

# Local Land Use, Planning and Zoning

2017 Statewide Teleconference Series



Local  
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## Ethics & Open Government Laws for Planning Body Members

Wednesday, January 18, 2017

10:30 a.m. – 12:00 noon.

### Presenter:

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Members of plan commissions, zoning boards of appeal or other planning bodies are subject to Wisconsin's ethics and open government laws regardless of whether the member is appointed or elected. It is vital that planning body members and their support personnel be familiar with these laws to help preserve the integrity of their decision making processes, as well as avoid any adverse effects of violating the law.

### Enclosures:

2017 Ethics and Open government Laws 01-17-2017 Teleconference- PowerPoint (46 slides)

Local Government Center Ethics FAQ (12 pages)

Local Government Center Fact Sheet Open Meetings Law (10 pages)

Local Government Center Fact Sheet Public Records Law (17 pages)

*Next in the Local Land Use, Planning and Zoning Series:*

## Insights on Recent Changes to Wisconsin Land Use Law

Wednesday, February 15, 2017; 10:30 a.m. – 12:00 noon

For a complete listing of this series please go to our website: [lgc.uwex.edu](http://lgc.uwex.edu)



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# Ethics and Open Government Laws for Planning Body Members

**Local Land Use Planning and Zoning WisLine  
January 18, 2017**

Attorney Philip J. Freeburg  
UW–Extension Local Government Center

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### Subjects Covered

- Making Fair Decisions
  - Policy Making
  - Applying the Law
- Ethics
- Open Meetings Law
  - Basics & Issues
- Public Record Law

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### Context of Open Government Laws and Planning Bodies

- It Begins with A Conditional Use Hearing for a Granite Pit
- Neighbor of Property Attends hearing for Conditional Use Permit
- The Neighbor objects to the the Conditional Use Permit...

– *Keen v, Dane County Bd. of Supervisors,*  
269 Wis. 2d 488 (Ct. App. 2004)

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### Making Fair Decisions

- Applying the Law
  - “Quasi-Judicial” decisions
- Developing Policy

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### Applying the Law "Quasi-Judicial"

- Examples:
  - Variances
  - Administrative Appeals
  - Land Divisions
  - Conditional Use Permits
- In addition to Ethics, Due Process and Fairness standards apply
- Avoid Bias & High Risk of Bias

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### Preserving Fairness

- Base decision on legal standards and information in record
- Avoid "ax grinding"
- Avoid comments exhibiting bias
- Avoid *ex parte* contacts
  - Personal contact:
    - explain problem and ask to appear or submit for record
  - Receipt of information:
    - Place in record
    - Consider if abstaining appropriate

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### Due Process & Fairness Examples

- BOA chair called the standard a "loophole in need of closing" and disparaged the applicant
  - *Maris v. City of Cedarburg*, 176 Wis. 2d 12 (1993)
- Planning Body member in support of CUP before hearing showed "an impermissibly high risk of bias"
- Member with prior unrelated business transaction was not disqualified
  - *Keen v. Dane County Bd. of Supervisors*, 269 Wis. 2d 488 (Ct. App. 2004)

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### Developing Policy

- Developing and Amending
  - Plans
  - Ordinances
  - Other Policies
- Ethics Code *may* apply
- Common law may prohibit official involvement if
  - Official has involvement not shared by others, or
  - If the effect on official is significantly different than others

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### Ethics

- Code of Ethics for Local Officials
  - Wis. Stat. §§19.42,19.58 and 19.59
- Private Interest in Public Contracts
  - Wis. Stat. §946.13

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### Public Official Ethics: Purpose & Policy

- Limit self-dealing
  - Not profiting from holding Public Office
- Limit undue influence & bias
  - Preserve the Integrity of Governmental Decision Making
- Preserve public confidence
  - Avoid the Appearance of Impropriety

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**“Local Public Officials”**  
Wis. Stat. 19.41(7w) & (7x)

- Elected Officials
- County Administrator or Administrative Coordinator
- Positions appointed:
  - for a specified term
  - at the pleasure of appointing authority

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**Local Code of Ethics**  
**Basics**

- Private Gain
- Influence and Reward
- Conflicting Interest

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**Private Gain**  
Wis. Stat §19.59(1)(a)

- Local Public Official cannot use office
  - To obtain financial gain, *or*
  - Anything of substantial value
  - For Private Benefit of:
    - The official,
    - Immediate family members, or
    - Organization associated with the official

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**“Immediate family” means**

- Spouse, or
- Relative by marriage, lineal descent or adoption who
  - Receives more than ½ support from official, or
  - Contributes more than ½ of official’s support
    - “support” refers to direct or indirect support

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**“Organization” & “Associated”**

- Organization
  - Almost all types, including non-profits
  - Excludes governmental units
- Associated
  - Director, officer, trustee, authorized representative or agent; or
  - Owns or controls 10% or more of equity
  - The Official or Member of immediate family
  - Excludes employment or membership

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**Influence and Reward**  
Wis. Stat. §19.59(1)(b)

- No local public official
- May solicit or accept
- Anything of value
- If it could reasonably be expected to influence the official’s judgment
- Or could reasonably be considered a reward for official action.

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### Improper Influence or Reward

- **Cannot** accept gifts because you are a public official
- **May** receive gifts unrelated to public office
- Applies to receipt of "anything of value", but not things of "insubstantial value."

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### Ethics Commission Guideline

- Would it be reasonable for someone to believe that the item or service is likely to influence my judgment or actions or that it is a reward for past action?
- If you answer "**yes,**" you **may not** accept the item or service.

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### Examples

- Meals
  - Should not accept free meals from those having business with your local government or your planning body
- Conferences
  - Can accept meal and refreshment from conference sponsor, but **not** from hospitality suites or other situations not part of a conference

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**Conflicts of Interest:  
Affecting a Financial Interest**  
Wis. Stat. 19.59(1)(c)(1)

- No public official may take any official action
- Substantially *affecting* a matter
- In which the official, the official’s immediate family, or an organization with which the official is associated
- Has a substantial financial interest.

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**Conflicts of Interest:  
Producing a Benefit**  
Wis. Stat. 19.59(1)(c)(2)

- No public official may take any official action
- To *produce* or *assist in the production*
- Of a substantial benefit
- For the official, the official’s immediate family, or an organization with which the official is associated

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**Abstaining**

- Removing yourself from the decision-making process or the information exchange in your official capacity.
- Not just voting “Abstain”

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### Enforcement

- Violations subject to civil forfeiture – up to \$1000
- Intentional violation is a misdemeanor
  - Fine \$100-\$5000
  - Jail up to one year
- Enforced by DA or may request AG, if DA does not act
- Lawsuits may seek to reverse vote by “disqualifying” vote of violating official

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### Prohibited Interest in Public Contracts Wis. Stat. §946.13

- Public Official cannot in private capacity have an interest in a public contract if in official capacity authorized to act regarding the contract.
  - Abstaining does not prevent violation
- Cannot act on the contract in official capacity unless there is an exception
  - Contract(s) not greater than \$15,000 in a calendar year
  - Exception only applies to private interest in this Statute
    - Not Ethics Code
    - Must abstain from acting regarding contract

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### Providing Service to Local Government Unit

- May be an independent contractor
- Abstain from official involvement
- Be alert of \$15,000 limit
- Violation is a felony

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### Abstaining

- Abstain if you have a conflict based on
  - Personal Interest
  - Interest of Family Member
  - Interest of Organization you or Family are associated with
- Abstain if you are not impartial as to issue
  - Although you may have an opinion
- Notify early of conflicts
  - BOA required by law to have alternates

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### Ethics Resources

- Wisconsin Ethics Commission
  - <http://ethics.wi.gov/>
- Local Government Center
  - Ethics FAQ

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### Open Meetings Law

Wis. Stats. §§19.81-19.98

- “Governmental Bodies”
  - Local Governing Bodies
  - Committees, Board and Commissions
    - E.g., Plan Commissions and Boards of Appeal (BOA)
  - A body created by rule or order
- Covers both Elected and Citizen Members

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### Meeting Defined

- A gathering of members of a governmental body for the purpose of exercising its responsibilities.
- A Meeting Occurs when the both **Purpose test** and **Numbers test** are met.

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### Open Meeting Tests

- Numbers test –
  - enough members of a body are present to determine the outcome of an action
- Purpose test –
  - Anyone of the following regarding a matter within the jurisdiction of the body:
    - discussion,
    - information gathering, or
    - decision-making

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### Numbers Test Rules

- Statute Presumption
  - If one half the members of a body are present there is a presumption that a meeting has occurred, unless can prove purpose test is not met
- Negative quorum
  - A lesser number of members may meet the numbers test if they can affect the outcome

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### Special Cases

- Walking Quorum
  - A series of phone calls, e-mails or conversations to “line up votes” or conduct other business
- Phone conferences
  - May constitute a meeting if the numbers and purpose tests are met.

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### Public Notice Requirement

- Presiding officer, or designee
- 24 Hour Notice required
  - 2 Hour minimum if good cause
- Posted in 3 public places
- Official newspaper, or, if none, news media likely to give notice
  - And any media that have filed a request for notice
- Separate Notice for each meeting
- Notice as required by any other Statute or Ordinance

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### Notice Contents

- Time, date, place & subject matter
- Specific enough to let people know what is covered
  - “...in a form likely to give notice to the public”
  - “Old Business,” “Reports,” “Other business allowed by law” likely violate specific notice requirement
- Notice any Anticipated Closed Sessions
- May consider only Noticed items

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### Public Participation

- Meetings must be open to public
- No right to participate in meeting
  - Unless a public hearing
- *May* include public comment on the agenda
- Public may photograph and record, if it does not interfere

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### Closed Session

- If anticipated must be Noticed
- May close only for purposes listed in statute
  - Purposes are intended to protect the local government’s interest, not the applicant’s
    - State ex rel Citizens for Responsible Development v. City of Milton, 2007 WI App 114.
- Presumption is open meeting; closed session is the exception

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### Closed Session Procedure

- To convene in “closed session”
  - Convene first in open session
  - Presiding officer announces topic & statutory exception
  - Motion to close and recorded vote
- Only discuss items for which session was closed
- Unless previously notice, cannot reconvene in open session for 12 hours
- Actions must be recorded and are subject to Public Records Law

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### Voting and Records

- All motions & votes must be recorded, preserved & made available as required by Public Records Law
- Closed Session Motion
- Member may require recording of individual votes

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### Open Meetings Issues

- When tests are met
- Presence at another body's meeting
- Telephone call, emails, blogs, IM, social media
- Unnoticed items
- Adequate room for crowd expected

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### Site Visits

- If a "meeting"
  - Notice
  - Open to Public
- *Ex parte* issues
- Response
  - Good record
  - Photos or video
  - Diagrams

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### Open Meetings Enforcement

- \$25 to \$300 forfeiture penalty
  - No reimbursement
- Court orders to ensure compliance
  - May include overturning decision if in public interest
- Enforced by
  - DA or AG
  - Private action if DA does not act 30 days after “verified complaint”

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### Open Meeting Law Resources

- Local Government Center Fact Sheet #1 “Open Meetings Law”
- Wisconsin Department of Justice Office of Open Government
  - <http://www.doj.state.wi.us/> and click on “About DOJ” banner and “Office of Open Government” in the drop down menu
  - Dept. of Justice “Open Meetings Compliance Guide”

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### Public Records Law

- Law applies to Plan Commissions and Board of Appeals
- Should designate a custodian to maintain records and respond to requests
- Records are presumed open to public inspection & copying
  - Disclosed unless a statute or common law require non-disclosure, or
  - Balancing Test: Harm to public interest is outweighed by public interest is disclosure

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### Public Records Law Resources

- Local Government Center Fact Sheet #7 "Public Records Law"
- Dept. of Justice "Public Records Compliance Outline"
  - <http://www.doj.state.wi.us/> and click on "About DOJ" banner and "Office of Open Government" in the drop down menu
  - "Wisconsin Public Records Compliance Guide"

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### Resources

- UW Extension's Local Government Center
  - [lgc.uwex.edu](http://lgc.uwex.edu)
  - Philip Freeburg
    - [philip.freeburg@uwex.edu](mailto:philip.freeburg@uwex.edu)
- The Center for Land Use Education at UW-Stevens Point
  - Publications and trainings for Plan Commission and Board of Appeals
  - <http://www.uwsp.edu/cnr-ap/clue/Pages/default.aspx>

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**Ethics and Open Government Laws for Planning Body Members**

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**Local Land Use Planning and Zoning WisLine**  
January 18, 2017

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UW-Extension Local Government Center

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## **Ethics & Conflicts of Interest—FAQs** (frequently asked questions)

*Prepared by James H. Schneider, J.D.  
Local Government Center  
April 2008*

This paper is directed particularly at local governing body members because they are the primary decision-makers in a local governmental unit and therefore the ones most subject to conflicts. (A “local governmental unit” includes a county, city, village or town, special purpose district or subunit of any of the foregoing. Sec. 19.42(7u), *Wis. Stats.*) Nevertheless, other local officials and employees may face such questions when they make decisions on matters in which they have a personal interest or a close connection with a person or organization with an interest in the matter. The paper is divided into the following headings:

- ◆ Background & General Matters (##1-5)
- ◆ Making Fair Decisions: Developing Policy; Applying the Law (##6-8)
- ◆ Code of Ethics for Local Officials (##9-11)
- ◆ Gifts, Food & Drink, Conferences, Political Contributions, etc. (##12-17)
- ◆ Contracts (##18-20)
- ◆ Compatibility Issues: Conflicts in Holding More than One Local Office or Position & in Job Creation & Selection (##21-24)
- ◆ Other provisions (#25)

### **Background & General Matters**

**1. *What is the purpose of ethics and conflicts of interest laws?*** The purpose of these laws is to prevent self-dealing, undue influence and bias, and to preserve public confidence in local government by avoiding the appearance of impropriety. In general, these laws, with the open meetings and public records laws, while occasionally cumbersome, provide an important part of the foundation for our democratic government.

**2. *Where can I find the laws that apply to ethics and conflicts of interest?*** These laws are found in various locations. First, check your local unit’s ordinances and rules to see what provisions may apply to you. Perhaps the most basic source of ethics is the local official’s oath of office in which he or she swears to “faithfully discharge the duties” of the office; these official duties include the “performance to the best of his or her ability” and the nonperformance of

forbidden acts. Sec. 19.01(1) and (3). The Code of Ethics for Local Government Officials (also referred to as the “Code of Ethics” in this paper) is found in ch. 19, *Wis. Stats.* See statutory sections 19.42 (definitions), 19.58 (criminal penalties) and 19.59 (prohibitions, procedures and civil penalties). Another important statute is sec. 946.13, which prohibits certain private interests of public officers and employees in public contracts. At a more general level, concepts of fairness and due process are covered by court decisions interpreting the Wisconsin and Federal constitutions (see #6). Finally, the “common law” developed by the courts is another source of law (see #7).

**3. *The existence of so many laws is confusing. How can I find answers to my questions?*** As a local official, you should familiarize yourself with any local ordinances or rules you may have and with the statutory Code of Ethics for Local Government Officials. A good place to find information is on the Wisconsin Government Accountability Board (GAB) Ethics Division website <http://ethics.state.wi.us/>. (Note: The GAB now includes the former Elections Board and Ethics Board as divisions; the provisions of the laws affecting local officials remain the same.) Two Ethics Division publications, available on the website, are particularly useful: Eth 219 (Local officials’ receipt of food, drink, favors, services, etc.) and 240 (Mitigating Conflicting Interests: Private Interest vs. Public Responsibility); see also Eth 235 (Disposition and reporting of gifts). The website has a link to the statutory Code of Ethics for Local Government Officials. In addition, the publications of the Wisconsin local government associations include explanatory materials on these topics. Also, the Local Government Center offers a yearly WisLine program on this topic. At the LGC website, <http://lgc.uwex.edu/>, click on the WisLine link for the “Open Government” series. To find any statute on-line, from the LGC website, click on “Web Links,” next on “Internet Resources” and finally on the “Wisconsin Statutes” link to access any statute.

In addition to checking existing information, a local official may wish to obtain advice from an attorney or ethics board. Under the Code of Ethics for Local Officials, an individual may request a confidential advisory ethics opinion from the unit’s ethics board, or if there is none, from the unit’s attorney. Sec. 19.59(5). Following this advice provides the local official with a legal defense if later prosecuted for a violation. The unit’s attorney or local government association may request an advisory opinion from the state GAB’s Ethics Division. Sec. 19.59(6).

**4. *How should ethics and conflicts of interest questions be approached?*** Carefully and ahead of time. It’s a good idea to learn to spot potential conflict situations. You can ask yourself these questions:

--*What is the nature of the decision?* If the decision involves applying the law to specific fact situations affecting individuals, such as an application for or revocation of a permit before a body, or disciplinary actions before a body, more stringent laws apply. See #7, below.

--*Does the matter involve a public contract in which I have a direct or indirect financial interest?* These questions demand careful consideration. See ##18-20.

--*Does the action affect myself, a member of my family, or an organization with which my family member or I are associated?*

--*How would I like to read about my actions on this matter in the newspaper?*

--*Would taking part in an official capacity seem fishy?*

If the answer to any of the last 4 questions is “yes,” you should look into the matter further.

**5. What should I do if I decide to abstain?** It should be understood that abstention goes beyond merely not voting on the matter. You must remove yourself from the decision-making body's table and refrain from involving yourself in any way in discussions or other information exchanges in your *official* capacity. Your abstention or absence should be noted in the record. Also, abstentions should be used only when warranted, rather than to avoid taking part in difficult or controversial matters. However, it should be noted that a member of a local legislative body has a First amendment right to abstain, *Wrzeski v. City of Madison, Wisconsin*, 558 F. Supp. 664 (1983).

### **Making Fair Decisions: Developing Policy; Applying Policy**

**6. The statutes have gaps in their coverage. Are there other limits on my ability to vote on policy or administrative matters?** Yes. The *common law* (i.e., the law developed by the courts) may prohibit a vote by a member of a body, such as a local governing body or board or commission member, even if statutory law does not, on matters such as adopting or amending ordinances, entering into contracts, hiring employees and deciding whether to litigate. The Wisconsin Ethics Board (now GAB Ethics Division) has noted in recent opinions that common law principles may disqualify a member of a body from voting on a matter where the member has a direct pecuniary interest not shared by others similarly situated. See, e.g., *Wis Eth Bd* opinions 2003-09 and 2003-17 (citing *Board of Supervisors of Oconto County v. Hall*, 47 Wis. 208 (1879) and 36 *Op. Att'y Gen.* 45, 46 (1947)). The Ethics Division interprets the Code of Ethics for Local Officials in a similar fashion when local officials who make policy decisions that affect themselves, "immediate family" members or "organizations" with which they are "associated" (as these terms are statutorily defined). In such cases, the official may vote or take action if the interest affects a class of similarly-situated interests, and the impact of the action on the official, family member or organization is not significantly different from the impact on the others affected. See the Ethics Division guidelines in "Eth 240."

In addition, the common law restriction is similarly stated in *Robert's Rules of Order Newly Revised (10<sup>th</sup> Edition)*, sec. 45, which states that, "No member should vote on a question in which he has a direct personal or pecuniary interest not common to other members of the organization." Many communities have adopted *Robert's* to apply in situations not covered by their ordinances or the statutes. See, e.g., *Ballenger v. Door County*, 131 Wis.2d 422, 431 (fn. 6) (Ct. App. 1986).

**7. What limitations apply to my actions when applying the law?** You act in a "quasi-judicial" capacity when you apply the general law (i.e., statutes and ordinances) to specific fact situations. Examples include granting a zoning variance or conditional use permit or revoking an alcohol beverage license. In such cases constitutional law and the common law apply in addition to the statutory ethics and conflicts laws. In quasi-judicial proceedings, you must provide due process (a constitutional concept) and be fair and unbiased. This means that you will have to abstain in more situations than you would have to when making policy, such as voting on an ordinance, or when acting in an administrative capacity, such as in hiring or awarding a contract.

In quasi-judicial proceedings you should consider whether you could be seen as biased regarding either the person or the issue involved, although having opinions on local matters is not improper. For example, while it would be permissible to publicly hold the view that an

ordinance should be amended, it would be improper to disparage the ordinance at a proceeding on an application. Similarly, it is improper to show bias regarding the applicant. In one case, the chair of a zoning board of appeals (BOA) called the applicable standard for a permit a loophole in need of closing and made critical personal comments about the applicant. Not surprisingly, an appeal to court resulted in the matter being returned to the BOA for a new hearing without the participation of the BOA chair. *Marris v. City of Cedarburg*, 176 Wis. 2d 14 (1993). Similarly, in a recent case, the court ruled that a conditional use permit application had to be reheard because of the improper participation on the decision-making body of a member whose letter in support of the applicant was a part of the record. *Keen v. Dane County*, 269 Wis. 2d 488 (Ct. App. 2003). Officials in these proceedings must be careful to base their decisions on the arguments and evidence presented in the record, including the hearing, and should avoid outside sources and contacts, such as discussions with the parties or neighbors outside of the meeting or hearing room.

Violations of these principles of due process and fairness, if challenged in court, may result in having the matter sent back to the body to do over again properly. Enforcement typically does not involve damages or other penalties, although it could in certain egregious situations, involving, for example, deliberate wrongdoing and civil rights violations.

**8. *How does the above reasoning apply when I, as a governing body member, am faced with a vote on a rezoning of property?*** Rezoning is in a grey area of the law. In some states they are treated as quasi-judicial, but in Wisconsin they are viewed as legislative. How you proceed depends upon the nature of the rezoning. Applying the concept (#6 above) of whether you are a member of a class of similarly-affected persons is helpful. So if it's your next-door neighbor who's asking for the rezoning, you should abstain from any official involvement. But if the rezoning is for a major project that affects, for example, the entire area where you live, and you are not affected more than others, it seems legitimate for you to take part in the vote. Close situations like this should be investigated prior to becoming involved in an official capacity.

### **Code of Ethics for Local Officials**

**9. *Briefly, what is prohibited by the Code of Ethics for Local Officials?*** The Code generally prohibits a "local public official" from using his/her office or position to obtain gain for the private benefit of himself/herself, an "immediate family" member or for an "organization" with which the official is "associated" (as these terms are defined in the law; item #10, following). Secs. 19.42 & 19.59, *Wis. Stats.* In addition, a recent provision prohibits a local public official from engaging in "pay to play" political agreements. See #17 below.

The language of sec. 19.59(1) contains the specific, lengthy wording of the prohibitions, which may be categorized as prohibitions on private gain, illegal influence or rewards, and involvement when the local official, a member of the official's immediate family, or an organization with which the official is associated has a substantial interest in the matter (see the following definitions).

**10. *Who is covered by the Code of Ethics for Local Officials?*** The local ethics code applies to local public officials who hold "local public office." Sec. 19.42(7w) and (7x), *Wis. Stats.* "**Local public office**" includes: elected officers of a local governmental unit; a county administrator or coordinator, or city or village manager; appointed local officers and employees

who serve for a specified term; and officers and employees appointed by the local governing body or executive or administrative head, who serve at the pleasure of the appointing authority.

“Local public office” *does not* include: independent contractors; persons who perform only ministerial (i.e., non-discretionary) tasks, such as clerical workers; or persons appointed for indefinite terms, who are removable for cause. Finally, the term “local public office” does not include a municipal judge; this office is considered a state office. Sec. 19.42(13)(h).

*Note:* Persons who are appointed for indefinite terms and are removable for cause, such as police officers and firefighters, as well as their chiefs, are omitted from coverage because the definition of “local public office” covers only those appointed officials who serve for a specified term or who serve at the pleasure of the local governing body or executive or administrative head (above). The reason for this omission is not clear. A town, village, city or county, may, however, use a local ethics ordinance to fill gaps in the statute's coverage.

Other key terms in the Code of Ethics for Local Officials are: “immediate family,” “organization” and “associated.” Sec. 19.42(2), (7) and (11). The “**immediate family**” of a local public official means the official’s spouse, and a “relative by marriage, lineal descent or adoption” who receives from the official or provides to the official more than one-half of his or her support. Note that, with the exception of a spouse, the coverage of the term is based on a support test. An official’s parent or child, for example, is not covered unless the support test is met.

**“Organization”** is broadly defined to cover “any corporation, partnership, proprietorship, firm, enterprise, franchise, association, trust or other legal entity other than an individual or body politic.” Note that nonprofits are included and governmental units are excluded. Finally, **“associated,”** in reference to an organization, refers to the situation in which the public official or a member of his or her immediate family is a director, officer, trustee, authorized representative or agent of the organization; or owns or controls, directly or indirectly, and severally or in the aggregate, at least 10% of the outstanding equity of the organization. Note that employees as such are not covered.

**11. *Must a local governmental unit adopt an ethics ordinance and establish its own ethics board? How are ethics laws enforced?*** Having a local ethics ordinance and establishing a local ethics board are optional. A local unit might wish to have its own ordinance to fill in some gaps in the law and have local enforcement. Sec. 19.59(1m)-(3). (If an ordinance is established, the ordinance is enforced by the unit’s attorney rather than by the district attorney.) Similarly, a unit might wish to establish an ethics board to provide guidance on ethics matters. Sec. 19.59(3)(d). Neither is required. However, the Code of Ethics for Local Government Officials, in subch. III of ch. 19, *Wis. Stats.*, applies to all “local public officials” (as defined). Enforcement of this state law is by the district attorney, as is enforcement of the law concerning private interests in public contracts (##18-20, below). Civil remedies, including forfeitures and injunctions, and criminal penalties may apply. Secs. 19.58 and 19.59(7)-(8).



## **Gifts, Food & Drink, Conferences, Political Contributions, etc.**

**12. *May I accept gifts? What limits exist regarding the acceptance of gifts?*** You may not accept a gift given to you because you are a public official, unless it is of insubstantial value. This means that you may, of course, receive gifts from friends and relatives who make the gifts for personal reasons, unrelated to seeking your favor as a public official. As a public official, it is best to politely refuse gifts and explain the policy in not accepting them. If the item cannot be returned to the donor the Wisconsin Ethics Division suggests turning the item over to the governmental unit, another public institution, or a charitable organization (other than one with which you or an immediate family member are associated). See Eth 235 (Disposition and reporting of gifts.) Gifts with an insubstantial value may be accepted, although it is always safest not to. So a small desk calendar or inexpensive pen with a logo, for example, may be accepted. The statutes do not define the terms “insubstantial value” or “substantial value.” Your local unit may do so by ordinance.

**13. *What about accepting a meal from a contractor who does business with our local unit?*** You should not accept such free meals. If the meal is for public business, you should pay for it yourself and seek reimbursement from your local governmental unit, preferably subject to pre-established guidelines on expense reimbursement.

**14. *How about accepting refreshments and entertainment at a conference?*** If you are attending the conference in your capacity as a local government official, you may accept such items if they are part of the conference and approved by the conference sponsor. So if you attend, say, the annual conference given by your statewide local government association you may certainly accept free refreshments supplied by vendors at the conference and attend entertainment provided at the conference. However, it is not proper to accept refreshments or entertainment or gifts at hospitality suites that are offered to you as a local official but are not an approved part of the conference.

**15. *Are there limits on accepting transportation and services?*** Yes, the Code of Ethics prohibits receiving services, of more than nominal value, that are offered to you because of your public office. Also, you may not, under a felony statute, accept free or discounted transportation, traveling accommodation or communication services for which the supplier would normally charge. Sec. 946.11, *Wis. Stats.*

**16. *Do considerations of public benefit outweigh those of private benefit in some cases?*** Perhaps, but be careful. When you get reimbursement for a meal during which you were on public business, you obviously received a private benefit, but your local governmental unit has decided that it is a legitimate expense—that the public benefit predominates. However, if the expense were paid by a third party, such as a potential contractor, for something which provided a private benefit, then the question would arise of whether the benefit was intended to influence your judgment. For this reason, it’s better for local officials to pay their own way and seek reimbursement from their local unit.

There may be some cases, though, where the cost is high and is incurred primarily for a public benefit. For example, if an official travels to see an expensive piece of equipment or a facility and incurs airplane, lodging, meal and entertainment costs, it seems that the local unit

might legitimately accept payment from the prospective vendor for the travel and lodging expenses. While this may be justified in some cases, it nevertheless seems better for the local unit to cover its officials' reasonable costs and seek savings from the vendor instead in the cost of the equipment being sold. Regarding the meal and entertainment expenses incurred in such a trip, the safest course is for these expenses to be paid by the official, subject to reimbursement under the local unit's guidelines.

**17. What is the recent “pay-to-play” prohibition in the Code of Ethics for Local Officials?**

No “local public official” or “candidate for local public office” may, directly or by an agent, use his/her office or influence regarding a proposed or pending matter in exchange for another person providing or refraining from providing a political contribution or providing or refraining from providing any service or other thing of value for the benefit of a “candidate,” a political party, any other person who must register under the campaign finance law, or to any person who makes a “communication” that refers to a “clearly identified” local public official holding an elective office or to a candidate for such office. Sec. 19.59(1)(br, *Wis. Stats.* (The terms in quotes are defined in sec. 19.42.) The pay-to-play prohibitions are enforced by a district attorney (or the attorney general) and violators are subject to forfeitures, court orders and criminal penalties. Secs. 19.58 and 19.59(7)-(8). However, a complaint alleging a violation of the law may not be brought within a specified period prior to the election for the local office.

Note that it is not a violation of the provision prohibiting a local official from using his/her office to obtain private gain, sec. 19.59(1)(a), when the official uses “the title or prestige of his or her office to obtain campaign contributions that are permitted and reported” under the campaign finance law. Sec. 19.59(1)(a).

## **Contracts**

**18. May I contract with my local unit to sell goods or equipment or land?** Yes, subject to limits. Of course, you may not, under the Code of Ethics, vote to award yourself the contract or act in any official capacity regarding the contract, such as performing inspections or authorizing payments. This same prohibition on *official* action in regard to a contract is also found in a felony statute, sec. 946.13(1)(b), *Wis. Stats.* In general, as long as you abstain from all official involvement, you do not violate the law, except as follows.

You must keep in mind that the felony statute, sec. 946.13(1)(a), prohibits a public officer or employee from acting in a *private* capacity to negotiate, bid or enter into a contract where the officer is *authorized* or required by law to participate in an official capacity in making the contract or exercising discretion under the contract, unless an exception applies. This means that it is possible to abstain and still violate the law—you may have to choose between doing business with your unit and keeping your public office or job. The most commonly used exception is the one that allows a public officer or employee to avoid violating the law by abstaining completely from official action when he or she has a direct or indirect financial interest in contracts with the local unit as long as the total receipts or disbursements under the contracts in which the individual has an interest do not exceed \$15,000 in a calendar year. (*Note:* Your salary as a public official is not counted in figuring the \$15,000 limit.) If the contracts in which you have an interest exceed (or would exceed) that amount in a year, you may have committed a felony, even if you abstained, by, in your private capacity, negotiating, bidding or entering into the contract. Furthermore, you can violate the felony statute merely by bidding on

the contract, even if you do not receive it. Finally, note that it is the annual total of the payments under the contracts that is subject to the \$15,000 ceiling and triggers a violation, rather than your personal financial interest (e.g., a commission), which may be less than \$15,000.

*Note:* Violation of sec. 946.13 is a serious matter, a Class I felony, which means that it is punishable by a fine not to exceed \$10,000, 3 ½ years in prison, or both. Violations are prosecuted by the district attorney, and the law provides that a contract entered into in violation of the statute is void.

**19. *May I provide services on contract with my local unit?*** Yes, the above considerations apply when you are an independent contractor. An independent contractor is one who provides his/her own tools and equipment in performing the job and exercises responsibility over how the work is done. This is in contrast to a part-time employee (see ##22 & 23 below). If you are an independent contractor, you must abstain from any involvement in your official capacity in approving or administering the contract. By abstaining, you are protected unless the contracts in which you have an interest exceed the \$15,000 amount for the receipts and disbursements in a year (see #18, above).

**20. *What about contracts involving my immediate family, an organization that I am associated with or my employer?*** As with the above examples concerning contracts in which you have a personal interest (##18 and 19), the Code of Ethics prohibits you from voting or acting in an official capacity in a contract involving your immediate family or an organization with which you are associated, subject to the definitions in that Code. However, because the definitions do not cover many situations, the Code may not apply. For example, you could vote to award a contract to your brother, because he would not be an “immediate family” member as that term is defined. (See item #10). This illustrates that even though a matter may not be prohibited by the Code of Ethics, other statutes or your ordinance, *you may nevertheless decide to abstain based on appearances*. Exercise great caution, however, regarding the \$15,000 ceiling on total annual contract payments if you may be deemed to have a direct or indirect personal financial interest in the contracts (see ##18, above).

In addition, under the definitions in the Code of Ethics, although you are not “associated” with your employer merely by being an employee, because of your personal interest in employment, you must abstain from voting on contracts involving your employer.

### **Compatibility Issues: Conflicts in Holding More Than One Local Office or Position & in Job Creation & Selection**

**21. *As a local official, may I serve in other local offices?*** The general rule is that the same person cannot hold two public offices, or an office and a position (see ##22 & 23, below), where one post is superior to another, or where, from a public policy perspective, it is improper for the same person to hold both. *Otradovec v. City of Green Bay*, 118 Wis.2d 293 (Ct. App. 1984). Therefore, a local governing body member cannot hold two local offices within the same unit of government, unless there is specific authorization. (A county officer is specifically prohibited from being on the county board by sec. 59.10(4), as mentioned in the following item.) For example, town, village, city and county governing body members may generally serve on local boards and commissions. Secs. 59.10(4)(counties) & 66.0501(2)(cities, villages & towns), *Wis. Stats.* Also, specific statutes allow governing body members to serve on various boards and

commissions, as is the case with town, village and city governing body members serving on the board of review and the plan commission. Secs. 70.46(1) & 62.23(1).

With regard to serving in offices for two different units, it is necessary to look at the particular offices involved to see if there is a conflict. Specific statutes may apply. For example, a county board supervisor may also serve as a town, village or city governing body member. Sec. 59.10(4). Also, the office of county board supervisor may be consolidated under a village or city charter ordinance with the office of village president or alderperson, if the boundaries of the county supervisory district are the same as those of the village or the aldermanic district. Sec. 66.0503.

What about officers other than governing body members? Again, it's necessary to look at specific situations. Generally, there are fewer conflicts when non-governing body officers are involved. Also, the statutes may cover various situations. For example, town officers are generally prohibited from receiving payment for acting in more than one town office at the same time. Sec. 60.323. However, certain local offices may be combined: e.g., the offices of town clerk-treasurer and town clerk-assessor are allowed. Sec. 60.305. Similarly, city and village offices, other than governing body offices, may generally be combined by charter ordinance. Secs. 61.195 & 62.09(3)(c).

**22. As a governing body member, may I work as an employee for the local unit?** No, not unless there is specific statutory authorization, such as the one recently created for town officers (see #23, below). In general, as mentioned above, under the case law on compatibility of offices and positions, a governing body member cannot also be an employee of his/her local unit. The case establishing this prohibition, *Otradovec* (above at #21), ruled that an appraiser in the city assessor's office could not also serve on the city common council.

A specific compatibility provision for counties provides that no county officer or employee may be a county board supervisor. Sec. 59.10(4), *Wis. Stats.* However, an elected or appointed county official may serve as the administrative coordinator in a county without a county executive or county administrator. Sec. 59.19.

For cities, villages and towns, the statutory law creates an exception to the general compatibility doctrine. It allows a city, village or town elected official to serve as a **volunteer fire fighter, emergency medical technician or first responder** for his or her local unit, as long as the annual compensation, including fringe benefits, does not exceed \$15,000 for the public safety position. (The limit was raised by the 2001 budget act, 2001 Wisconsin Act 16, from \$2,500 to \$15,000.) Sec. 66.0501.

A recent enactment addresses the question of the eligibility of county, city, village and town employees to run for elective office. Sec. 66.0501(5), created by 2003 Wisconsin Act 79. These employees may generally run for elective public office, and they may not be required to take a leave of absence during their candidacy, although the new provision does not affect the authority of a public employer to regulate the conduct of a public employee while acting in an official capacity. Public employees who wish to run for elective office should determine whether an incompatibility would exist if they were elected. It should be noted, however, as explained in the Wisconsin Legislative Council Act Memo on Act 79, that the new law does not apply to an individual if the federal Hatch Act applies. That federal act generally prohibits federally funded state and local officers from running for elective office unless they take a leave of absence.

**23. As an elected town officer, may I do part-time work such as keeping roadways clear and plowing snow?** Yes, subject to limits. The 2001 budget act created an exception to the compatibility doctrine for elected town officers, in addition to the above exception (#22) for the specified public safety positions. Sec. 66.0501(4), *Wis. Stats.*

This recent language provides that it is compatible for an elected town officer to receive wages for work he or she performs for the town as a part-time employee. Sec. 66.0501(4). An elected town officer who also serves as a part-time town employee may receive an hourly wage not exceeding a total of \$5,000 per year. Sec. 60.37(4). (For elected town officers who are a clerk, treasurer or clerk-treasurer this \$5,000 figure was raised to \$15,000 by 2007 Wisconsin Act 20). These wages are *in addition* to the amounts that may be received in the above public safety positions (#22) and for the person's elected office. However, the \$5,000 maximum *includes* amounts paid to a town board supervisor acting as superintendent of highways under sec. 82.03(1).

The town meeting of electors sets the hourly wage for an elected town officer serving as a town employee. Sec. 60.10(1)(g). The town meeting may delegate to the town board the authority to set this wage, except that the town meeting cannot delegate the authority to set the wage for a town board supervisor serving as a town employee. Sec. 60.10(2)(L).

*Note:* Even though a town officer may receive wages as a town employee, the town officer, under the Code of Ethics for Local Officials (#9, above), may not use his/her official capacity for his/her own financial gain, and would therefore have to abstain from official involvement as a town officer in this hiring decision and should likewise abstain from approving payment to himself or herself for such work. Also, remember that being a part-time employee is different from being an independent contractor; for the latter abstention and the \$15,000 limit on contracts apply, as discussed in ##18-20, above.

**24. As a governing body member, may I take another office or a job with my local unit? What if I resign from the governing body?** The answer depends upon the circumstances. First, as discussed in items ##21-23, the law of compatibility prohibits a governing body member from holding another office or position with the unit, unless a statutory exception applies. A specific statute addresses the eligibility of governing body members for election or appointment to offices and positions. Sec. 66.0501(2), *Wis. Stats.* This statute provides generally that no member of a city council or of a town, village or county board may, during the term for which the member is elected, be eligible for an office or position created during the term by the governing body or for an existing office or position where the selection is vested in the governing body.

This general prohibition, however, is subject to exceptions. It does not apply to being eligible for an elected office, or if a statute provides an exception. Also, the statute provides that the prohibition on a governing body member taking an *existing* office or job, where selection is vested in the governing body, does not apply if the member *resigns* prior to appointment. If the job or office was created during your term on the governing body, you may not resign and take the office or position during your current term of office, unless there is specific statutory authorization to do so. Sec. 66.0501(2). Of course, you could be elected to office. For example, you may as a governing body member run for and be elected to the newly created or existing office of municipal judge. However, taking the office of municipal judge would, under the compatibility of offices doctrine, #21 above, create a vacancy in your office on the governing body.

If the job or office is new and appointed, you would have to wait until after your current term has expired, and you are no longer on the governing body, to take the job or office (unless a statutory exception applies). The position of administrator serves as a good example. If you serve on a city, village or town governing body and that body creates the position of administrator, you could not resign and be appointed to fill that new post during your current term. However, if the position of administrator was in existence prior to your term of office, you could resign from the governing body and then be appointed to the position.

In contrast to the prohibition on appointment as administrator of a sitting city, village or town governing body member, it appears that a sitting county board member may be eligible for appointment as county administrator. The law provides that, "If any member of the (county) board is appointed as county administrator, his or her status as a board member is thereby terminated," except in the case of filling a vacancy in the position of administrator for up to 15 days. Sec. 59.18(1). If this situation arises, it is advisable to seek the opinion of corporate counsel on the interplay of the prohibitions in sec. 66.0501(2) and the applicability of the apparent exception in sec. 59.18(1).

The question may also arise as to whether the general prohibition in sec. 66.0501(2) prevents a governing body member from serving in one of the designated part-time public safety positions (#22, above) or prevents a town board supervisor from working on a part-time town job (#23, above) if the position was created during the governing body member's current term of office, or the selection is vested with the governing body. It appears that these provisions allowing elected officials to hold certain part-time positions (##22 & 23) are intended as exceptions to the general prohibition on governing body members taking jobs created during their current term of office or where selection is vested in the governing body.

Finally, it should be emphasized that you, as a governing body member, must not use the power of your office to obtain a new position, or to obtain financial gain for yourself. This could violate the Code of Ethics for Local Officials (sec. 19.59, #9 above) and could constitute misconduct in office (sec. 946.12)(#25j below). In addition, the felony statute prohibiting private interests in public contracts (##18-20) could also be involved if you, as a governing body member, submitted a job application for a job with a yearly payment over \$15,000 (unless a statutory exception applies).

## **Other Provisions**

**25. *What other ethics provisions are in the Wisconsin Statutes?*** This FAQs paper has primarily covered the Code of Ethics for Local Officials, found in subch. III of ch. 19, *Wis. Stats.*, and the related criminal provision on public interests in private contracts, sec. 946.13. These are the most commonly-referenced Wisconsin statutory provisions. However, there are a number of other provisions relating to ethics and conflicts of interest in the law. Some of them, such as the prohibition on certain sales to local employees, are very narrow. Following is a listing of Wisconsin ethics and conflicts-of-interest provisions, including the statutes covered in this paper (which are indicated by an asterisk). (For information on how to access the statutes, see #3 above.)

*a. Bribery.* Secs. 12.11 and 946.10. The scope of prohibitions covered by sec. 12.11 includes promising an official appointment or anything of value to secure votes. Section 946.10 prohibits public officials from taking bribes.

*b. Discounts at certain stadiums.* Sec. 19.451. Local officials may not accept discounts on prices charged to the general public for parking and seating at the stadiums of professional teams that are exempt from the property tax under sec. 70.11(36).

*c. \*Code of Ethics for Local Officials (## 9-11).* Secs. 19.42, 19.58 and 19.59. These statutes provide ethical standards for local officials, and authorize a local ethics ordinance and establishment of a local ethics board.

*d. \*Eligibility for office (##21-24).* Sec. 66.0501. This provision addresses limits on a local officer holding or taking another local office or position.

*e. Compensation of governing body members.* Sec. 66.0505 (formerly sec. 66.196). County, city, village and town governing body members may not give themselves mid-term salary increases. A new sub. (3), created by 2007 Wisconsin Act 49, creates a procedure for an elected official to refuse his or her salary. Salary and benefit changes are also covered by various specific provisions in the county, city, village, town and municipal law chapters of the statutes.

*f. Fraud by board of review member.* Sec. 70.502. Such member may not intentionally violate the law or fail to perform duties.

*g. Sales to liquor (and wine) licensees or applicants.* Sec. 125.51(1)(b). A member of a municipal governing body may not sell or offer to sell a bond, material or product to be used in the licensee's business.

*h. Sales to local employees.* Sec. 175.10. Local units of government, governing body members and purchasing agents in general may not sell things to their own employees. The prohibition does not cover meals, public services and items required for the safety or health of employees. The prohibition also does not apply to recreational, health, welfare, relief, safety or educational activities furnished by the governmental unit.

*i. \*Special privilege (travel, transportation, utilities)(#15).* Sec. 946.11; Art. 13, sec. 11, *Wis. Const.* Public officers may not be given, or receive, free or discounted traveling accommodation, transportation for persons or property, or transmission of messages or communications not available to the general public.

*j. Misconduct in office.* Sec. 946.12. A public official or employee may not intentionally: fail to do a mandatory, nondiscretionary, ministerial duty; act in excess of his or her authority; abuse his or her discretion with the intent to obtain a dishonest advantage for the officer, employee or another; falsify records; or under- or over-value any duty or service whose cost is fixed by law.

*k. \*Private interests in public contracts (##18-20).* Sec. 946.13. This statute places limits or prohibits local officials and employees with authority over contracts from bidding or entering into such contracts (subject to exceptions).

*l. Purchasing claims at less than full value.* Sec. 946.14. Public officers and employees may not, in their private capacity, intentionally purchase for less than full value any claim against the state or a political subdivision of the state.

*m. Public construction contracts at less than full value.* Sec. 946.15. Compensation due to persons employed under these contracts may not be given up, waived, returned or reduced.



## Wisconsin Open Meetings Law

§§ 19.81-19.98, *Wisconsin Statutes*

Revised by LGC Local Government Law Educator Philip Freeburg, J.D.

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*This Fact Sheet is part of a series of publications produced by the UW-Extension's Local Government Center. More information about open government and open meetings laws, as well as a variety of other topics, can be found on our website, <http://lgc.uwex.edu>.*

### Policy

#### § 19.81

**A. Declaration.** The legislature declares that state policy is to

1. enable the public to have “the fullest and most complete information regarding the affairs of government as is compatible with the conduct of government business.”
2. ensure that meetings of governmental bodies are held in places reasonably accessible to the public.
3. ensure that such meetings are open to the public unless otherwise expressly provided by law.

**B. Interpretation.** The Open Meetings Law is to be “liberally construed” (i.e. broadly interpreted) to achieve the purpose of open government. (The rule that penal statutes are strictly construed applies only to the enforcement of forfeitures under the law.)

### Definitions; Coverage

**A. “Governmental bodies” subject to the Open Meetings Law**

1. **State & local bodies.** A “governmental body” under the Open Meetings Law includes any state or local agency, board, commission, committee, department or council created by law, ordinance, rule or order. § 19.82(1). At the local level, bodies covered include school boards, county, village and town boards, city councils, and all their committees, commissions and boards. The term “rule or order” has been broadly interpreted by the attorney general to include formal and informal directives by a governmental body or officer that sets up a body and assigns it duties.<sup>1</sup> § 19.82(1). The term would include resolutions.
2. **Governmental & quasi-governmental corporations; other bodies.** In addition to the above, the term “governmental body” under the law includes governmental and quasi-governmental corporations and certain other specified entities. § 19.82(1). A



governmental or quasi-governmental corporation includes corporations created by the legislature or by other governmental bodies under statutory authorization.<sup>2</sup> Quasi-governmental corporations are not just those created by a governmental body, but are those corporations that resemble governmental corporations.<sup>3</sup> Determining if an entity, such as an economic development corporation, resembles a governmental corporation depends on the totality of facts about the entity determined on a case-by-case basis.<sup>4</sup> Thus no single factor is determinative, but courts have considered several factors:

- a. whether the entity performs or serves a public function, contrasted with any purely private function, even if public function is merely recommending action to a governmental body,<sup>5</sup>
  - b. the degree of public funding,<sup>6</sup>
  - c. government access to the entity's records,<sup>7</sup>
  - d. express or implied representations that the entity is affiliated with government,<sup>8</sup> and
  - e. extent government controls the entity's operation, such as appointing directors, officers or employees, or officials serving in those positions.<sup>9</sup>
3. **Special and advisory bodies.** Special study committees and other advisory committees set up by a local officer, the local governing body or by a body it has created are also subject to the law.<sup>10</sup>
4. **Collective bargaining.** A local governmental body conducting collective bargaining is not subject to the law. However, notice of reopening a collective bargaining agreement must be given under the Open Meetings Law and final ratification of the agreement must be done in open session under such law. §§ 19.82(1) & 19.86.

## B. "Meetings" under the Open Meetings Law

1. **Definition.** A meeting is defined as a gathering of members of a governmental body for the purpose of exercising responsibilities and authority vested in the body. § 19.82(2). The courts apply a *purpose test* and a *numbers test* to determine if a meeting occurred.<sup>11</sup>
2. **Purpose & numbers tests**
  - a. **Purpose test.** This test is met when discussion, information gathering or decision-making takes place on a matter within the governmental body's jurisdiction. This test is met even if no votes are taken; mere discussion or information gathering satisfies the test. Notice is therefore required if the *numbers test* is also met.
  - b. **Numbers test.** This test is met when there are enough members to determine the outcome of an action. If the *purpose test* is also met, then a meeting occurs under the law. The numbers test may be met if fewer than one-half of the members of the body are present—if such number can determine the outcome. This is called a "negative quorum." For example, since amending an adopted

municipal budget requires a two-thirds vote, a meeting occurs when one third plus one of the members meet to discuss the matter.<sup>12</sup> (This number can block the required two-thirds vote to pass a budget amendment.)

3. **“Walking quorums”; telephone calls; email.** A series of gatherings of members of a governmental body may cumulatively meet the numbers test, making a “walking quorum” in violation of the Open Meetings Law if the purpose test is also met.<sup>13</sup> Telephone conference calls among members, when the two tests are met, qualify as meetings, and must be held in such manner as to be accessible to the public, as with use of an effective speaker system.<sup>14</sup> (Telephone conference meetings should be used rarely, and preferably held only after seeking the advice of legal counsel.) A “walking quorum” by successive telephone calls is also subject to the law. Emails, instant messages, blogs and other electronic message forms could also be construed as a meeting of a governmental body. While courts have not addressed this specific issue, the State Attorney General’s Office advises the issue turns on whether the communications are more like an in-person discussion, such as a prompt exchange of viewpoints by members, or more like a written communication, which generally does not raise open meeting law concerns.<sup>15</sup>
4. **Multiple meetings.** A meeting under the law may occur when a sufficient number of members of one governmental body attend the meeting of another body to gather information about a subject over which they have responsibility. Unless the gathering of the members is by chance, a meeting should be noticed for both bodies.<sup>16</sup>
5. **Certain gatherings not meetings.** Chance gatherings, purely social gatherings, and joint attendance at conferences, where the *numbers test* is met, are not meetings if business is not conducted (that is, if the *purpose test* is not met). § 19.82(2).
6. **Presumption of a meeting.** If one-half or more of the members of a governmental body are present, a statutory presumption exists that there is a meeting. This presumption can be overcome by showing that the *purpose test* was not met or that an exception applied. § 19.82(2).
7. **Town & drainage board exceptions.** Limited exceptions to when a “meeting” occurs under the Open Meetings Law have been created for *town boards*, *town sanitary commissions* and *drainage boards* gathering at certain sites. § 19.82(2).
  - a. **Exception.** The town board may gather at the site of a public works project or highway, street or alley project approved by the board for the sole purpose of inspecting the work, without following the usual notice, accessibility and other requirements under the Open Meetings Law. § 60.50(6).<sup>17</sup>
  - b. **Notice.** To come under this exception, the town board chairperson or designee must notify news media by telephone or fax of the upcoming inspection, if the media have filed a written request for notice of “such inspections in relation to that project.”

- c. **Report.** After the inspection, the town board chairperson or designee must submit a report describing the inspection at the next town board meeting.
- d. **Prohibition on taking action.** No town board action may be taken at the inspection site.
- e. **Sanitary commissions & drainage boards.** The same exception and requirements apply to town sanitary commissions gathering at one of their public works projects, with the notice and reporting duties performed by the commission president or designee. § 60.77(5)(k). A similar provision applies to drainage district boards gathering at specified sites. § 88.065(5)(a).

## Notice and Access

**A. Accessibility.** The place of meeting must be reasonably accessible to the public, including persons with disabilities. § 19.82(3). Accordingly, the facility chosen for a meeting must be sufficient for the number of people reasonably expected to attend.<sup>18</sup>

**B. Public notice; posting.** Public notice is required for every meeting of a governmental body. §§ 19.83 & 19.84. This notice may be accomplished by posting in places likely to be seen by the public; a minimum of three locations is recommended.<sup>19</sup> The notice requirements of other applicable statutes must be followed. Although paid, published newspaper notices are *not* required by the Open Meetings Law, other specific statutes may require them.<sup>20</sup> § 19.84. If notices are published, posting is still recommended.

**C. Notice to media.** Notice must be provided to news media who have requested it in writing. § 19.84(1)(b). Notice may be given in writing, by telephone,<sup>21</sup> voice mail, fax or email. Written methods are preferable because they create a record that can be used to show compliance with this notice requirement. Notice must also be provided to the governmental unit's official newspaper, or, if there is no official newspaper, it must be sent to a news medium likely to give notice in the area.

**D. Notice of certain disciplinary & employment matters.** Actual notice must be given to an employee or licensee of any evidentiary hearing or meeting at which final action may be taken at a closed session regarding dismissal, demotion, licensing, discipline, investigation of charges or the grant or denial of tenure. § 19.85(1)(b). The notice must contain a statement that the affected employee or licensee has the right to demand that such hearing or meeting be held in open session.

**E. Timing of public notice.** At least a 24-hour notice of a meeting is required; however, if 24 hours is impossible or impractical for good cause, a shorter notice may be given, but in no case may the notice be less than 2 hours. § 19.84(3). This "good cause" provision allowing short notice should be used sparingly and only when truly necessary.

**F. Separate public notice required.** A separate notice for each meeting is required. § 19.84(4). A general notice of a body's upcoming meetings is not sufficient.<sup>22</sup>

## G. Public notice contents

1. **Items shown.** Notice must specify the time, date, place and subject matter of the meeting. § 19.84(2).
2. **Specificity.** The notice must be “reasonably likely to apprise members of the public and the news media” of the subject matter of the meeting. § 19.84(2). In other words, the notice must be specific enough to let people interested in a matter know that it will be addressed. The determination on specificity is made on a case-by-case basis using information available at the time of giving notice. What is reasonable specificity based on the circumstances involves three factors:
  - a. the burden of providing more detailed notice. This factor balances specificity with the efficient conduct of public business.
  - b. Whether the subject is of particular public interest. This factor considers the number of people interested and the intensity of the interest.
  - c. Whether the subject involves non-routine action that the public would be unlikely to anticipate. This factor recognizes that there may be less need for specificity with routine matters and more need for specificity where novel issues are involved.<sup>23</sup>

The State Attorney General advises that a generic meeting notice that contains expected reports or comments by a member or presiding officer should state the subjects that will be addressed in the comments or reports. The Attorney General’s Office further advises that subjects designated simply as “old business,” “new business,” “miscellaneous business,” “agenda revisions,” or “such other matters as are authorized by law” without further subject designation are inherently insufficient notice.<sup>24</sup>

3. **Anticipated closed session.** If a closed session on an item is anticipated, notice of such item and closed session must be given, and the statutory citation allowing closure should be cited. § 19.84(2).
4. **Consideration limited.** Consideration of matters in open and closed session is limited to the topics specified in the notice, except as noted in 5. §§ 19.84(2) & 19.85(1)(intro.).
5. **Public comment.** The notice may provide for a period of “*public comment*.” During this period the body may receive information from members of the public and discuss such matters (but may not take action on them unless properly noticed). §§ 19.83(2) & 19.84(2).

**H. Openness; recording & photographing.** Meetings must be open to all persons, except when closed for a specific purpose according to law (see following heading). §§ 19.81(2) & 19.83(1). In addition, the governmental body meeting must make a “reasonable effort to accommodate” persons wishing to record, film or photograph the meeting, provided that such acts do not interfere with the meeting or the rights of participants. § 19.90.

## Closed Sessions

### Permitted Exemptions for Holding Closed Sessions

**A. Policy; strict construction of exemptions.** The Open Meetings Law generally declares that it is state policy to provide the public with “the fullest and most complete information regarding the affairs of government as is compatible with the conduct of government business,” and that the law must be interpreted liberally to achieve this purpose (except for the forfeiture provisions, which are interpreted strictly). § 19.81(1) & (4). The law further provides that sessions must generally be open to the public. § 19.83(1). In light of these provisions, the exemptions in § 19.85 that allow closed sessions must be interpreted strictly and narrowly, rather than broadly.<sup>25</sup> Any doubt as to the applicability of an exemption or, if an exemption applies, the need to close the session should be resolved in favor of openness.<sup>26</sup> A closed session may be held only for one or more of the 13 specified statutory exemptions to the requirement that meetings be held in open session. The following 7 exemptions (B–J) are of interest to local government bodies.

**B. “Case” deliberations.** Deliberating on a case which was the subject of a quasi-judicial hearing. § 19.85 (1)(a). Note: this exemption should seldom be used in light of the narrow judicial interpretation given to it.<sup>27</sup>

**C. Employee discipline; licensing; tenure.** Considering dismissal, demotion, licensing, or discipline of a public employee or licensee, the investigation of charges against such person, considering the grant or denial of tenure, and the taking of formal action on any of these matters. The employee or licensee may demand that a meeting that is an evidentiary hearing or a meeting at which final action may be taken under this exemption be held in open session. Employees and licensee must be given actual notice of such hearing or meeting and their right to demand an open session. § 19.85 (1)(b). If this demand is made, the session must be open.

**D. Employee evaluation.** Considering employment, promotion, compensation or performance evaluation data of an employee. § 19.85 (1)(c).

**E. Criminal matters.** Considering specific applications of probation or parole, or strategy for crime prevention or detection. § 19.85 (1)(d).

**F. Purchases; bargaining.** Deliberating or negotiating the purchase of public property, investment of public funds, or conducting other specified public business when competitive or bargaining reasons require a closed session. § 19.85 (1)(e). The competitive or bargaining reason must relate to reasons benefitting the governmental body, not a private party’s desire for confidentiality.<sup>28</sup>

**G. Burial sites.** Deliberating on a burial site if discussing in public would likely result in disturbance of the site. § 19.85 (1)(em).

**H. Damaging personal information.** 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 the subject’s

right to open the meeting (item C above) applies. This exemption may be used only if public discussion would be likely to have a *substantial adverse effect* on the reputation of the person involved. § 19.85 (1)(f). Note that this exemption applies to “specific persons” rather than the narrower class of public employee or licensees (item C above.)

**I. Legal consultation.** Conferring with legal counsel about strategy regarding current or *likely* litigation. § 19.85 (1)(g).

**J. Confidential ethics opinion.** Considering a request for confidential written advice from a local ethics board. § 19.85 (1)(h).

## Conducting Permitted Closed Sessions

**A. Public notice.** Notice of a contemplated closed session must describe the subject matter and should specify the specific statutory exemption(s) allowing closure. §§ 19.84(2) & 19.85(1). The notice of the subject of a closed session must be specific enough to allow the voting members and the public to discern whether the subject matter is authorized for closed session under § 19.85(1).<sup>29</sup>

**B. Convening in open session.** The body must initially convene in open session. § 19.85(1)(intro.).

**C. Procedure to close.** To convene in closed session, the body’s presiding officer must announce in open session, prior to the vote, the nature of the business to be considered in closed session and the specific statutory exemption(s) allowing closure. This announcement must be made part of the record. A motion to go into closed session must be made and a vote taken so that the vote of each member can be determined. § 19.85(1)(intro.). The motion, second and vote must likewise be made a part of the record.

**D. Limits on reconvening in open session.** Once a body convenes in closed session it may not reconvene in open session for at least 12 hours, *unless* public notice of its intent to return to open session was given in the original notice of the meeting. § 19.85(2).

**E. Unanticipated closed session.** The body may go into an unanticipated closed session, if the need arises, on an item specified in the public notice.<sup>30</sup> In such case, the closed session item should be placed at the end of the agenda because the body cannot reconvene in open session without having given prior public notice. This provision on unanticipated closed sessions is very narrow. Whenever time allows, the 24-hour notice provision must be followed, or, at a minimum, when there is good cause, the 2-hour notice can be used to give an amended notice of the meeting indicating a closed session on an item that was not previously anticipated.

**F. Recording actions.** As with open sessions, motions and votes made in closed session must be recorded. § 19.88. Whenever feasible, votes should be taken in open session.

**G. Matters considered.** The body may consider only the matter(s) for which the session was closed. § 19.85(1)(intro.).



## Voting and Records

**A. Requiring recording of each member's vote.** A member of a governmental body may require that each member's vote be ascertained and recorded. § 19.88(2).

**B. Recording votes; Public Records Law applicability.** In general, motions, seconds and any roll call votes must be recorded, preserved and made available to the extent prescribed in the Public Records Law (§§ 19.32-19.39). § 19.88. Vote results, even if not by roll call, should likewise be recorded. Certain statutes may require that each member's vote be recorded. For example, motions, seconds and the votes of each member to convene in closed session must be recorded. § 19.85(1). In addition, various provisions outside of the Open Meetings Law require keeping minutes of proceedings.<sup>31</sup>

**C. Narrow secret ballot exception.** Although secret ballots are generally prohibited under the Open Meetings Law, a narrow exception allows a governmental body to use secret ballots to elect the body's officers. § 19.88(1). For example, a city council may so elect its president and a committee may so elect its chair (unless the chair is otherwise designated). This narrow exception does not allow secret balloting to fill offices of the governmental unit, such as vacancies in the office of chief executive officer or on the governing body.

## Subunits

### § 19.84(6)

**A. Definition.** Subunits are created by the parent body and consist only of members of the parent Body.<sup>32</sup>

### B. Applicability of Open Meetings Law; exceptions

1. Generally, meetings of subunits are subject to the advance public notice requirements of the law.
2. However, a subunit, such as a committee of a governing body, may meet without prior public notice during the parent body's meeting, during its recess or immediately after the meeting to discuss noticed subjects of the parent body's meeting.

**C. Procedure.** To allow the subunit to meet without prior public notice, the presiding officer of the *parent body* must publicly announce the time, place and subject matter (including any contemplated closed session) of the subunit in advance at the meeting of the parent body.

**D. Attendance at closed sessions.** Members of the parent body may attend closed sessions of a subunit unless the rules of the parent body provide otherwise. § 19.89.

## Penalties and Enforcement

### §§ 19.96 & 19.97

**A. Coverage.** All members of a governmental body are subject to the law's penalty provisions. E.g., if a committee consists of two governing body members and one citizen member, the law applies to the citizen member just as it does to the other members.

### **B. Penalties; liability**

1. **Forfeitures; personal liability.** Forfeitures (\$25-\$300) can be levied against governmental body members who violate the Open Meetings Law. No reimbursement for forfeitures is allowed.
2. **Voiding actions.** A court may void any actions taken by the governmental body at a meeting in violation of the Open Meetings Law.
3. **Prevention & self-protection.** Media and persons unhappy with actions of the body are the ones most likely to bring complaints of Open Meetings Law violations. Members can prevent problems by making sure, at the beginning of a meeting, that the meeting was properly noticed. Members should also be sure that topics considered were specified in the notice (unless they are brought up under the public comment agenda item<sup>33</sup>) and that proper procedures for closed meetings are followed. Useful protection can come from a clerk's log documenting proper notice, particularly when shorter notice is given or the notice is amended. Members can protect themselves from personal liability by voting to prevent violations, such as by voting against going into an improper closed session. However, if a meeting goes forward over a member's motion or vote in objection, the objecting member may still participate in the meeting.

**C. Bringing an enforcement action.** A person may file a verified complaint (see following heading) with the district attorney (DA) to enforce the Open Meetings Law. If the DA does not begin an action within 20 days, the person may bring the action and receive actual costs and reasonable attorney fees if he or she prevails. The attorney general (AG) may also enforce the law, but these matters are almost always viewed as local matters, for the DA to enforce, rather than of statewide concern appropriate for the AG.

## Further Reading & Additional Information

For the specific wording of Wisconsin's open government laws, please refer to §§ 19.81-19.98 of the *Wisconsin Statutes*; the statutes may also be accessed on the internet at <http://folio.legis.state.wi.us/>.

Advice on the Open Meetings Law is available from your county corporation counsel, municipal attorney or the Wisconsin Department of Justice.



Wisconsin Open Meetings Law, A Compliance Guide (2009), by the Wisconsin Department of Justice may be found on the internet at <http://www.doj.state.wi.us/site/ompr.asp>. This guide contains a copy of a verified complaint.

## Acknowledgments

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<sup>1</sup> 78 Op. Att’y Gen. 67,69 (1989).

<sup>2</sup> 66 Op. Att’y Gen. 113 (1977).

<sup>3</sup> *State v. Beaver Dam Area Development Corp.*, 2008 WI 90, ¶44.

<sup>4</sup> *Beaver Dam*, ¶45.

<sup>5</sup> *Beaver Dam*, ¶72.

<sup>6</sup> *Beaver Dam*, ¶66.

<sup>7</sup> *Beaver Dam*, ¶78.

<sup>8</sup> *Beaver Dam*, ¶¶73,74.

<sup>9</sup> *Beaver Dam*, ¶75.

<sup>10</sup> *State v. Swanson*, 92 Wis.2d 310 (1979), 78 Op. Att’y Gen. 67 (1989).

<sup>11</sup> *State ex rel. Newspapers, Inc. v. Showers*, 135 Wis.2d 77, 102 (1987); *State ex rel. Badke v. Village Board of the Village of Greendale*, 173 Wis.2d 553 (1993).

<sup>12</sup> This was the situation in the *Showers* case, above.

<sup>13</sup> *Showers*, 135 Wis.2d at 92, 100 (quoting *State ex. rel. Lynch v. Conta*, 71 Wis.2d 662, 687 (1976)).

<sup>14</sup> 69 Op. Att’y Gen. 143 (1980).

<sup>15</sup> See the *Compliance Guide*, p. 8, cited above under “Further Reading & Additional Information.”

<sup>16</sup> *Badke*, 173 Wis.2d 553, 561.

<sup>17</sup> Other on-site inspections, such as annual highway inspection tours are subject to Open Meeting Law requirements. *Compliance Guide*, p. 15.

<sup>18</sup> *Badke*, 173 Wis.2d 553, 580-81.

<sup>19</sup> 66 Op. Att’y Gen. 93 (1977).

<sup>20</sup> 66 Op. Att’y Gen. 230, 231 (1977); *Martin v. Wray*, 473 F. Supp. 1131, 1137 (E.D. Wis. 1979).

<sup>21</sup> 65 Op. Att’y Gen. Preface (1976).

<sup>22</sup> 63 Op. Att’y Gen. 509, 512-3 (1974).

<sup>23</sup> *State ex rel. Buswell v Tomah*, 2007 WI 71, ¶¶29-31.

<sup>24</sup> *Compliance Guide*, p. 12-13; *AG-Thompson Informal Correspondence*, September 3, 2004.; *AG-Ericson Informal Correspondence*, April 22, 2009.

<sup>25</sup> *State ex rel. Hodge v. Town of Turtle Lake*, 180 Wis.2d 62, 70 (1993).

<sup>26</sup> The open meeting exemptions permit conducting certain business in closed session, but do not require it. Therefore, they do not create a legal confidentiality privilege protecting disclosure of the content of a closed meeting, such as from discovery in a civil lawsuit. Any confidentiality requirements arise under other laws. *Sands v. Whitnall School Dist.*, 2008 WI 89 (2008).

<sup>27</sup> See *Hodge*, above.

<sup>28</sup> *State ex rel. Citizens v. City of Milton*, 2007 WI App 114, ¶¶ 14-15.

<sup>29</sup> *Compliance Guide*, p. 14; see also *Buswell*, 2007 WI 71, ¶ 37 n.7.

<sup>30</sup> 66 Op. Att’y Gen. 106 (1977).

<sup>31</sup> See, e.g., §§59.23(2)(a), 61.25(3) & 62.09(11)(b) requiring county, village and city clerks to keep a record of proceedings of their respective governing bodies.

<sup>32</sup> 74 Op. Att’y Gen. 38 (1985).

<sup>33</sup> §§19.83(2) & 19.84(2). See brief discussion under “Notice & Access” at F. 5.



## Wisconsin Public Records Law

§§ 19.21-19.39, *Wisconsin Statutes*

*Revised by LGC Local Government Law Educator Philip Freeburg, J.D., from original fact sheet by James H. Schneider, J.D.*

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*This Fact Sheet is part of a series of publications produced by the UW-Extension's Local Government Center. More information about open government and open meetings laws, as well as a variety of other topics, can be found on our website, <http://lgc.uwex.edu>.*

### Policy of Access (Wis. Stat. § 19.31)

Local governments keep a variety of records dealing with citizens, businesses, and government activities. To further the goal of having an informed public, Wisconsin's policy is to give the public "the greatest possible information regarding the affairs of government...." <sup>1</sup> Accordingly, the public records law (*Wis. Stat. §§ 19.32-19.37*) must "be construed in every instance with a presumption of complete public access, consistent with the conduct of government business." The statute further provides that "denial of public access generally is contrary to the public interest, and only in an exceptional case may access be denied." <sup>2</sup>

### What Is a Public Record?

A public record is a "record" of an "authority."

**Items covered.** A "record" is defined as "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*" (defined *below*). The term "record" includes, "but is not limited to, written materials, maps, charts, photographs, films, recordings, tapes (including computer tapes), computer printouts and optical disks." *Wis. Stat. § 19.32(2)*. A web site maintained by a public official about government business is also a public record, and access cannot be restricted.<sup>3</sup>

**Items not covered.** The term "record" "does not include 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..." This exception is narrowly interpreted. If a draft or other preliminary document is used as if it were a final document, it is not excluded from the definition of record.<sup>4</sup> Therefore, a "draft" report used to determine policy and notes circulated outside the chain of the originator's supervision, as well as notes used to memorialize a governmental body's activity, are records under the law.

“Record” does not include materials that are the personal property of the custodian and do not relate to the custodian’s office. Thus, the Wisconsin Supreme Court has determined that purely personal emails of public employees are not public records, unless the email evinces a violation of public law or policy.<sup>5</sup> The State Attorney General advises that if any part of an email sheds light on governmental functioning, then it is subject to disclosure.<sup>6</sup>

Materials to which access is limited by copyright, patent or bequest are not public records, although in certain situations copyrighted material may, under the fair use doctrine, be considered a public record.<sup>7</sup> Likewise, published materials of an authority available for sale and published materials available for inspection in a public library are not records. *Wis. Stat. § 19.32(2)*.

“**Authority.**” This term is broadly defined in the law to include state and local offices, elected officials, agencies, boards, commissions, committees, councils, departments and public bodies created by the constitution, statutes, ordinances, rules or orders. *Wis. Stat. § 19.32(1)*.

Local governing bodies, offices, elected officials and their committees, boards, and commissions are covered. However, when a public official leaves office they are no longer an “authority.”<sup>8</sup> “Authority” also includes governmental corporations; quasi-governmental corporations; a local exposition district; a long-term care district; any court of law; and nonprofit corporations that receive more than 50 percent of their funds from a county, city, village or town and provide services related to public health or safety to those units. Other factors are applied on a case-by-case basis when determining if an organization is a quasi-governmental entity, such as whether it performs a governmental function, degree of government access to its records, express or implied representations of government affiliation, and extent of government control of the organization.<sup>9</sup> Finally, subunits of the above are also authorities. *Wis. Stat. § 19.32(1)*.

## Management & Destruction of Records; Requested Records

Every public officer is the legal custodian of the records of his or her office. *Wis. Stat. § 19.21*. The statutes provide standards for retaining records and also provide procedures and timetables for transferring obsolete records to the Wisconsin Historical Society or destroying them. Tape recordings of meetings of local governmental bodies made solely for the purpose of making minutes may not be destroyed sooner than 90 days after the minutes of the meeting have been approved and published (if the body publishes its minutes). *Wis. Stat. § 19.21(7)*.

The otherwise legal destruction of records cannot be used to undermine a person’s public records request. No record may be destroyed until after a request to copy or inspect has been granted or until at least 60 days after the date of denial of such request (90 days in the case of a request by a committed or incarcerated person). *Wis. Stat. § 19.35(5)*. The right to destroy a record is also stayed if access to the record is being litigated. However, the records retention law, *Wis. Stat. § 19.21*, is not a part of the public records law and that law therefore provides no remedy for a requester seeking destroyed records, such as deleted emails.<sup>10</sup> Also, it is not a prohibited destruction of a requested public record if an identical copy is destroyed.<sup>11</sup>

## What Is a Local Public Office?

This term is used in public records law provisions concerning an authority's posting requirement and a requester's right of access to job applications and to other records with personally identifiable information. "Local public office" covers elected officers of local governmental units; a county administrator or administrative coordinator or a city or village manager; appointed local officers and employees who serve for a specified term; and officers and employees appointed by the local governing body or executive or administrative head who serve at the pleasure of the appointing authority. *Wis. Stat. § 19.32(1dm)*. The term also includes appointed offices or positions in which an individual serves as head of a department, agency or division of the local governmental unit.

The term does not include independent contractors; persons who perform only ministerial (i.e., nondiscretionary) tasks, such as clerical workers; and persons appointed for indefinite terms who are removable for cause. Contracted municipal assessors are independent contractors and are therefore not subject to the law.<sup>12</sup> However, local governments may not avoid responsibilities under the Public Records Law by contracting for collection, maintenance and custody of public records and directing document requesters to that contractor.<sup>13</sup> Also, the term "local public office" does not include any "municipal employee" as defined under the municipal employment relations law. *Wis. Stat. § 111.70(1)(i)*.

The public records provisions on posting and personally identifiable information also apply to a "state public official." *Wis. Stat. § 19.32(4)*. This term includes a municipal judge.

## Legal Custodians

***In general.*** The legal custodian maintains public records and has the duty to make decisions regarding access to the records. *Wis. Stat. §§ 19.21 and 19.33*. Specific statutes outside of the Public Records Law may establish record-keeping duties. For example, local clerks are designated as records custodians.

***Elected officials.*** The Public Records Law provides in general that elected officials are the custodians of the records of their offices, unless they have designated an employee of their staff to act as custodian. Chairpersons and co-chairpersons of committees and joint committees of elected officials, or their designees, are the custodians.

***Other custodians; designation.*** If one authority (other than an elected official, or committee or joint committee of elected officials, above) appoints another authority or provides administrative services for the other authority, the "parent" authority may designate the legal custodian for such other authority.

State and local authorities (other than elected officials and their committees and joint committees, above) under the public records law must designate custodians in writing and provide their names and a description of their duties to employees entrusted with records under the custodian. If the statutes do not designate a custodian and the authority has not designated one, the highest ranking officer and the chief administrative officer, if any, are the authority's custodian. An authority or legal custodian (other than members of local governmental bodies)

must designate a deputy legal custodian to respond to requests for records maintained in a public building.

**Records in a public building.** The legal custodian of records kept in a public building must designate one or more deputies to act in his or her absence. This requirement does not apply to members of any local governmental body.

## Office Hours & Facilities

**Posted notice required – Wis. Stat. § 19.34(1).** Each authority must adopt and prominently display a notice describing its organization, the times and locations at which records may be inspected, the identity of the legal custodian, the methods to request access to or copies of records and the costs for copies. *Wis. Stat. § 19.34(1)*. If the authority does not have regular office hours at the location where records are kept, its notice must state what advance notice is required, if any, to inspect or copy a record. *Wis. Stat. § 19.34(2)(c)*. The posted notice must also “identify each position of the authority that constitutes a local public office or a state public office” (see definition *above*).<sup>14</sup>

The posting requirement, however, does not apply to members of the legislature or to members of any local governmental body.

**Hours – Wis. Stat. § 19.34(2).** An authority with regular office hours must, during those hours, permit access to its records kept at that office, unless otherwise specified by law. If the authority does not have regular office hours at the location where the records are kept, it must permit access upon 48 hours’ written or oral notice. Alternatively, an authority without regular hours at the location where records are kept may establish a period of at least two consecutive hours per week for public access to records, and may require 24 hours’ advance written or oral notice of intent to inspect or copy a record within the established access period.

If a record is sometimes taken from the location where it is regularly kept, and inspection is allowed at the location where the record is regularly kept upon one business day’s notice, inspection does not have to be allowed at the occasional location.

**Computation of time – Wis. Stat. § 19.345.** Under the public records provisions (*Wis. Stat. §§ 19.33-19.39*) when the time in which to do an act (e.g., provide a notice) is specified in hours or days, Saturdays, Sundays and legal holidays are excluded from the computation.

**Facilities – Wis. Stat. § 19.35(2).** The authority must provide a person who is allowed to inspect or copy a record with facilities comparable to those used by its employees to inspect, copy and abstract records during established office hours. The authority is not required to provide extra equipment or a separate room for public access. The authority has the choice of allowing the requester to photocopy the record or providing a copy itself. *Wis. Stat. § 19.35(1)(b)*. In order to protect the original the custodian may refuse to allow the requester to use his or her own photocopier to copy the record.<sup>15</sup>

## Priority & Sufficiency of Request

Response to a public record request is a part of the regular work of the office. An authority must “as soon as practicable and without delay” fill a public records request or notify the requester of the decision to deny the request in whole or in part, and the reasons for that decision. *Wis. Stat. § 19.35(4)*. In some cases, the custodian may delay the release of records to consult legal counsel. Specified time periods apply for giving notice of the intended release of certain records containing personally identifiable information on employees and on individuals who hold public office (*see below*).

A request must reasonably describe the record or information requested. *Wis. Stat. § 19.35(1)(h)*. A request is insufficient if it has no reasonable limitation as to subject matter or length of time represented by the request. For example, a request for a copy of 180 hours of audio tape of 911 calls with a transcription of the tape and log for each transmission was a request without reasonable limitation that may be denied.<sup>16</sup> Although filling a request may involve a large volume of records, at some point a broad request becomes so excessive that it may be rejected.<sup>17</sup>

## Form of Request & Response; Separation of Information

A request may be either oral or written. *Wis. Stat. § 19.35(1)(h)*. If a mailed request asks that records be sent by mail, the authority cannot require the requester to come in and inspect the records, but must mail a copy of the requested record, assuming that it must be released and any required prepayment of fees (*see below*) has been made. *Wis. Stat. § 19.35(1)(h)*. Also, a response that requires unauthorized costs or conditions is considered a denial even though the response does not use words like “deny” or “refuse.”<sup>18</sup>

A request that is granted seldom presents a problem. Denials of requests, however, must be made in accordance with legal requirements. An oral request may be denied orally, unless a demand for a written reply is made by the requester within five business days of the oral denial. *Wis. Stat. § 19.35(4)(b)*.

The request must be in writing before an action to seek a court order or a forfeiture may be started. A written request must receive a written denial stating the reasons for the denial and informing the requester that he or she may file a “mandamus” action (or request the district attorney or attorney general to file such action) in the local circuit court seeking review of the custodian’s determination and an order to release the record (*see “Enforcement and Penalties” below*). *Wis. Stat. § 19.35(4)(b)*.

If a record contains both information that is subject to disclosure and information that is not, the information that may be disclosed must be provided and the confidential information deleted. *Wis. Stat. § 19.36(6)*.

## Form of Record

**Photocopies.** Many requested records can be photocopied. The authority may either provide a photocopy of such record to the requester or allow the requester to make the copy (as noted above under “Facilities”). *Wis. Stat. § 19.35(1)(b)*. If the form of the record does not permit



photocopying, the requester may inspect the record and the authority may permit the requester to photograph the record. *Wis. Stat. § 19.35(1)(f)*. If requested, the authority must provide a photograph.

**Tapes.** For audiotapes, the authority may provide a tape copy or a transcript, if the requester so requests. *Wis. Stat. § 19.35(1)(c)*. When an audiotape or handwritten record would reveal a confidential informant's identity, the authority must provide a transcript, if the record is otherwise subject to inspection. *Wis. Stat. § 19.35(1)(em)*. A requester has a right to a videotape copy of a record that is as substantially as good as the original. *Wis. Stat. § 19.35(1)(d)*.

**Digital records.** An authority must provide relevant data from digital records in "an appropriate format." It is not necessary for a requester to examine the exact information in an authority's electronic database. This is because the data may be at risk of damage or unwitting exposure of confidential information by complete access to the data base. For example, providing property assessment information for all properties in the data base as PDF documents satisfied a request for all property data from the digital record.<sup>19</sup>

**Putting records in comprehensible forms.** If the record is in a form not readily comprehensible, the requester has the right to information assembled and reduced to written form, unless otherwise provided by law. *Wis. Stat. § 19.35(1)(e)*. Except to put an existing record in comprehensible form, the authority has no duty to create a new record by extracting and compiling information. *Wis. Stat. § 19.35(1)(L)*. However, the custodian does have to separate information that may be disclosed from that which is being withheld. *Wis. Stat. § 19.36(6)*.

**Published records; restrictions on access.** A record (other than a videotape) that has been published or will be promptly published and available for sale or distribution need not be otherwise offered for public access. *Wis. Stat. § 19.35(1)(g)*. Note that the definition of "record," above, does not include published materials of an authority available for sale and published materials available for inspection at a public library. *Wis. Stat. § 19.32(2)*

**Protecting records from damage.** Reasonable restrictions on access may be placed to protect irreplaceable or easily damaged original records. *Wis. Stat. § 19.35(1)(k)*.

## What Fees May Be Charged?

Fees that do not exceed the "actual, necessary and direct" cost of copying, photographing or transcribing a record and mailing or shipping it may be charged to a requester of public records, unless another fee is set or authorized by law. *Wis. Stat. § 19.35(3)*. The authority may reduce or waive fees if that is in the public interest. The Department of Justice recommends a copy charge of about 15¢ per page and cautions against charges exceeding 25¢ per page, unless a statute provides otherwise or higher costs can be justified.<sup>20</sup> As an example of a statute providing for a different fee, the register of deeds may charge \$2 for the first page and \$1 for additional pages for copies of records under *Wis. Stat. § 59.43(2)(b)*. Also, the register, with the approval of the county board, may enter into a contract for the provision of records in electronic format at a price set as provided under *Wis. Stat. § 59.43(2)(c)*.<sup>21</sup>

A copy fee may include a charge for the necessary and direct time it takes a clerical worker to copy the records on a copy machine.<sup>22</sup> Costs associated with locating a record may be passed on to the requester only if the location costs are \$50 or more. Computer programming expense required to respond to a request may be charged.<sup>23</sup>

Prepayment of fees may be required only if the fee exceeds \$5. However, if the requester is a prisoner who has failed to pay any fee for a previous request, the authority may require prepayment of both the previous and current fee. The cost of a computer run may be imposed as a copying fee, but not as a location fee.<sup>24</sup> An authority may not charge the cost of separating confidential parts of a record from the parts to be released.<sup>25</sup>

## Inspection of Public Records

Any requester has a right to examine a public record, unless access is withheld according to law. As noted above, the presumption is that public records are open. Access to a public record, in accordance with *Wis. Stat. §§ 19.35(1)(a)* and *19.36(1)*, may be denied when:

- a state or federal law exempts the record from disclosure.
- a limitation on access has been established by case law or published court decisions. This is known as a common law exemption.
- the harm to the public interest from disclosure outweighs the public interest in inspection. This requires the custodian to perform the “balancing test” (below), often with the advice of legal counsel. The balancing test is also a common law doctrine.

## Limitations on Access under the Common Law; the Balancing Test

The statute provides that common law principles (i.e., the law developed in published court decisions) on the right of access to records remain in effect. *Wis. Stat. § 19.35(1)(a)*. For example, the common law provides an exception to public access to a district attorney’s prosecution files.<sup>26</sup> Most importantly, the common law has created the concept of the balancing test (below) to weigh the competing public interests in making the disclosure decision. In one case, the court ruled that the above common law exception for records in the custody of the district attorney’s office does not allow another custodian, in this case the sheriff’s department, to withhold the same record held by the district attorney’s office, although the sheriff’s department may withhold the record for a sufficient policy reason after applying the balancing test.<sup>27</sup>

**The balancing test.** Often no statutory provision or common law ruling answers the question of whether access to a public record may be denied. When the custodian has some doubt about whether to release the record, the balancing test must be performed. Under the common law, public records may be withheld only when the public interest in nondisclosure outweighs the public interest in disclosure.<sup>28</sup> The reasons for nondisclosure must be strong enough to outweigh the strong presumption of access.<sup>29</sup> The custodian must state specific policy reasons for denying access; a mere statement of legal conclusion is inadequate.<sup>30</sup> In explaining the denial, it may be helpful to cite statutory provisions (such as the following, if applicable) that indicate a public policy to deny access, even if these provisions may not specifically answer the access question.



Before refusing a request in an unclear situation, or granting a request that may invade a person's privacy or damage a person's reputation, the custodian should consult the county corporation counsel or municipal attorney. The office of the attorney general may also be consulted (*see final heading*). With the enactment of legislation on personally identifiable information in 2003 (*below*), the law is clearer than it had been before on these matters.

***Using open meetings law exemptions in the balancing test.*** The statutory exemptions under which a governmental body may meet in closed session under *Wis. Stat. § 19.85(1)* of the open meetings law indicate public policy, but the custodian must still engage in the balancing test and may not merely cite such an exemption to justify nondisclosure.<sup>31</sup>

These open meeting exemptions include the following: deliberating concerning a quasi-judicial case; considering dismissal, demotion, licensing or discipline of a public employee; considering employment, promotion, compensation or performance evaluation of a public employee; considering crime prevention or crime detection strategies; engaging in public business when competitive or bargaining reasons require closure; considering financial, medical, social or personal histories or disciplinary information on specific persons which would be likely to have a substantially adverse effect on the person's reputation if disclosed; and conferring with legal counsel for a governmental body on strategy for current or likely litigation.

## Examples of Statutory Limitations on Access

***Records requested by prisoners & committed persons – Wis. Stat. § 19.32.*** The definition of “requester” itself results limits access. “Requester” does not include any person who is “committed” or “incarcerated” unless the person requests inspection or copies of a record that contains specific references to that person or to his or her minor children if the physical placement of the children has not been denied to the person. Release of records to a committed or incarcerated person is, of course, subject to records that are otherwise accessible under the law.

***Certain law enforcement investigative records – Wis. Stat. § 19.36(2).*** Access to these records is limited where federal law, as a condition for receipt of aid, provides limitations.

***Computer programs; trade secrets – Wis. Stat. §§ 19.35(4) & (5).*** The computer program itself is not subject to inspection and copying, although the information used as input is subject to any other applicable limitations. See also “Digital Records” above under the heading “Form of Records.”

***Identities of applicants for public positions – Wis. Stat. § 19.36(7).*** Records that would reveal the identities of job applicants must be kept confidential if the applicants so request in writing. However, the identities of “final candidates” to “local public office” may not be withheld. A final candidate is one who is one of the 5 most qualified applicants, or a member of the final pool if that is larger than 5. If there are fewer than 5 candidates, each one is a final candidate.

***Identities of law enforcement informants – Wis. Stat. § 19.36(8).*** Information that would identify a confidential informant must be deleted before a requester may have access to the record.

***Employee personnel records & records of public officers (see below) – Wis. Stat. § 19.36(10)-(12).***

***Financial identifying information – Wis. Stat. § 19.36(13).*** Personally identifiable data that contains an individual’s account or customer number with a financial institution (such as credit card numbers, debit card numbers and checking account numbers) may not be released, unless specifically required by law.

***Ambulance records. – Wis. Stat. § 256.50(12).*** Records made by emergency medical technicians and ambulance service providers are confidential patient health care records, although certain information on the run is open to inspection.

***Patient health care records. – Wis. Stat. §§ 146.81-146.84.***

***Law enforcement officers’ records of children & adult expectant mothers. Wis. Stat. §§ 48.396 & 938.396.***

***Public library user records. Wis. Stat. § 43.30(1).***

***Certain assessment records.*** *Personal property tax returns* are confidential, except that they are available for use before the board of review. *Wis. Stat. § 70.35(3).* *Property tax income and expense information*, used in property valuation under the income method, are confidential. *Wis. Stat. § 70.47(7)(af).* *Real estate transfer returns* are also confidential, with specified exceptions. *Wis. Stat. § 77.265.*

***Personnel files. Wis. Stat. § 103.13.*** An employer (whether a government or non-government employer) must allow an employee to inspect his or her personnel documents, at least twice a year, within seven working days after making the request. The employee may submit a statement for the file that disputes information in it, if the employee and employer cannot agree to a correction. The statement must be attached to the disputed portion of the record and included with the record when released to a third party. Exceptions to the employee’s right to inspect include the following records: investigations of possible criminal offenses; letters of reference; test documents, other than section or total scores; staff management planning materials, including recommendations for future salary increases and other wage treatments, management bonus plans, promotions and job assignments, and other comments and ratings; personal information that would be a “clearly unwarranted invasion” of another person’s privacy; and records relevant to a pending claim in a judicial proceeding between the employee and employer.

## Personally Identifiable Information

### Introduction

In 1991 the legislature created provisions in the public records law to help preserve the privacy of individuals. Generally, a person who is the subject of a record with personally identifiable information has greater access to that record than is otherwise available under the public records law and may seek corrections to the information contained in the record. The 1991 legislation also created a subchapter on “personal information practices.”

The section following this one covers this important legislation designed to provide clarification on access to certain records containing personally identifiable information, primarily in the records of employees and local public officers.

### Definitions

*Wis. Stat. §19.32.* “Personally identifiable information” means “information that can be associated with a particular individual through one or more identifiers or other information or circumstances.” *Wis. Stat. §§19.32(1r) and 19.62(5).* (See the following exceptions for what this term does *not* include.) A “person authorized by the individual” means a person authorized in writing by the individual to exercise the rights to access records with personally identifiable information; the individual’s parent, guardian or legal custodian, if the individual is a child; the guardian of an individual adjudicated incompetent in this state; or the personal representative or spouse of a deceased individual. *Wis. Stat. §19.32(1m).*

### Right to inspect; exceptions

*Wis. Stat. §19.35(1)(am).* In addition to a requester’s general right to inspect public records under *Wis. Stat. §19.35(1)(a)(above)*, a requester, or a person authorized by that individual, has the right to inspect and copy any record containing personally identifiable information pertaining to the individual that is maintained by an authority. However, this right of access does *not* include the following records:

1. **Investigations, etc.** Any record with information 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 record collected or maintained in connection with any such action or proceeding.<sup>32</sup>
2. **Security issues.** Any record with personally identifiable information that, if disclosed, would
  - a. endanger an individual’s life or safety;
  - b. identify a confidential informant;
  - c. endanger the security of specified facilities and institutions, including correctional, mental health and other secured facilities, a center for the developmentally disabled and a facility for the care of sexually violent persons; or
  - d. compromise the rehabilitation of a person incarcerated or detained in one of the facilities in c.

3. **Record series.** Any record which is part of a record series, as defined in *Wis. Stat. § 19.62(7)*, that is not indexed or arranged so that the authority can retrieve it by use of an individual's name, address or other identifier.

### Contractors' records

*Wis. Stat. §§ 19.36(3) and (12)*. The general right to access records of a contractor produced under a contract with an authority under *Wis. Stat. § 19.36(3)* does not apply to personally identifiable information. Such information on an employee of a contracting employer subject to the prevailing wage law cannot generally be accessed, except information on employee work classification, hours of work and wage or benefit payment information may be released.

### Responding to requests

*Wis. Stat. § 19.35(4)(c)*. The authority must follow a specific procedure when it receives a request from an individual or a person authorized by the individual to inspect or copy a record with personally identifiable information on the individual. In these cases the requester generally has a right to inspect and copy a record. *§ 19.35(1)(am)*. However, this right does not extend to a number of situations and records (see "Applicability" and "Contractors' records" *above*).

The authority must first determine whether the requester has a right, under the general public records law, to inspect or copy the record with personally identifiable information. If the requester has such a right, the authority must grant the request. This determination may involve the balancing test (*above*). If the authority determines that the requester does not have the right to inspect or copy the record under the general public records law, then the authority must determine whether the requester has the right to inspect or copy the record under the specific provisions of the law applicable to personally identifiable information, and grant or deny the request accordingly.

(If the requested record contains information pertaining to a record subject other than the requester, or other than the record subject in a situation where the request is by a person authorized by that record subject, the provisions of *Wis. Stat. § 19.356* on notice to a record subject apply. See the section *below* on "Personally Identifiable Information on Employees, Local Public Officers & Other Records Subjects.")

### Correction of personally identifiable information

*Wis. Stat. § 19.365*. An individual or person authorized by the individual may challenge the accuracy of personally identifiable information pertaining to the individual in records to which they have access by notifying the authority in writing of the challenge. The authority must then either correct the information or deny the challenge. If the challenge is denied, the authority must notify the challenger of the denial and allow the individual or person authorized by the individual to file a concise statement setting forth the challenge to the information with the reasons for disputing that portion of the record. Only a state authority is required to give reasons for a denial of a challenge. The challenge provision does not apply to records transferred to an archival depository or when a specific state or federal law governs challenges to the accuracy of the record.

## Personal information practices

*Wis. Stat. §§ 19.62-19.80.* *Wis. Stat. § 19.65*, provides that an authority must develop rules of conduct for employees who collect, maintain, use, provide access to or archive personally identifiable information and must ensure that these persons know their duties relating to protecting personal privacy.

*Wis. Stat. §§ 19.65-19.80*, also has provisions concerning the accuracy of data collection and the sales of names or addresses. An authority that maintains personally identifiable information which may result in an adverse determination against an individual's rights, benefits or privileges must, to the greatest extent possible, collect the information directly from the individual, or verify the information, if obtained from another person. *Wis. Stat. § 19.67*. Also, an authority may not sell or rent a record containing an individual's name or address of residence, unless specifically authorized by state law. *Wis. Stat. § 19.71*.

## Personally Identifiable Information on Employees, Local Public Officers & Other Record Subjects (2003 Wisconsin Act 47)

### Introduction

The release of records affecting the privacy or reputational interests of public employees has involved a good deal of legal uncertainty. Under Wisconsin Supreme Court decisions, custodians have been required to notify the subject when such records were requested, and proposed to be released to give the record subject an opportunity to seek judicial review.<sup>33</sup> However, as explained in the prefatory note to 2003 Wis. Act 47, those cases did not establish criteria for determining when privacy and reputational interests are affected or for giving notice to affected parties. Nor did these cases address the issue of whether the same analysis applies to records of private employees.

The Legislature in *Wis. Stat. § 19.356*, codified these cases in part, but under this act the rights apply only to a limited set of records. The statute's procedure for notice and review now applies to four categories of records relating to employees, local public officers and other records subjects:

- Records of "record subjects" (i.e., persons who are the subject of personally identifiable information in public records) which, as a general rule, do not require notice prior to allowing access.
- Records of employees and other record subjects that may be released under the balancing test only after providing the record subject with notice of impending release of the record and the right to judicial review prior to release of the record.
- Records of local public officers that may be released under the balancing test only after providing notice to the record subject of the impending release of the record and the right to augment the record.
- Records of employees and local public officers that are generally closed to access.

## General rule regarding notice & judicial review – *Wis. Stat. § 19.356(1)*

An authority is not required to notify a record subject prior to allowing access to a record containing information on the person, except as authorized in *Wis. Stat. § 19.356* (see following) or as otherwise provided by statute. Nor is the record subject entitled to judicial review prior to release of the record. (Of course, a specific statute concerning access may apply and the authority may need to conduct the balancing test.) The statute goes on to provide when notice and an opportunity for judicial review are required prior to release of records.

## When notice to employee/record subject required; opportunity for judicial review – *Wis. Stat. § 19.356(2)-(8)*

The authority must provide written notice to the record subject, as specified in the statute, prior to releasing any of the three following types of records containing personally identifiable information pertaining to the record subject if the authority decides to allow access to the record. The authority in its notice must specify the requested records and inform the record subject of the opportunity for judicial review. The notice must be served on the record subject within three days of deciding to allow access; service is accomplished by certified mail or by personal delivery. The records requiring notice prior to release are:

- ***Disciplinary matters.*** A record containing information relating to an employee that is created or kept by the authority and is the result of an investigation into a disciplinary matter involving the employee or the possible employment-related violation by the employee of a statute, ordinance, rule, regulation, or policy of the employee's employer. The attorney general interprets this provision to be limited to disciplinary matters or possible employment-related violations by an employee of the employer in which the record was prepared by the employer, rather than by another entity.<sup>34</sup> In addition, if a private employer is involved, the attorney general reasons that the private employee may block access to the record, as noted below under "Records of other employers."
- ***Subpoenas; search warrants.*** A record obtained by the authority through a subpoena or search warrant. Note that this provision does not limit its applicability to employees; it applies in general to any record subject to whom the record pertains.<sup>35</sup>
- ***Records of other employers.*** A record prepared by an employer other than an authority if the record contains information relating to an employee of that employer, "unless the employee authorizes the authority to provide access to that information." The attorney general interprets this provision to mean that an authority may not release personally identifiable information pertaining to the employee of a private employer unless the employee consents.<sup>36</sup>

The requirement of notice prior to release of the above information does not apply to the release of the information to the employee or to the employee's representative under the statute relating to an employee's access to his or her own personnel records (*Wis. Stat. § 103.13*); nor does the notice requirement apply to release of the information to a collective bargaining representative.

Within 10 days of service of the notice of the intended release of the records, the record subject may start a court action to have the access to the records blocked. The statute provides a



procedure for expedited judicial review of the authority's decision to release records and also provides that the records may not be released within 12 days of sending a notice or during judicial review periods.

### When notice required to person holding local public office; opportunity for comments – *Wis. Stat. § 19.356(9)*

A different approach applies to the release of records with personally identifiable information pertaining to a person who holds a “local public office” (e.g., a governing body member, elected or appointed officer or department head) or a “state public office” (e.g., a municipal judge). Under this procedure, the authority must inform the record subject within 3 days of the decision to release the records to the requester. This notice is served on the officer by certified mail or personal delivery and must describe the records intended for release and the officer's right to augment the record. *Note* that the officer (unlike an employee under the previous heading) who is the record subject does not have the right of judicial review. Instead, the officer who is the record subject has the right to augment the record that will be released to the requester with his or her written comments and documentation. This augmentation of the record must be done within 5 days of receipt of the notice.

### Employee/officer records generally closed to public access

***Employee records closed to public access.*** *Wis. Stat. § 19.36(10)*, generally prohibits an authority from releasing the records listed in a-d below. However, this general prohibition on release does not apply if another statute specifically authorizes or requires release. Nor does the prohibition on release apply to an employee or his or her representative accessing the employee's personnel records under *Wis. Stat. § 103.13*, or to a collective bargaining representative for bargaining purposes or pursuant to a collective bargaining agreement. The employee records which are not generally open to public access are as follows:

- a) *Addresses; telephone number; social security number.* Information concerning an employee's home address, home email address, home telephone number and social security number, unless the employee authorizes the authority to provide access to such information.
- b) *Current criminal/misconduct investigations.* Information relating to the current investigation of a possible criminal offense or possible misconduct connected with an employee's employment, prior to disposition of the investigation.<sup>37</sup>
- c) *Employment examinations.* Information pertaining to an employee's employment examination, except an examination score if access to that score is not otherwise prohibited.
- d) *Employee evaluations.* Information relating to one or more specific employees used by an authority or the employer for staff management planning, including performance evaluations, recommendations for future salary adjustments or other wage treatments, management bonus plans, promotions, job assignment, letters of reference, or other comments or ratings relating to employees.

**Local public officers' records closed to public access.** *Wis. Stat. § 19.36(11)*. As with employees, certain records on individuals holding a local public office, as broadly defined, may not generally be released to the public. However, this general prohibition on release does not apply if another statute specifically authorizes or requires release. Nor does the prohibition on release apply to a local public officer who is an employee accessing his or her personnel records under *Wis. Stat. § 103.13*. The records on local public officers which are not generally open to public access are as follows:

- e) *Addresses; telephone number; social security number.* Information concerning the individual's home address, home email address, home telephone number and social security number, unless the individual authorizes the authority to provide access to such information.
- f) *Exceptions.* This prohibition on release, however, does not apply to the release of the home address of an individual who holds an *elective* public office or who, as a condition of employment as a local public officer, is required to reside in a specific location. This exception allows the public to verify that its elected officials and other officers or high-level employees (who fill a position that falls under the definition of "local public office") subject to residency requirements actually live in the community or meet the applicable requirement.

**Employee records under public works contracts.** *Wis. Stat. § 19.36(12)*. Unless access is specifically authorized or required by a statute, an authority may not provide access to a record prepared or provided by an employer performing work on a project in which the employer must pay prevailing wages, if the record contains the name or other personally identifiable information relating to an employee of the employer, unless the employee authorizes access. *Wis. Stat. § 19.36(12)*. However, as previously noted, information concerning an employee's work classification, hours of work, and wage and benefit payments received for work on the project may be released.

## Enforcement & Penalties

The public records law provides for forfeitures and court orders to enforce the law. *Wis. Stat. § 19.37*.

**Court order to allow access.** A person who has made a written request for access to a public record may bring an action for a writ of mandamus asking the court to order release of withheld information. This procedure does not require following the notice-of-claim law applicable to many suits against the government. In contrast to the procedure under the open meetings law, a person seeking release of a public record does *not* have to initially refer the matter to the district attorney. However, the person may request the district attorney or the attorney general to seek mandamus. A committed or incarcerated person has no more than 90 days after denial of a record request to begin an action in court challenging the denial.

A requester who prevails in whole or substantial part may receive reasonable attorney fees, actual costs, and damages of at least \$100. The costs and fees must be paid by the authority or



the governmental unit of which it is a part and are not the personal liability of the custodian or any other public official. A committed or incarcerated person, however, is not entitled to the minimum \$100 damages, although the court may award damages. Also, in a request for personally identifiable information under *Wis. Stat. § 19.35(1)(am)*, (*above*) there is no minimum recovery of \$100 in damages. Instead, actual damages may be recovered if the court finds that the authority acted in a willful or intentional manner.

The law also provides for the award of punitive damages to the requester if the court finds that the authority or legal custodian arbitrarily and capriciously denied or delayed their response or charged excessive fees. However, punitive damages may only be awarded as part of a mandamus action to compel delivery of records, not as a separate claim for violation of the Public Records Law after documents were released.<sup>38</sup>

**Forfeiture.** The district attorney or the attorney general may seek a forfeiture against an authority or custodian who arbitrarily and capriciously denies or delays response to a records request or charges excessive fees. The statute provides for a forfeiture of not more than \$1,000 along with the reasonable costs of prosecution.

## Reference and Advice

Local officials who have questions on the public records law should contact their unit's legal counsel. Also, any person may contact the attorney general (the Wisconsin Department of Justice) to request advice on the public records law. *Wis. Stat. § 19.39*.

Refer to §§ 19.31-19.39 of the *Wisconsin Statutes* for the specific wording of the law; the statutes may be accessed on the internet at <http://folio.legis.state.wi.us/>. There is a *Wisconsin Public Records Law, Compliance Outline (2010)*, by the Wisconsin Department of Justice, which may be found on the Internet at <http://www.doj.state.wi.us/site/ompr.asp>.

The Local Government Center has CDs of its Open Government *WisLine Series* program on the Public Records Law. Check the University of Wisconsin-Extension Local Government Center web site - For new developments in Open Meetings Law, follow the Local Government Center's "Local Call" blog at <http://fyi.uwex.edu/localgovcenter/>, or go to the Local Government center web page and click on the "Local Call" link.

Information on public records management and destruction may be found on the Web sites of the Wisconsin Historical Society and the Public Records Board of the Department of Administration. Go to [www.wisconsinhistory.org](http://www.wisconsinhistory.org) and enter "Local Government Records Program" in the search box. This links to the [Wisconsin Municipal Records Manual](#) and other information of interest. At [www.doa.state.wi.us](http://www.doa.state.wi.us), enter "Public Records Board" (search without quotation marks).

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<sup>1</sup>Wis. Stat. §19.31.

<sup>2</sup>*Ibid.*

<sup>3</sup>See the *Compliance Outline*, p. 3, cited above under “Reference & Advice”. Opinion of Att’y Gen. to Gail Peckler-Dziki, OAG 6-09 (December 22, 2009).

<sup>4</sup>*Fox v. Bock*, 149 Wis. 2d 403 (1989); 77 *Op. Att’y Gen.* 100, 102-03 (1988).

<sup>5</sup>*Schill v Wis. Rapids Sch. Dist.*, 2010 WI 86. ¶137; ¶172.

<sup>6</sup>Memorandum from J.B. Van Hollen, Attorney General, to Interested Parties (July 28, 2010), available online at [http://www.doj.state.wi.us/news/files/Memo\\_InterestedParties-Schill.pdf](http://www.doj.state.wi.us/news/files/Memo_InterestedParties-Schill.pdf)

<sup>7</sup>*Zellner v. Cedarburg School District*, 2007 WI 53, ¶¶ 25-31, 56.

<sup>8</sup>*AG-Seiser and Bunge Informal Correspondence, October 4, 2010.*

<sup>9</sup>*State v. Beaver Dam Area Development Corp.*, 2008 WI 90, ¶¶44-45, 66, 72-75, 78.

<sup>10</sup>*Gehl v. Connors*, 2007 WI App 238, ¶¶ 12-15.

<sup>11</sup>*Stone v. Board of Regents of the University of Wisconsin*, 2007 WI App 223, ¶¶ 11-27.

<sup>12</sup>*WIREData, Inc. v. Village of Sussex*, 2008 WI 69, ¶78.

<sup>13</sup>*WIREData, Inc.* at ¶89.

<sup>14</sup>Wis. Stat. §19.34(1).

<sup>15</sup>*Grebner v. Schiebel*, 240 Wis. 2d 551 (Ct. App. 2001).

<sup>16</sup>*Schopper v. Gehring*, 210 Wis. 2d 209 (Ct. App. 1997).

<sup>17</sup>*Gehl v. Connors*, 2007 WI App 238, ¶¶ 17-24.

<sup>18</sup>*WIREData, Inc. v. Village of Sussex*, 2007 WI App 22 ¶57; *application distinguished by WIREData, Inc. v. Village of Sussex*, 2008 WI 69 ¶55 (*WIREData II*).

<sup>19</sup>*WIREData, Inc. v. Village of Sussex*, 2008 WI 69, ¶¶ 97-98.

<sup>20</sup>See the *Compliance Outline*, p. 50, cited above under “Reference and Advice”

<sup>21</sup>*Opinion of Att’y Gen. to John Muench, Barron County Corp. Counsel*, 1-03 (October 2, 2003).

<sup>22</sup>72 *Op. Att’y Gen.* 150 (1983).

<sup>23</sup>*WIREData, Inc. v. Village of Sussex*, 2008 WI 69, ¶107.

<sup>24</sup>72 *Op. Att’y Gen.* 68 (1983).

<sup>25</sup>*Milwaukee Journal Sentinel v. City of Milwaukee*, 2012 WI 65.

<sup>26</sup>*State ex rel. Richards v. Foust*, 165 Wis. 2d 429 (1991).

<sup>27</sup>*Portage Daily Register v. Columbia Co. Sheriff’s Department*, 2008 WI App 30, ¶¶ 15-22.

<sup>28</sup>Wis. Stat. §19.35(1)(a); *State ex rel. Youmans v. Owens*, 28 Wis. 2d 672, 683 (1965).

<sup>29</sup>*Matter of Estates v. Zimmer*, 151 Wis. 2d 122 (Ct. App. 1989).

<sup>30</sup>*Village of Butler v. Cohen*, 163 Wis. 2d 819 (Ct. App. 1991).

<sup>31</sup>Wis. Stat. §19.35(1)(a); *Zellner v. Cedarburg School District*, 2007 WI 53, ¶¶ 47-58.

<sup>32</sup>*Seifert v. School District of Sheboygan Falls*, 2007 WI App 207, ¶¶ 35-36.

<sup>33</sup>*Woznicki v. Erickson*, 202 Wis. 2d 178 (1996); and *Milwaukee Teachers’ Education Association v. Milwaukee Board of School Directors*, 227 Wis. 2d 779 (1999).

<sup>34</sup>*Opinion of Att’y Gen. to James R. Warren*, OAG1-06 (August 3, 2006).

<sup>35</sup>*Ibid.*

<sup>36</sup>*Ibid.*

<sup>37</sup>*Zellner v. Cedarburg School District*, at ¶ 32-39.

<sup>38</sup>*The Capital Times Co. v. Doyle*, 2011 WI App 137.