IMPROVING TRANSPARENCY AND ACCOUNTABILITY IN GOVERNMENT:

A Discussion About Optimal Transparency Versus Shady Scenarios Involving Open Records, Open Meetings, Ethics and Digital Data

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SCENARIOS FOR DISCUSSION

Scenario # 1:

At a meeting of the Village Board, the treasurer asks that one of the motions that had been passed at the previous meetings be taken up again and reconsidered at an upcoming special meeting. The governing body's members generally agree with the request and granted the opportunity for reconsideration at a special meeting. Prior to the scheduled date of the special meeting, the treasurer directs a staff member to call all five of the board members who originally voted in favor of the motion to be reconsidered and to ask if they would change their votes and all five replied in the negative. The treasurer then conveyed the results of that poll to the Board president, who then decided that the reconsideration issue the treasurer had requested would not be on the agenda for the upcoming meeting.

Scenario # 2:

Your municipal agenda allows for treasurer to provide a general update or comments on matters affecting the treasurer's office. The agenda item may use generic subject matter designations such as "treasurer's comments" or "treasurer's department/staff comments," or the treasurer may be allowed to address matters affecting the office during agenda items denoted as "old business," "new business," "miscellaneous business," "agenda revisions," or "such other matters as are authorized by law" for the purpose of communicating information on matters within the scope of the governmental body's authority.

Scenario # 3:

The treasurer demands, and the governing body agrees, to go into a closed session (properly noticed) in order to discuss whether to increase or decrease staffing in the treasurer's office and the qualifications and salary range for a needed employment position to be created in the treasurer's office.

Scenario # 4:

The treasurer is assisting the finance committee in reviewing bids for purchase of two used vehicles. Three dealerships responded with bids, providing bids of $15,000 and $18,000. One is the only automobile dealership in the village. It is owned by the treasurer. The second is 120 miles away and is owned by her father and mother; the father recently passed away and the mother is now living with and being cared for the treasurer. The third is owned by her brother-in-law's best friend and is located 180 miles away. There is no local ordinance governing the situation, but the village follows Robert's Rules of Order.

Scenario # 5:

The treasurer's 18-year-old daughter who lives at home with him was arrested last night, along with her 17-year-old friend, for underage drinking. Both were arrested after going to a local house party following a Milwaukee Brewer's game. Both his daughter and her friend are distraught and beg him to help since the underage drinking ticket might impact their college hopes. They even say they were not drinking, despite a breathalyzer to the contrary. The treasurer agrees to call the municipality's prosecuting attorney. The treasurer tells the attorney that he believes his daughter and her friend, they are good kids with college aspirations, that they are truly sorry and the tickets should be dismissed or at least amended to some non-underage drinking offense.

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Scenario # 6:

A long serving and publicly respected clerk/treasurer is running for a seat on the governing body. Among her many accolades, she touts her business community experience due to being employed part-time for her friend's property tax assessment firm. Her friend is the head of that firm and in some years has been appointed the local assessor, although in other years the firm in general (i.e., not just its head) has been appointed the local assessor. The clerk/treasurer also touts her volunteer service. She has served her community as a volunteer fire department member for the past ten years, receiving an average of $1,000 a year for her services. The voters elect the clerk/treasurer in a landslide. Can she continue to work for the firm? Must she resign from the volunteer fire department?

Scenario # 7:

When handling requests for large records requests of property tax data, the clerk/treasurer charges public records requesters .15 to .25 cents/page. This cost reflects the direct costs associated with staff time to locate and assemble the records, copy them, redact, as well as costs for the paper and ink. This cost is also charged when more current records can be electronically accessed and downloaded on a memory stick and/or emailed to the requester.

Scenario # 8:

The clerk/treasurer uses the Google suite of products – email, docs, calendar and other business office features – in order to maintain a sophisticated and efficient workplace. She uses Google's private email addresses for public business, rather than the public address issued by the municipality. This practice allows her to extend email and calendaring to the use of private devices for her staff, in addition to the municipality's issued public devices.

Scenario # 9:

When the clerk/treasurer's office is short-staffed during the busy season, she may be more willing to allow the requester to inspect records freely. For instance, she will tell the requester to come look through a file to see if there's something responsive to the records request. It's very easy, and the public and governing body believe it provides great transparency.

Scenario # 10:

Deputy Treasurer Natasha observed two of Treasurer Patricia's personal friends come to the treasurer's office to transfer title to a large, enclosed, double-axle trailer they claimed to have purchased for $1,000. Natasha thought the purchase price seemed too low and contacted a DOT investigator who agreed, and asked her to provide him with copies of the paperwork. When Natasha reported the situation to Patricia, Patricia told Natasha, "I'm so disappointed in you" and "that was none of your business." Natasha alleges the next day, Patricia told her the people being investigated "are friends of mine" and Natasha acted outside the scope of her duties by contacting the DOT. Then, Human Resources Director suspended Natasha for one day, primarily because of her contact with the DOT investigator. In the meeting with Treasurer Patricia and the HR Director, Natasha was placed on administrative leave, accused of "vehicle

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title irregularity," and banned from the courthouse for the duration of the leave. Later, they asked Natasha to resign and she refused. Several days later, they fired Natasha.

For her side, Natasha claims DOT investigation led to a state auditor's report finding Treasurer Patricia failed to properly process title transactions, failed to follow DOT procedures and to collect certain fees and failed to pay the state its share of fees. The state audit report said "certain required fees" were not collected for title and registration transactions "for a local dealership." Nathasha accuses Patricia and the county of taking retaliatory actions against her for her disclosing information that showed evidence of possible law violations and mismanagement and abuse of authority. The suit further claims the county's actions violate the state policy requiring employees to report potential fraudulent practices.

LEGAL ISSUES INVOLVED IN SCENARIOS

I. OPEN MEETINGS LAW

A. General Application

The open meetings law applies to every "meeting" of a "governmental body." Wis. Stat. § 19.82(1).

A meeting under the open meetings law is defined as "the convening of members of a governmental body for the purpose of exercising the responsibilities, authority, power or duties delegated to or vested in the body." § 19.82(2), Wis. Stats. The Wisconsin Supreme Court has held that the open meetings law applies whenever a gathering of members of a governmental body satisfies two requirements: (1) there is a purpose to engage in governmental business; and (2) the number of members present is sufficient to determine the governmental body's course of action. *State ex rel. Newspapers v. Showers*, 135 Wis. 2d 77,102,398 N.W.2d 154 (1987).

The open meetings law also applies to a series of gatherings among separate groups of members of a governmental body, each less than quorum size, who agree, tacitly or explicitly, to act uniformly in sufficient number to determine the body's course of action. *See State ex rel. Lynch v. Conta*, 71 Wis. 2d 662,239 N.W.2d 313 (1976). Although none of these smaller gatherings, considered individually, includes enough members to constitute a "meeting," in the aggregate they effectively determine the body's course of action outside of the public's view. The open meetings law prohibits such serial or "walking" quorums, in order to ensure that the discussion and debate that influences a governmental body's decision is open to public scrutiny.

B. Contents of Notice

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

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In *State ex rel. Buswell v. Tomah Area School District*, 2007 WI 71, 301 Wis. 2d 178, 732 N.W.2d 804, the court observed "the plain meaning of Wis. Stat. § 19.84(2) sets forth a reasonableness standard, and that such a standard strikes the proper balance contemplated in Wis. Stat. §§ 19.81(1) and (4) between the public's right to information and the government's need to efficiently conduct its business." This reasonableness standard "requires a case-specific analysis" and "whether notice is sufficiently specific will depend upon what is reasonable under the circumstances." In making that determination, the factors to be considered include: "(1) the burden of providing more detailed notice, (2) whether the subject is of particular public interest, and (3) whether it involves nonroutine action that the public would be unlikely to anticipate." *Id*. ¶¶ 3, 6–7, 22, 37–38, 41. As a result, the Court held a public notice for a closed session for the purpose of "consideration and/or action concerning employment/negotiations with district personnel pursuant to Wis. Stat. § 19.85(1)(c)" was vague, misleading and legally insufficient, where the school board tentatively approved a collective bargaining agreement between it and the teacher's union.

The Wisconsin Attorney General has thus said:

> Purely generic subject matter designations such as "old business," "new business," "miscellaneous business," "agenda revisions," or "such other matters as are authorized by law" are insufficient because, standing alone, they identify no particular subjects at all. Similarly, the use of a notice heading that merely refers to an earlier meeting of the governmental body (or of some other body) without identifying any particular subject of discussion is so lacking in informational value that it almost certainly fails to give the public reasonable notice of what the governmental body intends to discuss. If such a notice is meant to indicate an intent to simply receive and approve minutes of the designated meeting, it should so indicate and discussion should be limited to whether the minutes accurately reflect the substance of that meeting.
>
> Likewise, the Attorney General has advised that the practice of using such designations as "mayor comments," "alderman comments," or "staff comments" for the purpose of communicating information on matters within the scope of the governmental body's authority "is, at best, at the outer edge of lawful practice, and may well cross the line to become unlawful." Because members and officials of governmental bodies have greater opportunities for input into the agenda-setting process than the public has, they should be held to a higher standard of specificity regarding the subjects they intend to address.

Wisconsin Open Meetings Law Compliance Guide, Wisconsin Department of Justice, p. 17 (March 2018).

C. <u>Closed Session</u>

As to closed session, every meeting of a governmental body must initially be convened in open session. All business of any kind, formal or informal, must be initiated, discussed, and acted upon in open session unless one of the exemptions in Wis. Stat. § 19.85(1) applies. Wisconsin Stat. § 19.85(1) contains eleven exemptions to the open session requirement which permit, but do not require, a governmental body to convene in closed session. "In general, the open meetings law gives wide discretion to a governmental body to admit into a closed session anyone whose presence the body determines is necessary for the consideration of the matter that is the subject of the meeting." *Wisconsin Open Meetings Law Compliance Guide*, Wisconsin Department of Justice, p. 29 (March 2018). Further, "nothing

in Wis. Stat. § 19.85(1) permits a person who is not a member of the governmental body to demand that the body meet in closed session." *Id*. p. 26.

Two of the statutory exemptions allowing closed session relate specifically to employment or licensing of an individual. See Wis. Stat. § 19.85(1)(b) (consideration of dismissal, demotion, discipline, licensing, and tenure); Wis. Stat. § 19.85(1)(c) ("[c]onsidering employment, promotion, compensation or performance evaluation data of any public employee over which the governmental body has jurisdiction or exercises responsibility."). As to the latter, the Wisconsin Attorney General has observed:

> The language of the exemption refers to a "public employee" rather than to positions of employment in general. The apparent purpose of the exemption is to protect individual employees from having their actions and abilities discussed in public and to protect governmental bodies "from potential lawsuits resulting from open discussion of sensitive information." It is not the purpose of the exemption to protect a governmental body when it discusses general policies that do not involve identifying specific employees. Thus, Wis. Stat. § 19.85(1)(c) authorizes a closed session to discuss the qualifications of and salary to offer a specific applicant but does not authorize a closed session to discuss the qualifications and salary range for the position in general. The section authorizes closure to determine increases in compensation for specific employees. Similarly, Wis. Stat. § 19.85(1)(c) authorizes closure to determine which employees to lay off, or whether to non-renew an employee's contract at the expiration of the contract term, but not to determine whether to reduce or increase staffing, in general.

Wisconsin Open Meetings Law Compliance Guide, Wisconsin Department of Justice, p. 29 (March 2018).

II. ETHICS AND PECUNIARY INTEREST

*Information below comes from League of Wisconsin Municipalities
Available at: https://www.lwm-info.org/1045/Pecuniary-Interest

The state statutes contain minimum standards of ethical conduct by local government officials. The statutes relating to ethics and conflicts of interest are interrelated and can be complicated. Because of the legal technicalities involved, many public officials may not, without additional training, fully understand all the intricate details of the various laws. However, public officials need to be able to recognize potential conflict situations.

Problems in this area can be avoided primarily by using common sense and applying the "smell test." Stated broadly, when an official, a member of the official's family or a business organization with whom the official is associated is involved in a municipal matter, the official needs to step back and question whether there are problems concerning his or her involvement in the matter. The official may want to discuss the situation with the municipal attorney. Local officials may also contact the League's attorneys to discuss ethics issues.

Sometimes the law does not clearly prohibit an official from taking action but the public may perceive a conflict. In such situations, the official needs to balance the benefits of involvement (e.g., representing the electors, using the official's expertise) against the drawbacks (e.g., how it would look, the risk of violating a law). Sometimes, even if it may be legal to act on a matter, you may not feel comfortable doing so or it may not look good to do so.

State Code of Ethics for Local Government Officials

A. *Prohibited Conduct.* The state ethics law for local officials, § 19.59, Stats., prohibits the following conduct:

1. Use of Office for Private Gain. Public officials are prohibited from using their offices to obtain financial gain or anything of substantial value for the private benefit of themselves, their immediate families, or organizations with which they are associated.

2. Offering or Receiving Anything of Value. No person may give and no public official may receive "anything of value" if it could reasonably be expected to influence the local public official's vote, official action or judgment, or could reasonably be considered as a reward for any official action or inaction.

3. Taking Action Affecting a Matter in Which Official Has Financial Interest. Local officials may not take official action substantially affecting a matter in which the official, an immediate family member, or an organization with which the official is associated has a substantial financial interest. Additionally, an official may not use his or her office in a way that produces or assists in the production of a substantial benefit for the official, immediate family member or organization with which the official is associated.

The prohibitions under no. 3 above do not apply to lawful payments of expenses, benefits, or reimbursements, or prohibit an official from taking action "to modify" an ordinance.

B. *Definitions*:

1. "Immediate Family" means an official's spouse or relative by marriage, lineal descent or adoption who receives, directly or indirectly, more than one-half of his or her support from the official or contributes, directly or indirectly, that amount for the official's support. § 19.42(7), Stats.

2. "Associated" with an Organization. An official is "associated" with an organization for purposes of the state ethics law when the individual or a member of the individual's immediate family is an officer, director or trustee, or owns at least 10 percent of the organization. An individual is not associated with an organization merely because the individual is a member or employee of an organization or business. § 19.42(2), Stats.

C. *Abstaining from Official Action.* The Government Accountability Board's (GAB's) Ethics Division suggests that when a matter in which a local official should not participate comes before a board, commission or other body which the official is a member, the official should leave that portion of the body's meeting involving discussion, deliberations, or votes related to the matter. When an official withdraws from the body's discussion, deliberation, and vote because of a potential conflict of interest, the body's minutes should reflect the absence.

D. *Local Ordinances*. Municipalities can adopt ethics ordinances that:

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- require disclosure of economic interests
- establish ethics boards
- prescribe standards of conduct
- establish forfeitures not exceeding $1,000

E. *Ethics Opinions*. Local officials may request advisory ethics opinions from the municipal ethics board or, if there is none, from the municipal attorney. The local ethics board or attorney may issue a written advisory opinion. If the official follows the advice in the opinion, it is evidence of intent to comply with the law.

F. *Penalties & Enforcement*. Any person who violates the state ethics law may be required to forfeit up to $1,000. The law is enforced by the district attorney.

G. *Interpretation*. The GAB has issued guidelines that are available on its web site, http://gab.wi.gov/guidelines. They address the following topics.

1. Participating in General Policy Decisions. An official may participate in an action in which he or she has a personal interest as long as: (a) the action affects a class of similarly-situated interests; (b) the interest of the official, an immediate family member or an organization with which the official is associated is not significant when compared to other members of the class; and (c) the effect of the action on the interests of the official, an immediate family member and an organization with which the official is associated is not significant when compared to other members of the class.

2. Receipt of Goods & Services. Under the state ethics code, local officials may receive: (a) items and services that are unrelated to their public service; (b) payment or reimbursement for costs relating to their work as public officials; and c) items of insubstantial value.

Under the state ethics code, local officials may not: (a) receive items or services offered because of their public position, unless the value of such items or services is insubstantial; (b) receive items or services that could reasonably be expected to influence their judgment or could reasonably be considered a reward for official action or inaction. See Eth 219.

3. Seminars & Conferences. Generally, officials attending such functions may accept the meals and refreshments provided or approved by the event's organizer and approved by the local governmental unit. An official should generally not accept food, drink or entertainment offered outside of the conference or activities at hospitality suites, receptions or similar activities.

Private Interests in Public Contracts (Pecuniary Interest)

Wis. Stat. § 946.13 generally prohibits municipal officials from having a private financial interest in a public contract. As a result, local officials are generally prohibited from entering into a contract for goods, services, construction or employment with the municipality.

A. *General Prohibition*. To protect against self dealing by public officials, § 946.13, Stats., generally prohibits public officials from having a private financial interest in a public contract. Thus, local

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officials are generally prohibited from entering into a contract for goods, services, construction or employment with the municipality.

1. Prohibition Against Official Action. A public official may not participate in the making of a contract in his or her official capacity if the official has a direct or indirect financial interest in the contract. § 946.13(1)(b). Since this is a prohibition on official action, abstaining from voting on the contract will prevent violation.

2. Prohibition Against Private Action. A public official may not in his or her private capacity negotiate or bid for or enter into a contract in which the public official has a direct or indirect financial interest if the official is "authorized or required by law to participate" in his capacity as such officer or employee in the making of that contract. § 946.13(1)(a). This latter provision is a prohibition on private action. A public official cannot avoid violating it merely by abstaining from voting. All that is necessary for a violation to occur is that the official be authorized to vote on or exercise discretion with regard to a contract in which the official has a private financial interest and the official has negotiated, bid for, or entered into the contract.

3. Exceptions:

a. $15,000. Section 946.13 does not apply to contracts in which receipts and disbursements do not, in the aggregate, exceed $15,000 in any one year. This means that a municipal governing body member can do a total of $15,000 in business with the municipality in any calendar year without violating § 946.13. For example, the governing body member could sell or lease a car to the municipality without violating § 946.13 if the price of the car or the lease payments do not exceed $15,000 annually.

b. Bankers. Bankers who receive less than $10,000 per year for serving on the city council or village board are exempted, unless the banker's compensation is directly dependent on procuring public business.

c. Attorneys. Partners in a law firm that serves as legal counsel to the municipality who receive less than $10,000 per year for serving on the city council or village board are exempted, unless the individual has an interest in the law firm greater than 2 percent of its net profit or loss; the individual participates in the making of a contract between the municipality and the law firm; or the individual's compensation from the law firm is directly dependent on procuring public business.

d. 2 percent of stock. There is an exception from sub. (l)(b), the prohibition on official action, for persons who own no more than 2 percent of the stock of the corporation involved.

4. Penalty: Violation of the statute is a Class E felony and subjects the person to a fine of not more than $10,000, imprisonment for not more than 2 years, or both.

Incompatibility Doctrine

A. *Common Law Prohibition.* The same person cannot hold two offices or an office and a position where one post is superior to the other or where, from a public policy perspective, it is

improper for one person to discharge the duties of both posts. For example, in *Otradovec v. City of Green Bay*, 118 Wis.2d 393 (Ct. App. 1984), the court held that a council member could not work as assistant appraiser in the city assessor's office.

1. Result. If a second office is taken that is incompatible with an existing office, the first office is vacated. In the case of office/position incompatibility, the outcome is unclear — person runs risk of losing first post, but court might allow choice.

2. General Rule of Thumb: Municipal governing body members may not hold other municipal offices or positions, unless specifically authorized by statute. This is because the governing body exercises control over such matters as the salaries, duties, and removal or discipline of most other municipal officers and employees.

3. Statutory Exception. A volunteer fire fighter, emergency medical services practitioner, or emergency medical responder in a city, village, or town whose annual compensation from one or more of those positions, including fringe benefits, does not exceed $25,000 if the city, village, or town has a population of 5,000 or less, or $15,000 if the city, village, or town has a population of more than 5,000, may also hold an elective office in that city, village, or town. § 66.0501(4)(a). Also, an elected town officer can receive wages under s. 60.37 (4) for work that he or she performs for the town, *id*., and a county supervisor can serve on a town board, common council or village board. Wis. Stat. § 59.10(4).

B. *Related Statutory Prohibition*. Section 66.0501(2) generally prohibits governing body members from taking municipal jobs. Under the statute:

1. Governing body members are prohibited, during the term for which the member is elected, from taking new municipal jobs created during their term of office even if they resign.

2. A governing body member may be appointed to an office or position which was not created during the member's term in office as long as the member resigns first .

3. Governing body members may run at any time for new or existing elective office, but incompatibility doctrine applies if elected. Individuals may run for two elected local offices at the same time. § 8.03(2m).

4. Governing body members may be appointed to serve on local boards and commissions (e.g., library board, and plan commission) where no additional remuneration other than a per diem is paid to such officers if other commission or board members receive such a per diem.

<u>Other Statutory Prohibitions</u>

A. *Misconduct in Office*. Section 946.12 is a criminal statute that prohibits public officers and employees from intentionally performing, or refusing to perform, certain acts. A violation of § 946.12 is punishable by up to two years in prison, a fine of up to $10,000, or both.

1. Section 946.12(1) prohibits a public official from intentionally failing or refusing to perform a "known mandatory, nondiscretionary, ministerial duty of his office or employment within the time or in the manner required by law."

2. Section 946.12(2) prohibits a public official from doing an act which he or she knows is forbidden by law to do in an official capacity.

3. Section 946.12(3) provides that a public official may not, by an act of commission or omission, exercise a discretionary power in a manner inconsistent with the duties of office or the rights of others, with an intent to obtain a dishonest advantage for himself or another.

B. *Bribery*. Section 946.10(2) prohibits public officials from taking bribes. Section 12.11 prohibits public officials from promising an official appointment or anything of value to secure votes.

C. *Sale to Employees Prohibited*. No municipal department or member of a municipal governing body may sell or procure for sale any municipal article, material or product to city or village employee, except meals, public services and special equipment necessary to protect the employee's safety and health. § 175.10. This statute is designed to prohibit governmental acquisition of products for resale to government employees.

D. Many municipalities have adopted Robert's Rules of Order Newly Revised (10th ed.) Officials should be aware that section 45 of those rules provides:

> 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.
>
> . . .
>
> The rule on abstaining from voting on a question of direct personal interest does not mean that a member should not vote for himself for an office or other position to which members generally are eligible, or should not vote when other members are included with him in a motion.

An earlier version of this rule and the Hall case noted above were cited by the Wisconsin court of appeals in *Ballenger v. Door County*, 131 Wis. 2d 422, 388 N.W.2d 624 (Ct. App. 1986), where the employee of an entity seeking a rezoning abstained from voting as a county board supervisor on the matter. The court concluded that had the employee-supervisor voted, his vote would have been disqualified.

III. PUBLIC RECORDS LAW

A. Overview

The Wisconsin Open Records Law is designed to guarantee that the public has access to public records of government bodies at all levels. In general, "any requester has a right to inspect any record." Wis. Stat. 19.35(1)(a). As set forth in Wis. Stat. section 19.31, the public policy of the state is that "all persons are entitled to the greatest possible information regarding the affairs of government and the

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official acts of those officers and employees who represent them." The statute further provides that the Public Records Law "shall be construed in every instance with a presumption of complete public access, consistent with the conduct of governmental business."

B. Definition of Record and Electronic or Digital Data

A "record" means:

> "Record" means any material on which written, drawn, printed, spoken, visual, or electromagnetic information or electronically generated or stored data is recorded or preserved, regardless of physical form or characteristics, that has been created or is being kept by an authority.
>
> "Record" includes, but is not limited to, handwritten, typed, or printed pages, maps, charts, photographs, films, recordings, tapes, optical discs, and any other medium on which electronically generated or stored data is recorded or preserved.
>
> "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; materials that are purely the personal property of the custodian and have no relation to his or her office; materials to which access is limited by copyright, patent, or bequest; and published materials in the possession of an authority other than a public library that are available for sale, or that are available for inspection at a public library.

Wis. Stat. § 19.32(2).

As a result of the policy, purpose and broad definition, personal emails and even private websites can fall within the scope of the public records law.

If the contents of the personal e-mails are records under the Public Records Law, then the courts must undertake a balancing test to decide whether the statutory presumption favoring disclosure of public records is outweighed by any other public interest. *Schill v. Wis. Rapids Sch. Dist*., 2010 WI 86, ¶ 20, 327 Wis. 2d 572, 786 N.W.2d 177. When a record custodian decides that the content of an e-mail is purely personal, has no connection to the government's functions, and evinces no violation of law or policy, the documents are not subject to disclosure under the public records law. *Id*. ¶ 10 & n.4. If the content of personal e-mail is used as evidence in a disciplinary matter or to investigate misuse of government resources, the personal e-mail is a "record" under Wis. Stat. § 19.32(2) and may be subject to disclosure under the public records law. *Id*. ¶¶ 23, 141. "As a result…, in addition to the other decisions the record custodian makes, he or she will have to determine whether the content of an e-mail is solely personal or has a connection to a governmental function. We recognize that it may not always be easy for the record custodian to separate the content of personal e-mails from the content of e-mails relating to school business." *Id*. ¶ 136. If the content of the e-mail is "personal in part and has some connection with the government function in part, then the custodian may need to redact the personal content and release the portion connected to the government function." *Id*. ¶ 137.

Further, public information on private websites may also be a "record" subject to disclosure. In at least one Attorney General opinion, the office concluded information regarding government business

kept or received by an elected official on her website more likely than not constituted a record. *See* OAG 06—09 (Dec. 23, 2009) p. 2-3 (Town Chairman's website, "Making Salem Better," granted access to about 140 Town members and at least partly addressed community business; she was an "authority"; the website met the definition of a "record" because she "created or kept" the website and its contents; she was using the website not for "purely personal content" but instead "actively presents and receives written communication on matters of public interest that relate to the chair's officials duties (library board representation, a high school addition project, and a round-about intersection)…..").

C. Handling the Request for Records and Reasonable Limits

There are no "magic words" and any written request for records requires a response, *ECO, Inc. v. City of Elkhorn*, 2002 WI App 302, 259 Wis. 2d 276, 655 N.W.2d 510. An authority has no obligation to create a new record to respond to a request. *See State ex rel Zinngrabe v. School Dist. of Sevastopol*, 146 Wis. 2d 629, 431 N.W.2d 734 (App. 1988); Wis. Stats. §19.35(1)(L).

A request for a record without a reasonable limit as to the subject matter or length of time is not sufficient. Wis. Stat. § 19.35(1)(h); *Seifert v. School Dist. of Sheboygan Falls*, 2007 WI App 207, ¶ 42, 305 Wis.2d 582, 740 N.W.2d 177 ("[A] records custodian should not have to guess at what records a requester desires."). However, a records custodian is not permitted to deny a request based solely on the custodian's assertion that the request could reasonably be narrowed. *State ex rel. Gehl v. Connors*, 2007 WI App 238, ¶ 20, 306 Wis. 2d 247. The fact that a public records request may result in generation of a large volume of records is not, in itself, a sufficient reason to deny a request as not properly limited. *Id*., ¶ 23.

Requests for digital or electronic information which are highly complex and technical may call into question whether such requests comport with the purpose of the specificity requirement, which is to prevent unreasonably burdening a records custodian by requiring the records custodian to spend excessive amounts of time and resources deciphering and responding to a request. *Schopper v. Gehring*, 210 Wis.2d at 213, 565 N.W.2d 187 (Ct. App. 1997) ("While this state favors the opening of public records to public scrutiny, we may not in furtherance of this policy create a system that would so burden the records custodian that the normal functioning of the office would be severely impaired."); *Gehl*, 2007 WI App 238, ¶ 17 ("the purpose of this time and subject matter limitation is to prevent a situation where a request unreasonably burdens a records custodian, requiring the custodian to spend excessive amounts of time and resources deciphering and responding to a request.")

The request may be made orally or in writing. Wis. Stat. § 19.35(1)(h). The motivation of those seeking access to public records immaterial, *State ex rel Youmans v. Owens*, 28 Wis. 2d 672, 677, 137 N.W.2d 470 (1965). The requester need not disclose identity unless record is at a private residence, or whenever security reasons or federal law requires it. Wis. Stat. § 19.35(1)(i). The identity of the requester will not control the decision to disclose. *Levin v. Board of Regents*, 2003 WI App 181, 266 Wis. 2d 481, 688 N.W.2d 779. *But see State ex rel. Ardell v. Milwaukee Bd. of Sch. Dirs*., 2014 WI App 66, ¶¶ 16–17, 354 Wis. 2d 471, 849 N.W.2d 894 (requester's identity as person with history of violence towards subject of request was relevant to inquiry into disclosure).

D. Response Time and Providing Access

The response to the requester shall be made "as soon as practical and without delay." Wis. Stat. § 19.35(4)(a); *WTMJ, Inc. v. Sullivan*, 204 Wis. 2d 452, 555 N.W.2d 140 (Ct. App. 1996). Courts have

recognized that municipalities should be afforded reasonable latitude in the time frame for their responses in situations where the requests are complex. *WIREdata v. Village of Sussex*, 2008 WI 69, ¶ 56, 310 Wis. 2d 397, 751 NW 2d 736 (Agreeing with DOJ that Open Records Law should not be construed for allowing a mandamus action even where municipalities were acting diligently in attempting to respond in a timely manner. "We further concur with the DOJ's opinion that what constitutes a reasonable time for a response by an authority "depends on the nature of the request, the staff and other resources available to the authority to process the request, the extent of the request, and other related considerations. Accordingly, whether an authority is acting with reasonable diligence in a particular case will depend upon the totality of the circumstances surrounding the particular request.").

In providing access to records, the authority must provide requester with facilities comparable to those used by employees to inspect, copy and abstract records. Wis. Stat. § 19.35(2).

That said, reasonable limits are allowed to protect records easily destroyed or irreplaceable. Wis. Stat. § 19.35(1)(k). Requester may be barred from leaving with original. See generally Wis. Stat. § 19.35(1)(k).

Thus, the authority may undertake to protect loss of data and damage to hardware, to deny access to computerized database and to put reasonable time restrictions on use of computer terminal or to disallow requester from using copier, computer, printer, etc. Indeed, concerns with confidentiality and protecting data may justify denial of direct access to an agency's operating system or to inspect a public employee's assigned computer. *See WlREdata*, 2008 WI 69, ¶ 97 ("We share the DOJ's concern….that allowing requesters such direct access to the electronic databases of an authority would pose substantial risks. For example, confidential data that is not subject to disclosure under the open records law might be viewed or copied. Also, the authority's database might be damaged, either inadvertently or intentionally. We are satisfied that it is sufficient for the purposes of the open records law for an authority, as here, to provide a copy of the relevant data in an appropriate format."). *See also* Wis. Stat. § 19.35(2); 72 Op. Att'y Gen. 36, 38 (OAG 9-83) (copier and microfilm printer can be run exclusively by authority's personnel, rather than requester, so long as authority opts to provide requested copies).

"Concerns for protecting the integrity of original records may justify denial of direct access to an agency's operating system or to inspect a public employee's assigned computer, if access is provided instead on an alternative electronic storage device, such as a CD-ROM. Security concerns may also justify such a restriction." DOJ's Compliance Outline (2012) p. 47-48 (*citing WIREdata*, 2008 WI 69, ¶ 56); see also *Grebner v. Schiebel*, 2001 WI App 17, ¶¶ 12-13, 240 Wis. 2d 551, 624 N.W.2d 892 (in construing Wis. Stat. § 19.35(1)(b) to find that the custodian, not the requester, has the option to choose how a record will be copied, court said: "this interpretation satisfies an important public policy concern. [The Clerk], like other record custodians, has important administrative obligations. Like other custodians, the county clerks must keep the records in their possession in good condition and have them readily accessible. The custodians are obligated to preserve and protect the records under their custody while at the same time allowing the public the right to access and copy these documents. The legislature was obviously aware of these two public interests and struck a balance by giving the custodian the option to determine how the records are copied.").

Staff may monitor inspection: "Depending on the circumstances, it may be appropriate to allow the requester to inspect paper copies without having an employee sit next to the requester." See Responses to Questions About the Public Records Law Submitted During DOJ's Webinar October 20, 2011 Webinar, Prepared by Attorney General's Office November 10, 2011, p. 6.

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Lastly, the custodian may decline requester's demand to use his or her own equipment (such as requester's own photocopier) in concern to protect originals. *Grebner*, 2001 WI App 17 (concluding that county clerk with custody of voting records could determine how to satisfy an open records request including by denying access to poll records in order to make copies with requester's own portable photocopying machine).

E. <u>Other Duties of the Custodian, Including Redaction</u>

Every authority, other than members of the legislature or members of any local governmental body, is required to prominently display at its offices a notice detailing the particulars of how an individual may submit a public records request. Wis. Stat. § 19.34(1). There are duties to maintain records, verify and to transfer. Upon expiration of term or by vacancy, each officer shall deliver all property in his/her custody to successor. Wis. Stat. § 19.21(2).

If a record contains information that comingles accessible information with that to be withheld custodian must separate and/or delete inaccessible information. Wis. Stat. § 19.36(6). *See, e.g., State ex rel Dalton v. Mundy*, 80 Wis. 2d 190, 257 N.W.2d 877 (1977) (researcher granted right to abortion records with custodian obscuring the patient names); *Maynard v. City of Madison*, 101 Wis. 2d 273, 304 N.W.2d 163 (1981) (care must be taken to assure information redacted cannot still be deduced by what remains).

The custodian must redact even if burdensome; there is no relief from the mandatory duty to redact. *See Osborn v. Board of Regents*, 2002 WI 83, ¶¶ 43, 45, 254 Wis. 2d 266, 647 N.W.2d 158 (rejecting University's argument that public records law does not require it to expend numerous hours and dollars redacting thousands of student application records to comply with Osborn's request; "We agree with Osborn and conclude that the University must comply with the statutory duty to delete or redact information not subject to disclosure.").

Care must be taken to assure information redacted cannot still be deduced by what remains. *Maynard v. City of Madison*, 101 Wis.2d 273, 304 N.W.2d 163 (1981) (disclosure of confidential informant).

F. <u>Fees and Redaction</u>

The public records law and case law identify a number of circumstances where a requester may be charged a fee for a public record. An authority may only charge a fee for the actual, necessary, and direct costs of four specific tasks: (1) reproduction and transcription; (2) photographing and photographic processing; (3) locating; and (4) mailing or shipping. An authority may not charge a requester for the costs of deleting, or "redacting," nondisclosable information included in responsive records. *See Milwaukee Journal Sentinel v. City of Milwaukee*, 2012 WI 65, ¶¶ 1 & n.4, 6, 58, 341 Wis. 2d 607, 815 N.W.2d 367. An authority may require prepayment of any fee if the total amount exceeds $5.00. Wis. Stat. § 19.35(3)(f). Moreover, the authority may refuse to make copies until payment is actually received. *State ex rel. Hill v. Zimmerman*, 196 Wis. 2d 419, 429-30, 538 N.W.2d 608, 613 (Ct. App. 1995). An authority has discretion to provide requested records for free or at a reduced charge. Wis. Stat. § 19.35(3)(e).

<u>First</u>, <u>copy and transcription fees</u> may be charged.

For "copying," an authority may charge copying fees but such fees are limited to the "actual, necessary and direct cost" of reproduction unless a fee is otherwise specifically established or authorized

to be established by law. Wis. Stat. § 19.35(3)(a). Permissible copy fees include the costs of a computer run. Wis. Stat. §§ 19.35(1)(e) and (3)(a); 72 Op. Att'y Gen. 68, 70 (1983). Similarly, an authority may charge a requester for any computer programming expenses required to respond to a request. *WIREdata, Inc. v. Vill. of Sussex*, 2008 WI 69, ¶ 107, 310 Wis. 2d 397, 751 N.W.2d 736. For many years, the Wisconsin Department of Justice public records guidelines stated that that photocopy fees should be around $0.15 cents per page, and that anything in excess of $0.25 cents may be suspect, although in recent announcements the DOJ has taken a more conservative look at these costs. DOJ's actual cost of a single black-and-white copy, including the cost of a paper, is $0.0135. The cost of a color copy is $0.0632. These amounts have now been published by the DOJ in its fee schedule. Moreover, "[a]s a general rule, the rate for an actual, necessary, and direct charge for staff time should be based on the pay rate of the lowest paid employee capable of performing the task." See https://www.doj.state.wi.us/news-releases/office-open-government-advisory-charging-fees-under-wisconsin-public-records-law

As to "transcription," such fees may be charged, but are limited to the "actual, necessary and direct cost" of transcription, unless a fee is otherwise specifically established or authorized to be established by law. Wis. Stat. § 19.35(3)(a).

Second, as to photography and photographic reproduction, an authority may charge photography and reproduction fees if the authority provides a photograph of a record, the form of which does not permit copying, but such the fees are limited to the "actual, necessary and direct" costs. Wis. Stat. § 19.35(3)(b).

Third, as to costs associated with locating records may not be charged unless they total $50.00 or more and only "actual, necessary, and direct" location costs are permitted. Wis. Stat. § 19.35(3)(c).

Fourth, as to mailing and shipping, such fees may be charged, but are limited to the "actual, necessary and direct cost" of mailing or shipping. Wis. Stat. § 19.35(3)(d).

IV. PUBLIC SECTOR EMPLOYMENT AND INDIVIDUAL RIGHTS

Various state and federal statutes provide substantive employment rights and protections. Such state and federal statutes also prohibit employers from retaliating against an employee for exercising rights or seeking protections under those statutes or assisting others in doing so.

Although such laws are beyond the scope of this presentation, they are generally familiar to most employers. The Wisconsin Fair Employment Act (Wis. Stat. §§111.31 - 111.325) (WFEA) makes it unlawful to discriminate against an employee on the basis of enumerated protected classifications ranging from age to race to genetic testing and sexual orientation. Under §111.322(3), it is unlawful to discharge or otherwise discriminate against an individual because that person has opposed any discriminatory practice or because the individual has made a complaint, testified or assisted in any proceeding under WFEA. Also, pursuant to §111.322(2m), it is unlawful to discharge or otherwise discriminate against an individual because the individual has filed a complaint under, attempted to enforce any right under, or testified or assisted in any action or proceeding held under a number of statutes other than the WFEA, or because the individual's employer believes that the individual engaged in or may engage in any such activity.

Additionally, the First Amendment protects public employees from retaliation by their employers when they exercise free speech rights. The United States Supreme Court has long held that public

employees do not surrender all their First Amendment rights by reason of their employment. The First Amendment protects a public employee's right, in certain circumstances, to speak as a citizen addressing matters of public concern.

Over forty years ago, this body of law began with the case of Marvin Pickering, a school teacher in Indiana who wrote a letter to the editor of a local newspaper concerning the school board's handling of funds. In *Pickering v. Board of Education*, 391 U.S. 347 (1976), the Court held that in order to determine whether a public employer's adverse action against an employee violates the employee's First Amendment rights, courts must balance the interest of the employee in commenting as a citizen on matters of public concern, against the interest of the public employer in promoting the efficiency of the public services it provides through its employees ("the Pickering balancing test"). If the employee's speech touches upon a matter of public concern, then the speech may be entitled to First Amendment protection. *Connick v. Myers*, 461 U.S. 138 (1983) (an assistant district attorney in New Orleans was not protected when she distributed a questionnaire to other assistant district attorneys that was viewed as critical of management). If it is merely a matter of "personal interest" such as a personnel matter, then the speech will not be protected. *Id*. at 147. The court must consider "the content, form, and context of a given statement, as revealed by the whole record," to determine whether employee speech addresses a matter of public concern. *Id*. at 147-148.

In *Garcetti v. Ceballos*, 547 U.S. 410 (2006), a divided Supreme Court added an important factor to the analysis, specifically whether the public employee's statements made "pursuant to the employee's official duties." That is, "[w]hen public employees make statements pursuant to their official duties, the employees are not speaking as citizens for First Amendment purposes, and the Constitution does not insulate their communications from employer discipline." Therefore, if the speech was made "pursuant to [the employee's] official duties," it is not subject to First Amendment protection. As the Court explained:

> The First Amendment limits the ability of a public employer to leverage the employment relationship to restrict, incidentally or intentionally, the liberties employees enjoy in their capacities as private citizens. So long as employees are speaking as citizens about matters of public concern, they must face only those speech restrictions that are necessary for their employers to operate efficiently and effectively.

Id. at 419-420. However, the Court held that when a public employee engages in speech pursuant to their official job duties, they are generally not speaking as private citizens, but as public servants, and the employer's interest qua employer is paramount. The Court rejected "the notion that the First Amendment shields from discipline the expressions employees make pursuant to their professional duties," concluding, "Our precedents do not support the existence of a constitutional cause of action behind every statement a public employee makes in the course of doing his or her job."

In sum, claims of First Amendment retaliation are not uncommon in the public employment sector and public employers must be aware of the parameters of "protected" speech in the workplace.

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