning the "deliberative process" leading up to the evaluation do not necessarily have to be disclosed. As a result, the Attorney General reasoned that correspondence shared by board members might be withheld or redacted if it would adversely affect the public interest in promoting frank and complete evaluations.

Thus, the Attorney General seems to acknowledge that certain information may be withheld because of the stage in the process in which it is generated (the deliberation stage),

but also seems to suggest that content may play a role in the determination as well.

- c. Considerations: The board may wish to consider having individual contributions and deliberation at the closed meeting of the board itself. Further, in circumstances where individual board members complete individual evaluations in order to contribute to a composite, final evaluation, the board may wish to consider agreeing that information will be shared and compiled only at the board meeting itself.

The board may wish to consider reviewing any formal policies/procedures that it has on administrative evaluations. Issues to consider include:

- i. "Draft" status of individual board member contributions to the final evaluation.
  - ii. Confidentiality procedures to be observed in formulating and storing evaluations.
  - iii. Procedures for finalizing "board" evaluation.
- d. Application of this Attorney General opinion to principals and other administrators.