

FREQUENTLY ASKED QUESTIONS:
PUBLIC RECORDS AND OPEN MEETINGS

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PUBLIC RECORDS

- I. What is a Record and Who is a Custodian?
 - A. There is a strong statutory presumption in favor of the right of the public to inspect “records” in the custody of a public “authority.” Section 19.35(1)(a), Stats.
 - B. The definition of what constitutes a public “record” is extremely broad encompassing almost any memorialization of information. Section 19.32(2), Stats. (Note: that that statutory definition excepts certain types of documents from the definition of “record” such as “drafts.”)
 - C. The legal custodians of records include elected officials, the chairs of governmental bodies or committees, and governmental department heads. Section 19.33, Stats. Each legal custodian must provide notice to the public and to employees entrusted with the authority’s records. Sections 19.33(4) and 19.34, Stats. Both notices must identify who the legal custodian is, and the notice to the public must be posted at the authority’s office and provide certain required information about the authority.
- II. What are the Custodian’s Obligations?
 - A. A request for a record is deemed sufficient if it reasonably describes the requested record or the information requested. A request is insufficient, however, if it is unreasonable as to time or subject matter. Section 19.35(1)(h), Stats.
 - B. A record custodian normally cannot ask why a request is being made or require the requester to identify themselves. Section 19.35(1)(i), Stats.
 - C. A custodian must respond to a record request “as soon as practicable and without delay.” Section 19.35(4)(a), Stats.
 - D. If a request is made orally, the custodian may deny the request orally. Section 19.35(4)(b), Stats. (Note: no legal action can be commenced on an oral request.)
 - E. If the request is made in writing, the custodian must provide the requester with a written statement setting forth the reasons for denial. The notice

must also inform the requester that he or she has a right to commence an action to review the adequacy of the reasons for denial or to ask the Corporation Counsel to do so. Section 19.35(4)(b), Stats.

- F. Before denying record inspection, the custodian must apply a balancing test. The test weighs the public-policy reason for nondisclosure (the Open Meeting Law exemptions are examples of such reasons) against the strong public policy in favor of disclosure. Disclosure may also be denied if specific state or federal law makes the records confidential. For example, health care records.

The reasons must be stated in the response. We strongly suggest that legal counsel be consulted before any written denial is made.

- G. There is no statutory obligation to create a new document to respond to a request. Section 19.35(1)(L), Stats.

III. Are Personnel Files Open to the Public?

- A. Requests by the Employee under sec. 103.13 Wis. Stats.

1. All employers must permit an employee to inspect personnel documents that are used in determining employment, promotion, transfer, compensation, termination, or discipline. The employer must grant at least two such requests per person per year.
2. An employer may require that the request be made in writing.
3. If an employee is involved in a grievance, a representative may view documents that may have a bearing on the grievance.
4. An employee may correct a record if he or she disagrees with information in the record. If the employer disagrees, the employee may submit a written statement.
5. Medical records are included in this section. If the employer thinks disclosure of the medical record could adversely affect the employee, the employer may release the medical records to the physician.
6. Employee may not see:
 - a. Records relating to investigation of possible criminal offenses.
 - b. Letters of reference.
 - c. Tests, except for cumulative-total test scores.
 - d. Staff management – planning documents, including recommendations about salary, bonuses, promotions, and job assignments.

- e. Personal information about another person, if it would invade that person's privacy.
- f. Records concerning another pending claim that may be discoverable in a judicial proceeding.

B. Law Enforcement Personnel Records

1. The blanket withholding of all law-enforcement personnel files is not justified, *Journal/Sentinel, Inc. v. Arreola*, 207 Wis. 2d 496, 558 N.W.2d 670 (Ct. App. 1996), except for certain types of information that may be especially harmful to the public interest. Courts are, therefore, more likely to permit withholding of that information. See *Wisconsin Newspress v. Sheboygan Falls Sch. Dist.*, 199 Wis. 2d 768, 546 N.W.2d 143 (1996).
2. Factual information contained in reports of incidents where police officers discharged their weapons is generally subject to public inspection. Nonfactual information, however, "may legitimately be withheld in order to maintain the effectiveness of ongoing investigations." Portions of reports containing supervisory opinions and recommendations should be withheld "because supervisors might be less than candid if they know that the documents are subject to public disclosure." *Arreola*, 207 Wis. 2d at 513, 514.
3. The disclosure of police-department disciplinary records could hamper the department's ability to thoroughly investigate allegations of wrongful conduct by inhibiting department personnel from giving pertinent confidential statements. This harm to the public interest may outweigh the interest in disclosure. *Pangman & Associates v. Zellmer*, 163 Wis. 2d 1070, 1083-84, 473 N.W.2d 538 (Ct. App. 1991).
4. *Village of Butler v. Cohen*, 163 Wis. 2d 819, 472 N.W.2d 579 (Ct. App. 1991), provided many public-policy reasons for nondisclosure of law-enforcement personnel files, including: inhibiting the municipality's right to hire and retain competent personnel; discouraging officers from testifying in court; circumventing the rules against pretrial discovery in traffic offenses; and discouraging an evaluation from making a candid assessment.

C. Personnel Files Requested by the Public

1. *Woznicki v. Erickson*. The Supreme Court ruled that there is no blanket exemption from the Public Records Law for public-employee personnel records. If portions of the records contain information that might affect someone's privacy or reputational interests, that person should get notice and time to challenge the release of the information in court. The Supreme Court has expanded this ruling to all public records, not just personnel records.
2. The Wisconsin Court of Appeals has held that the *Woznicki* case applies in all cases in which a record custodian decides to disclose information implicating the privacy and/or reputational interests of individuals identified in the records. *Milw. Teachers Ass'n v. Milw. Bd. of School Dirs.*, 227 Wis. 2d 779, 781, 596 N.W.2d 403, 404 (1999). Although the 2003 Amendments to the Public Records Law have modified and overturned the notice requirements of these court decisions the long-held recognition of privacy and reputational rights remain in effect. *Woznicki v. Erickson*, 202 Wis. 2d 178, 183, 549 N.W.2d 699 (1996). While there is no blanket exception to withholding law enforcement personnel files, certain types of information that may be especially harmful to the public interest may be allow a records custodian to permit withholding of that information. *See, Wisconsin Newspress v. Sheboygan Falls Sch. Dist.*, 199 Wis. 2d 769, 546 N.W.2d 143 (1996).
3. The Public Records Law restates the common-law rule that public records are open to public inspection. *State ex rel. Youmans v. Owens*, 28 Wis. 2d 672, 137 N.W.2d 470 (1965). One of the common-law limitations is the requirement that the harm to the public interest from disclosure of the records be balanced on a case-by-case basis against the benefit to the public of opening the records to examination. Statutory exceptions include medical records, social security numbers, and the like.
4. The exemptions to the Open Meetings Law may be used to deny access to a public record, including personnel files, if the custodian of the record makes specific demonstration that there is a need to restrict public access at the time that the request is made, sec. 19.35(1)(a), Stats., but these public-policy reasons for withholding the documents (including sec. 19.85(1)(f) – disclosure is likely to have a substantial adverse effect on reputations) must still be balanced against the public-policy reasons favoring disclosure.

5. Public employees have a lower expectation of privacy because of their choice of public employment. *Kraemer Bros., Inc. v. Dane County*, 229 Wis. 2d 861, 599 N.W.2d 79 (Ct. App. 1999).
6. The public interest in denying inspection of a record may be greater where disclosure would interfere with an ongoing investigation or a contemplated disciplinary action. *Youmans*, 28 Wis. 2d at 685.
7. The public has an especially strong interest in being informed about the conduct of public officials in carrying out their duties and this interest may weigh more heavily in the balance than possible damage to reputations. *Newspress*, 199 Wis. 2d at 786.
8. In *Hempel v. City of Baraboo*, *Hempel* was charged with sexual harassment by a colleague. The City of Baraboo Police Department conducted an internal investigation and determined there was not enough evidence to charge Hempel with a department rule violation of sexual harassment, but filed a letter report in Hempel's personnel file for three years. Hempel subsequently made a public records request for copies of written materials pertaining to the complaint against him. Hempel was given a copy of the report contained in his personnel file, however, the police department denied Hempel's request for documents created during the internal investigation relating to the complaint.

The court rejected some of the city's nondisclosure reasons, but agreed that the following reasons justified nondisclosure:

- (a) The report was filed as a result of an internal complaint of sexual harassment resulting in a confidential investigation;
- (b) Disclosure would interfere with and impede law enforcement's ability to conduct a thorough and confidential internal investigation;
- (c) Disclosure would discourage victims and witnesses from providing information regarding personnel investigations; and
- (d) It is necessary to shield victims and witnesses who cooperate with personnel investigations and their families from the increased risk of harassment. The court further recognized that there are "significant privacy issues at stake here." *Id.* at p. 5.

IV. What does the *Woznicki* case Require of Custodians?

A. *Woznicki* and Progeny

1. Supreme Court decisions

a) *Woznicki v. Erickson*, 202 Wis. 2d 178, 549 N.W.2d 699 (1996). There is no blanket exemption for public-employee personnel records. An employee may have reputational and privacy interests in those records, and should be given notice and an opportunity to file an action to prevent disclosure. (Notice requirement modified in 2003 Wisconsin Act 47).

2. *MTEA v. MBSD*, 227 Wis. 2d 779, 596 N.W.2d 403 (1999). Extended *Woznicki* holding to all public records.

3. Court of Appeals decisions

a) *Klein v. Wisconsin Resource Center*, 218 Wis. 2d 487, 582 N.W.2d 44 (Ct. App. 1998). This decision involved release of the personnel file of an employee of a state facility, upon request of patients who were committed to the facility. The employee's *Woznicki* action to challenge the custodian's determination to release a portion of her file was proper.

b) *Kailin v. Rainwater*, 226 Wis. 2d 134, 593 N.W.2d 865 (Ct. App. 1999). Acknowledges that the Supreme Court has grafted an additional procedure onto the Public Records Law. At a *Woznicki* hearing, the role of the circuit court is to determine if the custodian performed the appropriate balancing test, and then to review de novo the decision of the custodian. This second review would allow the court to hear arguments the custodian did not consider.

c) *Kraemer Brothers, Inc. v. Dane County*, 229 Wis. 2d 86, 599 N.W.2d 75 (Ct. App. 1999). Private employees of public contractors have a privacy interest in keeping their salaries from public view.

- d) *Atlas Transit, Inc. v. Korte*, 249 Wis. 2d 242, 638 N.W.2d 625, 2001 Wis. App. 286 (Ct. App. 2001). The custodian does not have to list reasons supporting his reasons to disclose, when giving a *Woznicki* notice.

B. The Process

1. The custodian performs the balancing test to determine if the interests of the public in access outweighs the interests of the public in keeping the records confidential.
2. If there is material that is likely to have a substantial adverse effect on the reputation of any person (sec. 19.84(1)(f)), this may justify refusing to release that portion of the records, after balancing the interests. At this point, notice may be required pursuant to Wis. Stat. § 19.356.
3. The subject should be provided a copy of the portion of the record relating to him or her, with redactions, if necessary.
4. If no lawsuit is commenced [or order received?], the records should be released. If the subject provides the custodian with new information, rebalancing can occur.

C. The Lawsuit

1. The custodian usually will be named as a party to the lawsuit and will be required to show the court that the appropriate balancing test was used, and will be required to bring the disputed records.

V. What has the Legislature Done in Response to *Woznicki* and *Milwaukee Teachers*?

A. Definitions

Section 19.32(1bg) – NEW Defines “**employee**” to mean any public or private sector employee except an individual holding a local or state public office.

1. 19.32(1dm) – NEW - This new section defines “**local public office**” to include current section 19.42(7w), which includes, in relevant part: (1) elected officials; (2) a county administrator or city/village manager; (3) appointed officers in a position in which the individual serves for a specified term, except for those positions limited to the exercise of ministerial actions or independent contractors; (4) individuals appointed by the governing body of the local government or the executive/administrative head of the local government who serves at the pleasure of the appointing authority, except for certain clerical positions; or, (5) a member of a board of directors. This definition does not include “municipal employees” as defined by section 111.70 (1)(i), (any individual employed by a municipal employer except an independent contractor, supervisor, or confidential, managerial or executive employee.)

The amendment additionally includes as local public officials, departments heads, and agency or division heads who are appointed by the authority. The legislative note to the amendment states that this specifically includes the offices of police chief and fire chief, and positions whose incumbents do not serve for a statutorily-specified term, who may be removed only for cause and are not appointed by the governing body of a local government. The note also states that the purpose of this new section of the law is to provide that individuals who hold upper-level government offices or positions and who are given broad discretionary authority may not seek judicial review in order to prevent release of records that name them. (But see, sec. 19.356(9a)).

2. Section 19.32(2g) – NEW “**Record Subject**” means an individual about whom personally identifiable information is contained in a record.
3. Section 19.345 – NEW States that when time periods are defined in hours or days, Saturdays, Sundays and legal holidays from midnight to midnight are excluded in computing the period. Additionally, according to section 990.001(4), the first day is not included in the calculation.

B. Public Notice

Section 19.34(1) – AMENDMENT - This is the requirement for posting a Public Notice explaining who the authority is, the services performed by the authority, how and when to gain access to records, costs, etc. The amendment includes a requirement that the authority separately identify “each position of the authority that constitutes a local public office or a state public office.” This includes all positions as defined by sections 19.32(1dm) and 4. (*See*, “Practical Application” section below.) For example, the City Attorney’s Office positions constituting a “local public office” include the City Attorney and three Deputy City Attorneys. (*See* attached notice.)

C. The Fix

1. 19.356(1) – NEW – Except as required in the Public Records Law amendments, a custodian is not required to notify a record subject (i.e., any individual) prior to disclosure of a record that contains information about the subject, and no person is entitled to judicial review of the custodian’s disclosure decision. (But *see*, sec. 19.356(2) below.)
2. 19.356(2) – NEW – EMPLOYEE PERSONNEL RECORDS – Under the amendments, after conducting the “balancing test,” notification is required to any “record subject” **only** with regard to: (1) records relating to a closed investigation into a disciplinary matter involving the employee or possible employment-related violation by the employee of a statute, ordinance, rule, regulation or policy of the employee’s employer; (2) records obtained by the authority through subpoena or search warrant; or (3) records from a previous employer that reference the subject employee unless the employee gives permission for disclosure. The provisions of this section of the amendment do not apply to instances where an employee who is the subject of a record or the employee’s

representative requests access to or copies of the record, or where otherwise provided by law.

If the custodian decides to permit access to a record of a public or private sector employee that includes the above-listed subject matter the records custodian must notify the record subject, within **three** days after the decision to permit access. The notice must give a brief description of the requested record and a description of the rights of the affected employee. It requires notification by personal service or certified mail.

It is important to be aware that the legislative note indicates that the amendments do not change the requirement that the custodian must apply the balancing test while making the decision whether or not to release the record. In other words, the first step in the analysis still requires the custodian to conduct the required balancing test and then, if the balance tips in favor of disclosure and the record references any of the information referenced in sec. 19.356(2) as outlined above, then the custodian must give the appropriate notice. The notice requirement, of course, is not applicable when the custodian is providing access to a record pertaining to an employee who is the subject of the record or to his or her representative or to his or her bargaining representative. It also does not apply to records produced for equal rights, discrimination or fair employment law compliance purposes.

If the request includes information falling within the above-listed subject matter of a non-employee (i.e., any individual who is not a public or private employee involved in an employment relationship with a government employer) the records custodian must apply the balancing test in making the decision of whether to disclose the requested record or portion of the record.

In conducting the balancing test the custodian (or authority) balances the competing interest of the public in access to the records against the possible harmful affect to the public interest in disclosing the records. *State ex rel. Richards v. Foust*, 165 Wis. 2d 429 (1991). When conducting the balancing test the custodian must keep in mind that the analysis must be whether the harm to the public's interest in non-disclosure outweighs the public's interest in inspection of the record. *Linzmeier v. Forcey*, 254 Wis. 2d 306, 646 N.W.2d 811, 818 (2002.) Notwithstanding the broad public policy of openness, the public's right to public records is not

absolute. *Journal Sentinel, Inc. v. Agerup*, 145 Wis. 2d 818, 822 (Ct. App. 1988).

In the case of *Newspapers, Inc. v. Breier*, 89 Wis. 2d 417, 427 (1979), the Wisconsin Supreme Court set forth the process that a public-records custodian must follow when responding to a record-inspection request. Specifically, the court stated as follows:

. . . when a demand to inspect public records is made, the custodian of the records must weigh the competing interests involved and determine whether permitting inspection would result in harm to the public interest which outweighs the legislative policy recognizing the public interest in allowing inspection. *Beckon v. Emery, supra* at 516; *Youmans, supra* at 682. If the custodian decides not to allow inspection, he must state specific public-policy reasons for the refusal. These reasons provide a basis for review in the event of court action. *Beckon, supra* at 518; *Youmans, supra* at 682. The custodian of the records must satisfy the court that the public-policy presumption in favor of disclosure is outweighed by even more important public-policy considerations.

D. Timing for Notification

1. Subsection (3): After receipt of the custodian's notice the record subject has **five days** to notify the employer, **in writing**, if he or she intends to seek a court order to attempt to block disclosure of the record.
2. Subsection (4): The record subject has **10 days** after receipt of the notice to go to court to file an objection to the release decision. If there is an objection filed in the court, the custodian is named as a defendant and must notify the requester of the court action. The custodian is also required to inform the requester of the results of the court action. The requester has a right to intervene.
3. Subsection (5): The custodian must wait **12 days** (not including Saturday, Sunday, legal holidays or the first day) before providing access to the requester if he or she does not receive a written objection. If there is an objection the custodian must wait until the result of the objection and all appeal time has passed to release the record.

4. Subsection (6): Instructs that the court can block disclosure using the common-law balancing test.
5. Subsection (7): Within **10 days** after filing the complaint and proof of service on all parties has been given, the court must issue a decision, unless a party can demonstrate that there exists a cause for extension. If extension is granted it can be for no more than **30 days**.

NOTE: This provision merely provides guidance for the procedure for filing a complaint and issuing a decision. There is no guidance provided for briefing or for a hearing and other procedural matters.

6. Subsection (8): If a party appeals the circuit court decision, the court of appeals must give these types of cases priority.

E. Local Public Officials

1. Subsection (9a): If the record subject is an officer or employee of the authority holding a “local public office” the custodian has **three days** after it decides to permit access to serve written notice to the record subject. Again, service must be by certified mail or by personal service and must include a brief description of the requested record and a statement of the record subject’s rights under the law, as described below.
2. Subsection (9b): Within **five days** the record subject can augment the record to be released with written comments and documentation. The record custodian may then release the requested record with the comments, notes and documentation added by the record subject.

F. Contractor Employee Records

Section 19.36(3) – AMENDMENT Amends the section of the public records law regarding contractors’ records by stating that subject to subsection (12) (which is explained below), contractor records must be made available to the same extent as if the record were maintained by the authority itself.

G. Employment Applications

Section 19.37(7a) amends the statute defining “final candidate” deleting the reference “as defined in sec. 19.42(7w)” because the bill expands the definition of the term “local public office,” as explained above in sec. 19.32(1dm).

Any applicant, except those applying or competing for a “local public office” position, may request that the authority keep confidential any record relating to the application that may reveal the applicant's identity, unless or until they become a “final candidate.” This usually consists of the top five or fewer candidates.

H. Disclosure Prohibited

1. Section 19.36(10) – NEW – EMPLOYEE PERSONNEL RECORDS This section provides that unless the employee authorizes or as required by a collective bargaining agreement, the authority **SHALL NOT** disclose:
 - a. Home address, home electronic mail address, social security number, and home telephone number unless the employee so authorizes.
 - b. Information relating to a current (on-going) investigation of possible employment-related misconduct or potential criminal or civil law violations.
 - c. Employee examination information, except for the score, unless otherwise prohibited.
 - d. Information relating to one or more specific employees that is used by an authority or by the employer of the employees for staff management planning, including **performance evaluations**, judgments, or recommendations concerning future salary adjustments or other wage treatments, management bonus plans, promotions, job assignments, letters of reference, or other comments or ratings relating to employees.

NOTE: This section applies to public and private sector employees only. Assembly Bill 884 would prohibit state and local governmental units from disclosing social security numbers of any individual under certain conditions. If passed, Assembly Bill 884 will provide that if a new record containing a social security number of any individual, together with information revealing the identity of the individual is kept by a state or local governmental unit on or after January 1, 2005, or any record in the custody of a state or local governmental unit is modified to insert the social security number of an individual on or after January 1, 2005 and the record contains information revealing the identity of that individual, the custodian must delete the social security number prior to permitting access to the record.

I would further argue that there are sufficient public policy reasons that a custodian may use to delete any social security number under any circumstances. Further, the Wisconsin Attorney General has recommended that social security numbers, dates of birth and other personal information be released only when absolutely necessary. (See www.doj.state.wi.us, referenced at the Office of Consumer Protection page).

2. Local Public Official

Section 19.36(11) – NEW Addresses the disclosure of records of individuals holding a “local public office.” States that the employer **SHALL NOT** disclose the home address, home e-mail address, home telephone number or social security number of a person who holds a local public office, unless authorized by the individual. The subsection does not apply to the home address of an individual who holds an elective public office or of a local public official who is required to live in a specific location. This subsection does not address issues concerning on-going investigations, exam information or performance evaluations, etc., regarding individuals holding a “local public office.”

3. Contractor Records

Section 19.36(12) – NEW Prohibits disclosure of names and personally identifiable information of prevailing wage employees unless authorized by the employee. Prevailing wage information does not include work classification, hours of work, or wages and benefits.

I. Appeals

Section 808.04(1m) – NEW – Appeals by a record subject under sec. 19.356 shall be initiated within **20 days** after the date of entry of judgment or order appealed from. This deviates from the ordinary 45 days for appeal under sec. 808.04.

J. PRACTICAL APPLICATION OF THE AMENDMENT

1. **Notice.**

All records custodians are currently required to post a Public Records Notice, in a public location, that includes the location of the office(s) and the dates, time, costs and method of obtaining public records. The new amendment now additionally requires all records custodians to list all positions (not employee names) of the department or division that constitute a “local public office” as defined in sec. 19.32(1dm) (elected or appointed officials). We have included the updated Milwaukee City Attorney Public Records Notice with the changes in bold.

2. **Procedure.**

- a. Under the new amendments, when faced with a request for employee-related records, the custodian must first redact all of the types of information listed under sec. 19.36(10) a-d, of the amendment.¹ (*See* above reference.) This step does not require the custodian to conduct the balancing test. This information **must not** be disclosed and therefore no “*Woznicki*” notice is required. It **does not** apply to the home address of an individual who holds an elective office or a local public official who, as a condition of employment, is required to reside in a specified location (i.e., those who are subject to the residency requirement.) This section does not address issues concerning on-going investigations, exam information or performance evaluations of local public officials. Therefore, the “balancing test” should be applied before the release of this type of information, as well as the home addresses, of local public officials. (*See*, amended definition of “local public office.”). The only provision in this section that applies to non-employees includes records obtained by the authority as a result of a search warrant or subpoena, and, arguably any individual mentioned in a closed personnel investigation. The balancing test must be applied to a request for any other information that references non-employees.

¹ Keep in mind that the custodian is allowed to charge for the “actual, necessary and direct cost of complying” with the public-records request. *Osborn v. Board of Regents of the University of Wisconsin System*, 254 Wis. 2d 266 (2002). (Emphasis added).

- b. The custodian must next examine the record to determine if the record (or any portion of the record) cannot be disclosed due to any other statutory provision, the common law, or an overriding public interest in keeping the record confidential (the “balancing test”). If the custodian decides not to disclose the requested record, or any portion thereof, at this step he or she must give the requester the remaining portions of the requested records and give the statutory, common law, or specific policy reasons for non-disclosure that outweigh the public policy in favor of disclosure.
- c. If the balance tips in favor of disclosure, the custodian must then determine whether the requested record(s), or any portions thereof, include the types of information listed in sec. 19.356(2) of the amendment, which includes a closed investigation of employee misconduct, records obtained by the authority through a subpoena or search warrant, or records from a previous employer that reference the subject employee. If any of these types of records are included within the request, the record custodian must give the employee and/or record subject notice within three days after the decision to permit access. (The notice must contain a description of the requested record and the record subject’s rights under the amendment.) Only records obtained by the authority as a result of a search warrant or subpoena (or closed investigation) apply to non-employees. The balancing test must be applied to a request for any other information that references non-employees.

3. **New Time Computations.**

- a. Once a custodian decides to disclose a record, the custodian must notify the record subject within **three business days** after the decision to permit access. (The notice must contain a description of the requested record and the record subject’s rights under the amendment.) **The amendment requires notification by personal service or certified mail.** The records subject then has **five days** after receipt of the notice to notify the employer in writing if they intend to object to the disclosure decision. The records subject has **ten business days** after receipt of the notice to go to court to file an objection. The custodian must notify the requester of the records subject’s objection and of the results of the court action. The custodian must wait **12 business days** before providing access if there is no objection. If there is an objection, the custodian must wait until the result of the objection and all appeal time has passed before releasing the subject record.
- b. If the affected employee is an officer or a “local public official,” the custodian also has **three business days** after it decides to permit access to serve written notice to the affected employee. Once again, **service must**

be by certified mail or personal service. Within **five business days** of receipt of the notice, the records subject officer or local public official can then augment the record to be released with written comments and documentation. The custodian may then release the requested record with the comments, notes and documentation added by the affected officer or local public official.

- c. Key provisions of the amendment include the blanket exceptions found in sec. 19.36(10) and (11), and the definition of types of records that require notice found in sec. 19.356(2). Records custodians must be aware of the new time deadlines once decisions to release have been made as well as the requirement that notice of the decision to release must be made by personal service or by certified mail. Failure to follow these requirements may result in liability against the authority although that is not specifically defined in the amendment.

Records custodians must also be aware that the amendment defines **employee** as any public or private sector employee. A “record subject” is defined as **any individual** about whom personally identifiable information is contained in a record. Therefore, the specific notice requirements found in sec. 19.356(2)(a) 3, and the public records exceptions found in sec. 19.36(10) & (11), apply only to **employees**. The notice requirements found in sec. 19.356(2)(a) 2, and arguably sec. 19.356(2)(a)1, apply to **any individual**. All other requests that may include personally identifiable information is still subject to the balancing test, but no notice requirement, prior to release.

VI. What Fees May a Custodian Impose Upon a Requester:

- A. **Reproduction Fees.** Wisconsin law authorizes the imposition of a fee for reproduction that does not exceed the actual, necessary, and direct costs of reproducing the record, unless a fee is otherwise specifically established or authorized to be established by law. Sec. 19.35(3)(a), Stats.

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

Generally, this means that a copy fee may include a charge for the time it takes the secretary or clerk to reproduce the records on a copying machine. 72 Op. Att’y Gen. 150 (1983).

- B. Location Fees. A records custodian may charge a fee for locating a record, not exceeding the actual, necessary, and direct costs of location, if the cost of locating the record is \$50 or more. Sec. 19.35(3)(c), Stats. This fee is to be determined separately from the cost imposed for copying or reproduction of the record.
- C. Shipping or mailing fees. Under sec. 19.35(3)(d), Stats., an authority may impose a fee upon a requester for the actual, necessary and direct costs of mailing or shipping of any copy or photograph of a record which is mailed or shipped to the requester.
- D. Miscellaneous. Copying fees, but not location fees, may be imposed on a requester for the cost of a computer run. 72 Op. Att'y. Gen. 68 (1983).

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

Under sec. 19.35(3)(f), Stats., an authority may require prepayment by a requester of any fee or fees imposed if the total amount exceeds \$5.

- E. Certification Fees. A requester of copies of public records is not required to pay for certified copies if certification is not requested. 72 Op. Att'y Gen. 35 (1983).
- F. A custodian can charge for the costs of complying with a public records request. *Osborn v. Bd. of Regents of the University of Wisconsin*, 254 Wis. 2d 266 (2002) We interpret this recent court decision to include the costs required to review the record, redact records or portions of records that are not disclosable under the Public Records Law, and the costs incurred in sending Woznicki notices where required.

VII. How is the Public Records Law Enforced?

- A. Mandamus. An authority withholding a record or part of a record or delaying granting access to a record may be subject to a mandamus action.
- B. Damages and Fees. The court may award damages and fees, including attorney's fees.
- C. Punitive Damages. If a court finds that an authority or legal custodian has arbitrarily and capriciously denied or delayed a response to a request or charged excessive fees, the court may award punitive damages to the requester.

- D. Forfeitures. An authority or legal custodian who arbitrarily and capriciously denies or delays response to a request or charges excessive fees may be required to forfeit not more than \$1000.

Actual and punitive damages and forfeitures may be a liability of either the agency or the legal custodian or both.

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

OPEN MEETINGS

- I. What are the relevant statutes?
- A. There is a strong statutory presumption in favor of providing the fullest and most complete information regarding the affairs of government to citizens as is “compatible with the conduct of government business.” Section 19.81, Wis. Stats.
- B. Every meeting of governmental bodies must be preceded by a public notice. With certain narrow exceptions, all business of any governmental body must be conducted in open session. Section 19.83, Wis. Stats.
- C. **What is a “governmental body?”** Under the statute, a “government body” includes a state or local agency, board, commission, committee, council, department or public body corporate and politic created by constitution, statute, ordinance, rule or order. It includes a governmental or quasi-governmental corporation. There are certain specific exceptions, including the Bradley Center, and the Olympic Ice Training Center. Section 19.82(1), Wis. Stats.
- II. What is the scope of the law?
1. The Open Meetings Law applies only to a body or group considered a “governmental body” as defined in § 19.82(1), Wis. Stats.

III. Who is covered?

A. State or local agencies, boards and commissions.

This provision focuses on the manner in which a body was created, rather than on the type of authority the entity possesses. State and local governmental bodies are created by “rule or order.” This rule has been liberally construed to include any directive, formal or informal, creating a body and assigning its duties. **“All that is required to create a governmental body is a directive creating the body and assigning it duties.”** This directive may come from a Mayor, head of a agency, department or division. 78 Op. Att’y Gen. 67, 68-69 (1989.)

B. Governmental or quasi-governmental corporations.

Although not defined by statute or case law, the Attorney General has concluded that the phrase includes a corporation directly created by the state legislature or some other governmental body pursuant to statutory authorization or direction. A volunteer fire department created by private citizens under Chapter 213, Wis. Stats., is not a “governmental body” subject to the Open Meetings Law. 66 Op. Att’y Gen. 113, 115 (1977.)

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

D. A municipal public utility commission managing a city-owned public electric utility. 65 Op. Att’y Gen. 243 (1976.)

E. Citizen advisory committee appointed by public officials for a governmental body. 78 Op. Att’y Gen. 67 (1989.)

F. The Wisconsin Attorney General recently ruled that a task force ordered by the Oshkosh Area School District’s superintendent is a governmental body in that it was a “committee . . . created by constitution, statute, ordinance, rule or order” under § 19.82(1), Wis. Stats. Wisconsin Attorney General letter, June 8, 2001. In this case the task force was organized to study enrollment disparities within the school district. In his opinion, the Attorney

General references the case captioned *State v. Swanson*, 92 Wis. 2d 310 (1979), which pointed out that the definition of a governmental body focuses on the manner in which a body was created rather than the type of authority the body possesses. Accordingly, the Oshkosh task force was interpreted to have been a “governmental body” created by “rule or order.” *Id.*

- G. In *State ex rel. Journal/Sentinel, Inc. v. Pleva*, 155 Wis. 2d 704 (1990), the Wisconsin Supreme Court held that because the Milwaukee World Festival, Inc. (a private, non-profit corporation) voluntarily agreed to a contract clause it is subject to the requirements of the Open Meetings Law. The Court held that *Journal/Sentinel*, as a representative of the public, had standing as a third party to seek enforcement of the Open Meetings Law with regard to festival meetings. The court held that both parties violated both the terms of the contract and the open meetings law.

IV. Which entities are not covered?

1. The statute explicitly excludes, for example, the Bradley Center Sports and Entertainment Corporation. Section 19.82(1), Wis. Stats.
2. Bodies formed for or meeting for the purpose of collective bargaining with municipal or state employees. Section 19.82(1), Wis. Stats. The collective bargaining exclusion does not allow a body to consider the final ratification or approval of the collective bargaining agreement in closed session. Section 19.85(3), Wis. Stats.
3. The definition does not include bodies created by the Wisconsin Supreme Court.

V. What is the legal definition of a “meeting”?

A. Statute.

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

- B. What triggers the application of the law? The Wisconsin Supreme Court has held that the Open Meetings Law applies whenever a gathering of members of a governmental body satisfies two requirements: (1) there is a

purpose to engage in governmental business; and (2) the number of members present is sufficient to determine the governmental body's course of action. *State ex rel. Newspapers, Inc. v. Showers*, 135 Wis. 2d 77, 102 (1987.)

1. Courts have interpreted the “purpose test” to include any gathering of the members of the governmental body for the purpose of engaging in governmental business including discussion, decisions or information-gathering. *State ex rel. Badke v. Village Board of the Village of Greendale*, 173 Wis. 2d 553 (1993). If members of the government body are gathering but do not conduct business within their jurisdiction, the gathering does not constitute a “meeting.” *Paulton v. Volkmann*, 141 Wis. 2d 370 (Ct. App. 1987.)
2. The numbers test. If one-half or more of the members of the body are present the meeting is rebuttably presumed to be for the purpose of exercising its responsibilities, authority, power or duties of the body. Section 19.82(2), Wis. Stats.

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

3. What is a negative quorum? When a government body operates under a super majority rule (2/3 majority) for example, less than half of the members of the body could block a proposal by agreeing to vote in opposition to the proposal. *Showers* made clear that the Open Meetings Law applies when such a group gathers for the purpose of conducting government business. *Showers*, 135 Wis. 2d at 101-02. See, Wisconsin Open Meetings Law: A Compliance Guide, Wisc. DOJ, 2001.
4. Who has the burden of proof? If one-half or more members of the body are present there is a presumption that it is for the purpose of conducting governmental business. The body may overcome the presumption by establishing that they did not gather information, etc. *Id.*

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

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

- A. **What is a walking quorum?** The requirements of the Open Meetings Law extends to walking quorums, which is defined as a series of gatherings among separate groups of the members of a body, each less than the quorum, who agree, passively or explicitly, to act in sufficient numbers to reach a quorum. *Showers*, 135 Wis. 2d at 92. Any attempt to avoid the appearance of a “meeting” through use of a walking quorum is subject to prosecution under the Open Meetings Law. *State ex rel. Lynch v. Conta*, 71 Wis. 2d 662, 687 (1976.)
- B. **Can an Open Meeting be held via conference call?** Telephone conference calls among members of a governmental body fit within the definition of “meeting” subject to the Open Meetings Law. 69 Op. Att’y Gen. 143 (1980.) A telephone conference call is acceptable as long as the appropriate notice is given and the conference call is made reasonably accessible to the public.
- C. **What if a quorum of the Common Council attends a subcommittee meeting?** When a quorum of a governmental body attends a subunit meeting for purpose of gathering information about matters over which they have decision-making responsibility, both government bodies must properly give notice to the public of its intent to attend the meeting of the subunit body. *Badke v. Village of Greendale*, 173 Wis. 2d 553, 570, 578 (1992). Separate meeting notices must be given if: (1) a quorum of a body is present at a properly noticed meeting of a subunit of the body, (2) when such gatherings are not social or chance; and, (3) one or more of the members of the quorum of the body is not also a member of the subunit of the governmental body. Separate notice must be given to provide the public with the broadest possible knowledge of the purpose of the meeting. *Id.* at page 578.
- D. **Are e-mail messages covered by the Open Meetings Law?** Attorneys representing governmental bodies must caution the body that the use of e-mail communications between members of the governmental body can potentially trigger the provisions of the Open Meetings Law.

In a letter from the Wisconsin Attorney General interpreting the use of e-mail by members of the governmental body, the Attorney General strongly urged governmental bodies to avoid using electronic mail to communicate on matters within the realm of its

authority, because such use creates a “serious risk” of violating the Open Meetings Law. Informal Op. Att’y Gen., October 3, 2000. The Attorney General repeated this advice in a letter dated March 12, 2004, in which she advised that e-mail “should not be used to carry on private debate and discussion which belongs at a public meeting subject to public scrutiny.” Informal Attorney General letter to Mr. Dan Benson, March 12, 2004.

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

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

VII. What is an “open session” or “open meeting”?

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

- A. What does “readily accessible” mean? An open meeting must be held in a facility giving reasonable access, not total access, and it may not

systematically exclude or arbitrarily refuse admittance to any individual. *State ex rel. Badke v. Village Board of Greenfield*, 173 Wis. 2d 553 (1993.)

1. Although the Attorney General has opined that a meeting in a private home may qualify a meeting place under § 19.82 (3), Wis. Stats., the policy of openness and accessibility favors governmental bodies holding their meetings in public places rather than on private premises. 67 Op. Att’y Gen. 125, 127 (1987.)
2. In order to comply with the “reasonably accessible” requirement, governmental bodies should conduct all their meetings at a location within the district they serve, unless there are special circumstances that make it impossible or impractical to do so. Informal Op. Att’y Gen., May 25, 1977.
3. Generally speaking, places such as a private room in a restaurant or a dining room in a private club are not considered “reasonably accessible.” A governmental body should meet on private premises only in exceptional cases, where the governmental body has a specific reason for doing so which does not compromise the public’s right to information about governmental affairs. *Wisconsin Open Meetings Law: A Compliance Guide*, Wisc. DOJ, 2001.

B. **Must the governmental body ensure the meeting is accessible to persons with functional limitations?** Under § 19.82(3), Wis. Stats., accessibility in cases of state governmental bodies means a building and room that enables access by persons with functional limitations as defined in § 101.13(1), Wis. Stats. This has been interpreted to mean accessibility without assistance to such persons. Although this technically does not apply to local governmental bodies, it is strongly encouraged that this type of accessibility be provided by local governmental bodies. 69 Op. Att’y Gen. 251 (1980.)

C. **Must a governmental entity comply with the ADA for its Open Meetings?** Under Title II of the Americans With Disabilities Act, a public entity is prohibited from denying equal services to individuals because of their disabilities. Title II of the ADA applies to both state and local governments. 42 U.S.C.A. 12131(1)(A) and (B). The analysis under Title II is similar, but not identical to the analysis under Title I of the ADA relating to accommodations in employment. A government entity must make a reasonable accommodation. The determination of what is reasonable is highly fact-specific and must be determined on a case-by-

case basis, balancing the cost to the defendant and the benefit to the person requesting accommodation, if the accommodation does not fundamentally alter the nature of the service, program, or activity. *Olmstead v. Zimring*, 119 S.Ct. 2176 (1999).

VIII. When is a public notice required?

- A. Public notice for all meetings of a government body shall be given: (a) as required by any other statutes; and (b) by communication from the chief presiding officer of a governmental body or such person's designee to the public, to those news media who have filed a written request for such notice, and to the official newspaper designated under secs. 985.04, 985.05 and 985.06 or, if none exists, to a news medium likely to give notice in the area. Section 19.84, Wis. Stats.
- B. **How and to whom should notice be given?** Wisconsin Statutes sec. 19.84 describes the public notice requirements. It specifies when, how and to whom notice must be given, as well as the information a notice must contain.
1. Notice must be given to the public by **posting** the notice in one or more places likely to be seen by the general public. 66 Op. Att'y Gen. 93, 95 (1977.) The Attorney General has also advised posting the notices in at least three different locations within the jurisdiction that the body serves. *Id.* "The requirement to communicate notice to the public can be satisfied by posting a notice or by publication of notice in the newspaper." 77 Op. Att'y Gen. 312.
 2. To the news media. The chief presiding officer must also give notice of each meeting to the members of the **news media who have requested a written request for notice**. This may be done in writing or by telephone. 65 Op. Att'y Gen. Preface (1976.)
 3. Additionally, the chief presiding officer must also give notice to the **officially designated newspaper** or, if none exists, to a news medium likely to give notice in the area. The governmental body is not required to pay for and the newspaper is not required to publish the notice. 66 Op. Att'y Gen. 230, 231 (1977.)
- C. **What information should be in the public notice?**

Every public notice of a meeting must give "the time, date, place and subject matter of the meeting, including that intended for consideration at

any contemplated closed session, in such form as is reasonably likely to apprise members of the public and the news media thereof.” Section 19.84(2), Wis. Stats.

General subject matter designations such as “miscellaneous business,” or “agenda revisions,” or “such other matters as may be authorized by law” should be avoided.

1. Must a governmental body allow a time for public comment? The notice may provide for a period of public comment, during which the body may receive information from members of the public. Section 19.84(2), Wis. Stats. Unless public comment is required by another statute, the governmental body is free to determine whether to allow citizen participation at its meetings. The body may refuse to permit citizens to speak at its meeting or limit the degree to which they can comment without violating the Open Meetings Law. I-5-93, April 26, 1993. *Wisconsin Open Meetings Law, A Compliance Guide*, Wisconsin Atty. Gen. 2001 at page 10.

1997 Wisconsin Act 123, effective in 1998, created secs. 19.83(2) and 19.84(b), Wis. Stats., which specifically allows governmental bodies to receive information from members of the public, if the public notice of the meeting designates a period of public comment. The new law allows the governing body to discuss, but not act on issues that are raised during a public comment period. The better practice is to defer extensive discussion and action until specific notice of the subject can be given *Id.*

2. How specific must the notice be? The description of the subject matter does not require much detail. In *State ex rel. H.D. Enterprises v. City of Stoughton*, the court of appeals held that the single term “licenses” was a sufficient description to provide notice of a meeting deciding the fate of liquor license applications. 230 Wis. 2d 480, 486 (Ct. App. 1999.) Similarly, a notice announcing the board’s intention to convene in closed session under sec. 19.85(1)(b), Wis. Stats., “to conduct a hearing to consider the possible discipline of a public employee.” has been held to be sufficient. *State ex rel. Schaeve v. VanLare*, 125 Wis. 2d 40 (Ct. App. 1985, *rev. denied*, 125 Wis. 2d 584.)

The notice must contain the specific nature of the business, as well as the exemption(s) under which the chief presiding officer believes a closed session is authorized. 66 Op. Att’y Gen. 93, 98

(1977.) Merely reciting the language of an exception verbatim is not sufficiently specific.

The notice will not be held a violation of sec. 19.84(2), Wis. Stats. if the notice contains a mistake if it still reasonably apprises members of the public of the subject matter and “contains enough information to alert any interested individual who might have been confused by the notice to find out more.” *State ex rel. Olsen v. City of Baraboo Joint Revenue Bd.*, 252 Wis. 2d 628, 643 N.W.2d 796, 800 (2002.)

3. If a subject arises unexpectedly, can it be discussed even if not listed on the notice? In the *Compliance Guide* the Attorney General states that if a meeting notice contains a “general subject matter” designation and if during the general subject matter discussion a subject is raised that was not specifically noticed the governmental body should refrain from engaging in any information gathering or discussion or from taking any action that would deprive the public of information about the conduct of the business. I-5-93, April 26, 1993. *Wisconsin Open Meetings Law, A Compliance Guide*, Wisconsin Atty. Gen. 2001, p. 8.

D. When should the notice be made available?

1. Section 19.84(3), Wis. Stats. requires that every public notice of a meeting be given at least 24 hours in advance of the meeting, unless “for good cause” such notice is “impossible or impractical.” If “good cause” exists, the notice should be given as soon as possible and must be given at least 2 hours in advance of the meeting.
2. There have been no court decisions or attorney general opinions that define what “good cause” is sufficient to allow less than 24-hour notice of a meeting.

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

Section 19.84(4), Wis. Stats. requires a separate notice for each meeting of a government body, which must be given at a date and time reasonably close to the meeting date. A single notice that lists all the meetings that a government body intends to hold over a period of time does not comply with the notice requirements of the Open Meetings Law. 63 Op. Att’y Gen. 509, 513 (1974.)

IX. Can open or closed meetings be tape recorded and/or video taped?

- A. The Open Meetings Law allows citizens the right to tape record or video tape open session meetings, as long as it does not disrupt the meeting. A governmental body must make a reasonable effort to accommodate anyone who wants to record, film, or photograph a open meeting session as long as it does not interfere with the meeting. Section 19.90, Wis. Stats.
- B. By contrast, members of the governmental body and persons lawfully attending a lawfully convened closed meeting have no right to record the closed meeting under circumstances that might void or violate its private and secret nature. If the governmental body desires to record its closed meetings it should arrange for the security of the records to prevent their improper disclosure. 66 Op. Att’y Gen. 318, 325 (1977.) This implies that in some circumstances the government body who convenes in closed session for an authorized and appropriately-noticed reason has some duty to make sure that the issues discussed in closed session are not “leaked.”

X. How is voting recorded?

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

B. Ballots.

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

C. Votes.

A body, as a practical matter, may only conduct business by the votes of its members.

D. Must a governmental body keep minutes of meetings?

The Open Meetings Law does not require a governmental body to take detailed minutes of its meetings. Other statutes, however, may impose minute-taking requirements. The Open Meetings Law does require a governmental body to keep a record of all motions and roll-call votes at each meeting of the body. Section 19.83(3), Wis. Stats. If a member of the body requests the vote of each member be recorded, a voice-vote or a vote by a show of hands is not permissible unless the vote is unanimous and the minutes reflect who was present for the vote. Informal opinion of Wisconsin Attorney General (I-95-89.) *Wisconsin Open Meetings Law: A Compliance Guide*, Wisc. DOJ, 2001.

XI. What are the criteria for closed meetings?

A. Statute.

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

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

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

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

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

The session may be closed under this exemption only for the purpose of deliberating, not for the purpose of conducting the hearing. *Dolphin v. Board of Review*, 70 Wis. 2d 403 (1974).

2. Employment and Licensing Matters. Consideration of Dismissal, Demotion, Discipline, Licensing and Tenure. Section 19.85(1)(b), Wis. Stats., authorizes a closed session for: “[c]onsidering dismissal, demotion, licensing or discipline of any public employee or a person licensed by a Board or commission or the investigation of charges against such person, or considering the grant or denial of tenure for a university faculty member, and the taking of formal action on any such matter....”

Required Notice. In considering dismissal, demotion, etc., the affected individual must be given actual notice of any “evidentiary

hearing which may be held prior to final action being taken and of any meeting at which final action may be taken.” Section 19.85(1)(b), Wis. Stats. This notice must state that the person affected has the right to request that a related hearing or meeting to be held in open session. If so requested, the governmental body may not meet in closed session under this exemption to conduct an evidentiary hearing or to take final action. *Id.*

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

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

The Attorney General has defined “evidentiary hearing” as meaning a formal examination of charges by the taking of testimony from interested persons, irrespective of whether oaths are administered, and receiving evidence in support or in defense of specific charges that may have been made. 66 Op. Att’y Gen. 211-214 (1977).

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

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

This exemption does not authorize closed session to discuss qualifications for a potential public employee. 80 Op. Att’y Gen. 176 (1992).

The language of the exemption refers to a specific public employee rather than to general positions of employment. The purpose is to protect individual employees from having their actions and abilities discussed in public and to “allow governmental bodies to protect themselves from potential lawsuits resulting from open discussion of sensitive information.” *Oshkosh Northwestern Co., v. Oshkosh Library Board*, 125 Wis. 2d 480 (Ct. App. 1985).

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

4. Probation, supervision, parole. Section 19.85(1)(d), Wis. Stats., allows an exemption to the Open Meetings Law when considering a specific application for probation, parole or considering strategy for crime detection or prevention.
5. Conducting public business with competitive or bargaining implications. Section 19.85(1)(e). A closed session is authorized for “[d]eliberating or negotiating the purchase of public properties, the investing of public funds, or conducting other specific public business, whether competitive or bargaining reasons require a closed session.” Section 19.85(1)(e), Wis. Stats.

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

6. Deliberating to discuss unemployment insurance. Section 19.85(1)(ee), Wis. Stats.

7. Deliberating by the council on worker's compensation issues. Section 19.85(1)(eg), Wis. Stats.
8. Deliberating on issues of location of burial sites. Section 19.85(1)(em), Wis. Stats.
9. "Considering financial, medical, social or personal histories or disciplinary data of specific persons, preliminary consideration of specific personnel problems or the investigation of charges against specific persons except where par. (b) applies, which, if discussed in public, would be likely to have a substantial adverse effect upon the reputation upon any person referred to in such histories or data, or involved in such problems or investigations." Section 19.85(1)(f), Wis. Stats.

Applicants for a vacant position may be interviewed in private under this exemption, but the appointment should be made in open session. 74 Op. Att'y Gen. 70 (1985.) Additionally, the Attorney General stresses that the information solicited and discussed must be likely to have a substantial adverse affect upon the reputation of any person referred to in such histories or data in order for the exception to apply. *Id.*

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

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

10. "Conferring with legal counsel for the governmental body who is rendering oral or written advice concerning strategy to be adopted by the body with respect to litigation in which it is or is likely to become involved." Section 19.85(1)(g), Wis. Stats.

This exemption applies only if legal counsel is actually rendering advice on strategy to adopt the litigation in which the governmental body is or is likely to become involved. There is no clear-cut standard to determine whether a governmental body is “likely” to become involved in litigation. Members of the body should rely on the body’s legal counsel for advice on whether litigation is sufficiently “likely” to authorize a closed session under this exemption. *Wisconsin Open Meetings Law: A Compliance Guide*, Wisc. DOJ, 2001.

11. Ethics Board. A consideration for request for confidential written advice from an ethics board. Section 19.85(1)(h), Wis. Stats.
 12. Considering specified matters related to a business ceasing its operations or laying off employees. Section 19.85(1)(i), Wis. Stats.
 13. Considering specified financial information relating to the support of a non-profit corporation operating an ice rink owned by the state. Section 19.85(1)(j), Wis. Stats.
- B. Board of Review Proceedings. Under sec. 70.47(2m), Wis. Stats., the Board of Review proceedings for the Tax Assessor Open Meetings are required to be held openly at all times. No formal acts of any kind can be introduced, deliberated upon or adopted at any closed session of the meeting of the Board of Review. It is permissible for the Board to convene in closed session to deliberate after a quasi-judicial hearing. The Board must be cautious however to avoid continuing the hearing in closed session without the presence or notice to the objecting taxpayer. *Dolphin v. Board of Review*, 70 Wis. 2d 403 (1975).

Boards of Review cannot rely on the exemptions in sec. 19.85(1), Wis. Stats., to close any meeting in view of the explicit requirements found in sec. 70.47(2m), Wis. Stats. 65 Op. Att’y Gen. 162.

XII. What procedures must be followed to convene in closed session?

A. Every meeting subject to the Open Meetings Law must begin as an open meeting. Section 19.83 and 19.85(1), Wis. Stats. To convene in closed session a motion must be made and may not be adopted unless the chief presiding officer announces at the meeting the nature of the business to be considered at the closed session and the specific statutory exemption which authorizes the closed session.

1. Specific reference to the statutory exemption must be included in the notice of a closed meeting. 66 Op. Att’y Gen. 94 (1997.).
2. A motion carried by a majority vote recorded in the open meeting is required to convene in closed session. If a motion is unanimous, there is no requirement to record the votes individually. *State ex rel. Schaeve*, 125 Wis. 2d at 51. If the vote is unanimous it should be specifically referenced in the minutes and the record identifies which members were present.
3. The legislature has empowered the governmental unit, not a citizen to close meetings. *State ex rel. Schaeve*, 125 Wis. 2d at 53.
4. No business may be taken up during the closed session except that relating to matters specifically referenced and noted on the record in the announcement for closed session. Section 19.85(1), Wis. Stats.

B. Who can attend the closed meeting?

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

For example, a member of the governmental body may not be excluded when that member’s family member or close personal friend has a claim or lawsuit against the body and the body is meeting to confer with legal counsel regarding the legal strategy to be adopted with regard to the lawsuit. Another example is where a member of the official’s family is the subject of a closed meeting under one of the authorized exemptions. Claire Silverman, *Closed Sessions Under Wisconsin’s Open Meetings Law*, 97 *The Municipality*, 421, 424 (Nov. 2002.)

2. A member of a governmental body, however, should avoid all acknowledged or perceived conflicts of interest. It is strongly recommended that any member of a governmental body recuse him/herself from any meeting when and actual or perceived conflict of interest exists. If the member fails to recuse him/herself, another member of the body may have a duty to ask the conflicted member to recuse him/herself voluntarily or take procedural actions necessary to make sure that a breach of the public trust does not occur. *See generally*, City of Milwaukee Code of Ordinances, Code of Ethics, Ch. 303, CAO 9/12/02; Restatement of the Law of Trusts, Sec. 224, 184, and Sec. 183, Comment e.
3. The rights granted in § 19.89, Wis. Stats., do not require a body to allow an official to attend a closed session if the body is not a subunit of the official's parent body.
4. This section also does not grant to non-subunit members the right to participate in the activities and business of a closed meeting of the subunit even though they may have a right to attend. Natkins and Schneider, *Understanding Wisconsin's Open Meetings Law*, 103-04 (1994), citing informal opinion of Wisconsin Attorney General (July 25, 1989.)
5. Attendance at a closed session is limited to the members of the governmental body, necessary staff and other officers such as clerks and attorneys, and any other persons whom the governmental body determines are necessary to be present for conducting the business noticed. Claire Silverman, *Closed Sessions Under Wisconsin's Open Meetings Law*, 97 *The Municipality*, 421, 424 (Nov. 2002.)
6. The Attorney General states that the Open Meetings Law gives wide discretion to a governmental body to admit into closed session anyone whose presence the body determines is necessary for the consideration of the matter that is the subject of the meeting. *Wisconsin Open Meetings Law: A Compliance Guide*, Wisc. DOJ, 2001.

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

When a closed session is to be followed by an open session the public notice must include notification that the governmental body will

reconvene in open session. Section 19.85(2), Wis. Stats. If this language is not included in the public notice, the governmental body “could not reconvene into open session after closed session within 12 hours unless the notice of such intention to reconvene in open session was given at the same time and in the same manner as the public notice of the meeting convened prior to the closed session.” 67 Op. Att’y Gen. 117 (1978.)

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

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

The Attorney General advises, taking into consideration the ambiguity of the above two referenced cases, that governmental bodies vote in open session unless the vote is “clearly an intricate part of the deliberations authorized to be conducted in closed sessions under Wis. Stats. § 19.85(1).” Stated another way, a governmental body should vote in open session, unless doing so would compromise the need for the closed session. *Wisconsin Open Meetings Law: A Compliance Guide*, Wisc. DOJ, 2001 at pg. 14.

XIII. Who enforces the open meetings law?

- A. **Enforcement.** The Attorney General and the District Attorney have authority to enforce the Open Meetings Law. Section 19.97(1), Wis. Stats. By intergovernmental agreement, in Milwaukee it is the Milwaukee Corporation Counsel rather than the District Attorney who has enforcement authority.

The Corporation Counsel has the authority to enforce the law only after an individual files verified Open Meetings Law complaint. Section 19.97(1), Wis. Stats. The complaint must be signed by the individual by the individual and is notarized.

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

1. The Attorney General or District Attorney may commence an action separately or in conjunction with the action brought under sec. 19.96, Wis. Stats., and may ask the court for such other legal or equitable relief, including but not limited to mandamus, injunction or declaratory judgment, as may be appropriate in the circumstances. Section 19.97(2), Wis. Stats.
2. Additionally, any action taken at a meeting of a governmental body in violation of the Open Meetings Law is voidable. However, any judgment declaring such action void shall not be entered unless the court finds that the public's interest in enforcement of the Public Meetings Law outweighs the public interest in sustaining the validity of the action taken. Section 19.97(3), Wis. Stats.

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

- B. What are the penalties for violating the open meetings law?** Any member of the governmental body who “knowingly” attends a meeting in violation of the Open Meetings Law is subject to a forfeiture between \$25 and \$300 for each violation. Section 19.96, Wis. Stats.

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

“A member of a governmental body who is charged with knowingly attending a meeting held in violation of the law may raise one of two defenses: (1) that the member made or voted in favor of a motion to prevent the violation; or (2) that the member’s votes on all relevant motions prior to violation were inconsistent with the cause of violation.”

Section 19.96, Wis., Stats., *Wisconsin Open Meetings Laws: A Compliance Guide*, Wisc. DOJ, 2001.

A governmental body may not reimburse a member for a forfeiture incurred as a result of violation of the law, unless the enforcement action involved a real issue regarding the constitutionality of the Open Meetings Law. 66 Op. Att’y Gen. 226 (1977). A governmental body may reimburse a member for his or her attorney fees in defending against an enforcement action and for any plaintiff’s attorney fees that the member is ordered to pay. The City Attorney may represent City officials in Open Meetings Law enforcement actions. 77 Op. Att’y Gen. 177, 180 (1988).

XIII. Who interprets the open meetings law?

Any person may request advice from the Attorney General as to the applicability of this subchapter under any circumstances.” Section 19.98, Wis. Stats.

79142