

Citizen Watchdog Training

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Franklin, WI – Sep 30, 2023

RESOURCES OF INTEREST

Edgar County Watchdogs: www.ecwd.press

American Watchdogs, Inc.: www.americanwatchdogs.org

American Watchdogs, Inc. License Plate Data Base – www.goveplates.com

Search public employee payroll / expenditures: www.openthebooks.com

Wisconsin Dept. of Justice AG Opinions Archive:

- <https://www.doj.state.wi.us/dls/ag-opinion-archive>

Wisconsin Dept. of Justice – Open Government Law and Compliance Guides:

- <https://www.doj.state.wi.us/office-open-government/open-government-law-and-compliance-guides>

Wisconsin Dept. of Justice – Open Government Law Trainings and Events:

- <https://www.doj.state.wi.us/office-open-government/office-open-government-trainings-and-events>

Wisconsin Legislative Reference Bureau:

- <https://legis.wisconsin.gov/lrb/nav/wisconsin-statutes/>

Review Court Cases by subject:

- www.courtlistener.com

Citizen Advocacy Center: <https://www.citizenadvocacycenter.org/>

WI Public Records

Q and A: <https://www.doj.state.wi.us/office-open-government/ask-oog>

The public records law “shall be construed in every instance with a presumption of complete public access, consistent with the conduct of government business. The denial of public access generally is contrary to the public interest, and only in an exceptional case may access be denied.”

Public Records – “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, which has been created or is being kept by an authority.”

Public Records? YES - Not created by the authority but in the authority’s possession; Personal email, texts, calls, and documents on an authority’s accounts; Business email, texts, calls, and documents on personal accounts; Data in a database; Social media; Contractors’ records; Police body camera and dash camera video

NOT Public Records - Drafts, notes, and preliminary documents; Published material available for sale or at library; Purely personal property; Material with limited access rights, such as copyrights or patents

HOW TO MAKE A PUBLIC RECORDS REQUEST

Send an email or letter listing which records you are interested in receiving.

Indicate whether a certain payment threshold should be considered.

WI Open Meetings Law

Q and A: <https://www.doj.state.wi.us/office-open-government/ask-oog>

Generally, the open meetings law requires that all meetings of governmental bodies: must be preceded by public notice; AND must be held in a place that is open and reasonably accessible to all members of the public; except in limited situations in which a closed session is specifically authorized.

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

On close questions, courts will prefer an interpretation of the law that favors open government,

Courts disfavor any interpretation that would facilitate evasion of the policy of openness.

WHO'S WHO UNDER OPEN MEETINGS

“Governmental body’ means a state or local agency, board, commission, council, department or public body corporate and politic created by constitution, statute, ordinance, rule or order”

- Any kind of collective governmental entity (state or local level).
- Created by constitution, statute, ordinance, rule or order.
- Without regard to what that entity is called (i.e., a board, commission, committee, council, etc.).
- Must be a group of people.
- Does not include a single, individual government official.
- Must have a collective identity and purpose.
- A group with a determinate membership and an expectation that it will act collectively in relation to some subject of governmental business.
- Does not include an ad hoc gathering.
- A governmental body generally does not include a group of administrative staff of a government agency.
- Formally constituted subunits of a governmental body are also subject to the

open meetings law.

- A “subunit” is a body that is:
 - created by a parent body; and
 - composed exclusively of members of the parent body
 - e.g., a committee of a municipal board or a subcommittee.
- A “governmental body” also includes governmental or quasi-governmental corporations.
 - A governmental corporation is a corporation that: has a public purpose AND is established directly by government pursuant to some specific legislative authorization.

MEETINGS:

A meeting occurs whenever: Members convene for the purpose of conducting governmental business, AND The number of members present is sufficient to determine the body's course of action.

Q: How many members must gather to constitute a meeting?

A: A sufficient number to determine a body’s course of action. WARNING: This number is not necessarily equal to a majority of the membership or to a quorum of the body – *this could be simply enough to keep from passing a measure requiring 3/5 vote (Negative Quorum) – this could also include a “Walking Quorum” where members are meeting in a series of smaller gatherings, agree to act uniformly, and in a number sufficient to control the body.

PUBLIC NOTICE:

Must be given by placing notice at least 24 hours prior to the meeting, unless impossible or impracticable (but no less than 2 hours), where people will see it, or by paid publication.

Presiding officer is legally responsible for notices.

RIGHT to attend and observe, photograph and record, but no right to speak.

No secret ballots except for electing officers of the public body.

Can vote in closed session if the vote is an integral part of authorized closed session deliberations.

Legislative Action:

Contact your state Representatives and Senators regarding public comment in open meetings, and costs for public records.

Contact legislators on other issues as they pop up – focus on issue related to graft and corruption.

OPEN MEETINGS OF GOVERNMENTAL BODIES

19.81 Declaration of policy.

- (1) In recognition of the fact that a representative government of the American type is dependent upon an informed electorate, it is declared to be the policy of this state that the public is entitled to the fullest and most complete information regarding the affairs of government as is compatible with the conduct of governmental business.
- (2) To implement and ensure the public policy herein expressed, all meetings of all state and local governmental bodies shall be publicly held in places reasonably accessible to members of the public and shall be open to all citizens at all times unless otherwise expressly provided by law.
- (3) In conformance with [article IV, section 10](#), of the constitution, which states that the doors of each house shall remain open, except when the public welfare requires secrecy, it is declared to be the intent of the legislature to comply to the fullest extent with this subchapter.
- (4) This subchapter shall be liberally construed to achieve the purposes set forth in this section, and the rule that penal statutes must be strictly construed shall be limited to the enforcement of forfeitures and shall not otherwise apply to actions brought under this subchapter or to interpretations thereof.

History: 1975 c. 426; 1983 a. 192.

NOTE: The following annotations relate to s. 66.77, repealed by Chapter 426, laws of 1975.

Subsequent to the presentation of evidence by the taxpayer, a board of review's consideration of testimony by the village assessor at an executive session was contrary to the open meeting law. Although it was permissible for the board to convene a closed session for the purpose of deliberating after a quasi-judicial hearing, the proceedings did not constitute mere deliberations but were a continuation of the quasi-judicial hearing without the presence of or notice to the objecting taxpayer. *Dolphin v. Board of Review*, 70 Wis. 2d 403, 234 N.W.2d 277 (1975).

The open meeting law is not applicable to the judicial commission. *State ex rel. Lynch v. Dancey*, 71 Wis. 2d 287, 238 N.W.2d 81 (1976).

A regular open meeting, held subsequent to a closed meeting on another subject, does not constitute a reconvened open meeting when there was no prior open meeting on that day. 58 Atty. Gen. 41.

Consideration of a resolution is a formal action of an administrative or minor governing body and, when taken in proper closed session, the resolution and result of the vote must be made available for public inspection, pursuant to s. 19.21, absent a specific showing that the public interest would be adversely affected. 60 Atty. Gen. 9.

Joint apprenticeship committees, appointed pursuant to Wis. Adm. Code provisions, are governmental bodies and subject to the requirements of the open meeting law. 63 Atty. Gen. 363.

Voting procedures employed by worker's compensation and unemployment advisory councils that utilized adjournment of public meeting for purposes of having members representing employers and members representing employees or workers to separately meet in closed caucuses and to vote as a block on reconvening was contrary to the open records law. 63 Atty. Gen. 414.

A governmental body can call closed sessions for proper purposes without giving notice to members of the news media who have filed written requests. 63 Atty. Gen. 470.

Discussing the meaning of "communication" with reference to giving the public and news media members adequate notice. 63 Atty. Gen. 509.

The posting in the governor's office of agenda of future investment board meetings is not sufficient communication to the public or the news media who have filed a written request for notice. 63 Atty. Gen. 549.

A county board may not utilize an unidentified paper ballot in voting to appoint a county highway commissioner but may vote by ayes and nays or show of hands at an open session if some member does not require the vote to be taken in such manner that the vote of each member may be ascertained and recorded. 63 Atty. Gen. 569.

NOTE: The following annotations refer to ss. 19.81 to 19.98.

When the city of Milwaukee and a private non-profit festival organization incorporated the open meetings law into a contract, the contract allowed public enforcement of the contractual provisions concerning open meetings. *Journal/Sentinel, Inc. v. Pleva*, 155 Wis. 2d 704, 456 N.W.2d 359 (1990).

Sub. (2) requires that a meeting be held in a facility that gives reasonable public access, not total access. No person may be systematically excluded or arbitrarily refused admittance. *State ex rel. Badke v. Village Board*, 173 Wis. 2d 553, 494 N.W.2d 408 (1993).

Discussing this subchapter. 65 Atty. Gen. preface.

Discussing public notice requirements for meetings of a city district school board under this subchapter and former s. 120.48, 1983 stats. 66 Atty. Gen. 93.

A volunteer fire department organized as a nonprofit corporation under s. 213.05 is not subject to the open meeting law. 66 Atty. Gen. 113.

Anyone has the right to tape-record an open meeting of a governmental body provided the meeting is not thereby physically disrupted. 66 Atty. Gen. 318.

The open meeting law does not apply to a coroner's inquest. 67 Atty. Gen. 250.

The open meeting law does not apply if the common council hears a grievance under a collective bargaining agreement. 67 Atty. Gen. 276.

Discussing the application of the open meeting law to the duties of WERC. 68 Atty. Gen. 171.

A senate committee meeting was probably held in violation of the open meetings law although there was never any intention prior to the gathering to attempt to debate any matter of policy, to reach agreement on differences, to make any decisions on any bill or part thereof, to take any votes, or to resolve substantive differences. Quorum gatherings should be presumed to be in violation of the law, due to a quorum's ability to thereafter call, compose, and control by vote a formal meeting of a governmental body. 71 Atty. Gen. 63.

Nonstock corporations created by statute as bodies politic clearly fall within the term "governmental body" as defined in the open meetings law and are subject to the provisions of the open meetings law. Nonstock corporations that were not created by the legislature or by rule, but were created by private citizens, are not bodies politic and not governmental bodies. 73 Atty. Gen. 53.

Understanding Wisconsin's Open Meeting Law. Harvey. WBB Sept. 1980.

Getting the Best of Both Worlds: Open Government and Economic Development. Westerberg. Wis. Law. Feb. 2009.

An Intro to Understanding Wisconsin's Open Meetings Law. Block. Wis. Law. Dec. 2015.

19.82 Definitions. As used in this subchapter:

- (1) "Governmental body" means a state or local agency, board, commission, committee, council, department or public body corporate and politic created by constitution, statute, ordinance, rule or order; a governmental or quasi-governmental corporation except for the Bradley center sports and entertainment corporation; a local exposition district under subch. II of ch. 229; a long-term care district under s. 46.2895; or a formally constituted subunit of any of the foregoing, but excludes any such body or committee or subunit of such body which is formed for or meeting for the purpose of collective bargaining under subch. I, IV, or V of ch. 111.
- (2) "Meeting" means 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. If one-half or more of the members of a governmental body are present, the meeting is rebuttably presumed to be for the purpose of exercising the responsibilities, authority, power or duties delegated to or vested in the body. The term does not include any social or chance gathering or conference which is not intended to avoid this subchapter, any gathering of the members of a town board for the purpose specified in s. 60.50 (6), any gathering of the commissioners of a town sanitary district for the purpose specified in s. 60.77 (5) (k), or any gathering of the members of a drainage board created under s. 88.16, 1991 stats., or under s. 88.17, for a purpose specified in s. 88.065 (5) (a).
- (3) "Open session" means a meeting which is held in a place reasonably accessible to members of the public and open to all citizens at all times. In the case of a state governmental body, it means a meeting which is held in a building and room thereof which enables access by persons with functional limitations, as defined in s. 101.13 (1).

History: 1975 c. 426; 1977 c. 364, 447; 1985 a. 26, 29, 332; 1987 a. 305; 1993 a. 215, 263, 456, 491; 1995 a. 27, 185; 1997 a. 79; 1999 a. 9; 2007 a. 20, 96; 2009 a. 28; 2011 a. 10.

A "meeting" under sub. (2) was found although the governmental body was not empowered to exercise the final powers of its parent body. *State v. Swanson*, 92 Wis. 2d 310, 284 N.W.2d 655 (1979).

A "meeting" under sub. (2) was found when members met with a purpose to engage in government business and the number of members present was sufficient to determine the parent body's course of action regarding the proposal discussed. *State ex rel. Newspapers Inc. v. Showers*, 135 Wis. 2d 77, 398 N.W.2d 154 (1987).

The open meetings law is not meant to apply to single-member governmental bodies. Sub. (2) speaks of a meeting of the members, plural, implying there must be at least two members of a governmental body. *Plourde v. Berends*, 2006 WI App 147, 294 Wis. 2d 746, 720 N.W.2d 130, 05-2106.

When a quorum of a governmental body attends the meeting of another governmental body when any one of the members is not also a member of the second body, the gathering is a "meeting" unless the gathering is social or by chance. *State ex rel. Badke v. Village Board*, 173 Wis. 2d 553, 494 N.W.2d 408 (1993).

A corporation is quasi-governmental if, based on the totality of circumstances, it resembles a governmental corporation in function, effect, or status, requiring a case-by-case analysis. Here, a primary consideration was that the body was funded exclusively by public tax dollars or interest thereon. Additionally, its office was located in the municipal building, it was listed on the city website, the city provided it with clerical support and office supplies, all its assets revert to the city if it ceases to exist, its books are open for city inspection, the mayor and another city official are directors, and it had no clients other than the city. *State v. Beaver Dam Area Development Corp.*, 2008 WI 90, 312 Wis. 2d 84, 752 N.W.2d 295, 06-0662.

A particular group of members of the government compose a governmental body if there is a constitution, statute, ordinance, rule, or order conferring collective power and defining when it exists. To cause a body to exist, the relevant directive must confer upon it the collective responsibilities, authority, power, or duties necessary to a governmental body's existence under the open meetings law. The creation of a governmental body is not triggered merely by any deliberate meetings involving governmental business between two or more officials. Loosely organized, ad hoc gatherings of government employees, without more, do not constitute governmental bodies. Rather, an entity must exist that has the power to take collective action that the members could not take individually. *State ex rel. Krueger v. Appleton Area School District Board of Education*, 2017 WI 70, 376 Wis. 2d 239, 898 N.W.2d 35, 15-0231.

When a governmental entity adopts a rule authorizing the formation of committees and conferring on them the power to take collective action, such committees are created by rule under sub. (1), and the open meetings law applies to them. Here, a school board provided that the review of educational materials should be done according to the board-approved handbook. The handbook, in turn, authorized the formation of committees with a defined membership and the power to review educational materials and make formal recommendations for board approval. Because the committee in question was formed as one of these committees, pursuant to the authority delegated from the board by rule and the handbook, it was created by rule and therefore was a “governmental body” under sub. (1). *State ex rel. Krueger v. Appleton Area School District Board of Education*, 2017 WI 70, 376 Wis. 2d 239, 898 N.W.2d 35, 15-0231.

Under *Showers*, 135 Wis. 2d 77 (1987), the open meetings law may apply to a walking quorum. A walking quorum is 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 reach a quorum. To establish a walking quorum, a plaintiff must prove that members of a governmental body purposefully engaged in discussions of governmental business and that the discussions were held between a sufficient number of members so as to affect the vote. *Zecchino v. Dane County*, 2018 WI App 19, 380 Wis. 2d 453, 909 N.W.2d 203, 17-0002.

A municipal public utility commission managing a city owned public electric utility is a governmental body under sub. (1). 65 Atty. Gen. 243.

A “private conference” under s. 118.22 (3) on nonrenewal of a teacher's contract is a “meeting” within sub. (2). 66 Atty. Gen. 211.

A private home may qualify as a meeting place under sub. (3). 67 Atty. Gen. 125.

A telephone conference call involving members of governmental body is a “meeting” that must be reasonably accessible to the public, and public notice must be given. 69 Atty. Gen. 143.

A “quasi-governmental corporation” in sub. (1) includes private corporations that closely resemble governmental corporations in function, effect, or status. 80 Atty. Gen. 129.

Election canvassing boards operating under ss. 7.51, 7.53, and 7.60 are governmental bodies subject to the open meetings law—including the public notice, open session, and reasonable public access requirements—when they convene for the purpose of carrying out their statutory canvassing activities, but not when they are gathered only as individual inspectors fulfilling administrative duties. OAG 5-14.

19.83 Meetings of governmental bodies.

(1) Every meeting of a governmental body shall be preceded by public notice as provided in s. 19.84, and shall be held in open session. At any meeting of a governmental body, all discussion shall be held and all action of any kind, formal or informal, shall be initiated, deliberated upon and acted upon only in open session except as provided in s. 19.85.

(2) During a period of public comment under s. 19.84 (2), a governmental body may discuss any matter raised by the public.

History: 1975 c. 426; 1997 a. 123.

When a quorum of a governmental body attends the meeting of another governmental body when any one of the members is not also a member of the second body, the gathering is a “meeting” unless the gathering is social or by chance. *State ex rel. Badke v. Village Board*, 173 Wis. 2d 553, 494 N.W.2d 408 (1993).

19.84 Public notice.

(1) Public notice of all meetings of a governmental body shall be given in the following manner:

(a) As required by any other statutes; and

(b) By communication from the chief presiding officer of a governmental body or such person's designee to the public, to those news media who have filed a written request for such notice, and to the official newspaper designated under ss. 985.04, 985.05 and 985.06 or, if none exists, to a news medium likely to give notice in the area. Communication from the chief presiding officer of a governmental body or such person's designee shall be made to the public using one of the following methods:

1. Posting a notice in at least 3 public places likely to give notice to persons affected.

2. Posting a notice in at least one public place likely to give notice to persons affected and placing a notice electronically on the governmental body's Internet site.

3. By paid publication in a news medium likely to give notice to persons affected.

(2) Every public notice of a meeting of a governmental body shall set forth 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. The public notice of a meeting of a governmental body may provide for a period of public comment, during which the body may receive information from members of the public.

(3) Public notice of every meeting of a governmental body shall be given at least 24 hours prior to the commencement of such meeting unless for good cause such notice is impossible or impractical, in which case shorter notice may be given, but in no case may the notice be provided less than 2 hours in advance of

the meeting.

- (4) Separate public notice shall be given for each meeting of a governmental body at a time and date reasonably proximate to the time and date of the meeting.
- (5) Departments and their subunits in any University of Wisconsin System institution or campus are exempt from the requirements of subs. (1) to (4) but shall provide meeting notice which is reasonably likely to apprise interested persons, and news media who have filed written requests for such notice.
- (6) Notwithstanding the requirements of s. 19.83 and the requirements of this section, a governmental body which is a formally constituted subunit of a parent governmental body may conduct a meeting without public notice as required by this section during a lawful meeting of the parent governmental body, during a recess in such meeting or immediately after such meeting for the purpose of discussing or acting upon a matter which was the subject of that meeting of the parent governmental body. The presiding officer of the parent governmental body shall publicly announce the time, place and subject matter of the meeting of the subunit in advance at the meeting of the parent body.

History: 1975 c. 426; 1987 a. 305; 1993 a. 215; 1997 a. 123; 2007 a. 20; 2019 a. 140.

There is no requirement in this section that the notice provided be exactly correct in every detail. State ex rel. Olson v. City of Baraboo Joint Review Board, 2002 WI App 64, 252 Wis. 2d 628, 643 N.W.2d 796, 01-0201.

Sub. (2) does not expressly require that the notice indicate whether a meeting will be purely deliberative or if action will be taken. The notice must alert the public of the importance of the meeting. Although a failure to expressly state whether action will be taken could be a violation, the importance of knowing whether a vote would be taken is diminished when no input from the audience is allowed or required. State ex rel. Olson v. City of Baraboo Joint Review Board, 2002 WI App 64, 252 Wis. 2d 628, 643 N.W.2d 796, 01-0201.

Sub. (2) sets forth a reasonableness standard for determining whether notice of a meeting is sufficient that strikes the proper balance between the public's right to information and the government's need to efficiently conduct its business. The standard requires taking into account the circumstances of the case, which includes analyzing such factors as the burden of providing more detailed notice, whether the subject is of particular public interest, and whether it involves non-routine action that the public would be unlikely to anticipate. Buswell v. Tomah Area School District, 2007 WI 71, 301 Wis. 2d 178, 732 N.W.2d 804, 05-2998.

The supreme court declined to review the validity of the procedure used to give notice of a joint legislative committee on conference alleged to violate the sub. (3) 24-hour notice requirement. The court will not determine whether internal operating rules or procedural statutes have been complied with by the legislature in the course of its enactments and will not intermeddle in what it views, in the absence of constitutional directives to the contrary, to be purely legislative concerns. Ozanne v. Fitzgerald, 2011 WI 43, 334 Wis. 2d 70, 798 N.W.2d 436, 11-0613.

Under sub. (1) (b), a written request for notice of meetings of a governmental body should be filed with the chief presiding officer or designee, and a separate written request should be filed with each specific governmental body. 65 Atty. Gen. 166.

Discussing the method of giving notice pursuant to sub. (1). 65 Atty. Gen. 250.

Discussing the specificity of notice required by a governmental body. 66 Atty. Gen. 143, 195.

Discussing the requirements of notice given to newspapers under this section. 66 Atty. Gen. 230.

A town board, but not an annual town meeting, is a "governmental body" within the meaning of the open meetings law. 66 Atty. Gen. 237.

News media who have filed written requests for notices of public meetings cannot be charged fees by governmental bodies for communication of the notices. 77 Atty. Gen. 312.

A newspaper is not obligated to print a notice received under sub. (1) (b), nor is a governmental body obligated to pay for publication. Martin v. Wray, 473 F. Supp. 1131 (1979).

19.85 Exemptions.

- (1) Any meeting of a governmental body, upon motion duly made and carried, may be convened in closed session under one or more of the exemptions provided in this section. The motion shall be carried by a majority vote in such manner that the vote of each member is ascertained and recorded in the minutes. No motion to convene in closed session may be adopted unless the chief presiding officer announces to those present at the meeting at which such motion is made, the nature of the business to be considered at such closed session, and the specific exemption or exemptions under this subsection by which such closed session is claimed to be authorized. Such announcement shall become part of the record of the meeting. No business may be taken up at any closed session except that which relates to matters contained in the chief presiding officer's announcement of the closed session. A closed session may be held for any of the following purposes:
 - (a) Deliberating concerning a case which was the subject of any judicial or quasi-judicial trial or hearing before that governmental body.
 - (b) Considering dismissal, demotion, licensing or discipline of any public employee or person licensed by a board or commission or the investigation of charges against such person, or considering the grant or denial of

tenure for a university faculty member, and the taking of formal action on any such matter; provided that the faculty member or other public employee or person licensed is given actual notice of any evidentiary hearing which may be held prior to final action being taken and of any meeting at which final action may be taken. The notice shall contain a statement that the person has the right to demand that the evidentiary hearing or meeting be held in open session. This paragraph and par. (f) do not apply to any such evidentiary hearing or meeting where the employee or person licensed requests that an open session be held.

- (c) Considering employment, promotion, compensation or performance evaluation data of any public employee over which the governmental body has jurisdiction or exercises responsibility.
- (d) Except as provided in s. 304.06 (1) (eg) and by rule promulgated under s. 304.06 (1) (em), considering specific applications of probation, extended supervision or parole, or considering strategy for crime detection or prevention.
- (e) Deliberating or negotiating the purchasing of public properties, the investing of public funds, or conducting other specified public business, whenever competitive or bargaining reasons require a closed session.
- (ee) Deliberating by the council on unemployment insurance in a meeting at which all employer members of the council or all employee members of the council are excluded.
- (eg) Deliberating by the council on worker's compensation in a meeting at which all employer members of the council or all employee members of the council are excluded.
- (em) Deliberating under s. 157.70 if the location of a burial site, as defined in s. 157.70 (1) (b), is a subject of the deliberation and if discussing the location in public would be likely to result in disturbance of the burial site.
- (f) Considering financial, medical, social or personal histories or disciplinary data of specific persons, preliminary consideration of specific personnel problems or the investigation of charges against specific persons except where par. (b) applies which, if discussed in public, would be likely to have a substantial adverse effect upon the reputation of any person referred to in such histories or data, or involved in such problems or investigations.
- (g) Conferring with legal counsel for the governmental body who is rendering oral or written advice concerning strategy to be adopted by the body with respect to litigation in which it is or is likely to become involved.
- (h) Consideration of requests for confidential written advice from the elections commission under s. 5.05 (6a) or the ethics commission under s. 19.46 (2), or from any county or municipal ethics board under s. 19.59 (5).
- (2) No governmental body may commence a meeting, subsequently convene in closed session and thereafter reconvene again in open session within 12 hours after completion of the closed session, unless public notice of such subsequent open session was given at the same time and in the same manner as the public notice of the meeting convened prior to the closed session.
- (3) Nothing in this subchapter shall be construed to authorize a governmental body to consider at a meeting in closed session the final ratification or approval of a collective bargaining agreement under subch. I, IV, or V of ch. 111 which has been negotiated by such body or on its behalf.

History: 1975 c. 426; 1977 c. 260; 1983 a. 84; 1985 a. 316; 1987 a. 38, 305; 1989 a. 64; 1991 a. 39; 1993 a. 97, 215; 1995 a. 27; 1997 a. 39, 237, 283; 1999 a. 32; 2007 a. 1, 20; 2009 a. 28; 2011 a. 10, 32; 2015 a. 118.

Although a meeting was properly closed, in order to refuse inspection of records of the meeting, the custodian was required by s. 19.35 (1) (a) to state specific and sufficient public policy reasons why the public interest in nondisclosure outweighed the public's right of inspection. *Oshkosh Northwestern Co. v. Oshkosh Library Board*, 125 Wis. 2d 480, 373 N.W.2d 459 (Ct. App. 1985).

Discussing the balance between protection of reputation under sub. (1) (f) and the public interest in openness. *Wisconsin State Journal v. UW-Platteville*, 160 Wis. 2d 31, 465 N.W.2d 266 (Ct. App. 1990). See also *Pangman v. Stigler*, 161 Wis. 2d 828, 468 N.W.2d 784 (Ct. App. 1991).

A "case" under sub. (1) (a) contemplates an adversarial proceeding. It does not connote the mere application for and granting of a permit. *State ex rel. Hodge v. Town of Turtle Lake*, 180 Wis. 2d 62, 508 N.W.2d 603 (1993).

A closed session to discuss an employee's dismissal was properly held under sub. (1) (b) and did not require notice to the employee under sub. (1) (b) when no evidentiary hearing or final action took place in the closed session. *State ex rel. Epping v. City of Neillsville*, 218 Wis. 2d 516, 581 N.W.2d 548 (Ct. App. 1998), 97-0403.

Section 19.35 (1) (a) does not mandate that, when a meeting is closed under this section, all records created for or presented at the meeting are exempt from disclosure. The court must still apply the balancing test articulated in *Linzmeier*, 2002 WI 84. *Zellner v. Cedarburg School District*, 2007 WI 53, 300 Wis. 2d 290, 731 N.W.2d 240, 06-1143.

The exception under sub. (1) (e) must be strictly construed. A private entity's desire for confidentiality does not permit a closed meeting. A governing body's belief that secret meetings will produce cost savings does not justify closing the door to public scrutiny. Providing contingencies allowing for future public input was insufficient. Because legitimate concerns were present for portions of some of the meetings does not mean the entirety of the meetings fell within the narrow exception under sub. (1) (e). *Citizens for*

Responsible Development v. City of Milton, 2007 WI App 114, 300 Wis. 2d 649, 731 N.W.2d 640, 06-0427.

Nothing in sub. (1) (e) suggests that a reason for going into closed session must be shared by each municipality participating in an intergovernmental body. It is not inconsistent with the open meetings law for a body to move into closed session under sub. (1) (e) when the bargaining position to be protected is not shared by every member of the body. Once a vote passes to go into closed session, the reason for requesting the vote becomes the reason of the entire body. Herro v. Village of McFarland, 2007 WI App 172, 303 Wis. 2d 749, 737 N.W.2d 55, 06-1929.

In allowing governmental bodies to conduct closed sessions in limited circumstances, this section does not create a blanket privilege shielding closed session contents from discovery. There is no implicit or explicit confidentiality mandate. A closed meeting is not synonymous with a meeting that, by definition, entails a privilege exempting its contents from discovery. Sands v. Whitnall School District, 2008 WI 89, 312 Wis. 2d 1, 754 N.W.2d 439, 05-1026.

Sub. (1) (e) can be invoked to prevent disclosure of a negotiation strategy or other insider information that is not available to one party in a negotiation. Sub. (1) (e) cannot, however, be invoked merely because a private entity desires confidentiality; because the public will later have the opportunity to provide input; or to prevent competition when the other side remains free to negotiate with potential competitors. In addition, there are public policy reasons why sub. (1) (e) should not generally be used to prevent competition among governmental entities, as this could harm both consumers and those citizens interested in the workings of their government. Friends of Frame Park, U.A. v. City of Waukesha, 2020 WI App 61, 394 Wis. 2d 387, 950 N.W.2d 831, 19-0096.

Boards of review cannot rely on the exemptions in sub. (1) to close any meeting in view of the explicit requirements in s. 70.47 (2m). 65 Atty. Gen. 162.

A university subunit may discuss promotions not relating to tenure, merit increases, and property purchase recommendations in closed session. 66 Atty. Gen. 60.

Neither sub. (1) (c) nor (f) authorizes a school board to make actual appointments of a new member in closed session. 74 Atty. Gen. 70.

A county board chairperson and committee are not authorized by sub. (1) (c) to meet in closed session to discuss appointments to county board committees. In appropriate circumstances, sub. (1) (f) would authorize closed sessions. 76 Atty. Gen. 276.

Sub. (1) (c) does not permit closed sessions to consider employment, compensation, promotion, or performance evaluation policies to be applied to a position of employment in general. 80 Atty. Gen. 176.

A governmental body may convene in closed session to formulate collective bargaining strategy, but sub. (3) requires that deliberations leading to ratification of a tentative agreement with a bargaining unit, as well as the ratification vote, must be held in open session. 81 Atty. Gen. 139.

"Evidentiary hearing" as used in sub. (1) (b), means a formal examination of accusations by receiving testimony or other forms of evidence that may be relevant to the dismissal, demotion, licensing, or discipline of any public employee or person covered by that section. A council that considered a mayor's accusations against an employee in closed session without giving the employee prior notice violated the requirement of actual notice to the employee. Campana v. City of Greenfield, 38 F. Supp. 2d 1043 (1999).

Closed Session, Open Book: Sifting the Sands Case. Bach. Wis. Law. Oct. 2009.

19.851 Closed sessions by ethics or elections commission.

- (1) Prior to convening under this section or under s. 19.85 (1), the ethics commission and the elections commission shall vote to convene in closed session in the manner provided in s. 19.85 (1). The ethics commission shall identify the specific reason or reasons under sub. (2) and s. 19.85 (1) (a) to (h) for convening in closed session. The elections commission shall identify the specific reason or reasons under s. 19.85 (1) (a) to (h) for convening in closed session. No business may be conducted by the ethics commission or the elections commission at any closed session under this section except that which relates to the purposes of the session as authorized in this section or as authorized in s. 19.85 (1).
- (2) The commission shall hold each meeting of the commission for the purpose of deliberating concerning an investigation of any violation of the law under the jurisdiction of the commission in closed session under this section.

History: 2007 a. 1; 2015 a. 118.

19.86 Notice of collective bargaining negotiations. Notwithstanding s. 19.82 (1), where notice has been given by either party to a collective bargaining agreement under subch. I, IV, or V of ch. 111 to reopen such agreement at its expiration date, the employer shall give notice of such contract reopening as provided in s. 19.84 (1) (b). If the employer is not a governmental body, notice shall be given by the employer's chief officer or such person's designee.

History: 1975 c. 426; 1987 a. 305; 1993 a. 215; 1995 a. 27; 2007 a. 20; 2009 a. 28; 2011 a. 10.

19.87 Legislative meetings. This subchapter shall apply to all meetings of the senate and assembly and the committees, subcommittees and other subunits thereof, except that:

- (1) Section 19.84 shall not apply to any meeting of the legislature or a subunit thereof called solely for the purpose of scheduling business before the legislative body; or adopting resolutions of which the sole purpose is scheduling business before the senate or the assembly.
- (2) No provision of this subchapter which conflicts with a rule of the senate or assembly or joint rule of the legislature shall apply to a meeting conducted in compliance with such rule.

- (3) No provision of this subchapter shall apply to any partisan caucus of the senate or any partisan caucus of the assembly, except as provided by legislative rule.
- (4) Meetings of the senate or assembly committee on organization under s. 71.78 (4) (c) or 77.61 (5) (b) 3. shall be closed to the public.

History: 1975 c. 426; 1977 c. 418; 1987 a. 312 s. 17.

Former open meetings law, s. 66.74 (4) (g), 1973 stats., that excepted "partisan caucuses of the members" of the state legislature from coverage of the law applied to a closed meeting of the members of one political party on a legislative committee to discuss a bill. The contention that this exception was only intended to apply to the partisan caucuses of the whole houses would have been supportable if the exception were simply for "partisan caucuses of the state legislature" rather than partisan caucuses of members of the state legislature. State ex rel. Lynch v. Conta, 71 Wis. 2d 662, 239 N.W.2d 313 (1976).

In contrast to former s. 66.74 (4) (g), 1973 stats., sub. (3) applies to partisan caucuses of the houses, rather than to caucuses of members of the houses. State ex rel. Newspapers Inc. v. Showers, 135 Wis. 2d 77, 398 N.W.2d 154 (1987).

19.88 Ballots, votes and records.

- (1) Unless otherwise specifically provided by statute, no secret ballot may be utilized to determine any election or other decision of a governmental body except the election of the officers of such body in any meeting.
- (2) Except as provided in sub. (1) in the case of officers, any member of a governmental body may require that a vote be taken at any meeting in such manner that the vote of each member is ascertained and recorded.
- (3) The motions and roll call votes of each meeting of a governmental body shall be recorded, preserved and open to public inspection to the extent prescribed in subch. II of ch. 19.

History: 1975 c. 426; 1981 c. 335 s. 26.

The plaintiff newspaper argued that sub. (3), which requires "the motions and roll call votes of each meeting of a governmental body shall be recorded, preserved and open to public inspection," in turn, required the defendant commission to record and disclose the information the newspaper requested under the open records law. The newspaper could not seek relief under the public records law for the commission's alleged violation of the open meetings law and could not recover reasonable attorney fees, damages, and other actual costs under s. 19.37 (2) for an alleged violation of the open meetings law. Journal Times v. City of Racine Board of Police & Fire Commissioners, 2015 WI 56, 362 Wis. 2d 577, 866 N.W.2d 563, 13-1715.

Under sub. (1), a common council may not vote to fill a vacancy on the common council by secret ballot. 65 Atty. Gen. 131.

- ### **19.89 Exclusion of members.**
- No duly elected or appointed member of a governmental body may be excluded from any meeting of such body. Unless the rules of a governmental body provide to the contrary, no member of the body may be excluded from any meeting of a subunit of that governmental body.

History: 1975 c. 426.

- ### **19.90 Use of equipment in open session.**
- Whenever a governmental body holds a meeting in open session, the body shall make a reasonable effort to accommodate any person desiring to record, film or photograph the meeting. This section does not permit recording, filming or photographing such a meeting in a manner that interferes with the conduct of the meeting or the rights of the participants.

History: 1977 c. 322.

- ### **19.96 Penalty.**
- Any member of a governmental body who knowingly attends a meeting of such body held in violation of this subchapter, or who, in his or her official capacity, otherwise violates this subchapter by some act or omission shall forfeit without reimbursement not less than \$25 nor more than \$300 for each such violation. No member of a governmental body is liable under this subchapter on account of his or her attendance at a meeting held in violation of this subchapter if he or she makes or votes in favor of a motion to prevent the violation from occurring, or if, before the violation occurs, his or her votes on all relevant motions were inconsistent with all those circumstances which cause the violation.

History: 1975 c. 426.

The state need not prove specific intent to violate the open meetings law. State v. Swanson, 92 Wis. 2d 310, 284 N.W.2d 655 (1979).

19.97 Enforcement.

- (1) This subchapter shall be enforced in the name and on behalf of the state by the attorney general or, upon the verified complaint of any person, by the district attorney of any county wherein a violation may occur. In actions brought by the attorney general, the court shall award any forfeiture recovered together with reasonable costs to the state; and in actions brought by the district attorney, the court shall award any forfeiture recovered together with reasonable costs to the county.
- (2) In addition and supplementary to the remedy provided in s. 19.96, the attorney general or the district attorney may commence an action, separately or in conjunction with an action brought under s. 19.96, to obtain such other legal or equitable relief, including but not limited to mandamus, injunction or declaratory judgment, as may be appropriate under the circumstances.

- (3) Any action taken at a meeting of a governmental body held in violation of this subchapter is voidable, upon action brought by the attorney general or the district attorney of the county wherein the violation occurred. However, any judgment declaring such action void shall not be entered unless the court finds, under the facts of the particular case, that the public interest in the enforcement of this subchapter outweighs any public interest which there may be in sustaining the validity of the action taken.
- (4) If the district attorney refuses or otherwise fails to commence an action to enforce this subchapter within 20 days after receiving a verified complaint, the person making such complaint may bring an action under subs. (1) to (3) on his or her relation in the name, and on behalf, of the state. In such actions, the court may award actual and necessary costs of prosecution, including reasonable attorney fees to the relator if he or she prevails, but any forfeiture recovered shall be paid to the state.
- (5) Sections 893.80 and 893.82 do not apply to actions commenced under this section.

History: 1975 c. 426; 1981 c. 289; 1995 a. 158.

Judicial Council Note, 1981: Reference in sub. (2) to a "writ" of mandamus has been removed because that remedy is now available in an ordinary action. See s. 781.01, stats., and the note thereto. [Bill 613-A]

Awards of attorney fees are to be at a rate applicable to private attorneys. A court may review the reasonableness of the hours and hourly rate charged, including the rates for similar services in the area, and may in addition consider the peculiar facts of the case and the responsible party's ability to pay. State ex rel. Hodge v. Town of Turtle Lake, 190 Wis. 2d 181, 526 N.W.2d 784 (Ct. App. 1994). Actions brought under the open meetings and open records laws are exempt from the notice provisions of s. 893.80. State ex rel. Auchinleck v. Town of LaGrange, 200 Wis. 2d 585, 547 N.W.2d 587 (1996), 94-2809.

Failure to bring an action under this section on behalf of the state is fatal and deprives the court of competency to proceed. Fabyan v. Achtenhagen, 2002 WI App 214, 257 Wis. 2d. 310, 652 N.W.2d 649, 01-3298.

Complaints under the open meetings law are not brought in the individual capacity of the plaintiff but on behalf of the state, subject to the two-year statute of limitations under s. 893.93 (2). State ex rel. Leung v. City of Lake Geneva, 2003 WI App 129, 265 Wis. 2d 674, 666 N.W.2d 104, 02-2747.

When a town board's action was voided by the court due to lack of statutory authority, an action for enforcement under sub. (4) by an individual as a private attorney general on behalf of the state against individual board members for a violation of the open meetings law that would subject the individual board members to civil forfeitures was not rendered moot. State ex rel. Lawton v. Town of Barton, 2005 WI App 16, 278 Wis. 2d 388, 692 N.W.2d 304, 04-0659

19.98 Interpretation by attorney general. Any person may request advice from the attorney general as to the applicability of this subchapter under any circumstances.

History: 1975 c. 426.

Records:

19.31 Declaration of policy. In recognition of the fact that a representative government is dependent upon an informed electorate, it is declared to be the public policy of this state that all persons are entitled to the greatest possible information regarding the affairs of government and the official acts of those officers and employees who represent them. Further, providing persons with such information is declared to be an essential function of a representative government and an integral part of the routine duties of officers and employees whose responsibility it is to provide such information. To that end, ss. [19.32](#) to [19.37](#) shall be construed in every instance with a presumption of complete public access, consistent with the conduct of governmental business. The denial of public access generally is contrary to the public interest, and only in an exceptional case may access be denied.

History: [1981 c. 335, 391](#).

An agency cannot promulgate an administrative rule that creates an exception to the open records law. *Chvala v. Bubolz*, [204 Wis. 2d 82, 552 N.W.2d 892](#) (Ct. App. 1996), [95-3120](#).

Although the requester referred to the federal Freedom of Information Act, a letter that clearly described open records and had all the earmarkings of an open records request was in fact an open records request and triggered, at minimum, a duty to respond. *ECO, Inc. v. City of Elkhorn*, [2002 WI App 302, 259 Wis. 2d 276, 655 N.W.2d 510, 02-0216](#).

The public records law addresses the duty to disclose records; it does not address the duty to retain records. An agency's alleged failure to keep sought-after records may not be attacked under the public records law. Section 19.21 relates to records retention and is not a part of the public records law. *Gehl v. Connors*, [2007 WI App 238, 306 Wis. 2d 247, 742 N.W.2d 530, 06-2455](#).

Absent a clear statutory exception, a limitation under the common law, or an overriding public interest in keeping a public record confidential, the public records law shall be construed in every instance with a presumption of complete public access. As the denial of public access generally is contrary to the public interest, access may be denied only in an exceptional case. An exceptional case exists when the facts are such that the public policy interests favoring nondisclosure outweigh the public policy interests favoring disclosure, notwithstanding the strong presumption favoring disclosure. *Hagen v. Board of Regents*, [2018 WI App 43, 383 Wis. 2d 567, 916 N.W.2d 198, 17-2058](#).

The Wisconsin Public Records Law. De la Mora. 67 MLR 65 (1983).

Toward a More Open and Accountable Government: A Call for Optimal Disclosure Under the Wisconsin Open Records Law. Roang. 1994 WLR 719.

Wisconsin's Public-Records Law: Preserving the Presumption of Complete Public Access in the Age of Electronic Records. Holcomb & Isaac. 2008 WLR 515.

Municipal responsibility under the Wisconsin revised public records law. Maloney. WBB Jan. 1983.

The public records law and the Wisconsin Department of Revenue. Boykoff. WBB Dec. 1983.

The Wisconsin Open Records Act: An update on issues. Trubek & Foley. WBB Aug. 1986.

Getting the Best of Both Worlds: Open Government and Economic Development. Westerberg. Wis. Law. Feb. 2009.

19.32 Definitions. As used in ss. [19.32](#) to [19.39](#):

- (1)** "Authority" means any of the following having custody of a record: a state or local office, elective official, agency, board, commission, committee, council, department or public body corporate and politic created by the constitution or by any law, ordinance, rule or order; a governmental or quasi-governmental corporation except for the Bradley center sports and entertainment corporation; a special purpose district; any court of law; the assembly or senate; a nonprofit corporation which receives more than 50 percent of its funds from a county or a municipality, as defined in s. [59.001 \(3\)](#), and which provides services related to public health or safety to the county or municipality; a university police department under s. [175.42](#); or a formally constituted subunit of any of the foregoing.
- (1b)** "Committed person" means a person who is committed under ch. [51](#), [971](#), [975](#) or [980](#) and who is placed in an inpatient treatment facility, during the period that the person's placement in the inpatient treatment facility continues.
- (1bd)** "Elective official" means an individual who holds an office that is regularly filled by vote of the people.
- (1bg)** "Employee" means any individual who is employed by an authority, other than an individual holding local public office or a state public office, or any individual who is employed by an employer other than an authority.
- (1c)** "Incarcerated person" means a person who is incarcerated in a penal facility or who is placed on probation and given confinement under s. [973.09 \(4\)](#) as a condition of placement, during the period of confinement for which the person has been sentenced.
- (1d)** "Inpatient treatment facility" means any of the following:

- (a) A mental health institute, as defined in s. [51.01 \(12\)](#).
- (c) A facility or unit for the institutional care of sexually violent persons specified under s. [980.065](#).
- (d) The Milwaukee County mental health complex established under s. [51.08](#).
- (1de) "Local governmental unit" has the meaning given in s. [19.42 \(7u\)](#).
- (1dm) "Local public office" has the meaning given in s. [19.42 \(7w\)](#), and also includes any appointive office or position of a local governmental unit in which an individual serves as the head of a department, agency, or division of the local governmental unit, but does not include any office or position filled by a municipal employee, as defined in s. [111.70 \(1\) \(i\)](#).
- (1e) "Penal facility" means a state prison under s. [302.01](#), county jail, county house of correction or other state, county or municipal correctional or detention facility.
- (1m) "Person authorized by the individual" means the parent, guardian, as defined in s. [48.02 \(8\)](#), or legal custodian, as defined in s. [48.02 \(11\)](#), of an individual who is a child, as defined in s. [48.02 \(2\)](#); the guardian of an individual adjudicated incompetent in this state; the personal representative or spouse of an individual who is deceased; or any person authorized, in writing, by an individual to act on his or her behalf.
- (1r) "Personally identifiable information" has the meaning specified in s. [19.62 \(5\)](#).
- (2) "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.
- (2g) "Record subject" means an individual about whom personally identifiable information is contained in a record.
- (3) "Requester" means any person who requests inspection or copies of a record, except a committed or incarcerated person, unless the person requests inspection or copies of a record that contains specific references to that person or his or her minor children for whom he or she has not been denied physical placement under ch. [767](#), and the record is otherwise accessible to the person by law.
- (3m) "Special purpose district" means a district, other than a state governmental unit or a county, city, village, or town, that is created to perform a particular function and whose geographic jurisdiction is limited to some portion of this state.
- (4) "State public office" has the meaning given in s. [19.42 \(13\)](#), but does not include a position identified in s. [20.923 \(6\) \(f\) to \(gm\)](#).

History: [1981 c. 335](#); [1985 a. 26, 29, 332](#); [1987 a. 305](#); [1991 a. 39](#), [1991 a. 269 ss. 26pd, 33b](#); [1993 a. 215, 263, 491](#); [1995 a. 158](#); [1997 a. 79, 94](#); [1999 a. 9](#); [2001 a. 16](#); [2003 a. 47](#); [2005 a. 387](#); [2007 a. 20](#); [2013 a. 171, 265](#); [2015 a. 195, 196](#).

NOTE: [2003 Wis. Act 47](#), which affects this section, contains extensive explanatory notes.

A study commissioned by the corporation counsel and used in various ways was not a "draft" under sub. (2), although it was not in final form. A document prepared other than for the originator's personal use, although in preliminary form or marked "draft," is a record. *Fox v. Bock*, [149 Wis. 2d 403, 438 N.W.2d 589](#) (1989).

A settlement agreement containing a pledge of confidentiality and kept in the possession of a school district's attorney was a public record subject to public access. *Journal/Sentinel, Inc. v. School Board*, [186 Wis. 2d 443, 521 N.W.2d 165](#) (Ct. App. 1994).

Individuals confined as sexually violent persons under ch. 980 are not "incarcerated" under sub. (1c). *Klein v. Wisconsin Resource Center*, [218 Wis. 2d 487, 582 N.W.2d 44](#) (Ct. App. 1998), [97-0679](#).

A nonprofit corporation that receives 50 percent of its funds from a municipality or county is an authority under sub. (1) regardless of the source from which the municipality or county obtained those funds. *Cavey v. Walrath*, [229 Wis. 2d 105, 598 N.W.2d 240](#) (Ct. App. 1999), [98-0072](#).

A person aggrieved by a request made under the open records law has standing to raise a challenge that the requested materials are not records because they fall within the exception for copyrighted material under sub. (2). Under the facts of this case, the language of sub. (2), when viewed in light of the fair use exception to copyright infringement, applied so that the disputed materials were records within the statutory definition. *Zellner v. Cedarburg School District*, [2007 WI 53, 300 Wis. 2d 290, 731 N.W.2d 240, 06-1143](#).

"Record" in sub. (2) and s. 19.35 (5) does not include identical copies of otherwise available records. A copy that is not different in some meaningful way from an original, regardless of the form of the original, is an identical copy. If a copy differs in some

significant way for purposes of responding to an open records request, then it is not truly an identical copy, but instead a different record. *Stone v. Board of Regents*, [2007 WI App 223](#), [305 Wis. 2d 679](#), [741 N.W.2d 774](#), [06-2537](#).

A municipality's independent contractor assessor was not an authority under sub. (1) and was not a proper recipient of an open records request. In this case, only the municipalities themselves were the "authorities" for purposes of the open records law. Accordingly, only the municipalities were proper recipients of the relevant open records requests. *WIREdata, Inc. v. Village of Sussex*, [2008 WI 69](#), [310 Wis. 2d 397](#), [751 N.W.2d 736](#), [05-1473](#).

A corporation is quasi-governmental if, based on the totality of circumstances, it resembles a governmental corporation in function, effect, or status, requiring a case-by-case analysis. Here, a primary consideration was that the body was funded exclusively by public tax dollars or interest thereon. Additionally, its office was located in the municipal building, it was listed on the city website, the city provided it with clerical support and office supplies, all its assets revert to the city if it ceases to exist, its books are open for city inspection, the mayor and another city official are directors, and it had no clients other than the city. *State v. Beaver Dam Area Development Corp.*, [2008 WI 90](#), [312 Wis. 2d 84](#), [752 N.W.2d 295](#), [06-0662](#).

Employees' personal emails were not subject to disclosure in this case. *Schill v. Wisconsin Rapids School District*, [2010 WI 86](#), [327 Wis. 2d 572](#), [786 N.W.2d 177](#), [08-0967](#).

Redacted portions of emails, who sent the emails, and where they were sent from were not "purely personal" and therefore subject to disclosure. Public awareness of who is attempting to influence public policy is essential for effective oversight of our government. Whether a communication is sent to a public official from a source that appears associated with a particular unit of government, a private entity, or a nonprofit organization, or from individuals who may be associated with a specific interest or particular area of the state, from where a communication is sent further assists the public in understanding who is attempting to influence public policy and why. *John K. MacIver Institute for Public Policy, Inc. v. Erpenbach*, [2014 WI App 49](#), [354 Wis. 2d 61](#), [848 N.W.2d 862](#), [13-1187](#).

To be a "quasi-governmental corporation" under sub. (1) an entity must first be a corporation. To hold that the term "quasi-governmental corporation" includes an entity that is not a corporation would effectively rewrite the statute to eliminate the legislature's use of the word corporation. *Wisconsin Professional Police Ass'n v. Wisconsin Counties Ass'n*, [2014 WI App 106](#), [357 Wis. 2d 687](#), [855 N.W.2d 715](#), [14-0249](#).

"Notes" in sub. (2) covers a broad range of frequently created, informal writings. Documents found to be notes in this case were mostly handwritten and at times barely legible. They included copies of post-it notes and telephone message slips, and in other ways appeared to reflect hurried, fragmentary, and informal writing. A few documents were in the form of draft letters, but were created for and used by the originators as part of their preparation for, or as part of their processing after, interviews that they conducted. *Voice of Wisconsin Rapids, LLC v. Wisconsin Rapids Public School District*, [2015 WI App 53](#), [364 Wis. 2d 429](#), [867 N.W.2d 825](#), [14-1256](#).

The exception from the definition of "record" in sub. (2) of notes "prepared for the originator's personal use" may apply to notes that are created or used in connection with government work and with a governmental purpose. *Voice of Wisconsin Rapids, LLC v. Wisconsin Rapids Public School District*, [2015 WI App 53](#), [364 Wis. 2d 429](#), [867 N.W.2d 825](#), [14-1256](#).

A district attorney is employed by an authority and holds a state public office and therefore is not an "employee" within the meaning of sub. (1bg). *Moustakis v. Department of Justice*, [2016 WI 42](#), [368 Wis. 2d 677](#), [880 N.W.2d 142](#), [14-1853](#).

Each case involving an alleged quasi-governmental corporation must be decided on the particular facts presented. An entity is a quasi-governmental corporation if, based on the totality of the circumstances, the entity resembles a governmental corporation in function, effect, or status. Accordingly, courts must consider a nonexhaustive list of factors, with no single factor being outcome determinative. The five factors that guided the supreme court's conclusion in *Beaver Dam Area Development Corp.*, [2008 WI 90](#), are: 1) whether the entity's funding comes from predominately public or private sources; 2) whether the entity serves a public function; 3) whether the entity appears to the public to be a government entity; 4) the degree to which the entity is subject to government control; and 5) the amount of access governmental bodies have to the entity's records. *Flynn v. Kemper Center, Inc.*, [2019 WI App 6](#), [385 Wis. 2d 811](#), [924 N.W.2d 218](#), [17-1897](#).

"Records" must have some relation to the functions of the agency. [72 Atty. Gen. 99](#).

Discussing the treatment of drafts under the public records law. [77 Atty. Gen. 100](#).

Applying Open Records Policy to Wisconsin District Attorneys: Can Charging Guidelines Promote Public Awareness? Mayer. 1996 WLR 295.

19.33 Legal custodians.

- (1)** An elective official is the legal custodian of his or her records and the records of his or her office, but the official may designate an employee of his or her staff to act as the legal custodian.
- (2)** The chairperson of a committee of elective officials, or the designee of the chairperson, is the legal custodian of the records of the committee.
- (3)** The cochairpersons of a joint committee of elective officials, or the designee of the cochairpersons, are the legal custodians of the records of the joint committee.
- (4)** Every authority not specified in subs. [\(1\)](#) to [\(3\)](#) shall designate in writing one or more positions occupied by an officer or employee of the authority or the unit of government of which it is a part as a legal custodian to fulfill its duties under this subchapter. In the absence of a designation the authority's highest ranking officer and the chief administrative officer, if any, are the legal custodians for the authority. The legal custodian shall be vested by the authority with full legal power to render decisions and carry out the duties of the authority under this subchapter. Each authority shall provide the name of the legal custodian and a

description of the nature of his or her duties under this subchapter to all employees of the authority entrusted with records subject to the legal custodian's supervision.

- (5) Notwithstanding sub. (4), if an authority specified in sub. (4) or the members of such an authority are appointed by another authority, the appointing authority may designate a legal custodian for records of the authority or members of the authority appointed by the appointing authority, except that if such an authority is attached for administrative purposes to another authority, the authority performing administrative duties shall designate the legal custodian for the authority for whom administrative duties are performed.
- (6) The legal custodian of records maintained in a publicly owned or leased building or the authority appointing the legal custodian shall designate one or more deputies to act as legal custodian of such records in his or her absence or as otherwise required to respond to requests as provided in s. 19.35 (4). This subsection does not apply to members of the legislature or to members of any local governmental body.
- (7) The designation of a legal custodian does not affect the powers and duties of an authority under this subchapter.
- (8) No elective official of a legislative body has a duty to act as or designate a legal custodian under sub. (4) for the records of any committee of the body unless the official is the highest ranking officer or chief administrative officer of the committee or is designated the legal custodian of the committee's records by rule or by law.

History: [1981 c. 335](#); [2013 a. 171](#).

The right to privacy law, s. 895.50 [now s. 995.50], does not affect the duties of a custodian of public records under former s. 19.21, 1977 stats. 68 Atty. Gen. 68.

19.34 Procedural information; access times and locations.

- (1) Each authority shall adopt, prominently display and make available for inspection and copying at its offices, for the guidance of the public, a notice containing a description of its organization and the established times and places at which, the legal custodian under s. 19.33 from whom, and the methods whereby, the public may obtain information and access to records in its custody, make requests for records, or obtain copies of records, and the costs thereof. The notice shall also separately identify each position of the authority that constitutes a local public office or a state public office. This subsection does not apply to members of the legislature or to members of any local governmental body.
- (2)
 - (a) Each authority which maintains regular office hours at the location where records in the custody of the authority are kept shall permit access to the records of the authority at all times during those office hours, unless otherwise specifically authorized by law.
 - (b) Each authority which does not maintain regular office hours at the location where records in the custody of the authority are kept shall:
 1. Permit access to its records upon at least 48 hours' written or oral notice of intent to inspect or copy a record; or
 2. Establish a period of at least 2 consecutive hours per week during which access to the records of the authority is permitted. In such case, the authority may require 24 hours' advance written or oral notice of intent to inspect or copy a record.
 - (c) An authority imposing a notice requirement under par. (b) shall include a statement of the requirement in its notice under sub. (1), if the authority is required to adopt a notice under that subsection.
 - (d) If a record of an authority is occasionally taken to a location other than the location where records of the authority are regularly kept, and the record may be inspected at the place at which records of the authority are regularly kept upon one business day's notice, the authority or legal custodian of the record need not provide access to the record at the occasional location.

History: [1981 c. 335](#); [2003 a. 47](#); [2013 a. 171](#).

NOTE: [2003 Wis. Act 47](#), which affects this section, contains extensive explanatory notes.

- 19.345 Time computation.** In ss. 19.33 to 19.39, when a time period is provided for performing an act, whether the period is expressed in hours or days, the whole of Saturday, Sunday, and any legal holiday, from midnight to midnight, shall be excluded in computing the period.

History: [2003 a. 47](#).

NOTE: [2003 Wis. Act 47](#), which creates this section, contains extensive explanatory notes.

19.35 Access to records; fees.

- (1) RIGHT TO INSPECTION.

- (a) Except as otherwise provided by law, any requester has a right to inspect any record. Substantive common law principles construing the right to inspect, copy or receive copies of records shall remain in effect. The exemptions to the requirement of a governmental body to meet in open session under s. [19.85](#) are indicative of public policy, but may be used as grounds for denying public access to a record only if the authority or legal custodian under s. [19.33](#) makes a specific demonstration that there is a need to restrict public access at the time that the request to inspect or copy the record is made.
- (am) In addition to any right under par. (a), any requester who is an individual or person authorized by the individual has a right to inspect any personally identifiable information pertaining to the individual in a record containing personally identifiable information that is maintained by an authority and to make or receive a copy of any such information. The right to inspect or copy information in a record under this paragraph does not apply to any of the following:
1. Any record containing personally identifiable information that is collected or maintained in connection with a complaint, investigation or other circumstances that may lead to an enforcement action, administrative proceeding, arbitration proceeding or court proceeding, or any such record that is collected or maintained in connection with such an action or proceeding.
 2. Any record containing personally identifiable information that, if disclosed, would do any of the following:
 - a. Endanger an individual's life or safety.
 - b. Identify a confidential informant.
 - c. Endanger the security, including the security of the population or staff, of any state prison under s. [302.01](#), jail, as defined in s. [165.85 \(2\) \(bg\)](#), juvenile correctional facility, as defined in s. [938.02 \(10p\)](#), secured residential care center for children and youth, as defined in s. [938.02 \(15g\)](#), mental health institute, as defined in s. [51.01 \(12\)](#), center for the developmentally disabled, as defined in s. [51.01 \(3\)](#), or facility, specified under s. [980.065](#), for the institutional care of sexually violent persons.
 - d. Compromise the rehabilitation of a person in the custody of the department of corrections or detained in a jail or facility identified in subd. [2. c.](#)
 - 2m. The actual address, as defined in s. [165.68 \(1\) \(b\)](#), of a participant in the program established in s. [165.68](#).
 3. Any record that is part of a records series, as defined in s. [19.62 \(7\)](#), that is not indexed, arranged or automated in a way that the record can be retrieved by the authority maintaining the records series by use of an individual's name, address or other identifier.
- (b) Except as otherwise provided by law, any requester has a right to inspect a record and to make or receive a copy of a record. If a requester appears personally to request a copy of a record that permits copying, the authority having custody of the record may, at its option, permit the requester to copy the record or provide the requester with a copy substantially as readable as the original.
- (c) Except as otherwise provided by law, any requester has a right to receive from an authority having custody of a record which is in the form of a comprehensible audio recording a copy of the recording substantially as audible as the original. The authority may instead provide a transcript of the recording to the requester if he or she requests.
- (d) Except as otherwise provided by law, any requester has a right to receive from an authority having custody of a record which is in the form of a video recording a copy of the recording substantially as good as the original.
- (e) Except as otherwise provided by law, any requester has a right to receive from an authority having custody of a record which is not in a readily comprehensible form a copy of the information contained in the record assembled and reduced to written form on paper.
- (em) If an authority receives a request to inspect or copy a record that is in handwritten form or a record that is in the form of a voice recording which the authority is required to withhold or from which the authority is required to delete information under s. [19.36 \(8\) \(b\)](#) because the handwriting or the recorded voice would identify an informant, the authority shall provide to the requester, upon his or her request, a transcript of the record or the information contained in the record if the record or information is otherwise subject to public inspection and copying under this subsection.
- (f) Notwithstanding par. (b) and except as otherwise provided by law, any requester has a right to inspect any record not specified in pars. (c) to (e) the form of which does not permit copying. If a requester requests permission to photograph the record, the authority having custody of the record may permit the requester to

photograph the record. If a requester requests that a photograph of the record be provided, the authority shall provide a good quality photograph of the record.

- (g) Paragraphs (a) to (c), (e) and (f) do not apply to a record which has been or will be promptly published with copies offered for sale or distribution.
- (h) A request under pars. (a) to (f) is deemed sufficient if it reasonably describes the requested record or the information requested. However, a request for a record without a reasonable limitation as to subject matter or length of time represented by the record does not constitute a sufficient request. A request may be made orally, but a request must be in writing before an action to enforce the request is commenced under s. 19.37.
- (i) Except as authorized under this paragraph, no request under pars. (a) and (b) to (f) may be refused because the person making the request is unwilling to be identified or to state the purpose of the request. Except as authorized under this paragraph, no request under pars. (a) to (f) may be refused because the request is received by mail, unless prepayment of a fee is required under sub. (3) (f). A requester may be required to show acceptable identification whenever the requested record is kept at a private residence or whenever security reasons or federal law or regulations so require.
- (j) Notwithstanding pars. (a) to (f), a requester shall comply with any regulations or restrictions upon access to or use of information which are specifically prescribed by law.
- (k) Notwithstanding pars. (a), (am), (b) and (f), a legal custodian may impose reasonable restrictions on the manner of access to an original record if the record is irreplaceable or easily damaged.
- (L) Except as necessary to comply with pars. (c) to (e) or s. 19.36 (6), this subsection does not require an authority to create a new record by extracting information from existing records and compiling the information in a new format.
- (2) FACILITIES. The authority shall provide any person who is authorized to inspect or copy a record under sub. (1) (a), (am), (b) or (f) with facilities comparable to those used by its employees to inspect, copy and abstract the record during established office hours. An authority is not required by this subsection to purchase or lease photocopying, duplicating, photographic or other equipment or to provide a separate room for the inspection, copying or abstracting of records.
- (3) FEES.
 - (a) An authority may impose a fee upon the requester of a copy of a record which may not exceed the actual, necessary and direct cost of reproduction and transcription of the record, unless a fee is otherwise specifically established or authorized to be established by law.
 - (b) Except as otherwise provided by law or as authorized to be prescribed by law an authority may impose a fee upon the requester of a copy of a record that does not exceed the actual, necessary and direct cost of photographing and photographic processing if the authority provides a photograph of a record, the form of which does not permit copying.
 - (c) Except as otherwise provided by law or as authorized to be prescribed by law, an authority may impose a fee upon a requester for locating a record, not exceeding the actual, necessary and direct cost of location, if the cost is \$50 or more.
 - (d) An authority may impose a fee upon a requester for the actual, necessary and direct cost of mailing or shipping of any copy or photograph of a record which is mailed or shipped to the requester.
 - (e) An authority may provide copies of a record without charge or at a reduced charge where the authority determines that waiver or reduction of the fee is in the public interest.
 - (f) An authority may require prepayment by a requester of any fee or fees imposed under this subsection if the total amount exceeds \$5. If the requester is a prisoner, as defined in s. 301.01 (2), or is a person confined in a federal correctional institution located in this state, and he or she has failed to pay any fee that was imposed by the authority for a request made previously by that requester, the authority may require prepayment both of the amount owed for the previous request and the amount owed for the current request.
 - (g) Notwithstanding par. (a), if a record is produced or collected by a person who is not an authority pursuant to a contract entered into by that person with an authority, the authorized fees for obtaining a copy of the record may not exceed the actual, necessary, and direct cost of reproduction or transcription of the record incurred by the person who makes the reproduction or transcription, unless a fee is otherwise established or authorized to be established by law.
- (4) TIME FOR COMPLIANCE AND PROCEDURES.

- (a) Each authority, upon request for any record, shall, as soon as practicable and without delay, either fill the request or notify the requester of the authority's determination to deny the request in whole or in part and the reasons therefor.
- (b) If a request is made orally, the authority may deny the request orally unless a demand for a written statement of the reasons denying the request is made by the requester within 5 business days of the oral denial. If an authority denies a written request in whole or in part, the requester shall receive from the authority a written statement of the reasons for denying the written request. Every written denial of a request by an authority shall inform the requester that if the request for the record was made in writing, then the determination is subject to review by mandamus under s. [19.37 \(1\)](#) or upon application to the attorney general or a district attorney.
- (c) If an authority receives a request under sub. [\(1\) \(a\)](#) or [\(am\)](#) from an individual or person authorized by the individual who identifies himself or herself and states that the purpose of the request is to inspect or copy a record containing personally identifiable information pertaining to the individual that is maintained by the authority, the authority shall deny or grant the request in accordance with the following procedure:
1. The authority shall first determine if the requester has a right to inspect or copy the record under sub. [\(1\) \(a\)](#).
 2. If the authority determines that the requester has a right to inspect or copy the record under sub. [\(1\) \(a\)](#), the authority shall grant the request.
 3. If the authority determines that the requester does not have a right to inspect or copy the record under sub. [\(1\) \(a\)](#), the authority shall then determine if the requester has a right to inspect or copy the record under sub. [\(1\) \(am\)](#) and grant or deny the request accordingly.
- (5) RECORD DESTRUCTION. No authority may destroy any record at any time after the receipt of a request for inspection or copying of the record under sub. [\(1\)](#) until after the request is granted or until at least 60 days after the date that the request is denied or, if the requester is a committed or incarcerated person, until at least 90 days after the date that the request is denied. If an authority receives written notice that an action relating to a record has been commenced under s. [19.37](#), the record may not be destroyed until after the order of the court in relation to such record is issued and the deadline for appealing that order has passed, or, if appealed, until after the order of the court hearing the appeal is issued. If the court orders the production of any record and the order is not appealed, the record may not be destroyed until after the request for inspection or copying is granted.
- (6) ELECTIVE OFFICIAL RESPONSIBILITIES. No elective official is responsible for the record of any other elective official unless he or she has possession of the record of that other official.
- (7) LOCAL INFORMATION TECHNOLOGY AUTHORITY RESPONSIBILITY FOR LAW ENFORCEMENT RECORDS.
- (a) In this subsection:
1. "Law enforcement agency" has the meaning given s. [165.83 \(1\) \(b\)](#).
 2. "Law enforcement record" means a record that is created or received by a law enforcement agency and that relates to an investigation conducted by a law enforcement agency or a request for a law enforcement agency to provide law enforcement services.
 3. "Local information technology authority" means a local public office or local governmental unit whose primary function is information storage, information technology processing, or other information technology usage.
- (b) For purposes of requests for access to records under sub. [\(1\)](#), a local information technology authority that has custody of a law enforcement record for the primary purpose of information storage, information technology processing, or other information technology usage is not the legal custodian of the record. For such purposes, the legal custodian of a law enforcement record is the authority for which the record is stored, processed, or otherwise used.
- (c) A local information technology authority that receives a request under sub. [\(1\)](#) for access to information in a law enforcement record shall deny any portion of the request that relates to information in a local law enforcement record.

History: [1981 c. 335, 391](#); [1991 a. 39, 1991 a. 269 ss. 34am, 40am](#); [1993 a. 93](#); [1995 a. 77, 158](#); [1997 a. 94, 133](#); [1999 a. 9](#); [2001 a. 16](#); [2005 a. 344](#); [2009 a. 259, 370](#); [2013 a. 171](#); [2015 a. 356](#).

NOTE: The following annotations relate to public records statutes in effect prior to the creation of s. 19.35 by ch. 335, laws of 1981.

A mandamus petition to inspect a county hospital's statistical, administrative, and other records not identifiable with individual patients states a cause of action under this section. State ex rel. Dalton v. Mundy, [80 Wis. 2d 190, 257 N.W.2d 877](#) (1977).

Police daily arrest lists must be open for public inspection. *Newspapers, Inc. v. Breier*, [89 Wis. 2d 417](#), [279 N.W.2d 179](#) (1979).

This section is a statement of the common law rule that public records are open to public inspection subject to common law limitations.

Section 59.14 [now s. 59.20 (3)] is a legislative declaration granting persons who come under its coverage an absolute right of inspection subject only to reasonable administrative regulations. *State ex rel. Bilder v. Town of Delavan*, [112 Wis. 2d 539](#), [334 N.W.2d 252](#) (1983).

A newspaper had the right to intervene to protect its right to examine sealed court files. *State ex rel. Bilder v. Town of Delavan*, [112 Wis. 2d 539](#), [334 N.W.2d 252](#) (1983).

Examination of birth records cannot be denied simply because the examiner has a commercial purpose. 58 Atty. Gen. 67.

Consideration of a resolution is a formal action of an administrative or minor governing body. When taken in a proper closed session, the resolution and result of the vote must be made available for public inspection absent a specific showing that the public interest would be adversely affected. 60 Atty. Gen. 9.

Inspection of public records obtained under official pledges of confidentiality may be denied if: 1) a clear pledge has been made in order to obtain the information; 2) the pledge was necessary to obtain the information; and 3) the custodian determines that the harm to the public interest resulting from inspection would outweigh the public interest in full access to public records. The custodian must permit inspection of information submitted under an official pledge of confidentiality if the official or agency had specific statutory authority to require its submission. 60 Atty. Gen. 284.

Discussing the right to inspection and copying of public records in decentralized offices. 61 Atty. Gen. 12.

Public records subject to inspection and copying by any person would include a list of students awaiting a particular program in a VTAE (technical college) district school. 61 Atty. Gen. 297.

The investment board can only deny members of the public from inspecting and copying portions of the minutes relating to the investment of state funds and documents pertaining thereto on a case-by-case basis if valid reasons for denial exist and are specially stated. 61 Atty. Gen. 361.

Matters and documents in the possession or control of school district officials containing information concerning the salaries, including fringe benefits, paid to individual teachers are matters of public record. 63 Atty. Gen. 143.

The Department of Administration probably had authority under former s. 19.21 (1) and (2), 1973 stats., to provide a private corporation with camera-ready copy of session laws that is the product of a printout of computer stored public records if the costs are minimal. The state cannot contract on a continuing basis for the furnishing of this service. 63 Atty. Gen. 302.

Discussing the scope of the duty of the governor to allow members of the public to examine and copy public records in the governor's custody. 63 Atty. Gen. 400.

Discussing the public's right to inspect land acquisition files of the Department of Natural Resources. 63 Atty. Gen. 573.

Financial statements filed in connection with applications for motor vehicle dealers' and motor vehicle salvage dealers' licenses are public records, subject to limitations. 66 Atty. Gen. 302.

Sheriff's radio logs, intradepartmental documents kept by the sheriff, and blood test records of deceased automobile drivers in the hands of the sheriff are public records, subject to limitations. 67 Atty. Gen. 12.

Plans and specifications filed under s. 101.12 are public records and are available for public inspection. 67 Atty. Gen. 214.

Under s. 19.21 (1), district attorneys must indefinitely preserve papers of a documentary nature evidencing activities of prosecutor's office. 68 Atty. Gen. 17.

Discussing the right to examine and copy computer-stored information. 68 Atty. Gen. 231.

After the transcript of court proceedings is filed with the clerk of court, any person may examine or copy the transcript. 68 Atty. Gen. 313.

NOTE: The following annotations relate to s. 19.35.

Although a meeting was properly closed, in order to refuse inspection of records of the meeting, the custodian was required by sub. (1) (a) to state specific and sufficient public policy reasons why the public's interest in nondisclosure outweighed the right of inspection. *Oshkosh Northwestern Co. v. Oshkosh Library Board*, [125 Wis. 2d 480](#), [373 N.W.2d 459](#) (Ct. App. 1985).

Courts must apply the open records balancing test to questions involving disclosure of court records. The public interests favoring secrecy must outweigh those favoring disclosure. *C.L. v. Edson*, [140 Wis. 2d 168](#), [409 N.W.2d 417](#) (Ct. App. 1987).

Public records germane to pending litigation were available under this section even though the discovery cutoff deadline had passed. *State ex rel. Lank v. Rzentkowski*, [141 Wis. 2d 846](#), [416 N.W.2d 635](#) (Ct. App. 1987).

To uphold a custodian's denial of access, an appellate court will inquire whether the trial court made a factual determination supported by the record of whether documents implicate a secrecy interest and, if so, whether the secrecy interest outweighs the interests favoring release. *Milwaukee Journal v. Call*, [153 Wis. 2d 313](#), [450 N.W.2d 515](#) (Ct. App. 1989).

That releasing records would reveal a confidential informant's identity was a legally specific reason for denial of a records request. The public interest in not revealing the informant's identity outweighed the public interest in disclosure of the records. *Mayfair Chrysler-Plymouth v. Baldarotta*, [162 Wis. 2d 142](#), [469 N.W.2d 638](#) (1991).

Items subject to examination under s. 346.70 (4) (f) may not be withheld by the prosecution under a common law rule that investigative material may be withheld from a criminal defendant. *State ex rel. Young v. Shaw*, [165 Wis. 2d 276](#), [477 N.W.2d 340](#) (Ct. App. 1991).

Prosecutors' files are exempt from public access under the common law. *State ex rel. Richards v. Foust*, [165 Wis. 2d 429](#), [477 N.W.2d 608](#) (1991).

Records relating to pending claims against the state under s. 893.82 need not be disclosed under this section. Records of non-pending claims must be disclosed unless an in camera inspection reveals that the attorney-client privilege would be violated. *George v. Record Custodian*, [169 Wis. 2d 573](#), [485 N.W.2d 460](#) (Ct. App. 1992).

The public records law confers no exemption as of right on indigents from payment of fees under sub. (3). *George v. Record*

Custodian, [169 Wis. 2d 573](#), [485 N.W.2d 460](#) (Ct. App. 1992).

The denial of a prisoner's information request regarding illegal behavior by guards on the grounds that it could compromise the guards' effectiveness and subject them to harassment was insufficient. State ex. rel. Ledford v. Turcotte, [195 Wis. 2d 244](#), [536 N.W.2d 130](#) (Ct. App. 1995), [94-2710](#).

The amount of prepayment required for copies may be based on a reasonable estimate. State ex rel. Hill v. Zimmerman, [196 Wis. 2d 419](#), [538 N.W.2d 608](#) (Ct. App. 1995), [94-1861](#).

The *Foust*, [165 Wis. 2d 429](#) (1991), decision does not automatically exempt all records stored in a closed prosecutorial file. The exemption is limited to material actually pertaining to the prosecution. Nichols v. Bennett, [199 Wis. 2d 268](#), [544 N.W.2d 428](#) (1996), [93-2480](#).

Department of Regulation and Licensing test scores were subject to disclosure under the open records law. Munroe v. Braatz, [201 Wis. 2d 442](#), [549 N.W.2d 452](#) (Ct. App. 1996), [95-2557](#).

Subs. (1) (i) and (3) (f) did not permit a demand for prepayment of \$1.29 in response to a mail request for a record. Borzych v. Paluszcyk, [201 Wis. 2d 523](#), [549 N.W.2d 253](#) (Ct. App. 1996), [95-1711](#).

An agency cannot promulgate an administrative rule that creates an exception to the open records law. Chvala v. Bubolz, [204 Wis. 2d 82](#), [552 N.W.2d 892](#) (Ct. App. 1996), [95-3120](#).

While certain statutes grant explicit exceptions to the open records law, many statutes set out broad categories of records not open to an open records request. A custodian faced with such a broad statute must state with specificity a public policy reason for refusing to release the requested record. Chvala v. Bubolz, [204 Wis. 2d 82](#), [552 N.W.2d 892](#) (Ct. App. 1996), [95-3120](#).

The custodian is not authorized to comply with an open records request at some unspecified date in the future. Such a response constitutes a denial of the request. WTMJ, Inc. v. Sullivan, [204 Wis. 2d 452](#), [555 N.W.2d 125](#) (Ct. App. 1996), [96-0053](#).

Subject to the redaction of officers' home addresses and supervisors' conclusions and recommendations regarding discipline, police records regarding the use of deadly force were subject to public inspection. State ex rel. Journal/Sentinel, Inc. v. Arreola, [207 Wis. 2d 496](#), [558 N.W.2d 670](#) (Ct. App. 1996), [95-2956](#).

A public school student's interim grades are pupil records specifically exempted from disclosure under s. 118.125. If records are specifically exempted from disclosure, failure to specifically state reasons for denying an open records request for those records does not compel disclosure of those records. State ex rel. Blum v. Board of Education, [209 Wis. 2d 377](#), [565 N.W.2d 140](#) (Ct. App. 1997), [96-0758](#).

Requesting a copy of 180 hours of audiotape of 911 calls, together with a transcription of the tape and log of each transmission received, was a request without "reasonable limitation" and was not a "sufficient request" under sub. (1) (h). Schopper v. Gehring, [210 Wis. 2d 208](#), [565 N.W.2d 187](#) (Ct. App. 1997), [96-2782](#).

If the requested information is covered by an exempting statute that does not require a balancing of public interests, there is no need for a custodian to conduct such a balancing. Written denial claiming a statutory exception by citing the specific statute or regulation is sufficient. State ex rel. Savinski v. Kimble, [221 Wis. 2d 833](#), [586 N.W.2d 36](#) (Ct. App. 1998), [97-3356](#).

Protecting persons who supply information or opinions about an inmate to the parole commission is a public interest that may outweigh the public interest in access to documents that could identify those persons. State ex rel. Bergmann v. Faust, [226 Wis. 2d 273](#), [595 N.W.2d 75](#) (Ct. App. 1999), [98-2537](#).

Sub. (1) (b) gives the record custodian, and not the requester, the choice of how a record will be copied. The requester cannot elect to use his or her own copying equipment without the custodian's permission. Grebner v. Schiebel, [2001 WI App 17](#), [240 Wis. 2d 551](#), [624 N.W.2d 892](#), [00-1549](#).

Requests for university admissions records focusing on test scores, class rank, grade point average, race, gender, ethnicity, and socio-economic background were not requests for personally identifiable information, and release was not barred by federal law or public policy. That the requests would require the university to redact information from thousands of documents under s. 19.36 (6) did not essentially require the university to create new records and, as such, did not provide grounds for denying the request under sub. (1) (L). Osborn v. Board of Regents, [2002 WI 83](#), [254 Wis. 2d 266](#), [647 N.W.2d 158](#), [00-2861](#).

The police report of a closed investigation regarding a teacher's conduct that did not lead either to an arrest, prosecution, or any administrative disciplinary action was subject to release. Linzmeyer v. Forcey, [2002 WI 84](#), [254 Wis. 2d 306](#), [646 N.W.2d 811](#), [01-0197](#).

When a requested item is a public record under the open records law, and there is no statutory or common law exception, the open records law applies and the presumption of openness attaches to the record. The court must then decide whether that presumption can be overcome by a public policy favoring non-disclosure of the record. The fundamental question is whether there is harm to a public interest that outweighs the public interest in inspection of the record. A balancing test is applied on a case-by-case basis. If the harm to the public interest caused by release overrides the public interest in release, the inspection of the record may be prevented in spite of the general policy of openness. Linzmeyer v. Forcey, [2002 WI 84](#), [646 N.W.2d 811](#), [254 Wis. 2d 306](#), [01-0197](#).

The John Doe statute, s. 968.26, which authorizes secrecy in John Doe proceedings, is a clear statement of legislative policy and constitutes a specific exception to the public records law. On review of a petition for a writ stemming from a secret John Doe proceeding, the court of appeals may seal parts of a record in order to comply with existing secrecy orders issued by the John Doe judge. Unnamed Persons Numbers 1, 2, & 3 v. State, [2003 WI 30](#), [260 Wis. 2d 653](#), [660 N.W.2d 260](#), [01-3220](#).

Sub. (1) (am) is not subject to a balancing of interests. Therefore, the exceptions to sub. (1) (am) should not be narrowly construed. A requester who does not qualify for access to records under sub. (1) (am) will always have the right to seek records under sub. (1) (a), in which case the records custodian must determine whether the requested records are subject to a statutory or common law exception and, if not, whether the strong presumption favoring access and disclosure is overcome by some even stronger public policy favoring limited access or nondisclosure determined by applying a balancing test. Hempel v. City of Baraboo, [2005 WI 120](#), [284 Wis. 2d 162](#), [699 N.W.2d 551](#), [03-0500](#).

Sub. (1) (a) does not mandate that, when a meeting is closed under s. 19.85, all records created for or presented at the meeting are exempt from disclosure. The court must still apply the balancing test articulated in *Linzmeier*, [2002 WI 84](#). *Zellner v. Cedarburg School District*, [2007 WI 53](#), [300 Wis. 2d 290](#), [731 N.W.2d 240](#), [06-1143](#).

A general request does not trigger the sub. (4) (c) review sequence. Sub. (4) (c) recites the procedure to be employed if an authority receives a request under sub. (1) (a) or (am). An authority is an entity having custody of a record. The definition does not include a reviewing court. *Seifert v. School District*, [2007 WI App 207](#), [305 Wis. 2d 582](#), [740 N.W.2d 177](#), [06-2071](#).

The open records law cannot be used to circumvent established principles that shield attorney work product, nor can it be used as a discovery tool. The presumption of access under sub. (1) (a) is defeated because the attorney work product qualifies under the "otherwise provided by law" exception. *Seifert v. School District*, [2007 WI App 207](#), [305 Wis. 2d 582](#), [740 N.W.2d 177](#), [06-2071](#).

Sub. (1) (am) 1. plainly allows a records custodian to deny access to one who is, in effect, a potential adversary in litigation or other proceeding unless or until required to do so under the rules of discovery in actual litigation. The balancing of interests under sub. (1) (a) must include examining all the relevant factors in the context of the particular circumstances and may include the balancing the competing interests consider sub. (1) (am) 1. when evaluating the entire set of facts and making its specific demonstration of the need for withholding the records. *Seifert v. School District*, [2007 WI App 207](#), [305 Wis. 2d 582](#), [740 N.W.2d 177](#), [06-2071](#).

The sub. (1) (am) analysis is succinct. There is no balancing. There is no requirement that the investigation be current for the exemption for records "collected or maintained in connection with a complaint, investigation or other circumstances that may lead to . . . [a] court proceeding" to apply. *Seifert v. School District*, [2007 WI App 207](#), [305 Wis. 2d 582](#), [740 N.W.2d 177](#), [06-2071](#).

"Record" in sub. (5) and s. 19.32 (2) does not include identical copies of otherwise available records. A copy that is not different in some meaningful way from an original, regardless of the form of the original, is an identical copy. If a copy differs in some significant way for purposes of responding to an open records request, then it is not truly an identical copy, but instead a different record. *Stone v. Board of Regents*, [2007 WI App 223](#), [305 Wis. 2d 679](#), [741 N.W.2d 774](#), [06-2537](#).

Schopper, [210 Wis. 2d 208](#) (1997), does not permit a records custodian to deny a request based solely on the custodian's assertion that the request could reasonably be narrowed, nor does *Schopper* require that the custodian take affirmative steps to limit the search as a prerequisite to denying a request under sub. (1) (h). The fact that the request may result in the generation of a large volume of records is not, in itself, a sufficient reason to deny a request as not properly limited, but at some point, an overly broad request becomes sufficiently excessive to warrant rejection under sub. (1) (h). *State ex rel. Gehl v. Connors*, [2007 WI App 238](#), [306 Wis. 2d 247](#), [742 N.W.2d 530](#), [06-2455](#).

The public records law addresses the duty to disclose records; it does not address the duty to retain records. An agency's alleged failure to keep sought-after records may not be attacked under the public records law. Section 19.21 relates to records retention and is not a part of the public records law. *State ex rel. Gehl v. Connors*, [2007 WI App 238](#), [306 Wis. 2d 247](#), [742 N.W.2d 530](#), [06-2455](#).

Foust, [165 Wis. 2d 429](#) (1991), held that a common law categorical exception exists for records in the custody of a district attorney's office, not for records in the custody of a law enforcement agency. A sheriff's department is legally obligated to provide public access to records in its possession, which cannot be avoided by invoking a common law exception that is exclusive to the records of another custodian. That the same record was in the custody of both the law enforcement agency and the district attorney does not change the outcome. To the extent that a sheriff's department can articulate a policy reason why the public interest in disclosure is outweighed by the interest in withholding the particular record, it may properly deny access. *Portage Daily Register v. Columbia County Sheriff's Department*, [2008 WI App 30](#), [308 Wis. 2d 357](#), [746 N.W.2d 525](#), [07-0323](#).

When requests are complex, municipalities should be afforded reasonable latitude in time for their responses. An authority should not be subjected to the burden and expense of a premature public records lawsuit while it is attempting in good faith to respond, or to determine how to respond, to a request. 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. *WIREdata, Inc. v. Village of Sussex*, [2008 WI 69](#), [310 Wis. 2d 397](#), [751 N.W.2d 736](#), [05-1473](#).

Employees' personal emails were not subject to disclosure in this case. *Schill v. Wisconsin Rapids School District*, [2010 WI 86](#), [327 Wis. 2d 572](#), [786 N.W.2d 177](#), [08-0967](#).

Under sub. (3) the legislature provided four tasks for which an authority may impose fees on a requester: "reproduction and transcription," "photographing and photographic processing," "locating," and "mailing or shipping." For each task, an authority is permitted to impose a fee that does not exceed the "actual, necessary and direct" cost of the task. The process of redacting information from a record does not fit into any of the four statutory tasks. *Milwaukee Journal Sentinel v. City of Milwaukee*, [2012 WI 65](#), [341 Wis. 2d 607](#), [815 N.W.2d 367](#), [11-1112](#).

Redacted portions of emails, who sent the emails, and where they were sent from were not "purely personal" and therefore subject to disclosure. Public awareness of who is attempting to influence public policy is essential for effective oversight of our government. Whether a communication is sent to a public official from a source that appears associated with a particular unit of government, a private entity, or a nonprofit organization, or from individuals who may be associated with a specific interest or particular area of the state, from where a communication is sent further assists the public in understanding who is attempting to influence public policy and why. *John K. MacIver Institute for Public Policy, Inc. v. Erpenbach*, [2014 WI App 49](#), [354 Wis. 2d 61](#), [848 N.W.2d 862](#), [13-1187](#).

The record requester's identity was relevant in this case. As a general proposition, the identity and purpose of the requester of public records is not a part of the balancing test to be applied in determining whether to release records. However, the determination of whether there is a safety concern that outweighs the presumption of disclosure is a fact-intensive inquiry determined on a case-by-case basis. *State ex rel. Ardell v. Milwaukee Board of School Directors*, [2014 WI App 66](#), [354 Wis. 2d 471](#), [849 N.W.2d 894](#), [13-1650](#).

In the present case, although the defendant commission's responses did not state that no record existed, that omission did not impair the court's ability to determine whether a statutory exemption to disclosure applied. Under the facts of the case, the defendant commission lawfully denied the plaintiff newspaper's request because no responsive record existed at the time of the request. *Journal*

Times v. City of Racine Board of Police & Fire Commissioners, [2015 WI 56](#), [362 Wis. 2d 577](#), [866 N.W.2d 563](#), [13-1715](#).

Sub. (4) (a) does not require immediate disclosure of a record. It allows a custodian a reasonable amount of time to respond to a public records request. *Journal Times v. City of Racine Board of Police & Fire Commissioners*, [2015 WI 56](#), [362 Wis. 2d 577](#), [866 N.W.2d 563](#), [13-1715](#).

There is no obligation to create a record in response to an open records request and a requester is not entitled to the release of information in response to a public records request. *Journal Times v. City of Racine Board of Police & Fire Commissioners*, [2015 WI 56](#), [362 Wis. 2d 577](#), [866 N.W.2d 563](#), [13-1715](#).

The question asked by the balancing test is whether there is a risk to the public if information is released, not whether there is a risk to an individual if the information is released. *Voces de la Frontera, Inc. v. Clarke*, [2016 WI App 39](#), [369 Wis. 2d 103](#), [880 N.W.2d 417](#), [15-1152](#).

Reversed on other grounds. [2017 WI 16](#), [373 Wis. 2d 348](#), [891 N.W.2d 803](#), [15-1152](#).

In applying the balancing test to a requested video in this case, the court concluded that the public interest in preventing release of specific police and prosecution strategies and techniques being taught and used in Wisconsin outweighed the general legislative presumption that public records should be disclosed. Because the video consisted almost entirely of police tactics and specific prosecution strategies in cases involving sexual exploitation of children, disclosure would result in public harm—if local criminals learn the specific techniques and procedures used by police and prosecutors, the disclosed information could be used to circumvent the law. The public policy factors favoring nondisclosure thus overcame the presumption in favor of disclosure. *Democratic Party of Wisconsin v. Department of Justice*, [2016 WI 100](#), [372 Wis. 2d 460](#), [888 N.W.2d 584](#), [14-2536](#).

The context of the records request, although not always relevant, was considered in this case. By asserting that, upon information and belief, several or all of the requested tapes in this case may have included offensive racial remarks and ethnic slurs, including but not limited to stereotyped accents, as well as sexist remarks, made by the attorney general when he was a district attorney, the language of the Democratic Party's petition in this case for a writ of mandamus suggested a partisan purpose underlying the request. When weighed against the likely harm to law enforcement's efforts to capture and convict sexual predators who target children, the justification offered for the request clearly did not tip the balance toward releasing the requested records. *Democratic Party of Wisconsin v. Department of Justice*, [2016 WI 100](#), [372 Wis. 2d 460](#), [888 N.W.2d 584](#), [14-2536](#).

The common law exception to disclosure for a prosecutor's case files, discussed in *Foust*, [165 Wis. 2d 429](#) (1991), applied in this case. Under *Foust*, a district attorney's closed files were not subject to the public records law based on the broad discretion a district attorney has in charging, the confidential nature of the contents of a file, and the threat disclosure poses to the orderly administration of justice. In this case, the prosecutor in charge of a sex extortion case discussed his thought processes for charging and walked through the case in a recorded educational presentation for prosecutors. The presentation was in great respect the oral equivalent of a prosecutor's closed case file. *Democratic Party of Wisconsin v. Department of Justice*, [2016 WI 100](#), [372 Wis. 2d 460](#), [888 N.W.2d 584](#), [14-2536](#).

A video requested in this case discussed the victims of a sex extortion case and the devastating impact of those crimes. Disclosing the recording would have reignited interest in the case and allowed identification in the same way it occurred the first time around. There was sufficient factual detail in the recording to easily connect the dots to identify the dozens of victims, who would have been re-traumatized should this case have resulted in a repeat exposure of their identities almost a decade after those events occurred. Disclosure leading to revictimization would have run afoul of Wisconsin's constitutional commitment to treating victims with "fairness, dignity and respect for their privacy" under [article I, section 9m](#), of the Wisconsin Constitution. *Democratic Party of Wisconsin v. Department of Justice*, [2016 WI 100](#), [372 Wis. 2d 460](#), [888 N.W.2d 584](#), [14-2536](#).

When the Wisconsin Employment Relations Commission (WERC) had received detailed and specific complaints of past coercion in other certification elections, a WERC employee lawfully performed the balancing test in concluding that the public interest in elections free from voter intimidation and coercion outweighed the public interest in favor of openness of public records. The public interest in certification elections that are free from intimidation and coercion is evidenced by the requirement that those elections be conducted by secret ballot and free from prohibited practices. The public interest in elections that are free from intimidation and coercion outweighs the public interest in favor of open public records under the circumstances presented in this case. *Madison Teachers, Inc. v. Scott*, [2018 WI 11](#), [379 Wis. 2d 439](#), [906 N.W.2d 436](#), [16-2214](#).

Sub. (3) (a) defers to other statutes that specifically authorize records custodians to charge fees for records that differ from the fees that the open records law itself authorizes. Section 343.24 (2m) grants the Department of Transportation (DOT) authority to charge parties for inspecting accident reports. Therefore, the requester was not entitled to free access to DOT's database because both Wisconsin open records law and statutory authority permit DOT to charge access fees for certain records and because case law has held that the right to access records does not extend to the right to access databases. *Media Placement Services, Inc. v. DOT*, [2018 WI App 34](#), [382 Wis. 2d 191](#), [913 N.W.2d 224](#), [17-0791](#).

The second sentence in sub. (1) (b) only applies to a requester who appears in person. *Leuders v. Krug*, [2019 WI App 36](#), [388 Wis. 2d 147](#), [931 N.W.2d 898](#), [18-0431](#).

When a requester requests records in electronic form, providing access to only paper printouts of those records is not a satisfactory response to the request. *Leuders v. Krug*, [2019 WI App 36](#), [388 Wis. 2d 147](#), [931 N.W.2d 898](#), [18-0431](#).

In this case, the circuit court did not erroneously exercise its discretion when it ordered the plaintiff parents, if they wished to proceed, to file under seal and pursuant to a protective order an amended complaint stating their identities such that their identities would be disclosed only to the court and the attorneys for the litigants. *Doe v. Madison Metropolitan School District*, [2021 WI App 60](#), [399 Wis. 2d 102](#), [963 N.W.2d 823](#), [20-1032](#).

A records custodian must determine whether the surrounding factual circumstances create an exceptional case not governed by the strong presumption of openness. An exceptional case exists when the facts are such that the public policy interest favoring nondisclosure outweighs the public policy interests favoring disclosure. The public has a strong interest in being informed about its

public officials and whether those officials have engaged in misconduct. Those interests cannot be outweighed simply by the fact that an official played a minor role in an improper search. *Milwaukee Deputy Sheriffs' Ass'n v. County of Milwaukee County Clerk*, [2021 WI App 80](#), [399 Wis. 2d 769](#), [967 N.W.2d 185](#), [20-2028](#).

A custodian may not require a requester to pay the cost of an unrequested certification. Unless the fee for copies of records is established by law, a custodian may not charge more than the actual and direct cost of reproduction. [72 Atty. Gen. 36](#).

Copying fees, but not location fees, may be imposed on a requester for the cost of a computer run. [72 Atty. Gen. 68](#).

Discussing the fee for copying public records. [72 Atty. Gen. 150](#).

Public records relating to employee grievances are not generally exempt from disclosure. Nondisclosure must be justified on a case-by-case basis. [73 Atty. Gen. 20](#).

Discussing the disclosure of an employee's birthdate, sex, ethnic heritage, and handicapped status. [73 Atty. Gen. 26](#).

The Department of Regulation and Licensing may refuse to disclose records relating to complaints against health care professionals while the matters are merely "under investigation." Good faith disclosure of the records will not expose the custodian to liability for damages. Prospective continuing requests for records are not contemplated by public records law. [73 Atty. Gen. 37](#).

Prosecutors' case files are exempt from disclosure. [74 Atty. Gen. 4](#).

Discussing the relationship between the public records law and pledges of confidentiality in settlement agreements. [74 Atty. Gen. 14](#).

Discussing a computerized compilation of bibliographic records in relation to copyright law. A requester is entitled to a copy of a computer tape or a printout of information on the tape. [75 Atty. Gen. 133](#).

Ambulance records relating to medical history, condition, or treatment are confidential while other ambulance call records are subject to disclosure under the public records law. [78 Atty. Gen. 71](#).

Courts are likely to require disclosure of legislators' mailing and distribution lists absent a factual showing that the public interest in withholding the records outweighs the public interest in their release. [OAG 2-03](#).

If a legislator custodian decides that a mailing or distribution list compiled and used for official purposes must be released under the public records statute, the persons whose names, addresses, or telephone numbers are contained on the list are not entitled to notice and the opportunity to challenge the decision prior to release of the record. [OAG 2-03](#).

Access Denied: How *Woznicki v. Erickson* Reversed the Statutory Presumption of Openness in the Wisconsin Open Records Law. Munro. 2002 WLR 1197.

19.356 Notice to record subject; right of action.

- (1) Except as authorized in this section or as otherwise provided by statute, no authority is required to notify a record subject prior to providing to a requester access to a record containing information pertaining to that record subject, and no person is entitled to judicial review of the decision of an authority to provide a requester with access to a record.
- (2)
 - (a) Except as provided in pars. (b) to (d) and as otherwise authorized or required by statute, if an authority decides under s. [19.35](#) to permit access to a record specified in this paragraph, the authority shall, before permitting access and within 3 days after making the decision to permit access, serve written notice of that decision on any record subject to whom the record pertains, either by certified mail or by personally serving the notice on the record subject. The notice shall briefly describe the requested record and include a description of the rights of the record subject under subs. (3) and (4). This paragraph applies only to the following records:
 1. A record containing information relating to an employee that is created or kept by the authority and that is the result of an investigation into a disciplinary matter involving the employee or possible employment-related violation by the employee of a statute, ordinance, rule, regulation, or policy of the employee's employer.
 2. A record obtained by the authority through a subpoena or search warrant.
 3. A record prepared by an employer other than an authority, if that record contains information relating to an employee of that employer, unless the employee authorizes the authority to provide access to that information.
 - (b) Paragraph (a) does not apply to an authority who provides access to a record pertaining to an employee to the employee who is the subject of the record or to his or her representative to the extent required under s. [103.13](#) or to a recognized or certified collective bargaining representative to the extent required to fulfill a duty to bargain or pursuant to a collective bargaining agreement under ch. [111](#).
 - (c) Paragraph (a) does not apply to access to a record produced in relation to a function specified in s. [106.54](#) or [230.45](#) or subch. [II of ch. 111](#) if the record is provided by an authority having responsibility for that function.
 - (d) Paragraph (a) does not apply to the transfer of a record by the administrator of an educational agency to the state superintendent of public instruction under s. [115.31 \(3\) \(a\)](#).
- (3) Within 5 days after receipt of a notice under sub. (2) (a), a record subject may provide written notification to the authority of his or her intent to seek a court order restraining the authority from providing access to the

requested record.

- (4) Within 10 days after receipt of a notice under sub. (2) (a), a record subject may commence an action seeking a court order to restrain the authority from providing access to the requested record. If a record subject commences such an action, the record subject shall name the authority as a defendant. Notwithstanding s. 803.09, the requester may intervene in the action as a matter of right. If the requester does not intervene in the action, the authority shall notify the requester of the results of the proceedings under this subsection and sub. (5).
- (5) An authority shall not provide access to a requested record within 12 days of sending a notice pertaining to that record under sub. (2) (a). In addition, if the record subject commences an action under sub. (4), the authority shall not provide access to the requested record during pendency of the action. If the record subject appeals or petitions for review of a decision of the court or the time for appeal or petition for review of a decision adverse to the record subject has not expired, the authority shall not provide access to the requested record until any appeal is decided, until the period for appealing or petitioning for review expires, until a petition for review is denied, or until the authority receives written notice from the record subject that an appeal or petition for review will not be filed, whichever occurs first.
- (6) The court, in an action commenced under sub. (4), may restrain the authority from providing access to the requested record. The court shall apply substantive common law principles construing the right to inspect, copy, or receive copies of records in making its decision.
- (7) The court, in an action commenced under sub. (4), shall issue a decision within 10 days after the filing of the summons and complaint and proof of service of the summons and complaint upon the defendant, unless a party demonstrates cause for extension of this period. In any event, the court shall issue a decision within 30 days after those filings are complete.
- (8) If a party appeals a decision of the court under sub. (7), the court of appeals shall grant precedence to the appeal over all other matters not accorded similar precedence by law. An appeal shall be taken within the time period specified in s. 808.04 (1m).
- (9)
 - (a) Except as otherwise authorized or required by statute, if an authority decides under s. 19.35 to permit access to a record containing information relating to a record subject who is an officer or employee of the authority holding a local public office or a state public office, the authority shall, before permitting access and within 3 days after making the decision to permit access, serve written notice of that decision on the record subject, either by certified mail or by personally serving the notice on the record subject. The notice shall briefly describe the requested record and include a description of the rights of the record subject under par. (b).
 - (b) Within 5 days after receipt of a notice under par. (a), a record subject may augment the record to be released with written comments and documentation selected by the record subject. Except as otherwise authorized or required by statute, the authority under par. (a) shall release the record as augmented by the record subject.

History: 2003 a. 47; 2011 a. 84.

NOTE: 2003 Wis. Act 47, which creates this section, contains extensive explanatory notes.

The right of a public employee to obtain de novo judicial review of an authority's decision to allow public access to certain records granted by this section is no broader than the common law right previously recognized. It is not a right to prevent disclosure solely on the basis of a public employee's privacy and reputational interests. The public's interest in not injuring the reputations of public employees must be given due consideration, but it is not controlling. *Local 2489 v. Rock County*, 2004 WI App 210, 277 Wis. 2d 208, 689 N.W.2d 644, 03-3101.

An intervenor as of right under the statute is "a party" under sub. (8) whose appeal is subject to the "time period specified in s. 808.04 (1m)." The only time period referenced in s. 808.04 (1m) is 20 days. *Zellner v. Herrick*, 2009 WI 80, 319 Wis. 2d 532, 770 N.W.2d 305, 07-2584.

This section does not set forth the only course of action that the subject of a disclosure may engage in to prevent disclosure. Subs. (3) and (4) state that "a record subject may commence an action." The plain language of the statute in no way discourages the subject of a records request from engaging in less litigious means to prevent disclosure nor does it prevent a records custodian from changing its mind. *State ex rel. Ardell v. Milwaukee Board of School Directors*, 2014 WI App 66, 354 Wis. 2d 471, 849 N.W.2d 894, 13-1650.

For challenges to decisions by authorities under the public records law to release records, as opposed to decisions by authorities to withhold records, the legislature has precluded judicial review except in defined circumstances. The right-of-action provision under sub. (1) unambiguously bars any person from seeking judicial review of an authority's decision to release a record unless: 1) a provision within this section authorizes judicial review; or 2) a statute other than this section authorizes judicial review. *Teague v. Van Hollen*, 2016 WI App 20, 367 Wis. 2d 547, 877 N.W.2d 379, 14-2360.

A district attorney is not an "employee" as defined in s. 19.32 (1b) and as used in sub. (2) (a) 1. A district attorney may not maintain an

action under sub. (4) to restrain an authority from providing access to requested records when the requested records do not fall within the sub. (2) (a) 1. exception to the general rule that a “record subject” is not entitled to notice or pre-release judicial review of the decision of an authority to provide access to records pertaining to that record subject. *Moustakis v. Department of Justice*, [2016 WI 42](#), [368 Wis. 2d 677](#), [880 N.W.2d 142](#), [14-1853](#).

Sub. (5) applies to an “authority” and does not preclude a court from providing limited access to the requested records on an attorney’s eyes-only basis for purposes of briefing a case before the court. Section 19.37 (1) (a), which applies when a party seeks release of records in an action for mandamus, provides guidance. Whether the action seeks release or an injunction, the need for limited review by a party who intervenes by right, in order to ensure fair and fully informed adjudication of the dispute, is equally applicable. *Hagen v. Board of Regents*, [2018 WI App 43](#), [383 Wis. 2d 567](#), [916 N.W.2d 198](#), [17-2058](#).

Sub. (2) (a) 1. must be interpreted as requiring notification when an authority proposes to release records in its possession that are the result of an investigation by an employer into a disciplinary or other employment matter involving an employee, but not when there has been an investigation of possible employment-related violation by the employee and the investigation is conducted by some entity other than the employee’s employer. [OAG 1-06](#).

Sub. (2) (a) 2. is unambiguous. If an authority has obtained a record through a subpoena or a search warrant, it must provide the requisite notice before releasing the records. The duty to notify, however, does not require notice to every record subject who happens to be named in the subpoena or search warrant records. Under sub. (2) (a), DCI must serve written notice of the decision to release the record to any record subject to whom the record pertains. [OAG 1-06](#).

To the extent any requested records proposed to be released are records prepared by a private employer and those records contain information pertaining to one of the private employer’s employees, sub. (2) (a) 3. does not allow release of the information without obtaining authorization from the individual employee. [OAG 1-06](#).

Sub. (9) does not require advance notification and a five-day delay before releasing a record that mentions the name of a person holding state or local public office in any way. A record mentioning the name of a public official does not necessarily relate to that public official within the meaning of sub. (9) (a). Sub. (9) is not limited, however, to the specific categories of records enumerated in sub. (2) (a). [OAG 7-14](#).

The use of the phrase “is created” in sub. (2) (a) 1. implies that the status of the record subject should be consistent with when the record was created. Therefore, if the record subject is an employee at the time the record is created, he or she is entitled to notice even if the employee is no longer employed by the authority at the time the authority receives the request. [OAG 2-18](#).

Sub. (9) does not apply when a record contains information relating to a record subject who is an officer or employee who formerly held a local or state public office. The provision only applies when an officer or employee of the authority currently holds a local or state public office. [OAG 2-18](#).

Should service fail in the manner specifically required in subs. (2) (a) 1. and (9) (a), after reasonable diligence, the alternatives to personal service in s. 801.11 may be used to provide notice to record subjects. Section 801.11 (1) appears reasonable and consistent with the public records law’s purposes with the exception of the publication requirement. An authority may leave a copy of the notice at the record subject’s usual place of abode in a manner substantially similar to s. 801.11 (1) (b). If the record subject’s usual place of abode cannot be located after reasonable diligence, an authority may leave a copy of the notice at the record subject’s usual place of business in a matter substantially similar to s. 801.11 (4) (b). If, after reasonable diligence, the authority is unable to effectuate service according to the public records law’s provisions and other alternatives to personal service that are consistent with the public records law’s purpose, the authority may release the records. [OAG 2-18](#).

19.36 Limitations upon access and withholding.

- (1) APPLICATION OF OTHER LAWS.** Any record which is specifically exempted from disclosure by state or federal law or authorized to be exempted from disclosure by state law is exempt from disclosure under s. [19.35 \(1\)](#), except that any portion of that record which contains public information is open to public inspection as provided in sub. [\(6\)](#).
- (2) LAW ENFORCEMENT RECORDS.** Except as otherwise provided by law, whenever federal law or regulations require or as a condition to receipt of aids by this state require that any record relating to investigative information obtained for law enforcement purposes be withheld from public access, then that information is exempt from disclosure under s. [19.35 \(1\)](#).
- (3) CONTRACTORS’ RECORDS.** Each authority shall make available for inspection and copying under s. [19.35 \(1\)](#) any record produced or collected under a contract entered into by the authority with a person other than an authority to the same extent as if the record were maintained by the authority. This subsection does not apply to the inspection or copying of a record under s. [19.35 \(1\) \(am\)](#).
- (4) COMPUTER PROGRAMS AND DATA.** A computer program, as defined in s. [16.971 \(4\) \(c\)](#), is not subject to examination or copying under s. [19.35 \(1\)](#), but the material used as input for a computer program or the material produced as a product of the computer program is subject to the right of examination and copying, except as otherwise provided in s. [19.35](#) or this section.
- (5) TRADE SECRETS.** An authority may withhold access to any record or portion of a record containing information qualifying as a trade secret as defined in s. [134.90 \(1\) \(c\)](#).
- (6) SEPARATION OF INFORMATION.** If a record contains information that is subject to disclosure under s. [19.35](#)

(1) (a) or (am) and information that is not subject to such disclosure, the authority having custody of the record shall provide the information that is subject to disclosure and delete the information that is not subject to disclosure from the record before release.

(7) IDENTITIES OF APPLICANTS FOR PUBLIC POSITIONS.

(a) In this subsection:

1. "Final candidate" means each applicant who is seriously considered for appointment or whose name is certified for appointment, and whose name is submitted for final consideration to an authority for appointment, to any of the following:
 - a. A state position that is not a position in the classified service and that is not a position in the University of Wisconsin System.
 - b. A local public office.
 - c. The position of president, vice president, or senior vice president of the University of Wisconsin System; the position of chancellor of an institution; or the position of the vice chancellor who serves as deputy at each institution.
 2. "Final candidate" includes all of the following, but only with respect to the offices and positions described under subd. 1. a. and b.:
 - a. Whenever there are at least 5 applicants for an office or position, each of the 5 applicants who are considered the most qualified for the office or position by an authority.
 - b. Whenever there are fewer than 5 applicants for an office or position, each applicant.
 - c. Whenever an appointment is to be made from a group of more than 5 applicants considered the most qualified for an office or position by an authority, each applicant in that group.
 3. "Institution" has the meaning given in s. 36.05 (9).
- (b)** Every applicant for a position with any authority may indicate in writing to the authority that the applicant does not wish the authority to reveal his or her identity. Except with respect to an applicant whose name is certified for appointment to a position in the state classified service or a final candidate, if an applicant makes such an indication in writing, the authority shall not provide access to any record related to the application that may reveal the identity of the applicant.

(8) IDENTITIES OF LAW ENFORCEMENT INFORMANTS.

(a) In this subsection:

1. "Informant" means an individual who requests confidentiality from a law enforcement agency in conjunction with providing information to that agency or, pursuant to an express promise of confidentiality by a law enforcement agency or under circumstances in which a promise of confidentiality would reasonably be implied, provides information to a law enforcement agency or, is working with a law enforcement agency to obtain information, related in any case to any of the following:
 - a. Another person who the individual or the law enforcement agency suspects has violated, is violating or will violate a federal law, a law of any state or an ordinance of any local government.
 - b. Past, present or future activities that the individual or law enforcement agency believes may violate a federal law, a law of any state or an ordinance of any local government.
 2. "Law enforcement agency" has the meaning given in s. 165.83 (1) (b), and includes the department of corrections.
- (b)** If an authority that is a law enforcement agency receives a request to inspect or copy a record or portion of a record under s. 19.35 (1) (a) that contains specific information including but not limited to a name, address, telephone number, voice recording or handwriting sample which, if disclosed, would identify an informant, the authority shall delete the portion of the record in which the information is contained or, if no portion of the record can be inspected or copied without identifying the informant, shall withhold the record unless the legal custodian of the record, designated under s. 19.33, makes a determination, at the time that the request is made, that the public interest in allowing a person to inspect, copy or receive a copy of such identifying information outweighs the harm done to the public interest by providing such access.

- (9) RECORDS OF PLANS OR SPECIFICATIONS FOR STATE BUILDINGS.** Records containing plans or specifications for any state-owned or state-leased building, structure or facility or any proposed state-owned or state-leased building, structure or facility are not subject to the right of inspection or copying under s. 19.35 (1) except as the department of administration otherwise provides by rule.

- (10) EMPLOYEE PERSONNEL RECORDS. Unless access is specifically authorized or required by statute, an authority shall not provide access under s. [19.35 \(1\)](#) to records containing the following information, except to an employee or the employee's representative to the extent required under s. [103.13](#) or to a recognized or certified collective bargaining representative to the extent required to fulfill a duty to bargain under ch. [111](#) or pursuant to a collective bargaining agreement under ch. [111](#):
- (a) Information maintained, prepared, or provided by an employer concerning the home address, home electronic mail address, home telephone number, or social security number of an employee, unless the employee authorizes the authority to provide access to such information.
 - (b) Information relating to the current investigation of a possible criminal offense or possible misconduct connected with employment by an employee prior to disposition of the investigation.
 - (c) Information pertaining to an employee's employment examination, except an examination score if access to that score is not otherwise prohibited.
 - (d) Information relating to one or more specific employees that is used by an authority or by the employer of the employees for staff management planning, including performance evaluations, judgments, or recommendations concerning future salary adjustments or other wage treatments, management bonus plans, promotions, job assignments, letters of reference, or other comments or ratings relating to employees.
- (11) RECORDS OF AN INDIVIDUAL HOLDING A LOCAL PUBLIC OFFICE OR A STATE PUBLIC OFFICE. Unless access is specifically authorized or required by statute, an authority shall not provide access under s. [19.35 \(1\)](#) to records, except to an individual to the extent required under s. [103.13](#), containing information maintained, prepared, or provided by an employer concerning the home address, home electronic mail address, home telephone number, or social security number of an individual who holds a local public office or a state public office, unless the individual authorizes the authority to provide access to such information. This subsection does not apply to the home address of an individual who holds an elective public office or to the home address of an individual who, as a condition of employment, is required to reside in a specified location.
- (13) FINANCIAL IDENTIFYING INFORMATION. An authority shall not provide access to personally identifiable information that contains an individual's account or customer number with a financial institution, as defined in s. [134.97 \(1\) \(b\)](#), including credit card numbers, debit card numbers, checking account numbers, or draft account numbers, unless specifically required by law.

History: [1981 c. 335](#); [1985 a. 236](#); [1991 a. 39, 269, 317](#); [1993 a. 93](#); [1995 a. 27](#); [2001 a. 16](#); [2003 a. 33, 47](#); [2005 a. 59, 253](#); [2007 a. 97](#); [2009 a. 28](#); [2011 a. 32](#); [2013 a. 171](#); [2015 a. 55](#); [2017 a. 59](#).

NOTE: [2003 Wis. Act 47](#), which affects this section, contains extensive explanatory notes.

A settlement agreement containing a pledge of confidentiality and kept in the possession of a school district's attorney was a public record subject to public access under sub. (3). *Journal/Sentinel v. School Board*, [186 Wis. 2d 443](#), [521 N.W.2d 165](#) (Ct. App. 1994). Sub. (3) does not require providing access to payroll records of subcontractors of a prime contractor of a public construction project. *Building & Construction Trades Council v. Waunakee Community School District*, [221 Wis. 2d 575](#), [585 N.W.2d 726](#) (Ct. App. 1999), [97-3282](#).

The ultimate purchasers of municipal bonds from the bond's underwriter, whose only obligation was to purchase the bonds, were not contractor's records under sub. (3). *Machotka v. Village of West Salem*, [2000 WI App 43](#), [233 Wis. 2d 106](#), [607 N.W.2d 319](#), [99-1163](#).

Production of an analog audio tape was insufficient under sub. (4) when the requester asked for examination and copying of the original digital audio tape. *State ex rel. Milwaukee Police Ass'n v. Jones*, [2000 WI App 146](#), [237 Wis. 2d 840](#), [615 N.W.2d 190](#), [98-3629](#).

Requests for university admissions records focusing on test scores, class rank, grade point average, race, gender, ethnicity, and socio-economic background were not requests for personally identifiable information and release was not barred by federal law or public policy. That the requests would require the university to redact information from thousands of documents under sub. (6) did not essentially require the university to create new records and, as such, did not provide grounds for denying the request under s. 19.35 (1) (L). *Osborn v. Board of Regents*, [2002 WI 83](#), [254 Wis. 2d 266](#), [647 N.W.2d 158](#), [00-2861](#).

"Investigation" in sub. (10) (b) includes only that conducted by the public authority itself as a prelude to possible employee disciplinary action. An investigation achieves its "disposition" when the authority acts to impose discipline on an employee as a result of the investigation, regardless of whether the employee elects to pursue grievance arbitration or another review mechanism that may be available. *Local 2489 v. Rock County*, [2004 WI App 210](#), [277 Wis. 2d 208](#), [689 N.W.2d 644](#), [03-3101](#). See also *Zellner v. Cedarburg School District*, [2007 WI 53](#), [300 Wis. 2d 290](#), [731 N.W.2d 240](#), [06-1143](#).

Misconduct investigation and disciplinary records are not excepted from public disclosure under sub. (10) (d). Sub. (10) (b) is the only exception to the open records law relating to investigations of possible employee misconduct. *Kroepflin v. DNR*, [2006 WI App 227](#), [297 Wis. 2d 254](#), [725 N.W.2d 286](#), [05-1093](#).

Municipalities may not avoid liability under the open records law by contracting with independent contractor assessors for the collection, maintenance, and custody of property assessment records and then directing any requester of those records to the independent contractor assessors. *WIREdata, Inc. v. Village of Sussex*, [2008 WI 69](#), [310 Wis. 2d 397](#), [751 N.W.2d 736](#), [05-1473](#).

When requests to municipalities were for electronic/digital copies of assessment records, "PDF" files were "electronic/digital" files despite the fact that the files did not have all the characteristics that the requester wished. It is not required that requesters must be given access to an authority's electronic databases to examine them, extract information from them, or copy them. Allowing requesters such direct access to the electronic databases of an authority would pose substantial risks. *WIREdata, Inc. v. Village of Sussex*, [2008 WI 69](#), [310 Wis. 2d 397](#), [751 N.W.2d 736](#), [05-1473](#).

By procuring a liability insurance policy and allowing the insurance company to retain counsel for it, the county in effect contracted with the law firm and created an attorney-client relationship. Because the liability insurance policy is the basis for the tripartite relationship between the county, insurance company, and law firm and is the basis for an attorney-client relationship between the law firm and county, the invoices produced or collected during the course of the law firm's representation of the county come under the liability insurance policy, and sub. (3) governs the accessibility of the invoices. *Juneau County Star-Times v. Juneau County*, [2013 WI 4](#), [345 Wis. 2d 122](#), [824 N.W.2d 457](#), [10-2313](#).

Responding to a public records request is not a "function" of the police department for purposes of the "agency functions" exception to the federal Driver's Privacy Protection Act, which allows disclosure of personal information from state motor vehicle records for use by a government agency in carrying out its functions. *New Richmond News v. City of New Richmond*, [2016 WI App 43](#), [370 Wis. 2d 75](#), [881 N.W.2d 339](#), [14-1938](#).

Under subs. (1) and (2), any record specifically exempted from disclosure pursuant to federal law also is exempt from disclosure under Wisconsin law. Federal regulations preclude release of any information pertaining to individuals detained in a state or local facility, and federal immigration detainer (I-247) forms contain only such information. Read together, subs. (1) and (2) and 8 CFR 236.6 exempt I-247 forms from release under Wisconsin public records law, and the forms are not subject to common-law exemptions or the public interest balancing test. *Voces de la Frontera, Inc. v. Clarke*, [2017 WI 16](#), [373 Wis. 2d 348](#), [891 N.W.2d 803](#), [15-1152](#).

Separation costs must be borne by the agency. [72 Atty. Gen. 99](#).

Discussing a computerized compilation of bibliographic records in relation to copyright law. A requester is entitled to a copy of a computer tape or a printout of information on the tape. [75 Atty. Gen. 133](#).

An exemption to the federal Freedom of Information Act was not incorporated under sub. (1). [77 Atty. Gen. 20](#).

Former sub. (7), 2011 stats., is an exception to the public records law and should be narrowly construed. In former sub. (7), 2011 stats., "applicant" and "candidate" are synonymous. "Final candidates" are the five most qualified unless there are less than five applicants, in which case all are final candidates. [81 Atty. Gen. 37](#).

Public Access to Law Enforcement Records in Wisconsin. Fitzgerald. 68 MLR 705 (1985).

19.37 Enforcement and penalties.

- (1) MANDAMUS.** If an authority withholds a record or a part of a record or delays granting access to a record or part of a record after a written request for disclosure is made, the requester may pursue either, or both, of the alternatives under pars. [\(a\)](#) and [\(b\)](#).
- (a)** The requester may bring an action for mandamus asking a court to order release of the record. The court may permit the parties or their attorneys to have access to the requested record under restrictions or protective orders as the court deems appropriate.
- (b)** The requester may, in writing, request the district attorney of the county where the record is found, or request the attorney general, to bring an action for mandamus asking a court to order release of the record to the requester. The district attorney or attorney general may bring such an action.
- (1m) TIME FOR COMMENCING ACTION.** No action for mandamus under sub. [\(1\)](#) to challenge the denial of a request for access to a record or part of a record may be commenced by any committed or incarcerated person later than 90 days after the date that the request is denied by the authority having custody of the record or part of the record.
- (1n) NOTICE OF CLAIM.** Sections [893.80](#) and [893.82](#) do not apply to actions commenced under this section.
- (2) COSTS, FEES AND DAMAGES.**
 - (a)** Except as provided in this paragraph, the court shall award reasonable attorney fees, damages of not less than \$100, and other actual costs to the requester if the requester prevails in whole or in substantial part in any action filed under sub. [\(1\)](#) relating to access to a record or part of a record under s. [19.35 \(1\) \(a\)](#). If the requester is a committed or incarcerated person, the requester is not entitled to any minimum amount of damages, but the court may award damages. Costs and fees shall be paid by the authority affected or the unit of government of which it is a part, or by the unit of government by which the legal custodian under s. [19.33](#) is employed and may not become a personal liability of any public official.
 - (b)** In any action filed under sub. [\(1\)](#) relating to access to a record or part of a record under s. [19.35 \(1\) \(am\)](#), if the court finds that the authority acted in a willful or intentional manner, the court shall award the individual actual damages sustained by the individual as a consequence of the failure.
 - (3) PUNITIVE DAMAGES.** If a court finds that an authority or legal custodian under s. [19.33](#) has arbitrarily and capriciously denied or delayed response to a request or charged excessive fees, the court may award punitive damages to the requester.

- (4) PENALTY. Any authority which or legal custodian under s. [19.33](#) who arbitrarily and capriciously denies or delays response to a request or charges excessive fees may be required to forfeit not more than \$1,000. Forfeitures under this section shall be enforced by action on behalf of the state by the attorney general or by the district attorney of any county where a violation occurs. In actions brought by the attorney general, the court shall award any forfeiture recovered together with reasonable costs to the state; and in actions brought by the district attorney, the court shall award any forfeiture recovered together with reasonable costs to the county.

History: [1981 c. 335, 391](#); [1991 a. 269 s. 43d](#); [1995 a. 158](#); [1997 a. 94](#).

A party seeking fees under sub. (2) must show that the prosecution of an action could reasonably be regarded as necessary to obtain the information and that a "causal nexus" exists between that action and the agency's surrender of the information. *State ex rel. Vaughan v. Faust*, [143 Wis. 2d 868](#), [422 N.W.2d 898](#) (Ct. App. 1988). But see *Friends of Frame Park, U.A. v. City of Waukesha*, [2020 WI App 61](#), [394 Wis. 2d 387](#), [950 N.W.2d 831](#), [19-0096](#).

If an agency exercises due diligence but is unable to respond timely to a records request, the plaintiff must show that a mandamus action was necessary to secure the records release to qualify for an award of fees and costs under sub. (2). *Racine Education Ass'n v. Racine Board of Education*, [145 Wis. 2d 518](#), [427 N.W.2d 414](#) (Ct. App. 1988). But see *Friends of Frame Park, U.A. v. City of Waukesha*, [2020 WI App 61](#), [394 Wis. 2d 387](#), [950 N.W.2d 831](#), [19-0096](#).

Assuming sub. (1) (a) applies before mandamus is issued, the trial court retains discretion to refuse counsel's participation in an in camera inspection. *Milwaukee Journal v. Call*, [153 Wis. 2d 313](#), [450 N.W.2d 515](#) (Ct. App. 1989).

If the trial court has an incomplete knowledge of the contents of the public records sought, it must conduct an in camera inspection to determine what may be disclosed following a custodian's refusal. *State ex rel. Morke v. Donnelly*, [155 Wis. 2d 521](#), [455 N.W.2d 893](#) (1990).

A pro se litigant is not entitled to attorney fees. *State ex rel. Young v. Shaw*, [165 Wis. 2d 276](#), [477 N.W.2d 340](#) (Ct. App. 1991).

A favorable judgment or order is not a necessary condition precedent for finding that a party prevailed against an agency under sub. (2).

A causal nexus must be shown between the prosecution of the mandamus action and the release of the requested information. *Eau Claire Press Co. v. Gordon*, [176 Wis. 2d 154](#), [499 N.W.2d 918](#) (Ct. App. 1993). But see *Friends of Frame Park, U.A. v. City of Waukesha*, [2020 WI App 61](#), [394 Wis. 2d 387](#), [950 N.W.2d 831](#), [19-0096](#).

Actions brought under the open meetings and open records laws are exempt from the notice provisions of former s. 893.80 (1), 1993 stats. *Auchinleck v. Town of LaGrange*, [200 Wis. 2d 585](#), [547 N.W.2d 587](#) (1996), [94-2809](#).

An inmate's right to mandamus under this section is subject to s. 801.02 (7), which requires exhaustion of administrative remedies before an action may be commenced. *Moore v. Stahowiak*, [212 Wis. 2d 744](#), [569 N.W.2d 711](#) (Ct. App. 1997), [96-2547](#).

When requests are complex, municipalities should be afforded reasonable latitude in time for their responses. An authority should not be subjected to the burden and expense of a premature public records lawsuit while it is attempting in good faith to respond, or to determine how to respond, to a request. 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. *WIREdata, Inc. v. Village of Sussex*, [2008 WI 69](#), [310 Wis. 2d 397](#), [751 N.W.2d 736](#), [05-1473](#).

The legislature did not intend to allow a record requester to control or appeal a mandamus action brought by the attorney general under sub. (1) (b). Sub. (1) outlines two distinct courses of action when a records request is denied, dictates distinct courses of action, and prescribes different remedies for each course. Nothing suggests that a requester is hiring the attorney general as a sort of private counsel to proceed with the case or that the requester would be a named plaintiff in the case with the attorney general appearing as counsel of record when proceeding under sub. (1) (b). *State v. Zien*, [2008 WI App 153](#), [314 Wis. 2d 340](#), [761 N.W.2d 15](#), [07-1930](#).

This section unambiguously limits punitive damages claims under sub. (3) to mandamus actions. The mandamus court decides whether there is a violation and, if so, whether it caused actual damages. Then, the mandamus court may consider whether punitive damages should be awarded under sub. (3). *Capital Times Co. v. Doyle*, [2011 WI App 137](#), [337 Wis. 2d 544](#), [807 N.W.2d 666](#), [10-1687](#).

Under the broad terms of s. 51.30 (7), the confidentiality requirements created under s. 51.30 generally apply to "treatment records" in criminal not guilty by reason of insanity (NGI) cases. All conditional release plans in NGI cases are, by statutory definition, treatment records. They are "created in the course of providing services to individuals for mental illness," and thus should be deemed confidential. An order of placement in an NGI case is not a "treatment record." *La Crosse Tribune v. Circuit Court for La Crosse County*, [2012 WI App 42](#), [340 Wis. 2d 663](#), [814 N.W.2d 867](#), [10-3120](#).

The plaintiff newspaper argued that s. 19.88 (3), of the open meetings law, which requires "the motions and roll call votes of each meeting of a governmental body shall be recorded, preserved and open to public inspection," in turn, required the defendant commission to record and disclose the information the newspaper requested under the open records law. The newspaper could not seek relief under the public records law for the commission's alleged violation of the open meetings law and could not recover reasonable attorney fees, damages, and other actual costs under sub. (2) for an alleged violation of the open meetings law. *Journal Times v. City of Racine Board of Police & Fire Commissioners*, [2015 WI 56](#), [362 Wis. 2d 577](#), [866 N.W.2d 563](#), [13-1715](#).

A record custodian should not automatically be subject to potential liability under sub. (2) (a) for actively providing information, which it is not required to do in response to a public records request, to a requester when no record exists. While it might be a better course to inform a requester that no record exists, the language of the public records law does not specifically require such a response.

Journal Times v. City of Racine Board of Police & Fire Commissioners, [2015 WI 56](#), [362 Wis. 2d 577](#), [866 N.W.2d 563](#), [13-1715](#).

When litigation is pending and an authority releases a public record because a public records exception is no longer applicable, causation is not the appropriate inquiry for determining whether the requesting party has substantially prevailed under sub. (2) (a). Rather, the key consideration is whether the authority properly invoked the exception in the authority's initial decision to withhold release. A plaintiff with standing to seek a withheld record in a mandamus action should generally be considered to have

“substantially prevailed” when the plaintiff demonstrates a violation of s. 19.35 (4) (a); that is, an unreasonable delay caused by the improper reliance on an exception. *Friends of Frame Park, U.A. v. City of Waukesha*, [2020 WI App 61](#), [394 Wis. 2d 387](#), [950 N.W.2d 831](#), [19-0096](#).

A mandamus litigant has prevailed in substantial part, and thus is entitled to fees, when the requester obtains access to improperly withheld public records through a judicial order. That a requester may have succeeded in obtaining access to some but not all of the records is an issue subject to the court's discretion in considering the amount of reasonable fees to be awarded. Under this section, the analysis of the extent of access goes to the discretionary award of reasonable fees, not the threshold determination of eligibility. *Meinecke v. Thyges*, [2021 WI App 58](#), [399 Wis. 2d 1](#), [963 N.W.2d 816](#), [20-0338](#).

Actual damages are the liability of the agency. Punitive damages and forfeitures can be the liability of either the agency or the legal custodian, or both. Section 895.46 (1) (a) probably provides indemnification for punitive damages assessed against a custodian, but not for forfeitures. [72 Atty. Gen. 99](#).

19.39 Interpretation by attorney general. Any person may request advice from the attorney general as to the applicability of this subchapter under any circumstances. The attorney general may respond to such a request.

History: [1981 c. 335](#).

-:- NOTES -:-