WASSA SPRING WORKSHOP

PUBLIC RECORDS, PERSONNEL RECORDS AND RECORDS RETENTION

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Presented by:

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ABOUT DAVIS & KUELTHAU, S.C.

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

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Areas of Experience

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

Professional and Community Involvement

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

- Contributing Author, "Public Sector Labor Law Relations in Wisconsin"
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- J.D., University of Wisconsin-Madison, 1985
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Admitted to Practice

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

THE WISCONSIN PUBLIC RECORDS LAW

I. POLICY

Access to public records is presumed.

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

II. DEFINITIONS

A. Authority

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

B. Employee

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

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

D. Record

Any material on which written, drawn, printed, spoken, visual or electromagnetic information is recorded or preserved, regardless of physical form or characteristics, which has been created or is being kept by an authority. "Record" includes, but is not limited to, handwritten, typed or printed pages, maps, charts, photographs, films, recordings, tapes (including computer tapes), computer printouts and optical disks. Wis. Stat. § 19.32(2).

The term "Record" does not include:

1. Drafts, notes, preliminary computations and like materials prepared for the originator's personal use or prepared by the originator in the name of a person for whom the originator is working;

2. Materials which are purely the personal property of the custodian and have no relation to his or her office;

3. Materials to which access is limited by copyright, patent or bequest; and

4. Published materials in the possession of an authority other than a public library which are available for sale, or which are available for inspection at a public library.

E. Record Subject

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

III. LEGAL CUSTODIAN

A. An elected official is the legal custodian of his or her records and the records of his or her office, but may designate an employee of his or her staff to act as the legal custodian. Wis. Stat. § 19.33(1).

B. The chairperson of a committee of elected officials or the designee of the chairperson, is the legal custodian of the records of the committee. Wis. Stat. § 19.33(2).

C. When a legal custodian is not otherwise identified by law, a governmental entity must designate in writing one or more positions occupied by an officer or employee of the governmental entity as a legal custodian to fulfill the duties of the governmental entity.

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

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

IV. PROCEDURAL INFORMATION

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

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

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

V. ACCESS TO RECORDS AND FEES

A. Access To Records

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

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

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

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

1. Any record containing personally identifiable information that is collected or maintained in connection with a complaint, investigation or other circumstances that may lead to an enforcement action, administrative proceeding, arbitration proceeding or court proceeding, or any such record that is collected or maintained in connection with such an action or proceeding.

2. Any record containing personally identifiable information that, if disclosed would do any of the following:

    a. Endanger an individual's life or safety.

    b. Identify a confidential informant.

    c. Endanger the security of any state correctional institution, jail, secured correctional facility, secured child caring institution, mental health institute, center for the developmentally disabled, or the population or staff of any of these institutions, facilities or jails.

3. Any record that is part of a records series that is not indexed, arranged or automated in a way that the record can be retrieved by the governmental entity maintaining the records series by use of an individual's name, address or other identifier.

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

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

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

The Public Records Law does not require a governmental entity to create a new record by extracting information from existing records and compiling the information in a new format. Wis. Stat. § 19.35(1)(L).

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

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

B. Fees

1. A governmental entity may impose a fee upon the requestor of a copy of a record which may not exceed the actual, necessary and direct costs of reproduction and transcription of the record, unless the fee is otherwise specifically established or authorized to be established by law. Wis. Stat. § 19.35(3)(a).

2. Except as otherwise provided by law or as authorized to be prescribed by law, a governmental entity may impose a fee upon a requestor for locating a record, not exceeding the actual, necessary and direct costs of location, if the cost is $50 or more. Wis. Stat. § 19.35(3)(c).

3. A governmental entity may impose a fee upon a requestor for the actual, necessary and direct cost of mailing or shipping of any copy or photograph of a record which is mailed or shipped to the requestor. Wis. Stat. § 19.35(3)(d).

4. A governmental entity may provide copies of a record without charge or at a reduced charge where the authority determines that waiver or reduction of the fee is in the public interest. Wis. Stat. § 19.35(3)(e).

5. A governmental entity may require payment by a requestor of any fee or fees imposed under this subsection if the total amount exceeds $5. Wis. Stat. § 19.35(3)(f).

6. Costs of a computer run may be imposed on a requester as a copying fee. Wis. Stat. § 19.35(1)(e) and (3)(a); 72 Op. Att'y Gen. 68, 70 (1983). An authority may charge a requester for any computer programming expenses required to respond to a request. *WIREdata II*, 2008 WI 69, ¶ 107.

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

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

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

VI. TIME FOR COMPLIANCE

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

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

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

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

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

C. The need to restrict access must exist at the time the request is made for the record.

D. Even if the record falls within an exemption category, the custodian must make a specific demonstration justifying the restriction.

E. When computing time under the Public Records Law, Saturday, Sunday, and any legal holiday are excluded. Wis. Stat. § 19.345.

VII. RETENTION OF RECORDS

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

VIII. LIMITATIONS UPON ACCESS AND WITHHOLDING

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

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

B. Pupil/student records

C. Law enforcement records

D. Computer programs and data

E. Trade secrets

F. Identities of applicants for public positions

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

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

1. Whenever there are at least five (5) candidates for an office or position, each of the five (5) candidates who are considered most qualified for the office or position by an authority is deemed a "final candidate."

2. Whenever there are less than five (5) candidates for an office or position, each candidate is deemed a "final candidate."

3. Whenever an appointment is to be made from a group of more than five (5) candidates, each candidate in the group is deemed a "final candidate."

G. Contractor's Payroll Records

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

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

IX. ENFORCEMENT AND PENALTIES

A. If a governmental entity withholds a record or a part of a record or delays granting access to a record or part of a record after a written request for disclosure is made, the requestor may:

1. Bring an action for mandamus asking a court to order release of the record; and

2. Request in writing that the district attorney of the county where the record is found or attorney general bring an action for mandamus asking a court to order release of the record to the requestor.

B. Sections 893.80 and 893.82, Wis. Stats. do not apply to actions commenced under this section.

C. If the requestor prevails in a mandamus action in whole or substantial part, the requestor may recover:

1. Damages of not less than $100.

2. Court costs and reasonable attorney's fees.

3. Punitive damages for arbitrary and capricious denial of access, delay in responding to a request or for charging excessive fees

D. A district attorney or the attorney general may seek forfeiture of up to $1,000 for arbitrary and capricious denial of access, delay in response or for charging excessive fees.

X. CASE STUDIES IN THE PUBLIC RECORDS LAW

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

1. Factual background.

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

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

2. Wisconsin Court of Appeals Decision.

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

a. Presumption of public access.

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

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

The Court rejected the notion that, because a disciplinary record in an employee personnel file will be used by an employer for matters such as staff management planning, performance evaluations, or recommendations concerning future salary adjustments, such records are exempt from disclosure under Wis. Stat. § 19.36(10)(d). It also rejected the DNR's more narrow understanding of the statute (the DNR argued that factual information must still be disclosed, while supervisory opinions may not be disclosed).

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

c. Subjective commentary in disciplinary records not exempt.

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

d. Balancing test requires disclosure.

i. Increased public scrutiny must be expected by those who held certain positions.

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

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

ii. The case for disclosure is strengthened when information is already in the public domain.

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

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

The Court concluded that the balancing test requires a finding that the public has a particularly strong interest in being informed about public officials who have been derelict in their duty and that Kroeplin's case did not qualify as an "exceptional case" in which access to records could be denied. *See*, Wis. Stat. § 19.31. As a result, the Court found that the public interest in information

concerning an employee's misconduct and supervising agency's investigation of that misconduct outweighs public interest in non-disclosure and, accordingly, the DNR's conclusions and findings, as well as supporting documents, reached in an investigation must be disclosed.

3. Implications of the Court's Ruling.

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

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

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

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

> However, we note two things in the language of § 19.36(10)(d). First, the subsection does not expressly except disciplinary records from public access; as The Lakeland Times points out, § 19.36(10)(d) does not contain the word "discipline" within its text. Second, performance evaluations are just one type of document among others listed in that subsection that are exempt from disclosure as containing information an employer uses for

> "staff management planning." A common sense reading of "performance evaluations" in this context refers to evaluations management generates on a routine basis for planning purposes.

Kroeplin, *supra*.

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

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

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

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

1. Factual background.

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

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

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

a result of a forensics analysis of Zellner's work computer that was conducted after the evidentiary hearing resulting in Zellner's termination.

The Board of Education held a grievance hearing the following day with the Cedarburg Education Association, to discuss its grievance on Zellner's behalf. The next day, the Journal-Sentinel sent a letter to the District seeking release of the CD and memo. The District then notified Zellner of this request and of its decision to release the requested records.

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

2. Wisconsin Supreme Court Decision.

   a. Even if the requested materials were copyrighted, they constitute "records" nevertheless under the Public Records Law in light of the "fair use" exception to copyright infringement rules.

   b. The CD and memo do not fall within the statutory exception for pending disciplinary records, because the District's investigation was concluded when the District terminated Zellner's employment. As a result, the CD and memo were not exempt from disclosure. In this regard, the Supreme Court cited a previous Wisconsin Court of Appeals decision with approval, *Local No. 2489, AFSCME v. Rock County*, 277 Wis. 2d 208, 689 N.W.2d 644 (2004).

   c. Although privacy and reputation interests are important to consider, the public interest in disclosure of the records "outweighs the public's interests in protecting the privacy and reputation interests of a citizen such as Zellner in this case."

3. Strategic and practical considerations.

   a. An investigation will be deemed concluded when an administration formally recommends disposition or, at the most, when a board takes action. After these events occur, a school district would not be able to deny access to an

investigative record based on the pending investigation exemption to the public records law.

b. Once an investigation is concluded and a records request for records from a disciplinary investigation concerning an employee is received, public employers must bear in mind that there is a specific statutory process that must be strictly followed in providing requesters with access to records. Wis. Stat. § 19.356.

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

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

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

d. The timing for declaring an investigation concluded can influence a just cause analysis under a collective bargaining agreement. In many situations, the reasons for the recommended dismissal or termination are or need to be articulated by the employer. When this occurs, arbitrators generally focus on why the employer claims to have terminated the employee in evaluating just cause issues, and not on reasons (and related evidence) developed after the fact.

e. School districts and other public employers must regularly review their acceptable use policies and protocols. Although much can be said on this subject alone, at least some commentators believe that employers must make distinctions between *de minimis* and unacceptable levels of non-work use of computers, and must distinguish between types of unacceptable use (stock market reports and pornographic material are not the same in an educational environment; if employers wish to make distinctions between employees that account for the type of non-work material that is accessed from work computers, policies governing employees' use of computers may need to make this clear).

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

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

1. Factual Background.

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

After the District decided not to reinstate the teacher as ordered by the arbitration award, a private citizen filed a formal request under Wis. Stat. § 19.35, for the transcript of the closed arbitration proceeding. The District determined that the transcript was a public record and, under the requirements of Wis. Stat. § 19.356 (2) (a), it

notified the teacher of its intent to release the transcript. The teacher sought judicial review contending that the transcript was not a "public record" and, in the alternative, if it was a public record, certain personal and medical information must be redacted prior to releasing the transcript.

The Circuit Court determined that the transcript was a "public record" and that no statutory or common law exceptions exempted the transcript from release. The Court then considered "whether the presumption of openness under the Open Records law is overcome by any other policy" and concluded that allowing the disclosure of the transcript would defeat the purpose of closed arbitration proceedings. The case was then appealed to the Wisconsin Court of Appeals.

2. The Wisconsin Court of Appeals Decision.

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

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

a. Is a transcript of a closed arbitration proceeding a public record under Wisconsin Public Records law.

b. If the transcript is a public record, must all personal and medical information be redacted before release.

3. The Wisconsin Supreme Court Decision.

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

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

1. Factual Background.

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

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

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

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

The District denied the Seiferts' request. The three page response detailed numerous reasons for the denial, including: (1) the records were exempt under Wis. Stat. §19.35(1)(am)1, as records containing personally identifiable information that was collected or maintained in connection with a complaint, investigation or other circumstances that may lead to a court proceeding; (2) the records were the work product of the District's counsel and contained privileged information; and (3) the records were part of Juedes' personnel file. The letter did not address any attorney fee billing records.

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

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

2. Wisconsin Court of Appeals Decision.

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

If no statutory or common law exceptions apply, a records custodian is permitted to engage in a balancing test to decide whether the strong presumption favoring disclosure is overcome by some even stronger public policy favoring limited access or nondisclosure. While custodians must remain mindful of the presumption of openness, each request entails a fact intensive inquiry such that the legislature entrusted custodians with substantial discretion in performing a disclosure analysis. The resulting records could not more clearly have been collected in connection with "a complaint, investigation or other circumstances that may lead to … [a] court proceeding," and therefore constitute an exemption under subsection (1)(am)1. The subsection plainly allows a records custodian to deny access to one who is, in effect, a potential adversary in litigation or other proceeding unless or until required to do so under the rules of discovery and actual litigation.

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

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

investigation." A custodian should not have to guess at what records a requestor desires.

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

1. Factual Background.

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

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

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

On April 28, 2005, Stevenson informed Stone that the requested records were available. Stone reviewed the materials, which, in his view, indicated that some records responsive to his requests had not been made available, but had instead been destroyed. Stone

petitioned for a writ of mandamus and alleged, among other things, that Coombs and Stevenson shredded documents that were within the scope of Stone's public records request. The Circuit Court accepted Stevenson's and Coombs' averments that only identical copies were destroyed. The Court explained that Stone provided no evidence of a factual dispute regarding whether the destroyed documents were anything other than identical copies. The Court then rejected Stone's argument that an identical copy of a "record" is itself a "record" under Wis. Stat. §19.32(2), and therefore, the destruction of identical copies of responsive documents that continue to exist is a violation of Wis. Stat. §19.35(5).

2. Wisconsin Court of Appeals Decision.

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

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

1. Factual Background.

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

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

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

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

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

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

a. The fact that records are in the custody of private parties that contract with public entities does not change the fact that a public body may be held responsible as an "authority" under the statute, citing *Journal-Sentinel, Inc., v. School District of Shorewood*, 186 Wis.2d 443, 520 N.W.2d 165 (Ct. App. 1994).

b. Governmental bodies, and not their independent contractors, bear the responsibility for complying with Wisconsin's Open Records Law, because contractors are not "authorities" under the law.

c. The Court recommended (at footnote 4) that public entities consider indemnification and hold harmless clauses in contracts with outside contractors to protect themselves in open records disputes.

d. The Public Records Law requires access to requested material and, as a result, a requestor can seek the material as it is both inputted and stored in the database, regardless

of its physical form or characteristics. The inputted property data, entered by municipal assessors into a program, is as much a part of the public record as if it were written on paper property cards and stored in a file cabinet. The organization of the data in a database, at public expense, allows greater public access to the information that the public might seek. As a result, the subject municipalities violated the Open Records Law when they provided a .pdf file, rather than more full access to property assessment records in the format created and maintained by the municipalities' independent contractor assessors in a computer database.

2. Wisconsin Supreme Court Decision.

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

a. The Wisconsin Supreme Court held that WIREdata did not properly commence the mandamus actions against the municipalities under the Open Records Law, pursuant to Wis. Stat. §19.37(1), because the municipalities had not denied WIREdata's requests for the records before WIREdata filed the mandamus actions. The Supreme Court also stated that in cases where the requests are complex, municipalities should be afforded reasonable latitude in timeframe for their responses. The Court agreed with the Department of Justice's opinion that an authority should not be subjected to the burden and expense of a premature public records lawsuit while it is attempting in good faith to respond, or to determine how to respond, to a public records request. What constitutes a reasonable timeframe for a response by an authority depends on the nature of the request, the staff and other resources available to the authority to process the request, the extent of the request, and other related considerations. Whether an authority is acting with reasonable diligence in a particular case will depend upon the totality of the circumstances surrounding the particular request.

b. The Supreme Court concluded that WIREdata's initial requests were sufficient as a matter of law in regard to subject matter and length of time. Wis. Stat. §19.35(1)(h), in relevant part, provides that a request "is deemed sufficient if it reasonably describes the requested record or the information requested. However, a request for a record without a reasonable limitation as to subject matter or length

of time represented by the record does not constitute a sufficient request." The Court found that WIREdata's requests were sufficient as to time and subject matter because the municipalities were able to fulfill WIREdata's requests using the PDF's that were provided to WIREdata. Furthermore, there never appeared to be a dispute between the parties, before the Court actions commenced, on what WIREdata was requesting or on whether the amount of information that was being requested was too great to be produced.

c. The Supreme Court determined that a municipality's independent contractor assessor was not an "authority" under the Open Records Law, therefore such an assessor was not a proper recipient of an open records request. Wis. Stat. §19.32(1), in relevant part, states "authority means any of the following having custody of a record: a state or local office, elected official, agency, board, commission, committee, counsel, department or public body corporate and politic created by constitution, law, ordinance, rule or order; …or a formally constituted subunit of any of the foregoing." This statute clearly envisions a public entity, a quasi-government corporation, or a governmental entity, not an independent contractor hired by such a public or governmental entity, as being the "authority" for purposes of the Open Records Law. The Supreme Court held that the municipalities themselves were the "authorities" for purposes of the Open Records Law. Accordingly, only the municipalities were proper recipients of the relevant open records requests. Therefore, a communication from an independent contractor assessor should not be construed as a denial of an open records request.

d. The Wisconsin Supreme Court held that the municipalities may not avoid liability under the Open Records Law by contracting with independent contractor assessors for the collection, maintenance, and custody of property assessment records, and by then directing any requestor of those records to the independent contractor assessors. The plain language of Wis. Stat. §19.36(3) makes an authority solely responsible for any liability for failing to comply with the Open Records Law where it states that "each authority shall make available for inspection and copying under Section 19.35(1) any record produced or collected under a contract entered into by the authority with a person other than an authority to the same extent as if the record were maintained by the authority."

e. The Wisconsin Supreme Court determined that the Court of Appeals was mistaken in concluding that the municipalities had not fulfilled WIREdata's initial open records requests once they produced PDFs with the requested information and gave those files to WIREdata. The Supreme Court disagreed with the Court of Appeals' statement that the requestors must be given access to the authority's electronic databases to examine them, extract information from them, or copy them. The Wisconsin Supreme Court determined that it is sufficient, for the purposes of the Open Records Law, for an authority to provide a copy of the relevant data in an appropriate format, due to confidentiality concerns.

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

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

1. Factual Background.

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

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

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

2. Wisconsin Court of Appeals Decision.

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

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

with sufficient notice of the grounds for denial to enable the requestor to prepare a challenge to the withholding.

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

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

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

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

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

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

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

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

1. Factual Background.

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

2. The Wisconsin Court of Appeals Decision.

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

XI. INTERPRETATION BY THE ATTORNEY GENERAL

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

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

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

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

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

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

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

1. Public records requests can be made regarding board member home computers and their contents, so long as they relate to records that concern the business of the board.

    a. Computers that are property of the school are likely to be accessible regardless of content.

    b. Personal computers that are individual board members' property, according to the Attorney General, can be accessed for e-mails and other documents that are created, sent, or received in the individual's capacity as a board member. E-mails that may be accessible include:

        i. E-mails from constituents.

        ii. E-mails to or from other board members.

        iii. E-mails from or to school district personnel.

2. The Attorney General's opinion implicates a series of open meetings law issues:

    a. Walking quorum.

    b. Negative quorum.

NOTE: Intent is not relevant if, objectively, the communications at issue involve the business of the governmental body. As a result, open meetings law violations can occur even if an individual board member's e-mail to another board member was not meant to trigger subsequent electronic correspondence with other board members.

3. Retention and Destruction of Governmental Records.

   a. Board member home computers.

   b. Computer systems owned and operated by the school district.

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

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

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

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

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

1. Historical significance: Previous cases have generally dealt with personnel file information involving matters that are closed or concerning former employees. Thus, for example, a superintendent's written reprimand has been found open to the public. Similarly, the evaluation of a former superintendent has been found open to the public. This case represents a new development, in that the evaluation of the chief executive for a public entity has been found subject to disclosure, even though his employment was ongoing.

2. The Newspapers' Association sought the following information in this case:

    a. Evaluations.

    b. Letters and memos shared among board members as part of the evaluation process.

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

3. Issues of interest not fully discussed in the Attorney General's opinion:

    a. The Attorney General's opinion has little discussion of the significance (if any) of the college president's ongoing employment relationship with the board or his ongoing role as college president generally. The Attorney General acknowledges that the college expressed concern that candor in the evaluation process could compromise the president's effectiveness, but generally dismisses this argument as subordinate to the public interest in knowing how the president has been evaluated and how the board

performs its evaluation function. As a result, the Attorney General's opinion does not (at least not expressly) balance the public interest in disclosure against the public interest in maintaining the confidentiality of the evaluation.

b. The Attorney General acknowledges that documents concerning the "deliberative process" leading up to the evaluation do not necessarily have to be disclosed. As a result, the Attorney General reasoned that correspondence shared by board members might be withheld or redacted if it would adversely affect the public interest in promoting frank and complete evaluations.

   Thus, the Attorney General seems to acknowledge that certain information may be withheld because of the stage in the process in which it is generated (the deliberation stage), but also seems to suggest that content may play a role in the determination as well.

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

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

   i. "Draft" status of individual board member contributions to the final evaluation.

   ii. Confidentiality procedures to be observed in formulating and storing evaluations.

   iii. Procedures for finalizing "board" evaluation.

d. Application of this Attorney General opinion to principals and other administrators.

PERSONNEL RECORDS

I. WHY SHOULD EMPLOYERS KEEP EMPLOYMENT RECORDS?

A. Statutory or Other Legal Requirements.

B. Efficient Personnel Administration.

C. Prevention and Defense of Lawsuits.

II. WHAT SHOULD BE INCLUDED IN EMPLOYEE PERSONNEL RECORDS?

A. Legally Mandated Records.

1. Payroll records.

a. Federal.

i. Fair Labor Standards Act (FLSA).

Non-exempt employees. 29 C.F.R. § 516.2.

Exempt employees. 29 C.F.R. § 516.3.

(A) Miscellaneous. 29 C.F.R. § § 516.11-516.34.

(B) State and local government employees.

ii. Age Discrimination in Employment Act/ERISA. 29 C.F.R. § 1627.3(a).

(A) Must include name, address, date of birth, occupation, rate of pay, compensation earned each week.

b. Wisconsin.

i. Wis. Admin. Code § DWD 272.11.

(A) Requirements are different from FLSA.

(B) With some exceptions, § DWD 272.11 applies to exempt and non-exempt employees.

ii. Wis. Admin. Code § DWD 274.06 and § DWD 274.08.

(A) Employers must keep records showing name and address, hours of employment, and wages for each employee.

(B) Public employers are exempt from this requirement, but instead are required to follow the provisions of FLSA, including 29 C.F.R. part 553.

2. Required tax records and forms. *See* I.R.S. Pub. 15 (Circular E, Employer's Tax Guide) (Rev. January 2008).

a. Includes, among other things, the following:

i. Employer identification number (EIN).

ii. Names, addresses, social security numbers, and occupations of employees and wage recipients.

iii. Employees' dates of employment.

iv. Records of wage, annuity, and pension payments.

v. Amounts of tips reported and records of allocated tips.

vi. Fair market value of in-kind wages paid.

vii. Periods for which employees were paid while absent due to sickness or injury and the amounts and weekly rate of payment made to them by employer or third party payor.

viii. Records of fringe benefits provided, including substantiation.

b. Also includes withholding information.

i. Federal. Form W-4 or equivalent.

ii. Wisconsin has its own withholding form. Form WT-4.

3. Verification of employment eligibility. *See* INS Form I-9; 8 U.S.C. § 1324a; 8 C.F.R. § 274a.

a. For employees hired after November 6, 1986.

b. Employees must not knowingly hire or continue to employ an unauthorized alien. To prevent this, employer must follow the I-9 verification process.

c. I-9 forms must be updated when new information comes to the employer's attention.

4. Unemployment insurance records.

   a. Quarterly wage reports. Wis. Stat. § 108.205; Wis. Admin. Code § § DWD 110.07 and 110.08.

   b. Record and audit of payrolls. Wis. Stat. § 108.21; Wis. Admin. Code § 110.02.

   c. Other records as requested by DWD. Wis. Stat. §§ 108.14, 108.21; Wis. Admin. Code § 110.03.

5. Worker's compensation records.

   a. Reports of accidents causing death or disability of any employee while performing services growing out of and incidental to the employment. Wis. Stat. § 102.37.

      i. Report must include name, address, age, and wages of deceased or injured employee, the time and causes of the accident, the nature and extent of the injury, and any other information required by DWD. *Id.*

      ii. Cases involving death must be reported to DWD within one day. Wis. Admin. Code § DWD 80.02(1).

      iii. Injuries or illnesses involving disability beyond third day after the employee leaves work must be reported to the insurance carrier within 7 days if the carrier has primary liability for unpaid medical treatment. *Id*.

   b. Records and reports relating to payments made. Wis. Stat. § 102.38.

   c. Under Wis. Admin. Code § DWD 80.02(2), self-insured employers and insurance companies are required to submit various reports to DWD, including:

      i. First report of injury. (WKC-12)

      ii. Supplementary report. (WKC-13).

      iii. Required wage information.

      iv. Employee verification of part-time status.

v. Compensation reports.

6. EEO Records.

Generally.

a. Employers may be required to keep records "relevant to the determinations of whether unlawful employment practices have been or are being committed." 42 U.S.C. § 2000e-8(c) (Title VII); 42 U.S.C. § 12117(a) (ADA) (incorporating § 2000e-8 powers).

b. EEOC regulations have no universal employer recordkeeping requirement. *See* 29 C.F.R. § 1602.12.

c. Once records are created, certain retention requirements apply. 29 C.F.R. § 1602.14.

7. FMLA Records.

a. Federal. 29 C.F.R. § 825.500.

i. Records pertaining to the employer's obligations under the FMLA in accordance with the recordkeeping requirements of FLSA and FMLA regulations.

ii. Required records include:

(A) Basic payroll and identifying data.

(B) Dates FMLA leave is taken by FMLA eligible employees.

(C) Records of leave taken in increments of less than a full day.

(D) Copies of notices furnished to employees.

(E) Documents describing employee benefits or employer policies and practices regarding the taking of paid and unpaid leaves.

(F) Premium payments for employee benefits.

(G) Records of disputes regarding designation of FMLA leave.

iii. Covered employers with no eligible employees keep limited records.

iv. Covered employers in a joint employment situation keep all records relating to "primary" employees and limited records relating to "secondary" employees.

b. Wisconsin FMLA. Wis. Stat. 103.10. No specific form of recordkeeping is required.

8. Employee benefit plans (ADEA and COBRA).

a. Generally. 29 C.F.R. § 1627.3.

i. Should keep copies of all pension and insurance plans.

ii. Also, copies of any seniority systems and merit systems that are in writing, or a memorandum fully outlining the terms of the plan or system and the manner in which it has been communicated to affected employee, with notations of changes or revisions.

b. COBRA Records. *See* 29 U.S.C. § 1166; 29 C.F.R. § 1627.3.

i. No specific form of records is required, but employers and administrators will have the burden to show that COBRA notifications were sent on time.

ii. In general, employers should follow the requirements of 29 C.F.R. § 1627.3. Records that should be kept include:

(A) COBRA notifications (and proof of mailing).

(B) COBRA election forms.

(C) Claims forms.

(D) Correspondence or documentation of rejection of COBRA coverage.

(E) Postmarked envelopes.

B. Records Not Required But Recommended.

1. Job application forms.

2. Job advertisements.

3. Job orders.

4. Test validation and documentation of testing results.

5. Teaching license application/renewals.

6. Employment contracts.

7. Performance evaluations.

8. Harassment investigation documentation.

9. Documentation of discipline and termination, including documentation of investigations.

10. At-will disclaimer (included in application, handbook, contract or other).

11. Signed receipts for:

    a. Employee handbook.

    b. Confidentiality policy.

    c. Non-compete agreement (and consideration if given).

    d. Harassment policy.

    e. Harassment training.

    f. Electronic communications policy.

    g. Employee orientation.

    h. Safety/OSHA training (*e.g.*, hazcom, logout-tagout, bloodborne pathogen).

    i. Other training.

    j. Company property held by employee.

12. Documentation of non-FMLA leave.

13. Documentation of accommodations requested and made.

14. Payroll withholding authorizations other than withholding that is legally required.

15. Reference check and background check results.

III. RECORDKEEPING STRATEGIES.

A. What To Leave Out Of Personnel Records.

1. Personal speculation about an employee's mental or physical condition (e.g., "this employee is a nutcase").

2. Statements implying underlying facts and are potentially defamatory unless the underlying facts can be confirmed.

3. Coding or other information (such as physical descriptions) that may identify protected status.

4. Stray marks or doodles that may be misinterpreted.

B. Maintaining Personnel Records.

1. Systematic recording.

a. Contemporaneous recording is best.

b. Consistency is important.

c. Forms can be very useful.

2. Central location and limited access.

a. Confidential records should be kept in locked or otherwise secured location.

b. Access should be limited to persons with a need to know.

i. Human resources personnel.

ii. Payroll and benefit administrators.

iii. Supervisors and other company officials with compliance responsibilities.

3. Ultra confidential files. These are records that should be kept separate from regular personnel files (either by law or by common sense).

   a. Medical information. *See, e.g.,* 42 U.S.C. § 12112(d)(3) and (d)(4) (ADA); 29 C.F.R. § 825.500 (FMLA).

      i. Also consider HIPAA and corresponding Wisconsin laws, the Wisconsin Fair Employment Act, and Wis. Stat. § 146.82 (confidentiality of patient health care records).

      ii. Medical records may include, e.g., any record including medical facts, such as the results of medical examinations, medical leave request forms, insurance applications, physicians' notes and correspondence, OSHA records (e.g., bloodborne pathogen exposure records), and worker's compensation documentation.

   b. I-9 forms. During audits the EEOC and OFCCP take the position that these records should be kept out of personnel files. To limit the scope of an audit, it also makes tactical sense to keep these forms in binders for easy access by auditors.

   c. Affirmative action and EEO surveys and questionnaires, as well as self-identification forms.

      i. Employers are encouraged to invite employees to self-identify. However, employers are permitted to obtain information through visual surveys and (except in certain cases) through post-employment surveys. 41 C.F.R. §§60-250.42 and 60-741.42.

      ii. Hiring managers usually should not have access to this information when making personnel decisions. *See, e.g.,* 29 C.F.R. § 1602.13 (permanent records as to racial or ethnic origin should be kept only if they are kept separate from employee's application form or other records available to those responsible for personnel decisions).

   d. Records relating to Department of Transportation required drug testing. 49 C.F.R. § 40.333(c) requires that they be kept "in a location with controlled access." § 40.321 requires that test information be kept confidential.

e. Criminal background and credit check information that could be used improperly in making decisions.

f. Personally identifiable information, such as driver's license numbers or credit card numbers, which could be used to steal identify and/or to perform fraudulent transactions.

4. Active versus inactive files.

a. Inactive files should be removed from general files for purposes of confidentiality and destruction according to regular file maintenance schedule.

b. Although applications must be kept for at least a year, employers should be cautious about telling candidates that their application "will be kept on file" and/or "considered for all future openings." This may imply activity that is not actually occurring.

5. Form of records.

a. Generally, under the FLSA, no specific order or form of records is required. 29 C.F.R. § 516.1(a).

b. Employers may choose any timekeeping method. Time clocks are not required, even for non-exempt employees. *See, e.g.,* Dept. of Labor, Employment Standards Administration Fact Sheet # 21: "Recordkeeping Requirements Under the Fair Labor Standards Act."

c. Records may be paper, computer file, microfiche, microfilm, or magnetic tape, provided that "adequate projection or viewing equipment is available, that the reproductions are clear and identifiable by date or pay period and that extensions or transcriptions of the information required … are made available upon request." *See e.g.*, 29 C.F.R. § 516.1(a) (FLSA); 29 C.F.R. §§ 1904.29, 1904.30 (OSHA); 29 C.F.R. § 2520.107-1 (ERISA).

RECORDS RETENTION

I. PUPIL RECORDS IN GENERAL.

A. Statutory Authority.

1. Sections 118.125(1)(d) and (e), Wis. Stats.:

> (d) "Pupil records" means all records relating to individual pupils maintained by a school but does not include any of the following:
>
> 1. Notes or records maintained for personal use by a teacher or other person who is required by the state superintendent under s. 115.28(7) to hold a certificate, license, or permit if such records and notes are not available to others.
>
> 2. Records necessary for, and available only to persons involved in, the psychological treatment of a pupil.
>
> 3. Law enforcement unit records.
>
> (e) "Record" means any material on which written, drawn, printed, spoken, visual, or electromagnetic information is recorded or preserved, regardless of physical form or characteristics.

2. Section 118.125(2), Wis. Stats.:

> 2. Maintain the physical security and safety of a public school.

3. Sections 118.125(2)(cg) and (e), Wis. Stats.:

> (cg) The school district clerk or his or her designee shall provide a law enforcement agency with a copy of a pupil's attendance record if the law enforcement agency certifies in writing that the pupil is under investigation for truancy or for allegedly committing a criminal or delinquent act and that the law enforcement agency will not further disclose the pupil's attendance record except as permitted under s. 938.396(1) (a). A school district clerk or designee who discloses a copy of a pupil's attendance record to a law enforcement agency for purposes of a truancy investigation shall notify the pupil's parent or guardian

of that disclosure as soon as practicable after that disclosure.

(e) Upon the written permission of an adult pupil, or the parent or guardian of a minor pupil, the school shall make available to the person named in the permission the pupil's progress records or such portions of the pupil's behavioral records as determined by the person authorizing the release. Law enforcement officers' records obtained under s. 48.396(1) or 938.396(1) (b)2. or (c)3. may not be made available under this paragraph unless specifically identified by the adult pupil or by the parent or guardian of a minor pupil in the written permission.

4. Sections 118.127(1) and (2), Wis. Stats.:

(1) Upon receipt of information from a law enforcement agency under s. 48.396(1) or 938.396(1) (b)2. or (c)3., the school district administrator or private school administrator who receives the information shall notify any pupil named in the information, and the parent or guardian of any minor pupil named in the information, of the information.

(2) A school district or private school may disclose information from law enforcement officers' records obtained under s. 938.396(1)(c)3. only to persons employed by the school district who are required by the department under s. 115.28(7) to hold a license, to persons employed by the private school as teachers, and to other school district or private school officials who have been determined by the school board or governing body of the private school to have legitimate educational interests, including safety interests, in that information. In addition, if that information relates to a pupil of the school district or private school, the school district or private school may also disclose that information to those employees of the school district or private school who have been designated by the school board or governing body of the private school to receive that information for the purpose of providing treatment programs for pupils enrolled in the school district or private school. A school district may not use law enforcement officers' records obtained under s.

938.396(1)(c)3. as the sole basis for expelling or suspending a pupil or as the sole basis for taking any other disciplinary action, including action under the school district's athletic code, against a pupil.

5. Sections 938.396(1)(a), and (c) 3 and 4, Wis. Stats.:

(1) Law enforcement records. (a) *Confidentiality.* Law enforcement agency records of juveniles shall be kept separate from records of adults. Law enforcement agency records of juveniles may not be open to inspection or their contents disclosed except under par. (b) or (c), sub. (1j) or (10), or s. 938.293 or by order of the court.

(c) *Exceptions.* Notwithstanding par. (a), law enforcement agency records of juveniles may be disclosed as follows:

* * *

3. A law enforcement agency, on its own initiative or on the request of the school district administrator of a public school district, the administrator of a private school, or the designee of the school district administrator or the private school administrator, may, subject to official agency policy, provide to the school district administrator, private school administrator, or designee, for use as provided in s. 118.127(2), any information in its records relating to any of the following:

a. The use, possession, or distribution of alcohol or a controlled substance or controlled substance analog by a juvenile enrolled in the public school district or private school.

b. The illegal possession by a juvenile of a dangerous weapon, as defined in s. 939.22(10).

c. An act for which a juvenile enrolled in the school district or private school was taken into custody under s. 938.19 based on a law enforcement officer's belief that the juvenile was committing or had committed a violation of any state or federal criminal law.

d. An act for which a juvenile enrolled in the public school district or private school was adjudged delinquent.

4. A law enforcement agency may enter into an interagency agreement with a school board, a private school, a social welfare agency, or another law enforcement agency providing for the routine disclosure of information under subs. (1) (b)2. and (c)3. to the school board, private school, social welfare agency, or other law enforcement agency.

6. Section 118.126, Wis. Stats.:

(1) A school psychologist, counselor, social worker and nurse, and any teacher or administrator designated by the school board who engages in alcohol or drug abuse program activities, shall keep confidential information received from a pupil that the pupil or another pupil is using or is experiencing problems resulting from the use of alcohol or other drugs unless:

(a) The pupil using or experiencing problems resulting from the use of alcohol or other drugs consents in writing to disclosure of the information;

(b) The school psychologist, counselor, social worker, nurse, teacher or administrator has reason to believe that there is serious and imminent danger to the health, safety or life of any person and that disclosure of the information to another person will alleviate the serious and imminent danger. No more information than is required to alleviate the serious and imminent danger may be disclosed; or

(c) The information is required to be reported under s. 48.981.

(2) A school psychologist, counselor, social worker or nurse, or any teacher or administrator designated by the school board who engages in alcohol or drug abuse program activities, who in good faith discloses or fails to disclose information under sub. (1) is immune from civil liability for such acts or omissions. This subsection does not apply to information required to be reported under s. 48.981.

7. Section 118.257, Wis. Stats.:

(1) In this section:

(a) "Controlled substance" has the meaning specified in s. 961.01(4).

(am) "Controlled substance analog" has the meaning given in s. 961.01(4m).

(at) "Delivery" has the meaning given in s. 961.01(6).

(b) "Distribute" has the meaning specified in s. 961.01(9).

(c) "Pupil services professional" means a school counselor, school social worker, school psychologist or school nurse.

(d) "School" means a public, parochial or private school which provides an educational program for one or more grades between grades 1 and 12 and which is commonly known as an elementary school, middle school, junior high school, senior high school or high school.

(2) A school administrator, principal, pupil services professional or teacher employed by a school board is not liable for referring a pupil enrolled in the school district to law enforcement authorities, or for removing a pupil from the school premises or from participation in a school-sponsored activity, for suspicion of possession, distribution, delivery or consumption of an alcohol beverage or a controlled substance or controlled substance analog.

8. Family Education Rights and Privacy Act ("FERPA") General Provision

a. Overview – In general, FERPA and implementing regulations prohibit the disclosure of most pupil records without written consent of the parent of a minor student, or the consent of a student who is 18 years of age.

i. FERPA give families the right to inspect and review records, the right to request amendment of records, and the right to non-disclosure of education records.

ii. FERPA also requires that school districts receiving federal funds provide an annual notification to parents and students of their privacy and confidentiality rights under FERPA.

iii. Under FERPA, all personal identifiable information from education records must be kept confidential with limited expectations.

b. Statutory Language – FERPA was originally passed in 1974 with the intent of protecting the privacy of students. FERPA has been amended a number of times of the years. The regulations implementing FERPA are administered by the Family Policy Compliance Office ("FCPO"), which is a part of the U.S. Department of Education ("DOE"). 20 U.S.C. § 1232g.

c. Applicability – FERPA generally applies to all educational agencies or institutions that receive funds from the U.S. Department of Education ("DOE"). These funds can be in the form of grants, subgrants, contracts or subcontracts. FERPA applies regardless of the type of funds received by the educational agency. FERPA also applies to an educational agency that has authority to direct and control public elementary or secondary schools. 34 CFR § 99.1

B. Recordkeeping Obligation.

1. Requests for Access – A school district is required to maintain a record of all requests made to review education records. 34 CFR § 99.32

a. The record of requests for access must be maintained with the individual education records.

b. The records must keep track of the following information regarding requests:

i. The parties requesting the education records.

ii. The legitimate (or nonlegitimate) interests of the individual requesting access.

c. The recordkeeping requirement does not apply to requests by:

i. Parents or the student.

ii. School officials.

iii. Any party with written consent from the parents.

iv. Any party seeking directory information.

v. Subpoenas

2. Disclosures – A school district is required to maintain a record of all disclosures of education records. 34 CFR § 99.32

a. The records must keep track of the following information regarding disclosures:

i. The parties receiving the education records.

ii. The legitimate interests of the individual receiving education records.

iii. The names of additional parties that the records may be disclosed to on behalf of the school district

b. This recordkeeping requirement does not apply to disclosures to:

i. Parents or the student.

ii. School officials.

iii. Any party with written consent from the parents.

iv. Any party seeking directory information.

v. Subpoenas.

3. Maintenance (Destruction) Of Pupil Records

a. FERPA: FERPA has no record maintenance requirements.

b. Wisconsin Pupil Records Law

i. Policy - A school board must adopt written rules specifying the content of pupil records and the time during which pupil records will be maintained. The

rules must be published as a Class I notice. Wis. Stat. § 118.125(3).

ii. Police Records - A school board must maintain law enforcement officers' records and other information obtained under Wis. Stat. § 938.396(lm) separately from other pupil records. Wis. Stat. § 118.125(3).

iii. Behavioral Records - No behavioral records may be kept for more than 1 year after a pupil ceases to be enrolled in a school district unless the pupil specifies otherwise in writing.

iv. Progress Records - Pupil progress records must be maintained for at least 5 years after a pupil ceases enrollment. Wis. Stat. § 118.125(3); 72 Op. Atty. Gen. 169 (1983).

v. Patient Health Care Records - There are no legal provisions explicitly addressing the period of time patient health care records must be maintained or when they must be destroyed. See, DPI Bulletin 98.02, Question 23. At a minimum, patient health care records should be maintained for 6 years. Additionally, patient health care records should be maintained separately from other pupil records.

vi. Special Education Records

> "Under the record retention requirements of the federal General Education Provisions Act (GEPA), a school district must maintain records to show compliance with the requirements of the Individuals with Disabilities Education Act (IDEA) for at least five years. These records include a child's multi disciplinary team (M-team) reports, individualized education programs (IEPs), and placement offers. Under the IDEA, a school district must inform the parents of a child with EEN when personally identifiable information is no longer needed to provide educational services to the child. The notice would normally be given at the time the child

graduates or otherwise ceases to be enrolled in the school district. The purpose of the notice is to alert parents that certain pupil records may be needed for proof of eligibility for benefits or other purposes. The information that is no longer needed must be destroyed at the request of the parent. Otherwise, under state law the information may be maintained for only one year after the child graduates or otherwise ceases to be enrolled, unless the parent or adult pupil specifies in writing that the records may be maintained for a longer period of time. Therefore, the department recommends that when a child graduates or otherwise ceases to be enrolled, the district obtain the permission of the parent or adult pupil to maintain M-team reports, IEPs, and placement offers for at least five years for audit purposes. If the parent requests destruction of the records or will not grant permission to maintain the records for five years, then the Office of Special Education Program (OSEP), U.S. Department of Education, recommends removing the personal identifiers from the records. Once personal identifiers are removed, the records are not pupil records and may be maintained until they are no longer needed to satisfy the federal record maintenance requirement." DPI Bulletin No. 98.02.

vii. Record Retention Format - Districts can keep records on microfilm, optical disc, in electronic format, or in whatever form the board deems appropriate. Wis. Stat. § 118.125(3).

II. DISPENSING WITH PUBLIC RECORDS.

A. Statutory Authority.

1. Section 19.35(5), Wis. Stats.:

> **(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.

2. Section 19.21(6) and (7), Wis. Stats.:

> (6) A school district may provide for the destruction of obsolete school records. Prior to any such destruction, at least 60 days' notice in writing of such destruction shall be given to the historical society, which shall preserve any records it determines to be of historical interest. The historical society may, upon application, waive the notice. The period of time a school district record shall be kept before destruction shall be not less than 7 years, unless a shorter period is fixed by the public records board under s. 16.61(3)(e) and except as provided under sub. (7). This section does not apply to pupil records under s. 118.125.
>
> (7) Notwithstanding any minimum period of time for retention set under s. 16.61(3)(e), any taped recording of a meeting, as defined in s. 19.82(2), by any governmental body, as defined under s. 19.82(1), of a city, village, town or school district may be destroyed no sooner than 90 days after the minutes

have been approved and published if the purpose of the recording was to make minutes of the meeting.

3. Section 16.61(3)(e), Wis. Stats.:

> (e) (The Public Records Board) [M]ay establish the minimum period of time for retention before destruction of any county, city, town, village, metropolitan sewerage district or school district record.

4. The public records "schedule" and related procedures.

III. OTHER SCHOOL RECORDS.

A. Labor Relations Materials.

1. Negotiations proposals.

2. Bargaining notes.

3. Grievances.

4. Memoranda of understanding.

B. Health Records.

C. The "Desk File."

D. Personnel Files.

1. CBA provisions.

2. Section 103.13, Wis. Stats.